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GUELPH SCHOOL BOARD APPEAL OF FOUR-STOREY RESIDENTIAL DEVELOPMENT UPHELD BY OLT

STEAL MY SUNSHINE

Matt Durnan

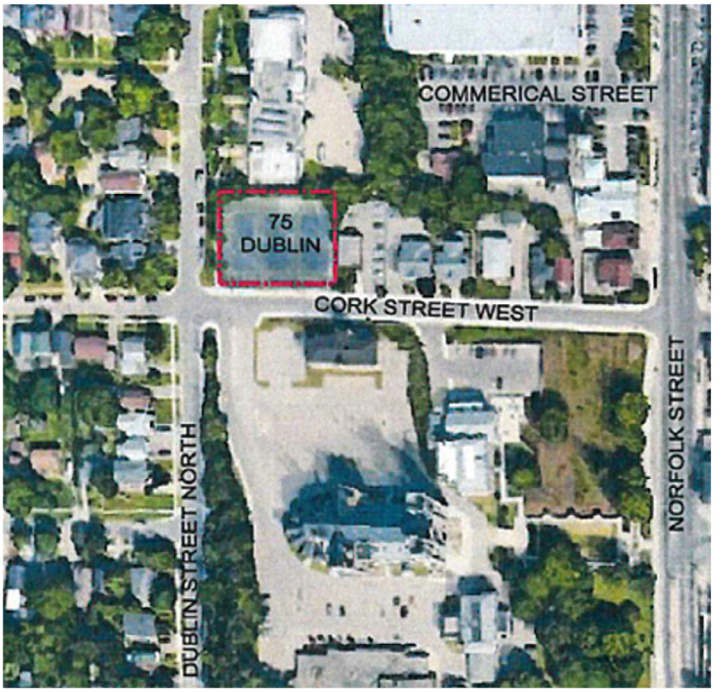
A recent **Ontario Land Tribunal** (OLT) decision regarding a school board's appeal of a proposed four-storey residential building in Guelph sets an interesting precedent for the province's land use planning adjudicators after some never-before-used evidence was accepted by the OLT in its decision to uphold the appeal, specifically, evidence demonstrating loss of direct sunlight as a negative impact.

The OLT recently upheld an appeal filed by the **Upper Grand District School Board** against the **City of Guelph** regarding a zoning by-law amendment (ZBLA) application by **Rykur Holdings Inc.** for a site at 75 Dublin Street North in Guelph, Ontario.

Rykur was seeking to develop a four-storey residential building on the 75 Dublin Street North site. The Dublin Street North site is located to the south of **Central Public School**, a single-storey elementary school located at 97 Dublin Street North. The City of Guelph approved Rykur's ZBLA for the site, permitting the development of a four-storey residential building at 75 Dublin Street North.

The Upper Grand District School Board appealed the decision to the OLT. The school board argued that the proposed height of the residential building would have negative impacts on the adjacent public school. The school board's witnesses argued that the height of the proposed building would result in a loss of direct and indirect sunlight for much of the Central Public School's schoolyard, along with a loss of direct and indirect sunlight in the winter for the school's kindergarten classrooms and play area, while also impeding the effectiveness of the school's rooftop solar panels.

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Map showing the location of the site at 75 Dublin Street in Guelph where Rykur Holdings' zoning by-law application seeking to develop a four-storey residential building was approved by the City of Guelph. The site is currently occupied by three tennis courts and sits to the south of the Central Public School. The Ontario Land Tribunal (OLT) recently upheld the Upper Grand District School Board's appeal against the proposed development, arguing that at four storeys, its height would negatively impact the adjacent Central Public School's access to direct and indirect sunlight, including on its schoolyard and the solar panels on the school roof.

SOURCE: CITY OF GUELPH

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Central Public School has been operating on the site at 97 Dublin Street North for nearly 150 years. Rykur Holdings' adjacent site at 75 Dublin Street North is a vacant 0.15-hectare piece of land located at the northeast corner of Cork Street West and Dublin Street North. The proposed residential development has a history of back and forth between the developer and the City, as well as the OLT.

In 2017, Rykur had been seeking an official plan amendment for the site to permit the development of a five-storey residential building. At the time, Guelph's official plan permitted building heights of two to four storeys on that site. After Guelph city council refused Rykur's OPA application in April of 2018, Rykur appealed to the OLT.

In July of 2021, Rykur reached a settlement with the City of Guelph and agreed to withdraw its 2018 appeal, provided zoning modifications were made regarding side yard setback regulations. The modifications were to reduce side yard setbacks from 4.5 metres to three metres, while also reducing the parking requirements for the site.

One of the unusual features of the Rykur site is the fact that it has one of the highest elevations of all land in Guelph, making potential loss of sunlight impacts on adjacent land more pronounced than they would be if the site were on a lower elevation.

Five witnesses testified in support of the Upper Grand District School Board appeal, saying that due to the high elevation of the Rykur site, developing a four-storey building on it would create sunlight impacts on its neighbours more similar to those of a six-storey building. Rykur Holdings did not appear at the hearing.

Ultimately, the Tribunal found in favour of the school board, and upheld the appeal in part, on an interim basis, withholding its final order contingent upon receiving and approving a final revised form of the ZBLA with a number of modifications.

