

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



ISSUE DATE: February 21, 2020

CASE NO(S): PL180255

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 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Television City Hamilton Inc.
Subject:	Request to amend the Official Plan - Failure of the City of Hamilton to adopt the requested amendment
Existing Designation:	Medium Density Residential
Proposed Designated:	Mixed Use
Purpose:	To permit the development of mixed-use multiple dwelling consisting of two towers and connecting base
Property Address/Description:	163 Jackson Street West
Municipality:	City of Hamilton
Approval Authority File No.:	UHOPA-17-27
OMB Case No.:	PL180255
OMB File No.:	PL180255
OMB Case Name:	Television City Hamilton Inc. v. Hamilton (City)

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

Applicant and Appellant:	Television City Hamilton Inc.
Subject:	Application to amend Zoning By-law No. (05-200) - Neglect of the City of Hamilton to make a decision
Existing Zoning:	Downtown Multiple Residential (06) Zone

Proposed Zoning: Site Specific Downtown Multiple Residential (06, XXX) Zone
 Purpose: To permit the development of mixed-use multiple dwelling consisting of two towers and connecting base
 Property Address/Description: 163 Jackson Street West
 Municipality: City of Hamilton
 Municipality File No.: ZAC-17-063
 OMB Case No.: PL180255
 OMB File No.: PL180256

Heard: March 25 – 29, 2019 in Hamilton, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Television City Hamilton Inc.

N. Smith*
J. Meader*

City of Hamilton

S. Chisholm*

Jennifer Balshaw

Self-represented

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] Television City Hamilton Inc. (“TV City”) wishes to develop a site a 163 Jackson Street West (“Subject Site”) in the City of Hamilton (“City”).

[2] In support of its intention to develop the Subject Site, TV City applied for an official plan amendment (“OPA”) and an associated zoning by-law amendment (“ZBA”). The City failed to make a decision on these applications and TV City appealed these matters to this Tribunal.

[3] Two parties appeared in opposition to TV City: the City and Jennifer Balshaw.

Ms. Balshaw is a resident of an adjacent high-rise building.

Witnesses Heard

[4] Ms. Balshaw is self-represented and lives in one of the Vanier Towers buildings adjacent to the proposed development. Hearing no objection, the Tribunal heard from Ms. Balshaw. The Tribunal also heard from three witnesses called by Ms. Balshaw: Laura Quinn, Candi Pollington and Karijn DeJong. Ms. Quinn and Ms. Pollington also live in Vanier Towers; Ms. DeJong provides peer support to Vanier Towers residents. The principal concern expressed by Ms. Balshaw and the three witnesses she called was shadowing from the proposed development, a reduction of direct sunlight into some of the units in the building in Vanier Towers and sight lines from the proposed development that might result in decreased privacy in certain units.

[5] Also appearing in opposition was the Durand Neighbourhood Association, a Participant in these proceedings represented by Janice Brown.

[6] Participant Lachan Holmes appeared in support of the TV City proposal.

[7] The Tribunal heard from several expert witnesses whom the Tribunal qualified to provide independent expert opinion evidence.

[8] TV City called: Peter Clewes, a qualified architect; Peter Smith, a qualified land use planner; and Robert Glover, qualified for urban design.

[9] The City called: Timothy Smith, a qualified land use planner, and Eric Turcotte who was qualified for urban design. Both gentlemen are external experts. The Tribunal did not hear from any internal City staff.

ISSUES, ANALYSIS AND FINDINGS

Site, Area and Revised Proposal

[10] The Subject Site is on an L-shaped lot in the Durand neighbourhood. It is the former site of the television station known as CHCH. The block in which the Subject Site is located also has two older slab style high-rise buildings that are known as Vanier Towers.

[11] The surrounding area includes several other high-rise residential buildings interspersed with some single-family detached house form buildings. A small enclave of low-rise house form buildings is on Wesanford Place, a short street to the east of the Subject Site with a high-rise building at its end.

[12] The Subject Site is located within the Downtown Hamilton Urban Growth Centre and the Downtown Secondary Plan area. It is within walking distance of employment uses and higher order transit.

