

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: February 26, 2026

CASE NO(S).: OLT-24-001214

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

Applicant and Appellant: K2 GP Inc.
Subject: Application to amend the Zoning By-law – Refusal or neglect to make a decision
Description: To permit development of a 12-storey mixed use building with at-grade commercial uses for a total of 168 residential units
Reference Number: 21 191601 ESC 20 OZ
Property Address: 1552-1572 Kingston Road
Municipality/UT: Toronto/Toronto
OLT Case No.: OLT-24-001214
OLT Lead Case No.: OLT-24-001214
OLT Case Name: K2 GP Inc. v. Toronto (City)

PROCEEDING COMMENCED UNDER subsection 114(15) of the *City of Toronto Act*, 2006, S.O. 2006, c. 11, Sched. A.

Applicant/Appellant: K2 GP Inc.
Subject: City of Toronto Site Plan Approval
Description: To permit development of a 12-storey mixed use building with at-grade commercial uses for a total of 168 residential units
Reference Number: 21 191601 20 SA
Property Address: 1552-1572 Kingston Road
Municipality/UT: Toronto/Toronto
OLT Case No.: OLT-24-001215
OLT Lead Case No.: OLT-24-001214

Heard: November 19-26, 2025 by video hearing

APPEARANCES:**Parties**

K2 GP Inc.
("Applicant" / "Appellant")

City of Toronto
("City")

Counsel

Jason Park
Daniel Angelucci

Marc Hardiejowski
Adam Ward

DECISION DELIVERED BY K.R. ANDREWS AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This appeal concerns a non-decision by the City regarding an application for a Zoning By-law Amendment ("ZBA") to permit development of a 12-storey (now 11-storey) mixed use building with at-grade commercial uses for a total of 168 (now 139) residential units at 1552-1572 Kingston Road ("the Site"). An appeal of a related Site Plan approval application is also before the Tribunal; however, it is being held in abeyance pending the outcome of the present ZBA matter.

[2] The dispute between the Parties is focussed on the proposed size of the building, particularly as it relates to height, step-backs, and setbacks from Kingston Road. Central to the height and step-back issues are Official Plan ("OP") built form policies which generally dictate maximum height and appropriate step-backs in terms associated with the width of the fronting road right-of-way ("ROW"). Additionally, the proposed building's front setback is also a concern to the City because it may impact the sustainability of growing shade trees along Kingston Road.

[3] For the reasons stated below, the Tribunal dismisses the Appeal on the basis that the proposed front setback is insufficient to support policy promoting the growth of trees along the City's roadways. The Tribunal did not hear sufficient evidence to determine what an adequate setback might be to ensure the survival of said trees, so it is not in a position to approve the ZBA with an alternate setback.

[4] Despite dismissing the appeal on this basis, the Tribunal nevertheless examined the issues associated with the buildings' height, rear setback, and front and rear step-backs.

THE SITE

[5] The Site is located within the Birchcliffe-Cliffside neighbourhood, on the north side of Kingston Road, with frontage on Eastwood Avenue to the east and Kalmar Avenue to the west. It is an irregular rectangular shaped parcel that occupies approximately 1,934.8 square metres of land, with an overall frontage of approximately 70.0 metres ("m") on Kingston Road and a depth of approximately 31.4 m.

[6] There are no terrain, physical features or neighbourhood characteristics that might constrain the proposed redevelopment of the Site for its intended purpose. It is currently occupied by five vacant, two-storey mixed-use buildings. The application proposes to demolish the existing buildings. There is no question that the property is currently underutilized.

[7] The two most noteworthy contextual factors of the Site are its depth and the ROW width of Kingston Road. The depth of the site is relatively shallow compared to its width, which limits setbacks and step-backs that might otherwise mitigate perceptions of the building's mass. The ROW width, meanwhile, is referenced in policy as a factor to determine the appropriate overall height of the building, as well as at what height the building should stepped back. The assessment of the ROW width was contentious between the parties. The Tribunal ultimately found that the ROW width varies across the front of the Site, as explained in greater detail below.

ANALYSIS

Preliminary Issue: Clergy Principle

[8] Official Plan Amendment No. 778 ("OPA 778") came into effect after the Appellant submitted its application for the present ZBA appeal. Generally, OPA 778 is

less restrictive than the City's OP, allowing the construction of mid-rise buildings with more density than what would otherwise be permitted. Greater density is allowed under OPA 778 by eliminating former rear massing transition requirements, specifically rear step-backs to provide a 45-degree angular plane transition from adjoining neighbourhoods.

