OLT Case No. OLT-22-002377

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 a 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
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: City of 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)

PART 2 - FOBT REQUEST FOR REVIEW OF DECISION DOCUMENT BOOK

Hal Jaeger
Neil Baarda
Friends of Olde Berlin Town
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[redacted]

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Tab 1

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: September 17, 2025 **CASE NO(S).:** OLT-22-002377
(Formerly PL210104)

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
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
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 46(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 W
Municipality/UT:	Kitchener/Waterloo
OLT Case No.:	OLT-22-004383
OLT Lead Case No.:	OLT-22-002377
Legacy Lead Case No:	PL210104

Heard: April 22, 2025 to May 8, 2025, by video hearing

APPEARANCES:

Parties	**Counsel/Representative***
30 Duke Street Limited	Jennifer Meader Jessica De Marinis
City of Kitchener	Alex Ciccone Katherine Hughes
Regional Municipality of Waterloo	Andy Gazzola Fiona McCrea (*in absentia*)
Friends of Olde Berlin Town	Hal Jaeger* Neil Baarda*

DECISION DELIVERED BY YASNA FAGHANI AND GREGORY J. INGRAM AND ORDER OF THE TRIBUNAL

Link to Order

INTRODUCTION AND BACKGROUND

[1] The matter before the Tribunal is related to appeals filed by 30 Duke Street Limited ("Appellant") pursuant to ss. 17(40) and 34(11) of the *Planning Act* ("Act") with respect to the failure of the City of Kitchener ("City") to make a decision within the statutory timeframes on Official Plan Amendment ("OPA") and Zoning By-law Amendment ("ZBA") applications (together "Applications"), for the property known municipally as 22 Weber Street West, in the City ("Property").

[2] A Heritage Permit Application was submitted to the City, refused, and appealed to this Tribunal. Phase One of the Hearing addressed the Applications and Phase Two dealt with the Heritage Permit Application.

[3] Following the refusal of the Applications, the Appellant revised and resubmitted the Applications to the City. The proposal before the Tribunal includes the development of a 19-storey rental apartment building with 167 units with no parking spaces ("Revised Proposal"). As the Property is located within a Major Transit Station Area ("MTSA") in the Regional Municipality of Waterloo ("Region") Official Plan ("Region OP") there is no requirement for parking spaces.

[4] For the reasons set out below in this Decision, the Tribunal finds in favour of the Appellant, allows the appeals, and approves the OPA and the ZBA.

THE PROPERTY AND SURROUNDING CONTEXT

[5] The Property is currently vacant and being used as a commercial parking lot. It has an area of approximately 1,392 square metres ("m^2") with approximately 27 metres ("m") of frontage on Weber Street West ("Weber").

[6] The Property is located within the Civic Centre Neighbourhood Heritage Conservation District (“Civic Centre Neighbourhood”) on an arterial road that directly faces the City’s downtown Urban Centre. The Property is at the southerly periphery of a mixed-use neighbourhood in the “Urban Area” and is designated as “High Density Commercial Residential” in the Civic Centre Secondary Plan (“Secondary Plan”), adopted as part of the 1994 City Official Plan (“City OP”). The interior of the Civic Centre Neighbourhood contains a consistent streetscape lined by mature trees, grassed boulevards, and laneways. Furthermore, buildings with consistent setbacks, linear streets, and private and public trees are located throughout the Civic Centre Neighbourhood. Hiber Park, the City’s second oldest park, is in the centre of the Civic Centre Neighbourhood, in close proximity to the Property. The Civic Centre Neighbourhood is roughly bounded by Weber, Victoria Street North, Ellen Street East, Lancaster Street East, and Queen Street North.

[7] Weber runs along the southern property limit, beyond which is the northern limit of the City’s Urban Growth Centre (“Downtown”). Buildings within the Downtown on the south side of Weber are primarily used for non-residential purposes. A 27-storey tower has been approved on the opposite side of Weber, across from the Property, at the intersection of Weber and Ontario Street. The commercial core of Downtown is located further to the south of the Property.

