

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)

Reply Submissions of Applicant, 30 Duke Street Limited

Density Targets are Minimums

FOBT placed great emphasis on density targets as a reason to oppose the Proposed Development. Mr. Schneider, Mr. Barton, and Ms. Sinclair agreed that density targets apply broadly across the MTSA and are not evaluated or measured on a single site basis.¹ Further, all witnesses agreed that the density targets are minimums and that Kitchener has pledged to build 35,000 additional homes by 2031.² The MTSA density target is not a basis for refusing the Application

Feasibility can Indirectly Consider Financial Implications

The City asserted that Mr. Currie and Ms. Sinclair strayed outside of their areas of expertise when commenting on the unfeasibility of a built form that would meet a strict application of the Heritage Guidelines. To the contrary, Mr. Currie and Ms. Sinclair have the requisite expertise to speak to whether a development proponent would pursue a particular built form and whether, in their professional assessment, they would support a particular built form. Where the strict application of a guideline would result in a building that no one would build or is not visually appropriate, it is fair to conclude that it is not feasible. This opinion is well within Mr. Currie's and Ms. Sinclair's expertise.

Further, contrary to the City's submission, the Tribunal can consider financial implications – if not directly, at least indirectly. There are policies that speak to providing affordable housing.³ This cannot be realized if buildings are too expensive to construct or if the Tribunal's assessment is devoid of the indirect financial impacts of a certain built form.

Relatedly, in response to the City's assertion that there is no way of ensuring that the units would be sold at an attainable price, 30 Duke submits that the units would be offered as rentals. There is no evidence to suggest that 30 Duke will not maintain them as rental tenure, as they have said they will. Further, Ms. Sinclair testified that the size of the units are smaller and more typical of the rental market.

“Within Current Permissions” Not the Test

The City and FOBT asserted that a development could be achieved on the site within the current permissions. In the context of the Heritage Guidelines, the evidence demonstrated that a built form

¹ 30 Duke Cross-Examination of Barton, Hearing Day 5, April 28 2025 and 30 Duke Cross-Examination of Schneider, Hearing Day 6, April 29 2025.

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

³ Exhibit 1, Joint Book of Documents, City of Kitchener Official Plan, Tab 38, pg 1609, 1612, 1662, 1823, for example.

that met the strict application of the guidelines to be not desirable or good planning. In the context of parent zoning regulations, the applicant does not have to demonstrate that something could or could not be built within the current permissions before amendments can be considered. Instead, they must show that statutory tests are met. Furthermore, the evidence demonstrates several recent zoning approvals for towers in the City that included amendments to a number of zoning regulations, including FSR and setbacks.

Guidelines are Not Given Extra Weight

The fact that the District Plan policies say the guidelines “will be used” does not give them extra weight or elevate the guidelines to policy, as suggested by the City. That’s an untenable position to take. It’s simply a direction to the appropriate guidelines in the Plan, as there are numerous sets of guidelines for different areas of the District.

Minimum Common Amenity Enshrined in By-law

The City took the Tribunal to the common amenity guidelines in Part C of the Urban Design Manual, and specifically to the guideline that sets out a rate per unit.⁴ The City did not take the Tribunal to the following guidelines which expressly supersedes that rate, and requires a minimum of 40 square meters for a development. The Proposed Development more than meets this minimum and further enshrines this into its proposed site-specific zoning by-law regulations.

Further, the City claims that private balconies are not permitted to be counted as amenity space in Zoning By-law 85-1 (“**Zoning By-law**”). During cross-examination, the City did not take Ms. Sinclair to a specific provision in the Zoning By-law that prohibited this. In any event, as Ms. Sinclair testified, the Zoning By-law does not have an amenity space requirement. As noted, the proposed amendment includes minimum amenity space, going beyond the current by-law requirement.

Designations Give Meaning to District Plan and Heritage Guidelines

The Secondary Plan designations give meaning to the policies of the District Plan, which call for preservation of the low-rise in the interior of the Heritage Conservation District. Mr. Currie’s application of the angular plane acknowledges the different designations of the low-rise residential properties on the north side of Roy Street from the intervening properties designated Office-Residential Conversion, which are intended to be a transition to the high-density uses anticipated for

⁴ Exhibit 8, Urban Design Manual – Part C – Section 12.

Weber Street. His approach gave further meaning to the guideline by way of an in-depth consideration of impacts.

To apply it the way Ms. Choudhry urged is untenable. She measures the angular plane for every property along Weber, including those designated for High Density and zoned CR3, from the rear yard of the properties on the south side of Roy Street, on the basis they were originally built for residential uses, even if there is no one living in the building. Not only does this approach not relate to the objective of the guideline, but it would also render the rear yard setback guideline meaningless. Ms. Choudhry's application of the angular plane would result in the same outcome in every case, such that there is no need for a rear yard setback guideline. Ms. Choudhry agreed that the guidelines should not be read in a way that renders any one of the guidelines meaningless.⁵ Further, the evidence demonstrates that she categorically did not consider impacts.

