ISSUE DATE:
June 27, 2006
DECISION/ORDER NO:
1849

Ontario

PL010726

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

O'Shanter Development Company Ltd. has appealed to the Ontario Municipal Board under subsection 51(34) of the *Planning Act,* R.S.O. 1990, c.P. 13, as amended, from a decision of the City of Toronto to refuse approval of a proposed plan of condominium on lands known municipally as 17, 19, 21, 23 and 25 Lascelles Boulevard in the City of Toronto
City File No: 55CDM-00219
OMB File No: S 010050

APPEARANCES:

Parties	**Counsel**
O'Shanter Development Company Ltd.	S. Robinson, P. Greco J. A. Kilgour
City of Toronto	S. Haniford
Shawn de Swart *et al* as the Brentwood Towers Tenants Association	M. Melling
Federation of Metropolitan Toronto Tenants Association and Advocacy Centre for Tenants in Ontario	M. Truemner

DECISION DELIVERED BY D. R. GRANGER AND ORDER OF THE BOARD

This is an appeal by O'Shanter Development Company Ltd. (applicant) from a decision of the City of Toronto (City) that refused to approve proposed plans of condominium for five existing rental apartment buildings (proposal) at 17, 19, 21, 23 and 25 Lascelles Boulevard (subject property). The proposal represents the conversion of 957 purpose-built *circa* 1950's rental apartment units to condominium apartment units. No significant physical changes to the existing development are proposed. Three existing separate properties will be consolidated into one property.

On behalf of the applicant, A. Krehm, part owner, W. B. Clarkson, expert land use planner, and W. A. Dunning, expert analyst of housing markets, provided evidence in support of the proposal.

On behalf of the City, D. J. Dea, expert transportation planner, T. Burkholder, expert area land use planner, and D. Spence, expert land use policy planner, provided evidence in opposition to the proposal.

On behalf of the Federation of the Metropolitan Toronto Tenants Association (FMTTA) and the Advocacy Centre for Tenants in Ontario (ACTO), J. D. Hulchanski, land use planner with expertise in housing policy, and J. Fraser, an expert in low income housing and human rights related to housing, provided evidence in opposition to the proposal.

On behalf of the Brentwood Towers Tenants Association (BTTA), C. Box, Vice-President of BTTA, and S. de Swart, President of BTTA, provided evidence in opposition to the proposal.

Several individual tenants of the subject property and some area residents outlined concerns including parking problems in the area, construction disruption, their need for rental accommodation, inconvenience of showing units to prospective purchasers, potential tenant/owner conflicts and the lack of existing amenities such as air conditioning, dish washers, soundproofing and common rooms. One tenant expressed an interest in purchasing a unit, finding the present rent and utilities to be unaffordable. One former tenant and employee of the applicant submitted that following a door-to-door survey he estimated that 60 percent of the existing tenants were undecided or in support of the conversion. No other evidence was proffered in that regard.

This was a twelve-day hearing with twenty-nine witnesses testifying and sixty-seven exhibits presented.

Having considered all of the evidence presented and having regard for subsection 51 (24) of the *Planning Act*, the Board finds that the proposal is premature, does not conform to the applicable in-force City Official Plan (OP), is not appropriate, does not represent good planning and is not in the overall public interest of the community.

The reasons follow.

This is a case of an apartment complex owner endeavouring to achieve potential tax savings and greater business flexibility that includes the potential future sale of existing rental apartment units. The part owner confirmed his intention to return the tax savings to tenants through reduced rental rates, thereby insuring competitiveness in the softening rental market place, and confirmed no present intent to sell units or operate as a condominium corporation. Rental reductions are estimated in the $60 to $80 range based on estimates of the housing analyst for the applicant.

This application arises from the uncontradicted evidence of an existing inequity between the assessment of condominium and new rental apartment units and existing apartment buildings. The City has addressed the inequity between condominium units and newly constructed rental units over the next 35 years, following from round table discussions with affected stakeholders. The City is proposing a phased in approach to deal with existing rental apartment units owing in part to the impact any immediate measures would have on increased tax rates for existing homeowners.

The land use planner for the applicant confirmed the purpose of the application being to achieve tax savings and competitiveness and flexibility in the refinancing of the existing development.

Having carefully considered the primary reasons for the application and this appeal as confirmed by the part owner and land use planner for the applicant, the Board finds that these reasons do not represent legitimate, genuine or authentic land use planning reasons for the change in tenure proposed. On the face, these are business reasons and relate to an inequity not under the control of this Board. There was no evidence of hardship to the owner or risk to the preservation and maintenance of the existing rental apartment units uncontested to be in good condition save some problems with portions of the garage structure due to salt damage not uncommon with other similar buildings. The proposal simply seeks an improved tax regime and, if the intentions of the part owner are to be relied upon, no present intent to change the operation as a rental complex.

