



## Ontario Land Tribunal

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# Affidavit

**OLT CASE NO.: OLT-22-002377**

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

Applicant/Appellant:	30 Duke Street Limited
Subject:	Failure of Approval Authority to announce a decision respecting a Proposed Official Plan Amendment
Reference Number:	OPA 20/005W/JVW
Property Address:	22 Weber Street W (22 Weber Street W.)
Municipality/UT:	Kitchener/Waterloo
OLT Case No:	OLT-22-002377
Legacy Case No:	PL210104
OLT Lead Case No:	OLT-22-002377
Legacy Lead Case No:	PL210104
OLT Case Name:	30 Duke Street Limited v. Kitchener (City)

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

Applicant/Appellant:	30 Duke Street Limited
Subject:	Application to amend the Zoning By-law – Refusal or neglect to make a decision
Reference Number:	20/013/W/JVW
Property Address:	22 Weber Street W (22 Weber Street W.)
Municipality/UT:	Kitchener/Waterloo
OLT Case No:	OLT-22-002378
Legacy Case No:	PL210105
OLT Lead Case No:	OLT-22-002377
Legacy Lead Case No:	PL210104

**PROCEEDING COMMENCED UNDER** subsection 42(6) of the *Ontario Heritage Act*,  
R.S.O. 1990, c. O.18

Applicant/Appellant:	30 Duke Street Limited
Subject:	Appeal of the Decision of Council to issue a permit with terms and conditions to (alter/erect/demolish/remove) a building or structure
Reference Number:	HPA-2022-V-015
Property Address:	22 Weber Street West
Municipality/UT:	Kitchener/Waterloo
OLT Case No.:	OLT-22-004383
OLT Lead Case No.:	OLT-22-002377
Legacy Lead Case No.:	PL210104

### **AFFIDAVIT OF NEIL BAARDA**

(affirmed October 13, 2025)

I, Neil Baarda of the City of Kitchener, in the Province of Ontario, AFFIRM:

1. I am a representative of Friends of Olde Berlin Town (FOBT). I was added as Co-Representative of Friends of Olde Berlin Town on April 17, 2025, for the merit hearing in the case OLT-22-002377 regarding the property at 22 Weber Street West in the City of Kitchener (“the Subject Property”). The previous CMCs referenced in my Affidavit I attended as a Participant. I was in attendance throughout the hearing. I was lead representative and on camera during all phases of testimony of the Heritage Expert Witnesses, Dan Currie (for the Applicant-Appellant) and Deeksha Choudhry (for the City of Kitchener), including examination-in-chief and cross-examination. I affirm that I have knowledge of the matters to which I depose.
2. This Review Request is made on behalf of Friends of Olde Berlin Town, a community group that was self-represented at the Hearing.

3. FOBT respectfully requests a review of the Decision on OLT Case No.: OLT-22-002377 (30 Duke Street Limited v. Kitchener (City)) issued on September 17, 2025 (“the Decision”), pursuant to Section 23 of the Ontario Land Tribunals Act, 2021, and Rule 25 of the Rules of the Ontario Land Tribunal. FOBT is requesting the Chair exercise their ability to review, rescind or vary the decision as detailed in the Request for Review, to address the following issues.
4. First, the Decision is outside of the Tribunal’s jurisdiction (Rule 25.7.a), in prescribing the means by which the City must implement regulations under designations and zoning.
5. In Paragraph 48, the Decision asserts that

“The Tribunal is not persuaded that height is regulated in the ZBL by the combination of FSR and setback regulation because the City could have regulated the height by directly imposing a cap in the ZBL.”
6. Expert Witness on Land-Use and Urban Design for the Applicant-Appellant Sinclair acknowledged under cross that the FSR regulations limit height. *“Absolutely, on this site, the FSR did restrict how much height we could get now,”* said Sinclair, who further stated that using the FSR limit of 4.0, about nine or ten storeys could be built on the subject lands.
7. During their testimony, Expert Witnesses Barton and Schneider opine that FSR regulations, in conjunction with the lot size, and the rear yard setback regulation, limit height (Para. 44 and 47). There was no disagreement among all the Land-Use witnesses that the FSR regulations, in conjunction with the lot size, limit height and that the rear yard setback regulations limit height in relation to the distance from the property line.
8. Second, I believe that the Decision does not provide natural justice or procedural fairness (Rule 25.7.b), by not issuing a timely ruling on the admissibility of evidence on the in-effect designations and zoning of the surrounding properties.
9. In the course of Opening Submissions, FOBT representative Hal Jaeger attempted to address the value of considering the in-effect designations and zoning on the surrounding properties, Counsel for the Applicant-Appellant objected, and the Tribunal ruled that any arguments on the admissibility of evidence on the in-effect designations and zoning on the surrounding properties would need to be delivered later in the hearing.

