

**Local Planning Appeal Tribunal**  
Tribunal d'appel de l'aménagement  
local



**ISSUE DATE:** August 27, 2020

**CASE NO(S):** PL171210

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

**PROCEEDING COMMENCED UNDER** subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Claremont Development Corporation
Subject:	Application to amend Zoning By-law No. 3037 - Refusal or neglect of the City of Pickering to make a decision
Existing Zoning:	Oak Ridges Moraine Rural Agricultural (ORM-A); Oak Ridges Moraine Village Residential (ORM-R5); and Oak Ridges Moraine Environmental Protection (ORM-EP)
Proposed Zoning:	Site Specific (To be determined)
Purpose:	To permit a 27-lot residential subdivision
Property Address/Description:	5113 Old Brock Road
Municipality:	City of Pickering
Municipal File No.:	A9/90
LPAT Case No.:	PL171210
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LPAT Case Name:	Claremont Development Corporation v. Pickering (City)

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Proposed Zoning:	(ORM-R5); and Oak Ridges Moraine
Property Address/Description:	Environmental Protection (ORM-EP)
Municipality:	Site Specific (To be determined)
Municipal File No.:	5113 Old Brock Road
LPAT Case No.:	City of Pickering
LPAT File No.:	A17/90
	PL171210
	PL171211

**PROCEEDING COMMENCED UNDER** subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Claremont Development Corporation
Subject:	Proposed Plan of Subdivision - Failure of the
	City of Pickering to make a decision
Purpose:	To permit a 27-lot residential subdivision
Property Address/Description:	5113 Old Brock Road
Municipality:	City of Pickering
Municipal File No.:	18T-90016
LPAT Case No.:	PL171210
LPAT File No.:	PL171212

**PROCEEDING COMMENCED UNDER** section 35 of the *Local Planning Appeal Tribunal Act*, 2017, S.O. 2017, c. 23, Sched. 1

Request by:	Claremont Development Corporation
Request for:	A review of the Tribunal's Decision issued on
	August 23, 2019

<b>Heard:</b>	In writing
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## **APPEARANCES:**

### **Parties**

Claremont Development Corporation

City of Pickering

Regional Municipality of Durham

### **Counsel\*/Representative**

J. Alati\* and A. Lusty\*

Q. Annibale\* and R. Annibale (Law Student)

R. Woon\*

Toronto and Region Conservation  
Authority

S. Heuchert

David Masters

E. Gillespie\* and M. Poremba\*

Claremont Conservation Group

A. Kern

Claremont District Community  
Association

J. Laffier

## **DECISION DELIVERED BY G.C.P. BISHOP AND ORDER OF THE TRIBUNAL**

### **BACKGROUND**

[1] This decision is with respect to a Section 35 request for review of a Decision issued August 23, 2019 (the “Decision”) from a motion that was heard on May 8, 2019 by former Member Thomas Hodgins.

[2] On November 6, 2019, the Associate Chair issued an Order rescinding paragraphs 21 through 38 (inclusive) of the Decision and Order issued by Member T. Hodgins on August 23, 2019.

[3] This matter has been delegated to me to decide.

### **REQUEST FOR PARTIAL REVIEW OF DECISION/ORDER DATED AUGUST 23, 2019 (“THE REQUEST”)**

[4] Counsel for Claremont Development Corporation (“CDC”) argues that none of the “public body” parties expressed any objection to the relief sought in the CDC Motion. The request also states that during the Motion Hearing, counsel for David Masters, did not make any substantive submissions in response to CDC's request to modify the geographic scope of Phase I plan of subdivision application to include Phase II lands. Rather, Mr. Gillespie had simply requested he be given an opportunity to further review CDC's authorities and, if necessary, to make written submissions after the Motion Hearing in response to the case law that counsel for CDC had provided concerning the

Tribunal's authority to expand the geographic scope.

