

ONTARIO LAND TRIBUNAL

PROCEEDING COMMENCED UNDER subsection 17(40) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	30 Duke Street Limited
Subject:	Failure of the City of Kitchener to announce a decision respecting Proposed Official Plan Amendment No. OPA 20/005W/JVW
Municipality:	City of Kitchener
OLT Case No.:	PL210104
OLT File No.:	PL210104
OLT Case Name:	30 Duke Street Limited vs. Kitchener (City)

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

Applicant and Appellant:	30 Duke Street Limited
Subject:	Application to amend Zoning By-law No. 85-1 - Refusal or neglect of the City of Kitchener to make a decision
Existing Zoning:	Commercial Residential Three Zone
Proposed Zoning:	Site Specific (To be determined)
Purpose:	To permit a 15 storey residential building
Property Address/Description:	22 Weber Street W.
Municipality:	City of Kitchener
Municipality File No.:	20/013/W/JVW
OLT Case No.:	PL210104
OLT File No.:	PL210105

PROCEEDING COMMENCED UNDER subsection 42(6) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.22.

Applicant and Appellant:	30 Duke Street Limited
Subject:	Heritage Conservation Act Appeal
Reference Number:	HPA-2022-V-015
Property Address:	22 Weber Street W
Municipality/UT:	Kitchener/Waterloo
OLT Case No.:	OLT-22-004383
OLT Lead Case No.:	OLT-22-002377
Legacy Lead Case No.:	PL210104
OLT Case Name:	30 Duke Street Limited vs. Kitchener (City)

Closing Submissions of Applicant, 30 Duke Street Limited

Overview

This hearing is about an application to develop a 19-storey residential, rental apartment building (“**Proposed Development**”) on an underutilized, vacant parking lot (“**Subject Lands**”) at the edge of Kitchener’s Downtown. It is situated in an area that is intended to accommodate a significant amount of intensification. What is being proposed is an appropriate implementation of the long-standing planned function for the site. While the lands are also located on the edge of a heritage district, they contain no cultural heritage resources. Heritage districts do not prevent development or change but rather provide additional policy and guidelines to ensure that development conserves cultural heritage resources.

Two issues arose numerous times over the course of the hearing: 1) compatibility and its relationship with unacceptable adverse impact; and 2) the application of guidelines.

Compatibility does not mean ‘the same as’, or even ‘similar to’. It means building forms that can exist together harmoniously without causing unacceptable adverse impacts. On this basis, you heard Ms. Sinclair and Mr. Currie undertake comprehensive, thoughtful, and thorough analyses to demonstrate that the Proposed Development is compatible with its surroundings and causes no unacceptable adverse impacts.

Guidelines are not to be applied strictly, but instead, flexibly and purposefully to meet the intention of the guideline. You heard Ms. Sinclair and Mr. Currie provide their evidence that the Proposed Development either meets or meets the intent of applicable guidelines.

Site & Surroundings

The Subject Lands are located on the north side of Weber Street West, a major Regional arterial road. Immediately south of the Subject Lands is the Downtown with a number of tall buildings, including a newly approved, but not yet built, 27-storey building directly across the street. North of the Subject Lands is the low-rise residential neighbourhood of the Civic Centre. The Subject Lands are within walking distance of four transit stations, two large parks, extensive retail and service commercial opportunities of the Downtown, and various cultural and institutional establishments¹.

¹ Exhibit 7, Revised Visuals of 30 Duke, p 4.

The Planned Function is High Density

The Subject Lands are located within a Major Transit Station Area (“**MTSA**”) and a Strategic Growth Area (“**SGA**”), as defined by the Provincial Planning Statement (“**PPS**”), and within the designated Built-Up Area and the Urban Area in the Region Official Plan. The Subject Lands are designated High Density Commercial Residential in the Civic Centre Neighbourhood Secondary Plan (“**SP**”). This designation allows for multiple residential with a maximum Floor Space Ratio (“**FSR**”) of 4.0, with no maximum height restriction.

The Subject Lands are located at the edge of the Civic Centre Neighbourhood Heritage Conservation District (“**District**”). All witnesses confirmed that this edge of the District – Weber Street – has a variety of built forms, setbacks, building heights, building materials, architectural designs, and fenestration, all very much in contrast with the interior parts of the District, which contain low-rise residential streetscapes lined by mature trees, grassed boulevards and laneways. Within the District, the Subject Lands are separated from the low-rise residential preservation area of the interior of the District by the lands immediately abutting the Subject Lands to the north, which are designated Office-Residential Conversion and intended to serve as a transition from higher density along Weber to the interior of the neighbourhood.²

The City of Kitchener Zoning By-law 85-1 zones the Subject Lands Commercial Residential Three (CR-3), which permits the proposed apartment building at a maximum FSR of 4.0, and with no maximum height restriction.