[8] Immediately north of the Property are properties that were designated and zoned to permit the conversion of residential to commercial and office uses. Two properties, 27 and 31 Roy Street, immediately abut the rear yard of the Property, one of which was previously converted to non-residential use and is now developed as a multiple-residential property with the built form of a single detached dwelling. The designated “Low Rise Residential Preservation Area” in the Secondary Plan is located further to the north on the north side of Roy Street.

[9] The property immediately to the south, at 21 Weber, is currently vacant.

[10] To the immediate east, at 18 Weber, is an office building (converted dwelling) which is a two-and-a-half-storey detached structure. St. Andrew's Presbyterian Church, the Region's offices and the Provincial Offences Court are all located further to the east.

[11] To the immediate west, at 28 Weber, is a three-storey commercial building (converted dwelling) with a church next to it. Further west along Weber are apartments with a proposed mid rise apartment building at the northeast corner of Weber and Young Street.

[12] At the time that the Applications were filed, the Property was identified as being within a MTSA (Map 2 – Urban Structure of the City OP ("Map 2")). Map 2 has since been amended to refine the limits of the MTSAs to align with Region OP Amendment 6. The Property continues to be located within an MTSA and is now identified as "Protected Major Transit Station Area" on Map 2.

REQUIRED APPROVALS

[13] The Revised Proposal seeks to amend the City OP designation from "High Density Commercial Residential" to "High Density Commercial Residential with a Special Policy Area to increase the Maximum Floor Space Ratio" ("FSR") from 4.0 to 8.0.

[14] The City's Zoning By-law No. 85-1 ("ZBL") zones the Property "Commercial Residential Three" (CR-3). The Revised Proposal seeks to amend the ZBL to regulate the final built form with respect to: FSR (4.0 to 8.0); maximum building height (19 storeys); minimum front yard; side yard and rear yard setbacks (measured from portions of the building up to 5 m in height and over 5 m in height); minimum landscape area and ground floor height; permitted locations of dwellings within a mixed-use or multiple dwelling building; exclusive use patio areas not required for ground floor units; rear yard access requirements do not apply; minimum provision of Class A and Class B bicycle parking spaces; minimum residential and visitor parking requirements; and minimum amenity area provisions.

[15] The proposed ZBA includes a Holding Provision that, among other matters, requires the preparation and approval of a detailed transportation (road) and stationary noise study to the satisfaction of the Region and the City. This Holding Provision was agreed to by the City, Region, and Appellant.

[16] The proposed OPA is included as **Attachment 1** to this Decision. The proposed ZBA is included as **Attachment 2** to this Decision.

SETTLEMENT BETWEEN REGION AND APPELLANT

[17] The Tribunal acknowledges the Minutes of Settlement ("MOS") received prior to the Hearing between the Region and the Appellant. Planner Andrea Sinclair provided evidence that addressed the Region's issues: parking and visitor parking; main entrance configuration; road widening (which is to be conveyed to the Region at the Site Plan Approval stage); no landscaping structures to be located within the widening; and access width to the Property. Counsel for the Region advised that the proposed ZBA reflects the provisions and elements agreed to by the Parties.

LEGISLATIVE FRAMEWORK

[18] With respect to OPA and ZBA appeals, the Tribunal must have regard to the matters of provincial interest as set out in s. 2 of the Act, and to the decision, if any, of the City and the information considered in making the decision, as required by s. 2.1(1) of the Act. Although these appeals relate to a non-decision by the City, it is noted that the City does not support the Revised Proposal.

[19] Further, s. 3(5) of the Act requires decisions of the Tribunal affecting planning matters to be consistent with the policy statements and conform, or not conflict, with the provincial plans that are in effect on the date of a decision.

[20] As of October 20, 2024, the Provincial Policy Statement, 2020 and the A Place to Grow: Growth Plan for the Greater Golden Horseshoe are no longer in effect, and the

Provincial Planning Statement, 2024 (“PPS 2024”) is in effect. In this respect, the Tribunal must be satisfied that the Revised Proposal is consistent with the PPS 2024.