[9] Of note, OPA 778 does not amend the OP's Chapter 3 built-form policies limiting a mid-rise building height and promotion of certain step-backs. This is an important point, because these policies were central to both Parties' evidence and submissions on the subject of built form.

[10] The Parties made comprehensive submissions on the Clergy Principle and whether the proposed ZBA should conform to the provisions of OPA 778 and the remainder of the City's OP, or if the Tribunal need only "have regard to" the policies of OPA 778 because the application was submitted before OPA 778 came into effect.

[11] Curiously, it is the Appellant that submits that the Clergy Principle must apply, despite OPA 778 being less restrictive, and the subject ZBA need only conform with the City's OP prior to OPA 778 coming into effect. The Appellant submits that the proper approach involves the Tribunal merely "having regard to" the new amending policies of OPA 778.

[12] Conversely, the City submits that the present ZBA application must conform with the City's OP as amended by OPA 778. For the reasons stated below, the Tribunal accepts the City's position.

[13] In coming to this conclusion, the Tribunal first examines the language of s. 24(1) of the *Planning Act*:

24 (1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith. [emphasis added]

[14] The Tribunal finds that OPA 778 is now “in effect” in accordance with this section, and so the Tribunal is obliged to consider conformity of the new OPA 778 policies by default. To be clear, the policies of OPA 778 are not emerging policies (albeit they were still emerging at the time when the application was made). Further, it is generally accepted that updated policies are to be preferred over former policy frameworks because they reflect new, better informed planning ideas, as tested against newer provincial policy instruments (see: [*Maynard v Mississippi Mills \(Town\)*](#), 2021 CanLII 109379 (ON LT) at para. 28).

[15] This means that the latest OP policies that are in effect when the Tribunal considers a matter are to be firstly considered under s. 24(1) and only supplanted by older OP policies if the Tribunal elects to apply the Clergy Principle. This is because the purpose of the Clergy Principle is to provide a discretionary procedural fairness remedy when the Tribunal finds that it would be unduly prejudicial to apply newer, more restrictive policies that were not yet in effect when the application was initially made. The Tribunal recognizes that this discretion almost always weighs in favour of applying the Clergy Principle if it would prejudice an Applicant to apply newer, more restrictive municipal planning policies; however, it remains at the discretion of the Tribunal to do so, given that it is not a legal principle *per se*.

[16] In the present case, the Tribunal finds no evidence that OPA 778 is more restrictive than the pre-existing policies of the City’s OP. Quite the opposite, the Tribunal finds that OPA 778 enables a denser building by eliminating the rear 45-degree angular plane requirement. Notably, the OP policies which restrict height and promote upper floor step-backs remain unchanged, so there is no prejudice in applying OPA 778 under s. 24(1) on account of these policies either. Consequently, the Tribunal finds no reason to apply the Clergy Principle, and the sought-after ZBA will therefore be adjudicated on the basis of conformity with the City’s OP as amended by OPA 778.

Principles of Balancing Policy Interests

[17] The Appellant relies heavily on policy directives that promote intensification. This, the Appellant submits, provides the necessary justification to exceed the stated limits on mid-rise heights according to the City's OP.

[18] While the City does not dispute that there are policies at both the provincial and municipal levels that promote intensification, it submits that the Appellant's approach to justify the degree to which it proposes to exceed stated policy limits ignores and /or excessively minimizes policy objectives associated with promoting community fit, public realm considerations and overall impact on the surrounding area.

[19] On this point, the Tribunal highlights the well accepted approach to assessing consistency or conformity with planning policy objectives as a balancing exercise. It is well understood that no policy or policies trump all others. Even in the current environment of a housing crisis, where the Provincial Planning Statement 2024 ("PPS"), clearly aims to increase housing supply, other policies, such as those which consider appropriate scale in relation to the context of the location are not simply cast aside. The Tribunal is obliged to consider all relevant policies of both the provincial and municipal governments, and it is not unusual for some of those policies rub against each other.

[20] Similarly, there is no paramountcy with regards to the application of the statutory tests contained in the *Planning Act*. The PPS consistency test found at s. 3(5) of the Act does not take precedence over the OP conformity test found at s. 24(1), or vice versa. The Tribunal is obliged to apply both tests, noting that the PPS may be heavier on policy directed at building more, denser and an increasingly compact development, while the City's OP may more clearly promote built form policies concerned with community fit and form together with creating a desirable public realm. While acknowledging that the OP conformity test uses a stricter standard of adherence than the PPS consistency test (see: [1455136 Ontario Ltd. v Waterloo \(Region\)](#), 2023 CanLII 50968 (ON LT) at para. 25), both tests must nevertheless be statutorily satisfied through the course of the Tribunal's decision.