The Proposed Development

The Proposed Development contains 167 rental residential apartment units in a 19-storey residential building. The building will have a clearly defined base³ at a pedestrian scale and a height comparable with the adjacent structures. There will be a two-metre stepback above the base of the building. The Proposed Development will have a 14-metre rear yard setback, above the first storey. Combined with the Office-Residential Conversion area and Roy Street, this provides for separation of approximately 58 metres between the proposed tower and the interior low-rise established neighbourhood north of Roy Street.⁴

² Exhibit 1, Joint Book of Documents (“**JBD**”), City of Kitchener Civic Centre Secondary Plan, Tab 41, p 1930.

³ 30 Duke Cross Examination of Fahiminan, Hearing Day 6, April 29 2025.

⁴ 30 Duke Cross Examination of Schnieder, Hearing Day 6, April 29 2025.

The Proposed Development will include a roof-top amenity area above the one-storey bicycle storage room, an indoor amenity area, and no parking. It will be fully transit supportive, relying on active transportation and existing and planned transit service.

Compatibility: No Adverse Impact

The applicable policy regime contains general policies related to compatible development.⁵ Among others, Policy 4.C.1.9 directs that residential intensification within existing neighbourhoods be compatible with its surrounding context. The City's OP defines Compatibility as follows:

*Land uses and building forms that are mutually tolerant and capable of existing together in harmony within an area without causing unacceptable adverse effects, adverse environmental impacts or adverse impacts. Compatibility or compatible should not narrowly interpreted to mean "the same as" or even as "being similar to".*⁶

On the basis of this definition, as spoken to at length by both Ms. Sinclair and Mr. Currie, an assessment of compatibility is inextricably linked to an analysis of "adverse impacts," which is also defined in the City's OP:

*May include but will not be limited to: shadows over private amenity areas or on building facades for an unacceptable duration, issues of privacy, overlook conditions, negative microclimatic impacts, light pollution (such as light trespass or glare), odour, vibration, noise pollution, urban heat islands effects, visual clutter or obstruction of views and/or vistas.*⁷

These definitions set out specific and itemized criteria of impact. As will be addressed in detail later in these submissions, Ms. Sinclair and Mr. Currie undertook a comprehensive analysis of the Proposed Development against these criteria to demonstrate that the Proposed Development is compatible and will not cause adverse impacts. The City's witnesses and Mr. Barton took a far more cursory approach.

Impact Not Merely a Quantum Analysis

Impact is not measured by the quantum or degree of change. The Tribunal's case law, in the context of the test for "minor" in a minor variance is informative. It is settled law that an assessment of impact

⁵ Exhibit 1, JBD, City of Kitchener Official Plan, Policy 4.C.1.9, Tab 38, p 1611; Exhibit 1, JBD, Civic Centre Secondary Plan, Policy 13.1.1.1, Tab 41, p 1927; Exhibit 1, JBD, Civic Centre Neighbourhood Heritage Conservation District Plan, Tab 45, p 2381.

⁶ Exhibit 1, JBD, City of Kitchener Official Plan, Tab 38, p 1858.

⁷ Exhibit 1, JBD, City of Kitchener Official Plan, Tab 38, p 1855.

is not a singular numeric approach or a robotic exercise of degree of deviation.⁸ Instead, it must be considered in light of the fit of appropriateness, the sense of proportion, regard to the built and planned environment, mitigation to address the possible concerns, and the impact of the deviation.⁹ The same principle, which was recited by Mr. Currie, should be applied when assessing impact in the context of an OPA and ZBA.

Guidelines are Guidelines

Much of the evidence in the hearing focused on the application of two guidelines: 1) the City's Urban Design Manual ("**UDM**"), inclusive of the guidelines on Tall Buildings, and guidelines about outdoor amenity areas; and 2) the Weber Street Specific Guidelines ("**Weber Heritage Guidelines**") in the District Plan.