Much evidence was proffered related to the affordability of the units as rental apartment units and as condominium units. There were no guarantees offered up by the owner to confirm future affordability in this uncontested prime central area of the

City in immediate proximity to and well served by existing community facilities including parks, retail stores and subway access. What is evident, and uncontradicted by the land use planners, is that the loss of 957 rental apartment units will result in a significant reduction in the availability of mid range rental apartment units within this neighbourhood.

The Board finds that the significant reduction in one form of existing rental housing in this area runs contrary to the City goal set out in OP policy 6.1 (c) to encourage a range of housing types within the City appropriate to the needs of different households, including in this case, rental households. There was no contradiction to the evidence of the planners for the City and FMTTA/ACTO of the importance of rental accommodation serving more transient populations and those unable to raise down payments including those on fixed incomes and with lower incomes willing to pay a higher percentage of income to attain secure accommodation. A change of this magnitude constitutes a significant shift from the original planned function of the community.

Similarly, the Board finds that the above noted loss runs counter to the provincial interest set out in subsection 2 (j) of the *Planning Act* to adequately provide a full range of housing and policy 1.2.1 of the Provincial Policy Statement (PPS) setting out provision for a full range of housing types to meet market requirements of current residents.

It cannot go unnoticed that a change in government has resulted in new initiatives related to the preservation of rental housing stock, especially in the City of Toronto. New legislation usually comes with transitional provisions to guide the applicability to applications in progress, as expected with Bill 53. New policy directions by municipalities, usually by official plan amendment, however, rarely do. Previous Board and Court cases including *Dumart* v. *Woolwich,* (Township) [1997] O.M.B.D. No. 1817, January 29,1998 and *Greater Toronto Airports Authority* v. *Clergy Properties Ltd.* Ont. C. J. (Divisional Court) September 29, 1997 offer up guidance to the point where it is clear that the Board is expected to apply reason, with recognized expertise, in determining the appropriate evidence to weigh in the circumstances of the cases in the context of changing policy direction. In this case, considering the open public

consultation process with the Province and long-standing City policy evolution relating to the important subject of rental housing stock and conversion impact, the Board finds it appropriate to duly consider the policy direction of the City to bring greater clarity to criteria related to this most important public interest issue.

Counsel for the applicant was candid in his admission that the criteria as set out in the proposed modification to the new City OP housing policy 3.2.1.8 in response to the Provincial Consultation Paper on Residential Tenancy reform cannot be met by the proposal.

That said, the Board is satisfied, having considered all of the land use planning and housing market evidence presented, that the vacancy rate of 2.5 percent being relied upon by the applicant in support of its application has not regularly returned as required in the applicable City OP policy 6.18.

That there was no dispute between the planning and housing experts of the 2.5 percent figure having no basis in any comprehensive study or analysis does not diminish its existence as a point of considering conversion. What is in dispute, in the narrow context of this policy, is what constitutes regularly returns.

There was no dispute that the vacancy rate as reported in the Canada Mortgage and Housing Corporation (CMHC) annual rental market reports has been over 2.5 for the years 2003, 2004 and 2005, 2004 noted as an all time high at 4.3 percent declining to 3.7 percent in 2005. Does this constitute regularly returns?

It was the evidence of the planners for the City that regularly returns must be considered in the context of the past thirty years. 2.5 percent has only been exceeded once before about 1971. The very steep increase only commenced after 2001 and was not predicted. It declined from 2004 to 2005. CMHC forecasts a continued decline whereas the housing analyst for the applicant forecasts a continued increase.

The planner for the applicant relies on language in the *Planning Act*, PPS, and applicable Official Plans that is not prohibitive. He then relies on his opinion that because the vacancy rate has been above 2.5 percent for three years that it is regularly returned and therefore the conversion should be approved as the policy is met. He was

forthright in his admission that the proposed new policy 3.2.1.8 of the new 2002 City OP could not be met.

To a large degree, the planner for the applicant relied on Board Decision/Order 1327 issued October 3, 2003 regarding a proposal by Interval Development Corporation Limited know as “the Maples.” He seemed unaware that the City was successful in seeking leave to appeal that decision, albeit uncontested, and that the decision was ultimately rescinded by the Board. This is set out in *City of Toronto* v. *Interval Development Corporation Limited* Ont. S.C.J. (Divisional Court) – Leave to Appeal, May 12, 2005 and Interval Development Corporation Limited v. City of Toronto, (OMB) May 26, 2005.