10. As Expert Witness Barton was conveying evidence on the in-effect designations and zoning of surrounding properties, Counsel for the Applicant-Appellant suggested that the Tribunal had already determined at the CMC of October 30, 2024, that the current designation and zoning on the surrounding properties would not be considered.
11. In fact, the October 30, 2024, CMC determined that the Subject Property was not subject to OPA 49 and ZBA 2024-065 because the Subject Property was specifically excluded from the scope of the two bylaws (CMC Decision, Paragraph 12). The decision flowing from the October 30, 2024, CMC was not based on Clergy precedent and made no determination as to the allowable context. The October 30, 2024, CMC decision, Paragraph 11, indicates arguments on Clergy would follow during the Hearing. FOBT expected to address the admissibility of evidence on the in-effect designations and zoning on the surrounding properties at the Hearing. No such opportunity was provided by the Tribunal.<sup>1</sup>
12. FOBT questions the fairness in not ruling on the permissibility of evidence on the in-effect designations and zoning on the surrounding properties until Expert Witness Barton had begun delivering his evidence.
13. Third, the Decision lacks natural justice or procedural fairness (Rule 25.7.b) by not permitting evidence that FOBT could have procured via the City's Expert Witnesses had FOBT not been barred from a fulsome examination of the witnesses.
14. After the City examined its first Expert Witness, on the morning of April 29, 2025, the Tribunal declared FOBT to be a Party of common interest with the City, barring FOBT from asking leading questions and limiting FOBT's questions of the City's Expert Witnesses to questions of clarification.
15. In the course of FOBT's examinations of the City's Expert Witnesses, the Tribunal further curtailed FOBT's examination. The Tribunal determined that questions of clarification could not include questions of expansion or exploration of the Expert Witness's foundations for their opinions.

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<sup>1</sup> October 30, 2024 CMC; Decision of Y.Faghani and G. issued November 21, 2024 – 30 Duke Street Limited v Kitchener (City), 2024 <https://www.canlii.org/en/on/onlt/doc/2024/2024canlii118331/2024canlii118331.html> (ON LT)

16. This decision is not consistent with the Tribunal's normal practises. As per Rule 8.1 e) of the OLT's Rules of Practice and Procedure of December 2, 2024, a party may "Present and examine witnesses and cross-examine witnesses not of like interest".
17. Page 21 of the OLT's Hearing Guide<sup>2</sup> of December 2, 2024, elaborates:  
"In most cases, witnesses will give evidence through direct examination, cross-examination, and re-examination in the following way:
- a) direct examination by the party presenting the witness;
  - b) direct examination by any party of similar interest, in the manner determined by the OLT (emphasis added);
  - c) cross-examination by parties of opposite interest;
  - d) re-examination by the party presenting the witness on issues that arise for the first time during cross-examination"
18. A Practical Guide to the Ontario Land Tribunal, 3rd Edition spells the procedure out more clearly:  
"When the examination-in-chief of a witness is complete, the witness is then turned over to the other party or parties. In a proceeding involving many parties, the next counsel or agent to question the witness is the one representing the party of "like interest" or "supportive interest", in an order to be determined by the Tribunal Chair and based on the most supportive proceeding first. Parties of like interest are not allowed to ask leading questions and are not permitted to ask the same questions that were dealt with by the party calling the witness" (A Practical Guide to the Ontario Land Tribunal, 3rd Edition, 2023, p. 254).
19. As such, FOBT expected to examine the City's Expert Witnesses as a means of entering key evidence.
20. So much of what makes the Civic Centre Heritage District neighbourhood special is intangible and not captured by numbers; the streetscape, the overall cohesive feel. The City's Heritage Witness mentioned this in her testimony, but FOBT was not given an opportunity to request clarification about this from the City's Heritage Witness and therefore the Tribunal appears unaware of the effect of the visual impacts of the subject proposal.