It is a well-established principle of the Tribunal that while guidelines have an important role in the analysis, guidelines are not policy and they do not carry the same weight as official plans.¹⁰ Strict adherence to guidelines is not required; meeting the intent of the guideline is preferred, based on a holistic and contextual analysis.¹¹ As set out in *The Junction Heritage Conservation District v Toronto (City)*:

*... guidelines are not predetermined mandatory performance standards, but instead should be assessed through a holistic assessment that looks at broader considerations of context, fit, and a fulsome analysis of impacts.*¹²

Where guidelines have not been met to the letter, this Tribunal has accepted rationale that explains how the intent of the guideline is met.¹³

Guidelines Applied Flexibly Elsewhere

Where there is evidence of guidelines being applied in a flexible manner to surrounding approvals, this Tribunal has continued to apply them flexibly:

⁸ Toronto Standard Condominium Corp. #1517 v Toronto (City), [2006] OMBD No 707, p 4.

⁹ Toronto Standard Condominium Corp. #1517 v Toronto (City), [2006] OMBD No 707, p 4.

¹⁰ See for example, *The Junction Heritage Conservation District v Toronto (City)*, [2019 CanLII 117334](#) (ON LPAT) at [para 59](#); *Bel-East Corp and Bel Ontario Inc v Toronto (City)*, [2016 CanLII 82339](#) at [para 30](#), and *Bertone Montreal Road LP v Ottawa (City)*, [2023 CanLII 64021](#) (ON LT) at [para 78](#).

¹¹ *The Junction Heritage Conservation District v Toronto (City)*, [2019 CanLII 117334](#) (ON LPAT) at [para 45](#).

¹² *The Junction Heritage Conservation District v Toronto (City)*, [2019 CanLII 117334](#) (ON LPAT) at [para 45](#).

¹³ *The Junction Heritage Conservation District v Toronto (City)*, [2019 CanLII 117334](#) (ON LPAT) at [para 60](#).

The Tribunal places only limited weight to the applicability of the Downtown Tall Building Guidelines in assessing the proposed height for two reasons. First, the Tribunal is mindful of the lesser status of guidelines in evaluating the merits of a planning proposal. Second, in reviewing the extensive evidence provided on planning approvals within the Bloor-Yorkville/North Midtown Area it is clear that the Guidelines have been flexibly applied to tall buildings in recent years: indeed there are examples of City staff recommending heights above 107 metres within the Height Ridges.¹⁴

Throughout the evidence in this hearing there were examples where the guidelines were applied flexibly in other locations, such as: 50 Weber St W (the angular plane, front yard, and rear yard guidelines of the Weber Heritage Guidelines were all applied flexibly) and 900 King St W¹⁵ and 417 King Street West¹⁶ (do not meet tower separation guidelines).

Land Use Planning: Compatible and No Adverse Impacts

The Tribunal should prefer the evidence of Ms. Sinclair over Mr. Schneider and Mr. Barton. She was thorough, comprehensive, and systematic in her review of the applicable planning policy. She testified that the Proposed Development has regard for the relevant matters of provincial interest set out in section 2 of the *Planning Act*, including contributing to a full range of housing, including attainable rental housing.¹⁷ The Subject Lands are currently underutilized and do not represent a sustainable use of land. The Proposed Development provides a compact urban development that will provide for transit supportive density. She testified that the Proposed Development is consistent with the PPS, in particular the provision of a full range of housing, including rental units, and intensification in proximity to transit.

She provided evidence that the Proposed Development conforms with the relevant provisions of the ROP in that it encourages residential growth in the Built-Up Area, it re-urbanizes a surface parking lot within MTSA, encourages active transportation, and contributes to a pedestrian friendly environment.

Ms. Sinclair further testified that the Proposed Development conforms with the policies of the City's OP. In particular, she pointed to Policy 4.C.1.9, which requires residential intensification to be designed to respect existing character and with a high degree of sensitivity to surrounding context in

¹⁴ *Empire Communities (Yorkville) LP v Toronto (City)*, [2018 CanLII 55801](#) (ON LPAT) at [para 53](#).

¹⁵ 30 Duke Cross-Examination of Fahimian, Hearing Day 6, April 29 2025.

¹⁶ 30 Duke Cross-Examination of Fahimian, Hearing Day 6, April 29 2025.

¹⁷ The City's witnesses were silent on Section 2 of the Planning Act.

considering compatibility. Returning to the OP definition for compatibility: It does not mean the same as, but rather is an exercise in whether the proposal can exist in harmony without causing adverse impacts.