The modifications to the ZBLA would include: the provision of three-metre stepbacks in the area adjacent to the school from the third storey of the building up; provision of a minimum 4.5-metre side yard setback adjacent to the school; the entrance to the proposed development would have to be off Cork Street West, with no vehicular access to Dublin Street North; and no driveways nor loading areas could be located off Dublin Street North. Finally, the inclusion of a public parking facility on the site of the proposed development would not be a permitted use.

Papazian Heisey Meyers senior partner **Alan Heisey**, who was counsel for the school board says that this particular case is unusual in that it represents the first case he is aware of in Ontario where loss of indirect light and evidence quantifying that loss and its impacts were accepted by the OLT.

"If you look at section 33 of the *Real Property Limitations Act*, there you'll find references to light and right to light. This is in official plans and other policy documents, and you can find discussion or guidance regarding light in three areas," Heisey told *NRU*.

"You can find it in an official plan, they'll talk about light on public parks. Sometimes in cities like Toronto, they'll give hours of light required on sidewalks to prevent too much shadowing. And then there's provincial policy, and there's the Growth Plan. In my practice, which has been going on for 42 years, the only kind of evidence that's been presented has been on direct or no direct sunlight, and a subjective discussion on how much light certain areas like a yard or windows got."

Additionally, Heisey notes,

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Aerial image of the site at 75 Dublin Street North in Guelph (tennis courts) where Rykur Holdings' proposal to develop a four-storey residential building was approved by the City of Guelph. The site is located just to the south of the one-storey Central Public School (bottom left corner of the photo). The Ontario Land Tribunal recently upheld the Upper Grand District School Board's appeal of the approval for the Rykur development The Tribunal found in favour of the school board, whose witnesses argued that the proposed four-storey development would have negative impacts on direct and indirect sunlight on the school site.

SOURCE: CITY OF GUELPH

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in most land use disputes heard at the OLT, the Tribunal has not considered access to sunlight during the winter months of December, January and February, because the shadows are much longer and people typically aren't outside as much during these months.

The Tribunal also found that the shadowing from the proposed development would impact the light and temperature on the schoolyard and inside of the school on the adjacent site, not necessarily measuring shadowing, but rather how much sun would be hitting the school's southerly wall and how that would translate to increased heating costs for the school.

In this case, the schoolyard is a different animal than other land uses, in the sense that schools have mandated outdoor times for students. The Tribunal heard and accepted evidence from Central Public School's principal, **Amy Ewing**, who discussed the health benefits for children of having access to the outdoors and natural light.

"She [Ewing] said children need access to the natural environment and green space, which can improve their learning, mental health, and well-being. She said this has a positive impact on their physical activity and pro-social behaviour," the OLT decision report said.

"She said children flourish when they have an opportunity to do things outside and the school tries to make use of its outdoor space as much as possible. She said natural light also provides a feeling of warmth in the classrooms and positively affects students. She opined that reducing students' access to natural sunlight would negatively impact their educational success. In particular, she said the proposed development would impact the warmth and sunlight at the school and its play areas."

The Tribunal chair also noted that the shadow created by the proposed development would negatively impact the amount of energy generated by the solar panels on the roof of the school.

The hearing also marked the first time, to Heisey's knowledge, that the Tribunal has accepted a European standard for minimum sunlight to classroom windows. The European standard sets a minimum of no less than two hours of direct sunlight a day on classroom windows.

This evidence was brought forward by **Morgan Solar** president and chief technology officer **John Paul Morgan**. Morgan was qualified by the Tribunal to provide opinion evidence in the area of solar power electrical engineering, with a special expertise in solar power, light and indirect light.

I think that the introduction of a European standard for direct sunlight to windows, evidence about that as part of an assessment of impact is a first, to my knowledge. I think I'm unaware of any other decision that has considered heat gain to a building from sunlight on a building surface," Heisey said.

Heisey said: "It's an important precedent in the sense that the OLT found that impact of loss of light and indirect light in the winter months can be an important impact, it depends on the [land] use. Finally, from a precedential perspective, the consideration of solar panels and the loss of energy generation from the solar panels, that was an impact that the Tribunal considered necessary to consider."

The consideration of impacts on solar panel efficiency is potentially precedent setting because there is nothing in the Provincial Policy Statement nor in Guelph's official plan that states that you can't cast shadows on solar panels. The only policy documents that are somewhat adjacent to addressing the impact that a proposed development may have on solar panels are the Growth Plan and the Provincial Policy Statement, which both encourage the use of renewable energy.

C2 Planning principal, land use planner **Christian Chan** provided opinion evidence to the Tribunal in the area of land use planning.

Chan recommended a number modifications to the zoning by-law for the Rykur site that would permit residential development on it without loss of direct sunlight impacts, including permitting the development of a maximum of two storeys at 3.2 metres per storey, and the inclusion of a three-metre stepback from the third storey up.

"Most of the school board's recommendations were accepted by the OLT," said Heisey.

Tribunal ultimately upheld the school board's appeal in part, on an interim basis contingent upon the recommendations presented by Chan.

The full decision report can be found online here.