[21] The Tribunal must also be satisfied that the ZBA, as part of the Revised Proposal, conforms with the Region OP and the City OP, and that the Revised Proposal represents good land use planning and is in the public interest.

PARTIES AND PARTICIPANTS

[22] Friends of Olde Berlin Town (“FOBT”) is an incorporated neighbourhood association that was granted Party status by the Tribunal. It made submissions and presented a witness in support of its position.

[23] A number of Participants provided statements with concerns related to neighbourhood character and compatibility, height, massing and scale, FSR, adequacy of parking, privacy and overlook, public interest, consistency with the PPS 2024, and conformity with the City OP. Additional concerns related to mental health, impact to the Civic Centre Neighbourhood, compatibility with heritage attributes, not meeting the Civic Centre Neighbourhood policies and guidelines, concerns relating to vibration effects on historic buildings, wind and shadow impacts, and walkability for pedestrians.

WITNESSES

[24] The Tribunal qualified the following witnesses to provide expert opinion evidence in their respective areas of expertise, as noted:

For the Appellant:

- Andrea Sinclair – Land Use Planning and Urban Design; and
- Dan Currie – Cultural Heritage;

For the City:

- Eric Schneider – Land Use Planning;
- Pegah Fahimian – Urban Design; and
- Deeksha Choudhry – Cultural Heritage; and

For FOBT:

- Michael Barton – Land Use Planning.

AGREED FACTS AND ISSUES – LAND USE PLANNING AND URBAN DESIGN

[25] The witnesses agreed that the Property is an ideal candidate for intensification, but there is disagreement with respect to what the intensification looks like. The Property is located within a Settlement Area, Strategic Growth Area, and MTSA, as defined in the PPS.

[26] There is no dispute that parking is not required for the proposed building and there is no dispute that the required wind, vibration impact studies will be provided at the Site Plan Approval stage.

[27] The witnesses disagreed that the Revised Proposal has regard for matters of provincial interest as set out in s. 2 of the Act and is consistent with the PPS 2024.

[28] Furthermore, with respect to land use planning and urban design, the main issues related to the scale and height of the 19-storey building and whether the building meets the intent of the City's Urban Design Manual ("UDM") regarding tall buildings, separation/overlook, and outdoor amenity areas.

EVIDENCE / ANALYSIS / FINDINGS FOR LAND USE PLANNING ISSUES

Matters of Provincial Interest Under s. 2 of the Act

[29] According to Ms. Sinclair, the Revised Proposal has regard for the relevant matters of provincial interest as identified under s.2 of the Act. Specifically, when considering ss. 2(d), 2(n), 2(p), and 2(r), Ms. Sinclair opined that an architectural assessment was completed and no future assessment was required. As the Property is within the Civic Centre Neighbourhood, a Heritage Impact Assessment was conducted which found that the Revised Proposal was consistent with the objectives of the Secondary Plan and does not result in adverse impacts to cultural heritage resources located with the Civic Centre Neighbourhood. A more detailed review of the cultural heritage issues will be discussed later in this Decision.

[30] Furthermore, Ms. Sinclair found that the Revised Proposal will provide necessary rental housing on a vacant, underutilized area within a MTSA, and a Strategic Growth Area, as identified in the PPS 2024. Therefore, the Property is appropriately located for growth and development. Finally, Ms. Sinclair opined that the Revised Proposal is well designed, encourages a sense of place and will positively contribute to the Weber streetscape with the lobby and entrance facing Weber and by having the orientation of the tower designed to minimize overlook onto the residential neighbourhood to the north. In addition, according to Ms. Sinclair, the preliminary building design incorporates traditional building materials in a contemporary style.