Ms. Sinclair spoke specifically to each of the criteria in the OP definition of “adverse impacts” to demonstrate that there will be either no impact, or that impact will be mitigated. Her evidence on each is summarized in the table below:

Category	Evidence	Impact and Mitigation
Shadow over private amenity area or building facades	Shadow Study was completed according to the City’s Terms of Reference. ¹⁸ Ms. Sinclair is the only witness who spoke to the Shadow Study.	No Impact Shadows over private amenity or on building facades do not remain for an unacceptable duration. ¹⁹
Privacy and overlook conditions to neighbouring properties along Weber Street	The most sensitive interface is between the two neighbouring properties and the lower floors of the proposed development. Above the second storey, overlook from the proposed development would be on the roof and lots of the adjacent buildings. As-of-right zoning permissions would allow a building that is taller than the adjacent buildings along Weber Street and which could be located closer to the property line. ²⁰	Impacts Mitigated Ms. Sinclair testified that these properties have a commercial residential designation and that the rear yards of both adjacent properties are currently being used for surface parking. ²¹
Privacy and overlook conditions to properties to the north of the proposed development	The existing zoning regulations would allow 5 storeys within 7.5 metres of the rear property line (much closer than the proposed development). This would result in a greater impact and a more immediate viewing into the rear yard of the Roy Street properties. Additionally, any potential impact is further mitigated by the rear yard of 27 Roy being used for parking. ²²	Impacts Mitigated Orientation of units and balconies is such that there are no balconies or large windows proposed on the rear façade of the building. ²³
Negative microclimate conditions	Agreed Statement of Facts between 30 Duke and the City addresses this.	Impacts Mitigated Wind impacts are addressed through the site plan process. ²⁴

¹⁸ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 70.

¹⁹ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 70; 30 Duke Direct Examination of Sinclair, Hearing Days 2 and 3.

²⁰ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 26; 30 Duke Direct Examination of Sinclair, Hearing Days 2 and 3.

²¹ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 26; 30 Duke Direct Examination of Sinclair, Hearing Days 2 and 3.

²² Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 55; 30 Duke Direct Examination of Sinclair, Hearing Days 2 and 3.

²³ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 67; 30 Duke Direct Examination of Sinclair, Hearing Days 2 and 3.

²⁴ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 296.

Light Pollution	Agreed Statement of Facts between 30 Duke and the City addresses this.	Impacts Mitigated Light impacts are addressed through the site plan process. ²⁵
Odour		No Impact
Noise	Minutes of Settlement between the Region and 30 Duke addresses this.	Impacts Mitigated Noise to be addressed by way of a holding provision requiring detailed study. ²⁶
Vibration		Impacts Mitigated Vibration monitoring plan recommended in the HIA. ²⁷
Heat island	Ms. Sinclair testified that the proposed development would have less asphalt than the current parking lot. ²⁸	No Impact
Visual Clutter	Ms. Sinclair testified that the proposal is a single compact tower. There are no significant views identified in this area. ²⁹	No Impact

Ms. Sinclair’s evidence on adverse impacts is unchallenged and uncontested. Comparatively, Mr. Schneider was brief and summary in his evidence, simply listing potential forms of impacts without any explanation. When asked to elaborate on the impacts, he testified that it would be left to Ms. Fahimian.

Instead of describing the impacts, Mr. Barton and Mr. Schneider opposed the requested relief on the basis of the numerical degree of departure from the as-of-right permissions. As previously noted, the Tribunal does not consider this approach to be a proper planning analysis of impact. Mr. Barton and Mr. Schneider testified that the requested FSR was not appropriate because it is “double” what is permitted in the OP.³⁰ Mr. Schneider stated that he instead would support an application that had “slight” deviations from the regulations.³¹ Mr. Barton objected to the Proposed Development being “half” above the angular plane, and calculated a 29.5 metre setback, as what he suggested would be appropriate based on the height of the building.³² Under cross-examination, Mr. Barton agreed that

²⁵ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 53.

²⁶ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 27.

²⁷ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 32.

²⁸ 30 Duke Direct Examination of Sinclair, Hearing Days 2 and 3.

²⁹ Exhibit 3, Compendium of Witness Statements, Witness Statement of Sinclair, Tab 1, p 74.

³⁰ Exhibit 3, Compendium of Witness Statements, Witness Statement of Barton, Tab 6 p 492; Exhibit 3, Compendium of Witness Statements, Witness Statement of Schneider, Tab 7, p 536.