[5] Counsel further argues that the Member erred in asserting that CDC had not properly applied to amend the Phase I Draft Plan Application to include the Phase II lands. The Associate Chair concluded that this is an error of fact.

[6] Furthermore, it is argued that the Member failed to give sufficient reasons for concluding that the request to modify the Phase I Application to include the Phase II lands was not fair and reasonable. The Associate Chair concluded that the insufficiency of reasons amounts to an error of law.

[7] This panel will first review the relevant opinion evidence from the experts.

#### **JOINT AFFIDAVIT OF DON GIVEN AND MATTHEW CORY**

[8] Mr. Given is a Registered Professional Planner and a Professional Land Economist with, among other experience, extensive experience in the Region of Durham and the City of Pickering. Mr. Cory is also a Registered Professional Planner and a Professional Land Economist have summarized their evidence in a joint affidavit sworn on April 17, 2019.

[9] It is their professional opinion that there are benefits to include the Phase II lands with Phase as this development proposal will:

- a) Be compatible with the surrounding uses;
- b) Provide for a number of public benefits which could not otherwise be delivered, including:
  - i. Remediation of the existing flood issues;
  - ii. Increasing the available housing supply;

- iii. Correcting historic private septic system encroachments;
- iv. Creating additional park and trail connections; and
- v. Protection and enhancement of the natural environment.

[10] It is Messrs. Given and Cory's opinion, with respect to compatibility and surrounding uses, that the subject property is surrounded by existing residential uses to the North, South and West. The scale of the development proposal is in keeping with the scale and density of Claremont and the residential nature of the development proposal is, in their opinion, compatible with the surrounding uses.

[11] Messrs. Given and Cory also see benefit with the development as it would introduce 70 new homes into Claremont while retaining the existing dwelling on the property. The new residences will contribute to the diversity of housing options in Pickering. The additional residents will also support and encourage retail, office and other small businesses to locate and remain viable in hamlet. The proposed development would locate residents close to a mix of uses and contribute to the resiliency of the hamlet as a complete community.

[12] As part of the proposed development three blocks are considered as an addition to three existing lots along Lane Street. Currently these properties have private septic systems that either encroach onto the subject property or do not meet current zoning setback requirements. The addition of these blocks to the existing lots along Lane Street will not only rectify the problem with the septic systems will but also alleviate the deficiencies and meet the zoning requirements.

[13] Messrs. Given and Cory also opined that by combining the two phases it would also benefit both proposed residents and the existing residents with the addition of a 1.7 hectares park proposed at the corner of Lane and Franklin Streets. There are also open space blocks that will provide trail connection between Franklin Street and Street 'A' and another connection between Street D and Brock Road. The development

proposal completes the northeast portion of Claremont and provides an opportunity for active transportation and connectivity through the park and open space blocks between this new portion of the neighborhood and existing areas to the south and west.

[14] It is Messrs. Given and Cory's position that the proposed development protects a significant wood lot in the northern most part of the property and also will protect additional open space in the southern most part of the property which allows for environmental enhancements between the stormwater pond and the open space blocks.

### **AFFIDAVIT OF STEVEN SCHAEFER**

[15] Mr. Schaefer is a Professional Engineer and responsible for the preparation of two Functional Servicing Reports and a Stormwater Management Analysis. His sworn affidavit is dated April 18, 2019. The first Functional Servicing Report was for Phase I lands and the other for the combined Phase I and II lands. The Stormwater Management Analysis investigated the existing flooding reduction benefits to Franklin Street being one of the north/south streets leading to the subject lands.