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<sup>2</sup> <https://olt.gov.on.ca/wp-content/uploads/Hearings-Guide.pdf>

21. Fourth, the Decision included errors of law (Rule 25.7.c). by not applying the required tests for conformity to the City's Official Plan (OP) and conformity to the Heritage District Plan (HDP).
22. The Decision substitutes testing for an "unacceptable adverse impact" instead of the full test of conformity defined by the OP.
23. The OP definition of compatibility (Ref. Hearing Exhibit 1, Document Book Pg. 1858) includes three elements: 1) "mutual tolerance", 2) "harmony", and 3) the absence of "unacceptable adverse effects, adverse environmental impacts or adverse impacts". The Decision makes no investigation into whether the proposed build and the adjacent land uses and building forms are "mutually tolerant and capable of existing together in harmony".
24. My concern is that a finding based on only one of the three elements of compatibility is incomplete and a replacement of the required test with a partial test.
25. In Paragraph 112, the Decision concludes that "[t]he Revised Proposal ... is consistent with the objectives of the [Heritage] District Plan" when the required test, conformity to the HDP, is not established.
26. The Decision investigated whether the Applications conformed to HDP Policies, including those for the Weber St Area Site/Area Specific Policies in s. 3.3.5.2. (Ref. Hearing, Exhibit 1, Document Book Pg. 2383), including,
  - 3.3.5.2.f) "Design guidelines provided in Section 6.9.2 [a typographical error, the guidelines are in s. 6.9.4] of this Plan will be used to review and evaluate proposals for major alterations, additions or new buildings to ensure that new development is compatible with the adjacent context."
27. To comprehend whether the proposed new development conforms to 3.3.5.2.d), i.e., is "compatible with adjacent heritage resources", the Decision investigated the HDP guidelines in s. 6.9.4, (Ref. Hearing, Exhibit 1, Document Book Pg. 2443):

#### **6.9.4 Weber Street**

Any infill development on Weber Street should maintain a strong relationship to the street at the lower levels (2 to 4 storeys) with respect to built form and use.

[Guideline 1]

Setbacks of new development should be consistent with adjacent buildings. Where significantly different setbacks exist on either side, the new building should be aligned with the building that is most similar to the predominant setback on the street. [Guideline 2]

Building facades at the street level should incorporate architectural detail, similar materials and colours, and consistency with the vertical and horizontal proportions or rhythm of adjacent / nearby buildings on the street to establish a cohesive streetscape. [Guideline 3]

Size, placement and proportion of window and door openings for new buildings or additions should be generally consistent with those on other buildings along the street. [Guideline 5]

Any new buildings taller than 3 to 4 storeys should incorporate some form of height transition or stepbacks to minimize the perception of height and shadow impacts to pedestrians on the street and provide more visual continuity. Stepbacks should be a minimum of 2 metres to provide for useable outdoor terraces for the upper levels. [Guideline 6]

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. [Guideline 7]

To minimize impacts on properties to the rear of or flanking Weber Street, a rear yard setback of 15 metres should be maintained for new buildings as well as additions where feasible. [Guideline 8]

28. Expert Witness Currie admitted under cross that the Applications fail to meet Guideline 2 while asserting it met the intent of the Guideline. Currie admitted under cross that the Applications fail to meet Guideline 7 while asserting it resulted in no unacceptable adverse impact. Currie opined during evidence-in-chief, that the Applications fail to meet Guideline 8, but asserted that the reduced setback “does not introduce a negative impact”.

29. Expert Witness Choudhry opined, during evidence-in-chief, that the Applications fail to meet Guidelines 1-3 and 5-8 in s. 6.9.4.

30. The Expert Witnesses thus agreed the Applications do not meet Guidelines 2, 7, and 8 in s. 6.9.4.

31. On the morning of April 30, 2025, Expert Witness Choudhry identified page 4.6 of the HDP, which reads:

The High Density Commercial Residential designation, located on Weber Street and extending slightly into College and Young Streets, has the potential to be in conflict with the intent of the heritage conservation district plan. ... It is recommended that zoning regulations and Special Provisions similar to those proposed for Victoria Street be considered.

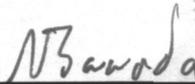
Paragraph 23 of FOBT's Closing Argument flagged this element of Choudhry's evidence.

AFFIRMED BEFORE ME at the City of  
Kitchener, in the Regional Municipality of  
Waterloo on October 13<sup>th</sup>, 2025

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Notary Public



NEIL BAARDA