[21] In this sense, the Tribunal does not accept that greater weight should be given to provincial policies and/or such policies that promote greater intensification. The Tribunal must strike the right balance between all applicable policies from both levels of government.

The City's ROW Policies

[22] Given that there is no dispute that policies promoting intensification are important and must be considered when assessing the present ZBA application, the Tribunal will focus on the more contentious built form policies which must be balanced against those policies.

[23] The City's Chapter 3 built-form Policy 3.1.4.4.a) states that *"mid-rise buildings will be designed to have heights generally no greater than the width of the [ROW] that it fronts onto"* (Emphasis added) ("ROW policy"). Both Parties spent a great deal of time dealing with this policy both in evidence and submissions. The evidence shows that the ROW for the Site is 20 m on the west half of the property, slightly more going east from the approximate halfway point, and substantially more at the furthest east end of the Site where it fronts onto a T-intersection at Kingston Road and Kildonan Drive (see below at Figure 1).

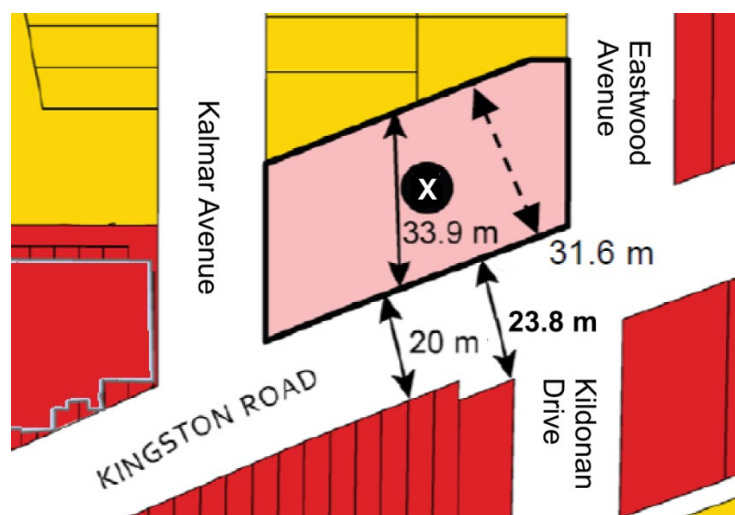


FIGURE 1

[24] The Appellant raises the point that the ROW policy uses the word “generally”, which means that this policy does not need to be strictly adhered to in a mathematical sense. The City submits that while this may be true, it also does not provide for *carte blanche* to build to any height desired, with specific context of the site and proposed mitigation measures being considerations. The Appellant does not disagree but claims that the proposed 11-storey building is not extravagantly too tall in light of this policy.

[25] Expanding on it’s position, the City submits that any height beyond the stated 1:1 height-ROW ratio should incorporate step-backs and other building design features to mitigate the impression of a taller building. The City further highlights that policy 3.1.4.4.b) states that “*street proportion*” and “*open views of the sky from the public realm*” should be maintained “*by stepping back building massing generally at a height equivalent to 80% of the adjacent [ROW] width*” (emphasis added) (“ROW step-back policy”).

[26] The Tribunal notes that the City’s planning and urban design evidence concerning height was based on it determining that the ROW in front of the site is 20 m. If this number is accepted, the City’s witnesses stated that a six-storey building would be comfortably appropriate for the Site, and a seven- or eight-story building is possible depending on the built form. They confirmed that an eight-storey building would be higher than the ROW-width by approximately 30%.

[27] The Tribunal accepts this evidence and similarly finds that an eight-story building could be policy supported depending on step-backs that are implemented to mitigate the perception of height and massing. The Tribunal finds that the proposed 11-story building would be too tall where the building fronts onto a 20 m ROW, because the depth of the site does not allow for sufficient mitigating step-backs.

[28] The Appellant’s evidence was more nuanced respecting the calculation of the ROW in front of the Site. The Appellant’s witnesses took into account a ‘bump-out’ in the ROW which produces a localized ROW of 23.8 m going east from the approximate

halfway point of the Site. The City dismissed this jog in the ROW, saying that it is imperceptible from the public realm.