[31] Mr. Schneider did not provide an analysis with respect to whether the Revised Proposal has regard for maters of provincial interest, while Mr. Barton disagreed that the Revised Proposal has regard for the relevant matters of provincial interest. Mr. Barton found that the Revised Proposal does not have appropriate regard for the existing and planned context. In his analysis, Mr. Barton placed great importance on the updated Strategic Growth Area policy under the City’s policy regime. For example, identifying that there is now a distinction between Strategic Growth A and C, and what

those distinctions suggest. This new regime was not in place at the time the Applications were originally made.

[32] Mr. Barton further opined that the development is not sensitive to the existing and planned build form character of the properties located in the Civic Centre Neighbourhood, including height, transition to adjacent land uses, and surrounding low rise residential neighbourhood.

Finding

[33] At a prior Case Management Conference, the Tribunal ruled that the applicable policies would be those that were in place at the time of the original Applications. This was decided after hearing submissions from the Parties, and in particular, from the City, who expressly decided to exempt the Property from the conformity exercise regarding the new legislation because the Property was under appeal. Therefore, reference to the new policy regime in Mr. Barton's analysis was not helpful, nor persuasive. Mr. Barton also did not provide adequate detail when making assertions about height and transition.

[34] The Tribunal preferred the evidence of Ms. Sinclair as it relates to the Revised Proposal having regard to matters of provincial interest. She highlighted the fact that the Revised Proposal represents development in a Strategic Growth Area, in a MTSA, on a vacant, underutilized Property. Further, she advised that there would be no adverse impacts to cultural heritage resources, and the Revised Proposal has been designed in a way to minimize overlook and incorporate traditional materials in a contemporary style.

Consistency with the PPS 2024

[35] Ms. Sinclair opined that the Revised Proposal and planning instruments are consistent with the PPS 2024 and the applicable policies regarding planning for people and housing. Essentially, she found the Revised Proposal will contribute to a range of

residential types by introducing rental housing that is transit oriented within a priority intensification area (MTSA). According to Ms. Sinclair, the PPS 2024 contemplates broad policy objectives to ensure municipalities can accommodate growth through lands that are designated and available for residential development, and to maintain lands with servicing capacity. In her opinion, the applicable policies do not speak about context or lot size when considering the broad growth objectives, nor do they consider how a complete community is to be evaluated and where densities and heights should be allocated.

[36] Mr. Schneider opined that the Revised Proposal is not consistent with the applicable policies in the PPS 2024. While he agreed that the Revised Proposal is located within an MTSA, is transit supportive, and that the PPS 2024 encourages development in intensification areas, including redevelopment of surface parking lots, his evidence was that site context and local conditions are important considerations when determining whether a proposal is consistent with the policies in the PPS 2024. He found that the PPS 2024 should not be interpreted to mean that all lands in intensification areas can be developed to any density and scale without having regard to factors such as cultural heritage conservation and compatibility. Essentially, he concluded that the height, scale, and density of the Revised Proposal was not suitable for the site and that the adverse impacts onto the abutting lands would not meet the health and well being requirements of the current and future residents.

[37] Mr. Barton agreed that the PPS 2024 identifies Strategic Growth Areas, that there is no longer a reference to Urban Growth Centre, and that the reference to Strategic Growth Areas has a specific policy for MTSAs, which is a priority for intensification. The bulk of Mr. Barton’s oral evidence suggested that, in 2019, the City had met its density growth targets and has since continued to exceed said targets in the MTSA. He opined that this was a relevant factor when considering requests for further development. He suggested that even if a proposal were to conform to all applicable policies in an official plan and zoning by-law, density targets should be considered. In this case, he opined that the building’s height and scale was not compatible with the

surrounding context, that the Revised Proposal did not conform to the City OP, which the PPS 2024 identifies as “the most important vehicle for implementation” of the PPS 2024.