³¹ City Direct Examination of Schneider, Hearing Day 6, April 29 2025.

³² FOBT Direct Examination of Barton, Hearing Day 5, April 28 2025.

planning is more than a numerical exercise. He agreed that impact ought to be determined on a case-by-case basis.³³ Yet, he did not undertake this analysis.

Urban Design

The City's OP speaks to a high standard of urban design for sites along major arterial streets and the enhancement of sites, buildings, open space, and the streetscape.³⁴ The City's Urban Design Manual ("UDM"), inclusive of the Tall Building Guidelines and guidelines for outdoor amenity space, contains hundreds of guidelines that provide guidance for development applications.

Design for Tall Buildings Guideline

The Design for Tall Buildings guideline applies to all development proposals that are nine or more storeys in height. The Tribunal should prefer the evidence of Ms. Sinclair. She was measured and realistic in her application of the guidelines (Part C, Sections 11 and 12). Ms. Sinclair testified that not all of the guidelines would apply to every application. Indeed, she testified that it would be difficult to comply with all of them.

Ms. Sinclair testified that the Proposed Development meets the intent of the guidelines as it is designed to engage pedestrians and contribute to an active streetscape with a well-defined building base at a pedestrian scale. It is a compact building, having a relatively small floor plate, with vertical and horizontal articulation and architectural features that break up the building mass. While the exact materials will not be finalized until site plan, Ms. Sinclair testified that the Proposed Development boasts visual variety provided through well-articulated massing and high-quality materials.

Ms. Fahimian was generally unreliable in her evidence. She mischaracterized Ms. Sinclair's evidence with respect to the weight and role of guidelines. She described the test as conformity with the guidelines, but agreed on cross examination that the proper test is whether the development is 'generally consistent with and meets the overall intent of the guidelines.'³⁵ She overstated the reference to the guidelines in the OP and created arbitrary hierarchies and trade-off of guidelines, claiming that in certain proposals some guidelines were applied flexibility only where other

³³ 30 Duke Cross-Examination of Barton, Hearing Day 5, April 28 2025.

³⁴ Exhibit 1, JBD, City of Kitchener Official Plan, Tab 38, p 1678.

³⁵ 30 Duke Cross Examination of Fahimian, Hearing Day 6, April 29 2025; Exhibit 1, JBD, Staff Report 890-900 King Street East, Tab 61, p 2927; Exhibit 1, JBD, Staff Report 1001 King Street East, Tab 65, p 2994.

guidelines were met strictly.³⁶ Ms. Fahimian further suggested that the Tall Building Guidelines would supersede as-of-right zoning by-law permissions.³⁷ This is clearly wrong in law and casts doubt on the reliability of Ms. Fahimian's evidence and her ability to assist this Tribunal.

Tower Separation & Tower Overlook

With respect to the Tower Separation guidelines, Ms. Sinclair spoke in depth about the rear yard setback and the impact to the low-rise neighbourhood to the north. She testified that the proposed rear yard setback exceeded what was recommended in the guidelines and that the design of the Proposed Development would limit overlook by way of ensuring that no balconies or large windows were located on the north façade.

Ms. Fahimian did not address the rear yard setback in her analysis, presumably because this relationship meets the Tower Separation guidelines. Instead, she spent a significant portion of her evidence on the separation between the Proposed Development and the east and west property lines. Despite the uncontested constraints on the neighbouring sites, including their small lot sizes, which will require consolidation before a viable development proposal could be brought forward, and the cultural heritage resources on those properties, she claimed that a tall building on the Subject Site would set a negative precedent and would prevent those properties from developing with towers. Ms. Fahimian's testimony also uncovered an inherent, internal inconsistency in the City's case: while Ms. Fahimian is interested in protecting the adjacent properties for their future, hypothetical development with towers, Mr. Schneider and Ms. Choudhry are concerned that the Development Proposal is too tall, given the surrounding built form. Those concerns are at odds.

Furthermore, in the LPAT decision of *Allerton v Kitchener (City)*,³⁸ the Tribunal considered the impact of a development on the future development potential of adjacent lands:

The Board is satisfied that the Applicant's development, with the Tower 1 setbacks currently proposed, will not adversely impact the planned function of the Arthur Place lands. It is significant that, while the new City OP intends that there will be some form of high density development on those lands in the future, there is no tower proposed for those lands at present and in fact, no specific proposal at all. There is only the potential for future development.