Further, on designations, the City compared the policy language in the City's OP of High Density Multiple Residential with Medium Density Residential, claiming that the former recognized the four existing tall buildings and was put in place to prevent additional tall buildings. This interpretation is flawed and nonsensical. It defeats the purpose of having another high-density designation (within which the Subject Lands are included). Ms. Sinclair, on cross-examination disagreed that the existing tall buildings are the only area where high density was contemplated. Further, on this point, Ms. Choudhry unreasonably refused to acknowledge that there was nothing in the Secondary Plan that prohibits high rise development along Weber.

Front Yard Setback is Deemed to Comply

Mr. Schnieder agreed that section 5.9 of the Zoning By-law (Reduction in Regulations Resulting from Street Widening)⁶ applied so that Proposed Development's 0 m setback is deemed to comply with the setback requirements of the Zoning By-law.⁷ On re-examination, through coaxing from counsel for the City, he changed his opinion. He agreed with Mr. Ciccone that the regulation does not apply because the Region has not yet acquired the land.⁸

In any event, the interpretation of this section does not require planning opinion. A purposive legal interpretation and a plain reading of the words confirms that this regulation applies to the Proposed

⁵ 30 Duke Cross-Examination of Choudhry, Hearing Day 7, April 30 2025.

⁶ Exhibit 1, Joint Book of Documents, Zoning By-law 85-1, Tab 42, pg 1958.

⁷ 30 Duke Cross-Examination of Schneider, Hearing Day 6, April 29 2025.

⁸ City Re-examination of Schneider, Hearing Day 6, April 29 2025.

Development. It would be an absurd and meaningless outcome if it were to only apply to historical takings, and not widenings being taken through the application itself. In this case, the proposed setback is 3 m and the road widening is 3 m, so the front yard setback is deemed to comply. Furthermore, as noted by Ms. Sinclair, the actual widening of the vehicular portion of Weber Street West is unlikely to occur, instead the widening will allow for future improvements to the public realm (e.g. wider sidewalks).

Participant Statements of Abutting Properties

As requested by the Tribunal, below are 30 Duke's submissions in response to the Participant Statements of those individuals who reside directly abutting the Subject Lands:

Participant	Summary of Concerns	30 Duke Submissions in Response
Cathryn Harris, Tenant at 28 Weber Street West Immediately west	Light/shadow and privacy impacts for her clients (psychology clinic next door to subject lands) Parking and traffic; already an issue at this site, has concerns with the additional people being dropped off and picked up and deliveries	Light/shadow and privacy impacts mitigated. Shadow impacts over private amenity or on building facades will not remain for an unacceptable duration. Light impacts will be addressed through the site plan process. As noted by Ms. Sinclair, as-of-right zoning permissions would allow a building which could be located much closer to the property line and have significantly greater overlook impacts.
Simon Euteneier Owner of 28 Weber Street West Immediately west	Owner of neighbouring property; his tenants chose the heritage aesthetic; Proposal not matching heritage characteristics of the neighbourhood; concerns about parking; shadow and privacy concerns; thinks 8 storeys is more appropriate	Evidence demonstrates that the Proposed Development will not cause impacts to the heritage resources as identified in the District Plan. Compatibility does not require that the Proposed Development "match" the heritage characteristics of the neighbourhood.
Ron Broham 27 Roy Street Immediately north	Supportive as long as it is designed with sensitivity to the surrounding context Understands there is a need for additional housing, 22 Weber is a great re-development site; agrees that no heritage buildings will be ruined as a result	Evidence demonstrates that the Proposed Development will not cause impacts to the heritage resources as identified in the District Plan.

Neil Baarda 31 Roy Street Immediately north	Specific concern is the angular plane analysis Concerns about vibrations on historic brick buildings and fieldstone foundations	Mr. Currie's evidence is that the intent of the angular plane is met and there will be no impact. Vibration monitoring plan recommended in the Heritage Impact Assessment.
Mica Sadler 35 Roy Street Immediately north-west	In support of proposal because it is an opportunity for more housing and it is close to the LRT. Will not cause any significant impacts to my property.	

Reply to Case Law

30 Duke replies to FOBT's substantive case law references as follows:

FOBT relies on [*CHC MPAR Church Holdings Inv c Toronto \(City\)*](#), to argue that the Proposed Development will overshadow and dominate the adjacent properties. First of all, the evidence does not support this proposition. Secondly, *Church* is distinguishable. In *Church*, the Board appropriately framed the heritage issue as whether the proposal conserves the listed heritage attributes of the adjacent properties.

In that case, the Board was presented with detailed and persuasive opposition heritage evidence demonstrating specifically how the enumerated heritage attributes of the adjacent properties were impacted. There the Board found that the proposal was not appropriate because it created unacceptable negative impacts. In the present case, the Tribunal was not presented with similar evidence. Ms. Choudhry failed to provide evidence about how the heritage attributes and resources would be impacted by the Proposed Development. Mr. Currie opined that there was no impact or impact was mitigated. *Church* does not assist FOBT.

FOBT further relies on the Tribunal's comments in [*Bayview Ottawa Holdings Ltd v Ottawa \(City\)*](#) regarding reliance on angular plane as a means to ensure transition to neighbouring heritage properties. *Bayview* is similarly of no assistance to FOBT. In *Bayview*, the angular plane analysis took on weight in the Tribunal's analysis because it was enshrined in both the Official Plan policies and the zoning regulations applicable to that proposal. Here, the angular plane is referenced only in the Heritage Guidelines, and as such, should be afforded significantly less weight.