While not bound by precedent, the Board must be cognizant of any potential for cumulative adverse impact resulting from its decision-making responsibilities. In this case, the Board finds the subject property to be indistinguishable from other *circa* 1950’s and 1960’s older rental apartment building complexes located throughout the City. To consider this conversion for the primary reasons confirmed by the applicant and focusing on one poorly defined City OP policy related to vacancy rates is to risk a substantial change in the form of reduction to the private rental housing stock in the City. This would not be in the overall public interest of the City.

The Board prefers the opinion of the planners for the City and FMTTA/ACTO in this regard. The Board finds it to be premature to declare the vacancy rate to be regularly returned in the context of such a long history of being very low then a sudden increase and now evidence of a decline. The experts agreed that it was too early to know whether or not the sudden increase would be considered a “bubble,” “aberration” or continue as a stable, sustained, constant level.

In this context, the Board finds it to be premature and not good planning to accept that the vacancy rate has regularly returned at a sustained constant level above 2.5 percent. The magnitude of loss of 957 well-maintained units in the central City from private rental stock is just too great a risk without more certainty of a stable vacancy rate especially in the context of OP policy 6.17 that encourages the retention and conservation of the existing stock of private rental housing and accordingly discouraging conversion.

This risk is further compounded when considering the longer-term security of tenure that is diminished through conversion to condominium ownership. All experts acknowledged that while existing tenants are protected as long as they remain in their units, future unit owners could displace future tenants.

Having found the proposal to be premature, not in the public interest and not in conformity with the policies of the in-force City OP, the Board will not address the evidence called related to the proposed conditions of condominium approval other than to say that the Board is not convinced of the appropriateness of allowing the final registration of a condominium corporation in the absence of all works being in place, any environmental remediation completed, being up to acceptable building standards with a clear delineation and disposition for all land and building areas in the description ready for appropriate transfer.

The applicant submitted an intent to operate as a dormant condominium and continue to rent units for the foreseeable future. The applicant relies on *R.* v. *Minto Developments Inc.* – Reasons for Judgement of His Worship Justice of the Peace M. Jolicoeur dated June 9, 1993 and Reasons for Judgment of the Honourable Judge B. E. MacPhee dated November 30, 1994 that found such a proposal to be legal. The applicant desires to forego some requirements such as completion of all parking required for the condominium corporation until after registration but before the sale of the first unit. While novel, the Board finds this to be unprecedented and not in the public interest of future residents should difficulties arise in the performance of the applicant. The City rightly submitted it being the ultimate receiver of complaints with an expectation of having to address compliance enforcement. The City is not willing to accept such a responsibility in the absence of full compliance of all requirements, including zoning by-law compliance of parking requirements, prior to the registration of any condominium corporation. The Board would be loath to require the City to deviate from its normal practice with respect to condominium approvals.

All parties to these proceedings have conducted themselves with commitment and enthusiasm for their positions.

In the end, much of the case for the applicant rests on it meeting the vacancy rate threshold of OP policy 6.18 and, therefore, with no other prohibitions, exercising its right to convert.

In that respect, while the Board finds OP policy 6.18 to be minimal without benefit of clear criteria or definition, when taken in the context of the *Planning Act* requirements, PPS policies and applicable policies of the Metropolitan Toronto Official Plan and City OP as presented through the course of this hearing, the Board does not accept that the vacancy rate threshold is met nor that the other policies have been appropriately respected. Added to this is the evolving better-defined criteria and policy resulting from extensive government, stakeholder and community consultation over the past few years culminating in a new City OP policy proposal. With all of that, the Board prefers the opinions of the planners for the City and FMTTA/ACTO in their unanimity that the proposal does not represent good planning.

The Board does note that if vacancy rates were

to continue high and rental stock were to become more vulnerable through dereliction, a rental-housing crisis could ensue. All levels of government must be cognizant of and be willing to immediately address any tax inequity that might be cause for any rental stock vulnerability forthwith.

With respect to determining the appropriate level of equilibrium between occupied and vacant rental units and between long-term secure rental units and ownership units, it is time for an up-date through independent comprehensive study and analysis of the Canadian and Ontario urban experiences in that regard.

In conclusion, the appeal by O'Shanter Development Company Ltd. is dismissed. The proposed plans of condominium are not approved.

The Board so Orders.

Original signed by Member

D. R. GRANGER
VICE-CHAIR