[13] The Subject Site is also within a small portion of the Durand neighbourhood that overlaps the Downtown Hamilton Urban Growth Centre and the Downtown Secondary Plan. The Durand neighbourhood itself stretches from this area of the City's downtown all the way to the Niagara Escarpment.

[14] The Subject Site includes a designated heritage building, known as the Pinehurst. The Pinehurst remains in place on the site and will be restored and reused. A surface parking lot in front of the Pinehurst will be replaced by privately-owned publicly-accessible open space.

[15] TV City made its initial application for an OPA and ZBA in September 2017. A with-prejudice offer of a revised proposal to settle these matters was made by TV City in February 2019.

[16] The core of the development proposal remains the same with two residential

point towers, the heritage building restored and reused in place and the surface parking area converted to open space. The revised proposal changed three things:

1. a podium, intended for commercial use to animate the street, was added;
2. the initial 40-storey and 32-storey point towers were replaced by two 32-storey point towers; and
3. the east tower was shifted west to provide an increased setback from the street.

The with-prejudice offer was rejected by the City in March 2019 and the hearing of these matters began five days later.

The Issues List with one Addition

[17] A Procedural Order was issued in this matter and included an Issues List. The City and Ms. Balshaw each identified three issues. While the City's issues were more detailed, its issues may be summarized as character and integration with the neighbourhood, pedestrian environment, and sun shadow impacts.

[18] Ms. Balshaw's issues were phrased as light/shadows, which the Tribunal understands to be akin to the City's third issue but with a principal focus on the adjacent Vanier Towers building. She also identified privacy and view as her two other issues.

[19] On consent, a seventh issue was added at the outset of the hearing. At the time of the hearing, the Downtown Secondary Plan, 2001 ("DSP 2001") was in force. A new Downtown Secondary Plan, 2018 ("DSP 2018") was adopted on April 25, 2018, under appeal and not in force. The added issue focussed on the status and weight to be given to the DSP 2018 and a new Downtown Zoning By-law. Specifically, this issue was stated as follows:

The New Downtown Secondary Plan and New Downtown Zoning By-law

are adopted/passed by the City but under appeal. What role do these planning instruments play, if any, in determining the appeals?

[20] The Tribunal's analysis of the proposal and consideration of these issues is done through the lens of statutory requirements and policy. These include having regard to the matters of provincial interest in s. 2 of the *Planning Act*, having regard to the decision of the City Council as required by s.2.1 of the *Planning Act* and determining that the proposal is consistent with the Provincial Policy Statement, 2014 ("PPS") and conforms to the applicable provincial plan as set out in s.3(5) of the *Planning Act*. In the case of an OPA, the Tribunal must analyze conformity with the policy regime of the official plan. For the ZBA, the Tribunal must determine conformity with the official plan as modified by the proposed OPA.

[21] The Tribunal's analysis begins with the local instruments and then moves to provincial matters.

Downtown Secondary Plans, 2001 and 2018

[22] Turning to an analysis of the issues, the Tribunal begins with this seventh issue on the question of the role of the DSP 2018.

[23] Unless specifically required by statute, or in extremely rare circumstances, the Tribunal's jurisprudence has been clear that applications are judged against the policy regime in force at the time the applications are submitted. There is no statutory requirement to deviate from this principle as the Tribunal considers these matters, nor did the Tribunal receive any persuasive evidence to support doing so in the absence of a statutory requirement.

[24] For the downtown secondary plans, the policy regime in force and determinative for these matters is the DSP 2001. At the time of the hearing, the DSP 2018 was a statement of the direction and intention of the City for its downtown and is therefore relevant for the Tribunal's analysis. The Tribunal heard evidence on the DSP 2018 and considered it in the course of deciding these matters.

[25] Planner Peter Smith was unshaken in his evidence that the proposed OPA conformed with the policy regime of the DSP 2001. The proposed development meets the heritage policies of the DSP 2001 with the retention and reuse of the Pinehurst heritage building. Policies addressing sun/shadow impacts, wind impacts, impacts on streetscapes, and views of streetscapes, landmark structures and heritage buildings are all set out in the context of the impact on or from the public sidewalk. These policies are met.

[26] The area of the DSP 2001 that generates the need for an OPA for this proposal is in height. The DSP 2001, while designating the site Medium Density Residential, contains a height limit of four storeys. A four-storey height falls into the low-density category.