[29] On this point, the Tribunal accepts that the bump-out must be considered, and this invites a slightly taller building (by at least one storey) beginning at the approximate halfway point of the Site. While it might be imperceptible from the public realm, the bump-out factually exists and the Tribunal finds that the City cannot be selective when measuring the ROW. Based on this finding and extrapolating the City's witness' evidence that a 30% excess of the ROW could conform with the ROW policy, the Tribunal finds that a minimum nine-storey building could be appropriate for the Site starting at the half-way point going east; again, depending on built form.

[30] Further, the Appellant highlights the fact that the ROW expands exponentially away from the Site at the T-intersection at Kingston Road and Kildonan Drive. In this instance again, the Tribunal finds that the City cannot be selective when calculating the ROW for the purpose of applying the ROW Policy. Consequently, the proposed building can be taller across the road from this open space.

[31] The Tribunal finds that this situation is not substantially different from that of 1346 Kingston Road, where the City found it reasonable to allow exceedance of the immediate ROW-width by 50% due to the open space of the Toronto Hunt Club across the road. In that case, the City's witness opined that the perception of a closed in street wall was mitigated by the open space provided on one side. The Tribunal finds that the same rationale should apply to the present situation and similarly finds that the open space created by the T-intersection mitigates against the public's perception of a closed in street wall, plus it provides for adequate sky views. At this location of the Site, the Tribunal therefore finds that a proposed height of 11-storeys and possibly 12-storeys could be policy supported; again, depending on built form.

[32] Regarding the proposed combination of setbacks and step-backs at the rear of the building, the Tribunal is satisfied that it is satisfactory, noting that the City did not meaningfully contest it.

[33] Focussing on the front of the building, the Tribunal finds that the proposal does not provide a sufficient step-back at the upper floors to conform with the ROW step-back policy or otherwise mitigate against the perception of increased height. Having considered the flexibility provided by the word “generally” within the policy, the Tribunal finds that a step-back should be minimally established at the sixth floor at the west half of the building, and the eighth floor at the east half of the building.

[34] Regarding the appropriate depth of the step-back, the Tribunal accepts the Appellant’s evidence that a step-back of 1.5 m is sufficient to achieve the desired effect. To be clear, the Tribunal finds that any step-back must be relative to the base of the building, not upper floor projections. In addition, the Tribunal accepts the Applicant’s proposal to further step-back the building by 1.25 m at the eleventh floor.

[35] Regarding the proposed cantilever, the Tribunal is satisfied that it is appropriate to incorporate it into the building’s design at the third and fourth floors because it highlights the siting of the commercial space below. To be clear again, any step-backs at the upper floors are to be measured against the base, not the cantilever.

[36] The Tribunal acknowledges that the Appellant presented a number of comparable midrise buildings along Kingston Road, similar or taller in height than the proposal, and the Appellant proposed that these buildings provided a precedent in favour of allowing the Appeal. However, the Tribunal finds these comparables provide little value because the contexts of these sites are not sufficiently comparable. Notably, these other buildings exist on wider ROW portions of Kingston Road, and/or are situated on deeper lots which allow further mitigating built form strategies to reduce perceptions of increased height and massing.

[37] The Tribunal further notes that there were extensive submissions about whether the Appellant’s proposal adheres to the City’s design guidelines. In this respect, the Tribunal finds such evidence to be of limited value, given that guidelines are not policy. While the guidelines may assist the Tribunal to envision how certain OP policies may

materialize as built form, there is no statutory requirement for a building proposal (as facilitated by a ZBA application) to adhere to guidelines.

[38] In summary, having considered both parties' evidence concerning the appropriate application of the ROW policy concerning the overall height of the building, and ROW step-back policy concerning built form to reduce the perception of the building's height and mass, the Tribunal finds that a ZBA allowing a building with the following features could be policy-supportive:

- Up to an eight-storey building from approximately the halfway point of the Site going west;
- Up to a nine-storey building from the halfway point going east;
- Up to an 11-storey building (and possibly a 12-storey building) at the east end of the site across from the T-intersection;
- Setback and step-backs minimally as currently proposed at the rear of the building;
- The currently proposed cantilever at the third and fourth floors may remain;
- A step-back of 1.5 m (relative to the base of the building) at no higher than the sixth floor at the west half of the building, and the eighth floor at the east half of the building, and a further step-back of 1.25 m at the eleventh floor.