[16] Mr. Schaefer's report on the existing drainage "on Franklin Street has a storm sewer capacity for considerably less than a 1 in 2 year storm, which statistically has a 50% chance of occurring in any given year" (para 15) and "current City of Pickering Stormwater Management Design Guidelines requires storm sewer capacity for a 1 in 5 year storm with 100 year hydraulic grade line being a minimum of 300 mm below the basement footing elevations. Since the existing storm sewer as well less than a 2 year storm capacity, both of these criteria are not met." (para 16)

[17] In Mr. Schaefer's affidavit, he references a 2009 drainage system analysis that was completed by AECOM for a large portion of Claremont and the report studied drainage on Franklin Street in response to a basement flooding at 1762 Joseph Street. The report found that the primary causes of the basement flooding were found to be: a large upstream drainage area; "tight" or soils not easily infiltrated by stormwater along

with; and, an undersized conveyance system. Nine alternatives were analyzed with alternative 7 and 9 providing the greatest benefit to the entire conveyance system but alternative 9 was the recommended option from this report. All works to take place throughout the existing streets south of the subject property at an estimated cost of \$1,110,881.25 in 2010.

[18] In paragraph 21 of Mr. Schaefer's affidavit, he agrees with the findings of the previous AECOM report which is consistent with his conclusions that the Franklin Street corridor is currently experiencing recurring flooding primarily due to:

- a. Undersized existing storm sewer system which has considerably less than a 1 in 2 year storm capacity. The City of Pickering design criteria requires the storm sewer system to accommodate a 5 year storm. A 5 year storm has a 20% chance of occurring in any year.
- b. Insufficient over land flow capacity of the existing right of way which has narrow boulevards, in some cases sloping towards the private lots as opposed to toward the paved road. Based on City of Pickering criteria, the overland flow system should be able to accommodate up to 100 year storm runoff within the municipal right of way or sewer system; however, the current system has less than a 2 year storm sewer capacity.
- c. An inadequate continuous overland flow route to direct flows from Franklin Street to Central Street, due to the raised elevation of Central Street, which forces overland flow onto private lots west of Franklin Street. The municipal design criteria requires the overland full route to be able to accommodate the 100 year storm within the public storm sewer and road draining system, this standard is not currently being met.

[19] The AECOM solution contemplates changes within the existing municipal infrastructure whereas Mr. Schaefer proposes to maximize the drainage improvement opportunity on the subject lands that includes a design contained within both the Phase

I and Phase II lands. This is achieved by directing 96% of the Subject lands' drainage area away from Franklin Street to the Brock Road right of way. The flow rate to Brock Road will be controlled by the Southeast Storm Water Management pond to less than the existing flow rates.

[20] As stated in paragraph 28 of Mr. Schaefer's affidavit; "In addition to directing 96% of the subject lands drainage area away from Franklin Street, to the Brock Road right of way, his solution will result in:

- a. An 83% reduction in peak 100 year flow at the Joseph Street and Franklin Street Intersection,
- b. A 70% reduction in peak 100 year flow at the Central Street and Franklin Street intersection, and
- c. A 67% reduction in storm runoff volume at the Central Street and Franklin Street intersection.

[21] It is Messrs. Given and Cory's opinion that, as part of the Development Proposal, two stormwater management ponds are proposed totaling 3.32 hectares, one at the southeastern portion of the development (1.93 ha) and the other in between Streets 'A' and Street 'C' on the East side of Old Brock Road (1.39 ha), on the west part of the property. The proposed ponds provide sufficient stormwater management control to support the development and also alleviate historic flooding experienced in the existing community to the South (para 43).

[22] Messrs. Given and Cory opine that the Phase I and Phase II lands should be considered together as it would result in additional public benefits that would not be realized if Phase I lands were to proceed separately and the 2018 revised applications for the Phase I and II lands provides for the subject property to be developed in a manner that achieves the historically planned and logical completion of the Hamlet of Claremont to Brock Road.