³⁶ City Direct Examination of Fahimian, Hearing Day 6, April 29 2025.

³⁷ 30 Duke Cross-Examination of Fahimian, Hearing Day 6, April 29 2025.

³⁸ [2016 CanLII 50762](#).

*The Arthur Place lands are not yet completely assembled. Even once they are assembled, they will be subject to a number of potential constraints, including the heritage listing of the Arthur Place properties and the proximity of the existing building at 72 Victoria. Not only is there no proposal for a development on the Arthur Place lands, there are a number of steps to be taken and issues to be dealt with before a proposal could be developed and an application made to the City.*³⁹

With respect to Tower Overlook, Ms. Sinclair opined that because no other towers exist on surrounding lands, this guideline cannot be applied. Ms. Fahimian insisted that this guideline must be considered now. But her evidence on this point was diminished when taken to the recently approved project at 900 King St W, that she worked on and supported. During cross examination, she agreed that it did not meet the Tower Separate guidelines. She also acknowledged that Tower Overlook in respect of the adjacent property will be addressed when and if an application comes forward for that adjacent property.⁴⁰

Outdoor Amenity Space

Ms. Sinclair testified that the current zoning for the Subject Lands does not require a minimum amenity space. Notwithstanding this, she testified that the Proposed Development would provide amenity space by way of private balconies and indoor shared amenity space. She testified that, in her opinion, Part C, Section 11 of the Urban Design Manual was intended to apply to ground oriented low-density forms of multiple residential development such as cluster townhouses. She testified that Section 12 of the Urban Design Manual did not require outdoor play areas for children, but rather provided guidelines if play areas were to be provided.⁴¹ She also confirmed that a play structure exists within walking distance to the Subject Lands.

Ms. Fahimian insisted that the Proposed Development was deficient in outdoor amenity and in children play areas, but did acknowledge in cross examination that the guideline calls for no more than a minimum of 40 m² of outdoor amenity space.⁴²

In any event, the proposed ZBA enshrines this guideline by requiring:

q. A minimum amenity area of 1,500 square metres shall be provided and shall include balconies and common amenity space.

³⁹ *Allerton v Kitchener (City)*, 2016 CanLII 50762 (LPAT), at paras 70-71.

⁴⁰ 30 Duke Cross Examination of Pegah Fahimian, Hearing Day 6, April 29 2025.

⁴¹ Exhibit 3, Compendium of Witness Statements, Reply Witness Statement of Sinclair, Tab 2, p 313.

⁴² 30 Duke Cross Examination of Pegah Fahimian, Hearing Day 6, April 29 2025.

r. The minimum amenity area shall include at least 130 square metres of common amenity space, including a minimum of 40 square metres of outdoor common amenity space.

Cultural Heritage Planning: No Impact to Heritage Resources

Heritage district plans are designed to manage change through the lens of heritage conservation.⁴³ The aim is not to “mothball” the heritage district,⁴⁴ nor is the intention “museum-type restoration.”⁴⁵ The Subject Lands are vacant and have no heritage significance, as categorized in the District Plan. Therefore, it is not a question of impacts related to demolition or alteration of an existing building, but rather, the key issue is whether the Development Proposal will cause impacts to the surrounding cultural heritage resources of the District.

In analyzing potential impacts, it is important to delineate what are heritage attributes and objectives found in the District and what are not. In *Queen Street v City of Toronto*,⁴⁶ the city opposed an application on the basis that the height did not respect the heritage district and did not carry out the intent of the official plan to conserve heritage resources. The Board held that absent demonstrated impact on heritage resources or objectives, height in and of itself is not an impact:

*... The Board finds that the City has not demonstrated that a building height of 16 metres height is an indicator of the heritage character. The Board finds that height is not a Heritage Attribute and it is not an objective of the HCD. The Board finds that it is a zoning standard from which the Applicant seeks to be exempted, and that the City is attempting to elevate its utility by linking it to heritage matters, notwithstanding that it has not substantiated such a connection.*⁴⁷

The Tribunal should prefer the evidence of Mr. Currie, whose has an entire career-worth of demonstrated expertise in preparing heritage conservation district studies and plans, cultural heritage assessments, and heritage impact assessment, among other related projects. He was thorough in his analysis and steadfast through cross-examination: the height, massing, and location of the Proposed Development does not result in impacts to surrounding cultural heritage resources.