Finding

[38] The Tribunal prefers the evidence of Ms. Sinclair and finds that the Revised Proposal is consistent with the general policies within the PPS 2024. Indeed, the applicable policies are broad and intended to direct growth to specified locations where servicing is available. All witnesses agreed that the Property is located within a MTSA, and that intensification is directed within this area. The Tribunal finds that the analysis with respect to lot size and local conditions is not persuasive to determine if the Revised Proposal meets broad policy objectives of the PPS 2024 with respect to growth. Further, Mr. Barton agreed that the density growth targets are minimum targets, not maximum targets. It follows that if a proposal meets applicable regulatory test, including conformity with the relevant official plan and zoning by-law, which will be addressed later in this Decision, there should be encouragement, not discouragement, to go beyond said targets.

Height and Scale of Apartment Building

[39] The Property is designated “High Density Commercial Residential” with an FSR of 4.0. There is no maximum height restriction in the City OP or the ZBL. With respect to the height of the apartment building, Ms. Sinclair opined that the “High Density Commercial Residential” designation in the Secondary Plan contemplates higher storey buildings because it specifically states: “the aim of [this designation] is to recognize the proximity of the Civic Centre Neighbourhood to the higher intensity land uses of the Downtown, and the location of the properties on Primary Roads (such as Weber)”. She noted that the Secondary Plan specifies that properties located within the “Office Residential Conversion” serves as a “transition area between the higher intensity uses along Weber …. and the Low Rise Residential – Preservation designation of the interior

of the neighbourhood”. As such, there was recognition that high rise buildings could be developed on Weber.

[40] On cross examination, counsel for the City took Ms. Sinclair to the “Medium Density Multiple Residential” designation in the Secondary Plan and compared it to “High Density Multiple Residential”. Counsel put forth the assertion that the “High Density Multiple Residential” policy language was put in place to prevent additional tall buildings as it recognized the four existing tall buildings in the area. Ms. Sinclair disagreed, namely, because the “High Density Commercial Residential” designation, which applies to the Property, contemplates high density developments, otherwise there would be no need for this designation.

[41] Ms. Choudry testified that there are no other buildings withing the Civic Centre Neighbourhood that contain similar massing or design. She stated that while there are other high rise buildings with the Civic Centre Neighbourhood, they were developed before the Secondary Plan came into effect. According to policy 13.1.2.5 of the Secondary Plan:

> 5. The aim of the High Density Multiple Residential designation is to recognize the existing high rise apartment buildings located at 119 College Street, 11 Margaret Avenue, 100 Queen Street North, and 175 Queen Street North, all which have been constructed in excess of 200 units per hectare.
>
> Permitted uses are restricted to multiple dwellings in excess of 200 units per hectare, home businesses, private home day care, lodging houses, parks, and large and small residential care facilities. Day care facilities are permitted provided they are on the same lot as a large multiple dwelling. The maximum floor space ratio shall be 4.0, meaning the above grade gross floor area shall not exceed 4.0 times the lot area.

[42] She opined that the Secondary Plan provides clear direction that the high rise development is limited to those properties only, as these developments were not typical of the existing character in the Civic Centre Neighbourhood.

[43] Regarding FSR, Ms. Sinclair opined that FSR was a function of lot size, not determinative of how tall a building should be. On cross-examination, counsel for the

City advised that the City's position was that the height proposed on the Property was not appropriate because there was a request to double the FSR. Ms. Sinclair was specifically asked whether she thought the height proposed could be better suited on a larger lot. Ms. Sinclair found that height and FSR did not corelate and she did not believe that higher buildings could only be achieved on larger lots. Instead, Ms. Sinclair's analysis focused the potential of adverse impacts (shadow, overlook, privacy) of this high rise and how the adverse impacts would be mitigated. A more detailed discussion regarding adverse impacts is further below in the Decision.