## **THE CORPORATION OF THE CITY OF PICKERING (“CITY”) RESPONSE TO THE MOTION**

[23] The City does not object to the relief sought by CDC which is requesting an Order that the Proposed Plan of Subdivision includes all the lands shown in Appendix A, of the joint affidavit of Messrs. Given and Cory and an Order of the Tribunal directing the City to circulate forthwith all application materials submitted May, 2018, for the purpose of obtaining agency and public comments. If the Tribunal grants the relief sought by CDC and orders the applications be circulated, the City has requested clarification as to what extent the *Clergy* principle applies to the applications and if the *Clergy* principle does apply, the applicable policy regime is the one described at paragraphs 57 to 66 of the joint affidavit of Messrs. Given and Cory.

[24] The affidavit of Catherine Rose, sworn April 29, 2019, Chief Planner at the City, does not proffer expert opinion either for or against the opinion evidence of the two planners but only requests direction from the Tribunal prior to circulating the applications to the commenting agencies with respect to which set of planning policies are applicable to these applications.

## **AFFIDAVIT OF VICTOR DOYLE**

[25] With or without accepting that Mr. Doyle may be impartial, the Tribunal does not find this evidence to be of much assistance. Mr. Doyle’s evidence focusses on the 1997 City of Pickering Official Plan and the Oak Ridges Moraine Amendments. It is Mr. Doyle’s opinion that the enactment of these two documents and the obligation of the Applicant to engage in the public process and due to the lack of their insertion into this process, they have potentially lost previous development rights. Mr. Doyle does not offer that there are any transitional rights for any applications preceding the two documents discussed above and appears to take the position that no rights at all, certainly in this case and maybe all cases, can be considered. The Tribunal finds this an unreasonable and untenable position, which it does not accept.

## FINDINGS

[26] The Motion brought by CDC clearly requests:

- 1) an Order that the proposed plan of subdivision includes all of Phase I and II lands as illustrated in the joint affidavit of Messrs. Given and Cory, sworn April 17, 2019; and
- 2) an Order directing the City to circulate all application materials submitted May, 2018, for the purpose of obtaining agency and public comments.

[27] The jurisprudence relied on by counsel for CDC clarifies and solidifies the power of this Tribunal to modify an application by adding lands to areas subject to an application or appeal. The former Ontario Municipal Board continued as this Tribunal repeatedly found that the power to modify an Official Plan Amendment application includes the power to add lands to the geographic extent of an area under appeal.

[28] The Ontario Municipal Board has in the past allowed boundary modifications where the lands to be included: share the same essential character as the lands originally subject to the application; the modification is compatible with the existing uses; the modification allows for comprehensive planning; the public has been made aware of the proposal; and no prejudice would be suffered by the parties.

[29] The Tribunal accepts the opinion evidence from the affidavit of Mr. Schaefer, dated April 18, 2019 and of Messrs. Given and Cory, dated April 17, 2019 and finds that it is in the public interest in this unique case, to include the Phase II lands with the Phase I lands for adjudication before this Tribunal.

[30] This evidence shows that the public has been made aware of the current CDC proposal and that anyone who has made comments about the scope of the of the draft plan of subdivision or specific elements of the plan will have an opportunity to comment and make submissions at the future full hearing on the merits of the applications.

[31] The Tribunal finds that all of these elements are present in this circumstance.

[32] The Tribunal finds that the *Clergy* principle applies in this case and that the applicable policy regime is the one described at paragraphs 57 to 66 of the joint affidavit of Messrs. Given and Cory.

[33] The Tribunal's Order herein to include all of the Phase I and II lands in the proposed plan of subdivision as illustrated in the joint affidavit of Messrs. Given and Cory, sworn April 17, 2019 should not be read as an approval of the of the Draft Plan of Subdivision, the adjudication of which, will take place at a full hearing.

[34] The Tribunal so Orders.

*"G.C.P. Bishop"*

G.C.P. BISHOP  
VICE CHAIR

If there is an attachment referred to in this document,  
please visit [www.olt.gov.on.ca](http://www.olt.gov.on.ca) to view the attachment in PDF format.

**Local Planning Appeal Tribunal**

A constituent tribunal of Ontario Land Tribunals

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