Speaking to the potential sources of adverse impact set out in the Ontario Heritage Toolkit (“**Toolkit**”), InfoSheet #5, Mr. Currie testified that there is no risk of isolation of a property from its

⁴³ *Briscoe v Caledon (Town)*, 2017 CanLII 83891 (ON LPAT) at para 24.

⁴⁴ *Queen Street v City of Toronto*, 2014 CanLII 103708 at para 49.

⁴⁵ *Cote v Toronto (City)*, 2019 CanLII 120206 at para 29.

⁴⁶ 2014 CanLII 103708.

⁴⁷ *Queen Street v City of Toronto*, 2014 CanLII 103708 at para 44.

context and no adverse impacts with respect to shadows on heritage resources, including Hibner Park. Mr. Currie further testified that there would be no obstruction of significant views. He noted that from a pedestrian perspective, the oblique view of the side façade of the neighbouring property would be impacted, but that this view was not a significant view identified in the District Plan (and therefore not an adverse impact), nor would this be different if the Proposed Development was a shorter building of even two storeys.⁴⁸ He noted that the views of the two neighbouring churches, which are identified as landmarks, are not obstructed. Mr. Currie’s evidence on the Toolkit is uncontested. Ms. Choudhry admittedly did not address or analyze these categories of adverse impacts, nor did she consider the impacts of the development on the immediate surrounding properties.

In sum, Mr. Currie testified that the Proposed Development does not conflict with the objectives and principles of the District Plan and does not result in the loss or alteration of the identified heritage attributes. Therefore, the Proposed Development is consistent with the cultural heritage policies of the PPS and conforms to the cultural heritage policies of the ROP and the City OP.⁴⁹

In contrast, Ms. Choudhry was evasive, inconsistent, and imprecise in her evidence. She routinely referred to guidelines as “policies.” She was taken to examples within the District where tall buildings exist directly adjacent to heritage resources and which do not diminish those resources. In response to virtually every policy and every question asked of her, she insisted that the height would overpower and that is why it is not compatible with the broader District.

With respect to the Weber Heritage Guidelines, Mr. Currie’s evidence demonstrated that Proposed Development either meets or meets the intent of these Guidelines. Where a specific guideline has not been met by its letter, Mr. Currie provided a rationale. His evidence is summarized in the table below:

Weber Heritage Guidelines	Mr. Currie’s Evidence
Relationship to Street	Meets guideline.
Front Yard Setback	Meets intent of guideline and no impact. See discussion below.
Architectural Detail of Building Facades	No consistent design for the buildings currently on Weber Street. To be addressed in greater detail at site plan stage.
Entrance Oriented to Street	Meets guideline.
Placement of Windows and Doors	No consistency but compatible with others. To be addressed in greater detail at site plan stage.
Stepbacks	Meets guideline. Stepback provided at 2 nd storey.
Rear yard Setback	Meets intent of guideline and no impact.

⁴⁸ 30 Duke Direct Examination of Currie, Hearing Day 4, April 25 2025.

⁴⁹ Witness Statement of Currie para 16, at Witness Statement Compendium, p 338.

Garbage & Services	Meets guideline.
Angular Plane	Meets intent of guideline and no impact. See discussion below.

Front Setback

There is no consistent front yard setback along the north side of Weber Street. Ranging from 0 metre to approximately 9.5 metres,⁵⁰ nearly all of these are measured from the existing property line, without considering the road widening as required by the Region. Mr. Currie testified that the Proposed Development is setback 3.0 metres (0 metres with road widening) and is within the range of setbacks.⁵¹ Rather than analyzing the intent of this guideline or turning her mind to the predominant setback, Ms. Choudhry concludes that the Proposed Development fails to meet it, because it is “distinctly different” from the existing built form.⁵² However, during cross examination, Ms. Choudhry acknowledged that the intent of the guideline is to attempt alignment with the predominant setback on the street. She also acknowledged that there is no consistent setback along Weber Street.

Rear Setback

A rear yard setback of 14 metres is proposed, whereas the Weber Heritage Guideline suggests a 15 metre setback. Mr. Currie indicated that the intent of this guideline is met with the Development Proposal. He opined that there will be no impact by the one-metre deficit.

Ms. Choudhry, on the other hand, applied an inconsistent approach between 50 Weber Street and the Subject Lands. For reasons not understood, a setback of 7.5 metres is appropriate at 50 Weber, but somehow a 14-metre setback is not appropriate at 22 Weber. She provides no rationale for the single sentence in her Witness Statement that, “the proposed development does not satisfy this requirement.”⁵³.