[27] The Tribunal finds that the Subject Site that is within the downtown, within the Urban Growth Centre, within walking distance of higher order transit, that preserves a heritage building and still meets the other performance standards for sun/shadow and wind impacts on the public sidewalks and views from the public sidewalks can readily accommodate the proposed two 32-storey point towers. As such, the Tribunal finds that the proposed OPA conforms with the policy regime of the DSP 2001.

[28] The policies of the DSP 2018 reinforce the appropriateness of this proposal on the Subject Site. The DSP 2018 designates the site as Downtown Residential and identifies it as High-rise 2. This would enable a building height of 30 storeys, subject to maintaining views of the Niagara Escarpment. The Subject Site remains near an identified Priority Transit Corridor and is within a Higher Order Transit station area.

[29] The DSP 2018 emphasizes heritage preservation, Niagara Escarpment views, diversity of housing and downtown living. Heritage preservation is met with the conservation of the Pinehurst heritage building. Streetscape enhancements are met with proposed setbacks, as are the requirements regarding the limitation of shadow impacts on the public sidewalk. The proposed improvements to the open space in front of the Pinehurst enhances this heritage building as well as improving the availability of

publicly-accessible open space in the area.

[30] On the question of urban design impacts, particularly the questions of the impact on views of the Niagara Escarpment and of sun/shadow on the public realm, the Tribunal relies on the unshaken urban design evidence of Mr. Glover. In Mr. Glover's professional opinion, the proposed development meets these requirements in substance and is appropriate.

Urban Hamilton Official Plan

[31] The Urban Hamilton Official Plan ("UHOP") places the Subject Site within the downtown Urban Growth Centre, which for residential uses is intended to be a vibrant focus of transit-supportive residential intensification.

[32] The general residential intensification policies of the UHOP speak to the need for a balanced evaluation of proposals, maintaining and, where possible, enhancing the character of the area, providing a range of dwelling types and tenures, and integrating compatibly.

Neighbourhood Character and Compatibility

[33] Neighbourhood character is the context in which the proposal is analyzed to assess compatibility. Neighbourhood character begins with an appreciation of what is already on the ground. In this case, the Subject Site sits within a block that has a heritage building and two existing high-rise apartment buildings. Beyond the block, the broader neighbourhood has high-rise apartment buildings dotted throughout with some house form buildings adjacent to and nearby the apartment buildings.

[34] An understanding of neighbourhood character is not complete without an understanding of its planned context. While the Subject Site is within a small portion of the Durand neighbourhood, the Durand neighbourhood is not the dominant influence in neighbourhood character for this proposal. Of much greater influence is the fact that the

Subject Site is within the City's downtown. It is within a Strategic Growth Area, and Urban Growth Centre, a Major Transit Station Area and along a Priority Transit Corridor and higher order transit. It is clearly in a neighbourhood intended for intensification and planned for growth.

[35] The issue then becomes whether the proposal is compatible with the existing neighbourhood character, given the planned context.

[36] The UHOP has a definition for compatibility/compatible that is instructive:

Compatibility/compatible: means land uses and building forms that are mutually tolerant and capable of existing together in harmony with an area. Compatibility or compatible should not be narrowly interpreted to mean "the same as" or even as "being similar to".

[37] The definition of compatibility/compatible contemplates the possibility of change that is still capable of existing in harmony with an area.

[38] The proposal would result in change to the Subject Site, to the block in which it sits and would contribute to change in the larger neighbourhood.

[39] A heritage building is to be restored and reused. That is change.

[40] A surface parking lot is to be converted to privately-owned publicly-accessible open space. That is change.

[41] Former television studios are to be replaced with two new point towers. That is change.

[42] The existing high-rise apartment buildings that share the block with the Subject Site are designed as slab buildings. The proposal is designed, instead, with a two-storey podium and two point towers. That is change.

[43] To determine whether the changes result in a proposal that is compatible, the Tribunal considers several matters captured in the UHOP requirements and reflected in

the Issues List. These include height, pedestrian environment, sun/shadow impacts, light, privacy and view.