[39] The Tribunal notes that the building's overall setback at the front of the building is not covered above. This is because the appropriate measure of said setback is impacted by the Tribunal's findings regarding the sustainability of trees proposed to be planted along Kingston Road.

Street Tree Policies

[40] OP policy 3.1.1.6.a) speaks to providing adequate space for trees along existing City streets, and policy 3.4.1.d) addresses the preservation of the urban forest by “*providing suitable growing environments for trees*” and “*increasing tree canopy coverage and diversity, especially of long-lived native and large shade trees*” (collectively, hereinafter the “Street Tree Policies”). The Tribunal finds that these policies are no less important than those policies that deal with development intensity, building size, massing and built form. Additionally, as with most environmental policies, a firm adherence to these policies is necessary on a case-by-case basis or the broader objectives of these policies will fail through attrition.

[41] Importantly, the proposed ZBA does not purport to regulate how trees will be planted on the site, or even their location. The City raises the Street Tree Policies on the basis that the proposed building’s setback from Kingston Road, plus the proposed cantilevered projection, will make it impossible to provide adequate growing space (both above and below ground) for the trees to survive. Put another way, the City submits that if the proposed ZBA does not provide enough of a setback to allow the trees to grow, then it does not conform with the Street Tree Policies.

[42] The Tribunal heard evidence that the Appellant’s plan provides only the minimum soil volume that might theoretically be capable of sustaining the trees; however, the evidence also shows that those calculations do not account for underground constraints due to buried utilities, nor the footprint of an existing hydro pole, both of which would inevitably reduce the actual amount of soil volume to below what is capable of sustaining the trees.

[43] The Tribunal accepts this evidence, finding that the current plan does not provide enough soil volume to sustain the trees. The Appellant’s expert in landscape architecture opined that there are other underground methods to ensure that the trees can be grown sustainably (i.e., using at-grade soil cells), but the Tribunal is not satisfied with this evidence, finding that the Appellant’s witness did not defend it well

enough when subjected to cross-examination. Further, the City's witness, who was the only arborist qualified as an expert, opined that the solutions offered by the Appellant would not be adequate to successfully grow the trees. Given her qualifications and the fact that an Arborist is professionally trained in the field of tree health (not just landscape design), the Tribunal prefers her evidence over that of the Appellant's witness when considering tree-health.

[44] Further, the City's arborist opined that the proposed cantilever projection will restrict vertical growth of the proposed trees, providing insufficient room to develop their natural form or reach their full mature height. This was disputed by the Appellant using anecdotal evidence, comparing other sites to the subject site; however, the Tribunal is not satisfied with this comparison-method, finding it inconclusive from a tree-health standpoint. The Tribunal was also left wondering if the comparable sites were similar enough underground. Ultimately, given the choice between the two opinions, the Tribunal accepts that of the City's witness due to her Arborist qualifications.

[45] The Tribunal comes to the above findings while considering both a plan to locate the sidewalk between the proposed trees and the roadway, and locating the trees between the sidewalk and the roadway. In either case, the Tribunal is not satisfied with the evidence tendered to prove that there is enough space provided to successfully grow the proposed trees.

[46] Having come to the above findings, the Tribunal concludes that the Appellant's plans do not provide an adequate front setback to viably grow the proposed trees. This leads the Tribunal to find that the proposed ZBA, setting out said prescribed setback, does not conform with the City's OP.

CONCLUSION

[47] While the Tribunal was able to determine heights, front step-backs, and rear setbacks and step-backs that conform with the City's OP policies, it was not able to determine a conforming minimum front setback based on the evidence provided. This leads the Tribunal to dismiss the appeal, rather than approve an alternate ZBA.

[48] Applying a balancing approach does not save the ZBA application despite significant conformity in many ways with the City's OP policies, as well as consistency with the PPS. This is because the Tribunal finds that the City's Street Tree Policies would have to be entirely ignored to approve the Application. In the same way that no particular policy may trump all other policies as part of a conformity/consistency analysis, no particular policy may be ignored either.

[49] As a consequence, the Tribunal cannot approve the proposal as currently presented. Having come to this conclusion, the Tribunal declines to determine any other outstanding issues of this matter.

ORDER

[50] **THE TRIBUNAL ORDERS THAT** the appeal is dismissed and the requested amendment to the City of Toronto Zoning By-law No. 569-2013 is refused.

"K.R. Andrews"

K.R. ANDREWS
MEMBER

Ontario Land Tribunal

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