We would ask that the Tribunal prefer the evidence of Mr. Currie in respect of this guideline. Furthermore, it is important to keep in mind that this rear yard setback requirement is no more or no less important than any of the other Weber Heritage Guidelines, including the angular plane guideline.

⁵⁰ Exhibit 7, Revised Visuals of 30 Duke, p 33.

⁵¹ Exhibit 3, Compendium of Witness Statements, Witness Statement of Currie, Tab 3, p 347.

⁵² Exhibit 3, Compendium of Witness Statements, Witness Statement of Choudhry, Tab 11, p 596.

⁵³ Exhibit 3, Compendium of Witness Statements, Witness Statement of Choudhry, Tab 11, p 602.

Angular Plane

The angular plane guideline of the Weber Heritage Guidelines reads as follows:

Any buildings taller than 5 storeys abutting a residential property to the rear should be constructed within a 45 degree angular plane where feasible, starting from the rear property line, to minimize visual impacts on adjacent property owners.⁵⁴

Mr. Currie testified that the Proposed Development meets the 45-degree angular plane guidelines when measured from the edge of the Low Rise Residential properties on the north side of Roy Steet. Mr. Currie testified that measuring the angular plane from this location accounts for the south side of Roy Street being designated Office Residential Conversion aimed at being a transition zone between High Density Commercial and the low-density area in the interior of the District. The logic of this approach was supported by Mr. Schneider, for the City, who agreed that the building was separated from the established low-rise residential neighborhood by approximately 58 metres.⁵⁵ Measuring it from a closer location would mean placing a buffer on a buffer.

Ms. Choudhry measured the angular plane from the rear lot line of 31 and 27 Roy Street to conclude that the Proposed Development fails to meet the guideline. Under cross-examination, her rationale for measuring from this location oscillated from zoning to building typology. It became clear that she was not interested in protecting for the use of the abutting properties – just the fact that they were originally built for residential purposes meant that they should benefit from an angular plane. This is an illogical approach which is not at all grounded in the intent of the guideline.

She also said that the intent of the guideline is met at 50 Weber Street because the exterior areas of the adjacent property are paved. However, she could not explain why the intent of the guideline is not met at the Subject Lands, even though the majority of the surrounding lands are also paved.⁵⁶

Ms. Choudhry further acknowledged that no cultural heritage resources on Roy Steet are impacted by the Development proposal. Ms. Choudhry's evidence was circular: the impact from the intrusion into the angular plane is the intrusion into the angular plane.⁵⁷

⁵⁴ Exhibit 1, JBD, City of Kitchener Civic Centre Neighbourhood Heritage Conservation District Plan, Tab 45, p 2444.

⁵⁵ 30 Duke Cross Examination of Schnieder, Hearing Day 6, April 29 2025.

⁵⁶ 30 Duke Cross Examination of Choudhry, Hearing Day 7, May 1 2025.

⁵⁷ Exhibit 1, Compendium of Witness Statements, Witness Statement of Choudhry, Tab 11, p 602.

However, and most importantly, this Tribunal has decided in previous cases that, angular plane is the *means* for achieving transition, but it is not an objective in and of itself. In *Burnac Enterprises Inv v Toronto (City)*, the city opposed a tower, in part, because it protruded above the 45 degree angular plane. The Tribunal favoured the evidence of the Applicant/Appellant that:

*... transition in scale is not an objective in and of itself. Transition is a means of achieving the objectives of the Official Plan which include mitigation of potential impacts such as shadows, light and privacy and can be provided in a variety of ways...*⁵⁸

Unwavering through cross-examination on this point, Mr. Currie disagreed that a small intrusion above the angular plane was in general better than a large intrusion. He testified that the analysis was about impact, and here, there is none. The Proposed Development meets the intent of this guideline.

Relief Requested

We are asking the Tribunal to approve the Official Plan Amendment to reflect the increased FSR from 4.0 to the proposed 7.95.⁵⁹ We will be further asking the Tribunal to approve the Zoning By-law Amendment, which proposes greater permissions than the parent zoning in some respects and introduces new limitations and more restrictive permissions in others.

⁵⁸ *Burnac Enterprises Inv v Toronto (City)*, [2021 CanLII 86273](#) at [para 85](#).

⁵⁹ Exhibit 1, JBD, Proposed Official Plan Amendment, Tab 75, p 3067.