Height

[44] The proposal is for two 32-storey point towers, the ultimate height of which is intended to be inclusive of any mechanical penthouse. The DSP 2018 identifies the site as High-rise 2. Structures in High-rise 2 are intended to be the tallest structures with a height up to 30 storeys, as modified by ensuring a view of the Niagara Escarpment.

[45] The Niagara Escarpment is an important natural feature and an appropriate view of the Niagara Escarpment is one of the priorities for the City. Building heights may differ depending on a combination of the elevation at grade of a building site, the design of the building and the distance from the Niagara Escarpment – all of which impact the ability to view the Niagara Escarpment from the downtown. The view to be protected is the view from the public sidewalk and not a view from a particular residential or commercial unit.

[46] The City's witnesses were critical of the proposed height of 32 storeys but did not provide an analysis with a definite alternative height for the Tribunal's consideration.

[47] On the extensive and unshaken urban design evidence of Mr. Glover, the Tribunal finds that the view of the Niagara Escarpment is appropriately maintained with the proposed height and massing of the buildings on the Subject Site.

Pedestrian Environment

[48] An animated pedestrian environment is a function of design and use. The podium is two storeys high. It extends to the street and is compatible with the houses across the street. Retail and commercial activity in the podium is intended to address and animate the street. Retaining and reusing the Pinehurst heritage building provides interesting visual contrast to the new construction and helps reinforce a sense of place. Converting

the existing surface parking lot in front of the Pinehurst heritage building to publicly accessible private open space contributes to making the area more inviting to residents and passersby. The point tower design of the two towers produces much faster-moving shadow and is open to provide sky views. The Tribunal finds that the pedestrian environment is enhanced with this proposed development.

Sun and Shadow

[49] The Tribunal had before it two sun/shadow studies, one from TV City and one from the City. The City's sun/shadow study was based on an earlier proposal rather than the current proposal. This current proposal was served on the City as a without-prejudice offer some six weeks prior to the start of this hearing and in ample time for a proper sun/shadow study to have been prepared. The sun/shadow study presented by the City did not assist the Tribunal in making its determination on the proposal before the Tribunal in these proceedings.

[50] The question on shadow is whether it has been mitigated with design and is an acceptable impact. The unshaken evidence of Messrs. Peter Smith and Glover is that there are no unacceptable adverse shadow impacts on the public realm and that the shadow impacts on the private realm are minor. The Tribunal agrees.

[51] This is a neighbourhood with abundant high-rises, many of which are slab style. Shadows are already cast by existing development. The test is not that there are no new shadows. Applying such a test would mean that no new construction could occur in this area designated for growth, including what would otherwise be as-of-right development on the Subject Site.

[52] House-form structures near the Subject Site are already in a neighbourhood with high-rises considered to be compatible. Neighbouring high-rises adjacent to the Subject Site and within the same block already cast shadows themselves. The point-tower design of the proposed development assists in having any new shadows move quickly.

[53] The Tribunal finds that the sun/shadow impacts of this proposal are reasonable and acceptable.

Light, View and Privacy

[54] Light is daylight. It is not direct sunlight and not direct sunlight into the windows of the units of an adjacent building.

[55] Witnesses called by Ms. Balshaw expressed concern that direct sunlight that comes currently through the windows and into certain suites in the Vanier Towers might be reduced. They suggested that such reduction, if it occurred, would have a negative impact on residents of the buildings. The Tribunal understands the sincerity with which this testimony was given but it falls into the category of apprehension regarding something that is not governed by the tests this proposal must meet.

[56] There may well be certain times when direct sunlight into a suite may be reduced and general daylight in the suite remain. While individual occupants of a suite or users of a common area may not welcome this change, the change falls within the parameters of an acceptable impact and is not otherwise proscribed by the planning instruments that govern consideration of this proposal. By reference to the sun/shadow studies, the Tribunal is satisfied that considerable daylight remains regardless of any reduction in direct sunlight.

[57] The view that is governed by the planning instruments is the view from the public realm. There is no right to a view from a particular residential unit. The Tribunal is satisfied that the public realm views, particularly of the Niagara Escarpment, are maintained. The nearer public realm views of the Pinehurst heritage building are maintained and enhanced with the conversion of the surface parking lot to the proposed open space. Tower separation distances and point-tower design maintain light and sky views.