[44] Furthermore, with respect to height, Ms. Sinclair disagreed with Mr. Schneider that the height was indirectly regulated by the combination of the maximum FSR in the City OP and rear yard setback regulation in the ZBL, which requires half the building height as building separation to the rear property line. Mr. Schneider elaborated that the ZBL regulates height by stating that the size of any given site would dictate how tall a building can be based on how much building separation can be provided to the rear lot line using the figure of half the building height. The ZBL states that setbacks should be "7.5 m or one half the building height, whichever is greater". He explained that, in this case, the proposed rear yard setback for the tower portion of the building of 14.1 m would facilitate a building height of 28.2 m, whereas 58.6 m is proposed. According to Mr. Schneider, the building height of 28.2 m would mean a tower height of approximately eight to nine storeys, whereas a tower height of 19 storeys is proposed. Ms. Sinclair disagreed with this approach, namely because she opined all zoning regulations were subject to amendments. She clarified that, since there was no height restriction in the ZBL in this case, seeking an amendment for height was not necessary.

[45] Regarding the rear yard setback and the combination of maximum FSR, on cross-examination Mr. Schneider agreed with counsel for the Appellant that there have been several examples in the City where an increase of the FSR and reduction in rear yard setbacks were granted in zones where there were no height restrictions. Specifically, counsel for the Appellant took Mr. Schneider to the R9 zone in the Civic Centre Neighbourhood where there is no height restriction with lots that are next to low

density residential properties. Counsel argued that the rear yard setback in this zone is 7.5 m, which means a high rise could be as close as 7.5 m to the property line of the residential lots. Mr. Schneider agreed. However, Mr. Schneider noted that most of the other examples counsel provided (aside from the one in R9 zone) included lands that were not within a Cultural Heritage District.

[46] Nevertheless, Mr. Schneider's most salient point was that when there is a request for an increase in FSR coupled with setback reductions, it is important to analyze the adverse impact to determine if the height of the tower is appropriate.

[47] Mr. Barton's evidence was that there was no height restriction identified in the applicable ZBL but that there was a "de facto height". He stated that there was effectively a height cap based on the rear yard setback, which is a function of how close a property is to the neighbour's property. He stated that the greater the setback provided in a proposal, the greater the height a building can be.

Finding

[48] The Tribunal prefers the evidence of Ms. Sinclair with respect to height. 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. In fact, in the new City Official Plan, and corresponding Zoning By-law, which are not applicable to these Applications, the City quite clearly imposes a cap on height (eight storeys). Furthermore, the documentary evidence showed that in multiple other residential zones a height cap is directly imposed.

[49] Furthermore, the Tribunal accepts that the land designation of "High Density Commercial Residential" on a "primary road", as identified in the Secondary Plan, is a clear signal that the City anticipated high rise buildings as possibilities in this particular zone. The barrier to the high rise would be any adverse impacts as identified by both Ms. Sinclair and Mr. Schneider, which will be discussed below.

[50] Additionally, the Tribunal does not accept that the Secondary Plan provides clear direction that high rise development is limited to the four buildings within the Civic Centre Neighbourhood. If this was the case, policy makers would have clearly used prohibitive or restrictive language to prevent additional high rise buildings. Simply recognizing four tall buildings and calling out their locations does not prevent additional development.

Compatibility with the Neighbourhood Character

[51] One of the main issues (which also encompasses height) is the compatibility of the 19-storey tower in the Civic Centre Neighbourhood. Counsel for the Appellant submitted that policy 4.c.1.9 of the City OP applies, which states that "residential intensification within existing neighbourhoods be compatible with its surrounding context". The City 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".

[52] Ms. Sinclair's evidence included analysis of potential "adverse impacts" (which is also defined in the City OP to include shadow, privacy, overlook, noise, vibration, amongst other things). She advised that a Shadow Impact Assessment ("Shadow Study") was conducted, and the result found that there was no unacceptable duration of shadows cast over private amenity or buildings' facades. With respect to privacy and overlook conditions to neighbouring properties along Weber, her evidence was that, above the second storey, overlook from the proposed building would be on the roof and lots of the adjacent buildings. She noted that as-of-right zoning permissions would allow a building that is taller than the adjacent buildings along Weber, and which could be located closer to the property line. Furthermore, the adjacent properties are commercial residential with their rear yards currently being used for parking. With respect to privacy and overlook conditions to properties to the north of the proposed building (where there are mainly residential properties), Ms. Sinclair testified that the proposed building's

balconies and large windows would not be on the rear facade in order to minimize overlook onto said properties. She said other impacts (wind, noise, light) would be addressed at the Site Plan Approval stage, while she found there was no impact from heat, odour, or visual clutter.