[58] Ms. Balshaw's witnesses raised the question of privacy from the proposed point

towers. Of particular concern was the possibility that someone in a unit in one of the proposed towers might be able to see into a unit in the Vanier Towers. The Tribunal agrees that might be possible if there is light in a unit and no window coverings. The question is whether such a circumstance constitutes a reasonable impact.

[59] The existing Vanier Towers are themselves high-rises and are adjacent to the Subject Site. They are within the downtown in an urban area designated for growth and intensification. The proposed development has considered the City's Tall Buildings Guidelines and ensures appropriate tower separation. The tower separation contributes to appropriate light and air between buildings and assists in minimizing the visual intrusion by residents of one building into another. The Tribunal finds that the design of the proposed development provides a reasonable degree of visual privacy and is appropriate.

Planning Act Requirements

Section 2

[60] The Tribunal finds that the proposed development has had regard for the matters of Provincial interest, as set in s. 2 of the *Planning Act*. The Tribunal notes, in particular, sections 2(d) on the conservation of heritage, 2(h) on the orderly development of communities, 2(j) on the provision of a full range of housing, 2(p) on the appropriate location of growth and development, 2(q) on the promotion of development that supports public transit and is oriented to pedestrians, and 2(r) on the promotion of built form that is well-designed, encourages a sense of place and provides for public spaces that are high quality, accessible, attractive and vibrant.

Section 2.1

[61] The appeals before the Tribunal are from the failure of the City to make a decision on the application. As a result of comments from City staff and the community, TV City submitted a with-prejudice offer to settle with a revised proposal. That proposal,

now before the Tribunal, was rejected by the City five days prior to the start of this hearing. The Tribunal considered the initial failure of the City to make a decision, the rejection of the proposal now before the Tribunal, and the evidence called by the City in this hearing in opposition to the revised proposal. Taken together, the Tribunal is satisfied that it has had regard for the decision of the City Council, as required by s. 2.1 of the *Planning Act*.

Section 3(5): PPS

[62] This proposal is within a settlement area and is transit supportive. It contributes to the provision of a range of housing. The proposal conserves the Pinehurst, a heritage building. The proposal makes efficient use of land and infrastructure through redevelopment and intensification. The Tribunal finds that, in doing so, the proposed planning instruments are consistent with the PPS.

Section 3(5): Provincial Plan in Effect

[63] At the time of the hearing, the Growth Plan for the Greater Golden Horseshoe 2017 (“Growth Plan 2017”) was in effect. The evidence on conformity with the Growth Plan was directed to the Growth Plan 2017. That evidence noted that the site is within a strategic growth area in the downtown and designated for growth and intensification. It is within a Major Transit Station Area and near a Priority Transit Corridor. The proposed development is transit supportive and contributes to development of a complete community. These points were key in the professional opinion that these planning instruments conform with the Growth Plan 2017.

[64] In the time between the hearing and this decision, the A Place to Grow: Growth Plan for the Greater Golden Horseshoe 2019 (“Growth Plan 2019”) has come into effect. The Growth Plan 2019 continues and strengthens the emphasis on intensification and the optimization of the efficient use of infrastructure with an emphasis on transit-oriented and transit-supportive development. The Subject Site continues to be within the downtown strategic growth area, in a Major Transit Station Area and near a Priority

Transit Corridor. The Tribunal takes notice that the evidence in support of the conformity of this proposal with the Growth Plan 2017 applies equally to the Tribunal's consideration of conformity with the Growth Plan 2019.

[65] The Tribunal finds that the proposed development and the planning instruments before the Tribunal conform to the Growth Plan 2019.

ORDER

[66] The Tribunal Orders that:

1. The appeals by Television City Hamilton Inc. are allowed in part.
2. The City of Hamilton Urban Official Plan is modified by the Official Plan Amendment found at Tab 36 of Exhibit 18, as filed in these proceedings, and as so modified is approved.
3. The City of Hamilton Zoning By-law No. 05-200 is amended in accordance with the Zoning By-law Amendment found at Tab 36 of Exhibit 18, as filed in these proceedings.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
VICE-CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal

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