[53] On cross-examination, Ms. Sinclair made a point that a shorter building could have larger shadows because of its footprint, and therefore unacceptable adverse impacts. She elaborated that there are “different ways to mitigate height, [it] does not mean if taller, it is less appropriate”.

[54] Mr. Schneider’s evidence regarding adverse impacts was brief. He simply listed what potential adverse impacts could be and did not provide sufficient detail. Mr. Barton testified, in the context of a policy analysis, that the “element of harmony” is a big piece of compatibility. He stated that “designing a building for no consideration for overlook, privacy … and having this building stand out” would suggest that there is no harmony. He did not provide an analysis of potential adverse impacts.

[55] Of note, at the end of the Hearing, counsel for the Appellant advised that the Appellant was amenable to adding a provision that expressly prohibits balconies on the rear elevation and a provision that would limit glazing/fenestration to 15% of the total rear elevation. Counsel submitted that the evidence demonstrated that privacy concerns to the properties to north of the proposed building would be mitigated but left it to the Tribunal to decide if it would be prudent to include the provisions on the redline version of the proposed ZBA.

Finding

[56] The Tribunal preferred the evidence of Ms. Sinclair. Amongst the planning witnesses, she was the only one to provide sufficient detail with respect to any potential adverse impacts and how those were to be mitigated. In fact, the Appellant was the only Party who conducted a Shadow Study, which found no unacceptable results from shadow casts. Mr. Barton’s assertion that there was no consideration for overlook and

privacy is inaccurate since Ms. Sinclair took time to take the Tribunal through the adverse impacts and how the design of the building would mitigate any concerns. Furthermore, while the definition of “compatibility” includes “existing together in harmony”, the more important aspect of the definition is “without causing unacceptable adverse effects” because it is the impacts from those effects that need to be analyzed. In this case, absent sufficient detail regarding unacceptable adverse impacts, as listed in the definition of “adverse impacts”, the Tribunal finds that there are no unacceptable adverse impacts from the proposed building.

[57] The Tribunal notes that Mses. Fahimian and Choudhry touched on adverse impacts within the context of Urban Design and Cultural Heritage, which will be discussed further below.

[58] In order to ensure that the privacy concerns of the properties north of the Property are met, the Tribunal accepts the provisions in the redline version of the proposed ZBA, as attached to this Decision.

Meeting Intent of the UDM – Tall Building Guidelines

[59] As a starting point, the Urban Design witnesses agreed that the UDM contains several guidelines that provide guidance for development applications. The Tall Buildings Guidelines (“Guidelines”) apply to development proposals that are nine or more storeys in height. Ms. Sinclair testified that the Guidelines should be applied flexibly and that not all the Guidelines apply to every application. She further stated that it would be difficult to apply all the guidelines and that a number of applications within the MTSA and downtown area have been approved which did not fully comply with the Guidelines.

[60] Ms. Fahimian spoke about the importance of the Guidelines and that the ZBL cannot contain all the “standard of details”, such as “separation, overlook, design” that would apply to tall buildings. Therefore, the ZBL must be read in conjunction with the applicable Guidelines. Ms. Fahimian agreed with counsel for the Appellant that the test

with respect to the Guidelines is whether a development is “generally consistent with and meets the overall intent of the guidelines” rather than “conformity”, which the Tribunal has acknowledged, is a stricter test to meet.

[61] Ms. Sinclair opined that the Revised Proposal meets the intent of the Guidelines. It is a compact building with a small floor plate with vertical and horizontal articulation, and architectural features that break up the building mass. According to Ms. Sinclair, if step backs were added to the Revised Proposal, overall, the height would be maintained, “one would be able to see a tall tower”, and it would mean additional costs, such as implementation of stairwell and removal of rental units. She found that the step backs would not achieve anything additional in terms of design, for example, help with shadow impacts, because the tower was already compact. She also noted that a wind study would be conducted at the Site Plan Approval stage to account for any mitigation measures, and this was agreed to by the City.

[62] From an Urban Design perspective, Ms. Fahimian found the Revised Proposal represented an overdevelopment because of the specific site context. She found that the tower did not meet the requirement for “a 3 metre step back from the base to the 19-storey tower”, which would minimize scale, help with shadow and wind impact, and mitigate perceived massing and visual impacts on the public realm. She noted that only the second storey was recessed by 2 m. On cross-examination, Ms. Fahimian agreed that there is no requirement for a step back in the ZBL and that the Revised Proposal is requesting to amend the ZBL to add a requirement for the second storey to be stepped back a minimum of 2 m above the ground floor. She elaborated that the tower portion (floors three to 19) would not be stepped back, and therefore the intent of the Guidelines was not met. According to Ms. Fahimian, the sky views would be hindered, as in the amount of the sky one would see. During cross-examination, she agreed that according to the Appellant’s visual evidence of the proposed building, the tower had a clearly defined base, projecting balconies (which are encouraged), and visual interest.

[63] Ms. Fahimian also noted that the proposed building was incompatible with the existing built form as it was surrounded on three sides by residential buildings that are two-and-a-half storeys and would hinder the development of tall buildings at 18 and 28 Weber, as will be discussed further below. Therefore, based on the deficiencies in meeting the guidelines for tower separation, step back, rear yard setback and podium design, she found that there was insufficient transition to the low rise neighbourhood.

UDM Tall Buildings – Separation and Overlook

[64] Both Ms. Sinclair and Ms. Fahimian agree that the proposed building does not meet the tower separation guidelines for Tall Buildings. It was explained that the Guidelines include a formula for calculating physical separation between towers ((Tower Length X Tower Height) / 200). The Guidelines indicate that the City recognizes that Tall Buildings come in all shapes and sizes, and that a dynamic, scalable approach to separation is key to providing towers that are responsive to their specific contexts. For the proposed building, based on the formula, the physical separation is calculated at 9.8 m. According to Ms. Sinclair, the most important separation for the Property is the rear yard setback of 14 m, which exceeds the recommended 9.8 m. In addition, the tower face is separated from the side lot lines by 2.8 m and 5 m, respectively, which exceed the minimum ZBL requirement of 1.2 m side yard setback. With that said, the separation Guideline is not met.

[65] Looking at the site context, Ms. Sinclair explained that towers are unlikely to be permitted on the lands abutting the northern property line of the Property because properties on the south side of Roy Street are limited in height and density permissions. This area has previously been identified as the interior of the Civic Centre Neighbourhood. Weber separates future towers in the Urban Growth Centre, which means tower separation would be to the centre of the Weber right-of-way, exceeding the recommended tower separation.

[66] Finally, Ms. Sinclair detailed constraints on the sites next to the Property (18 and 28 Weber), including their small lot sizes which would require consolidation with the lots next to them before a tower development proposal could be brought forward. She also noted that there are cultural heritage resources on these properties which would either have to be integrated or demolished for any development proposal to occur.

[67] Overall, Ms. Sinclair believed the proposed building achieved an appropriate transition of built form because the proposed building height (19 storeys) allows for height transition from the greater building heights contemplated and approved on the opposite side of Weber, for example, a 27-storey building across the street in the urban Downtown core.

[68] Regarding overlook, it was Ms. Sinclair's evidence that the guideline did not apply to the proposed tower. The guideline specifically sates "overlook is the overlap that exists between two neighbouring towers" with maximum overlook targets established between abutting towers. According to Ms. Sinclair, the Property does not abut any other towers, and therefore, the guideline does not apply.

[69] Ms. Fahimian spent a large portion of her testimony on the adverse impact of this development on the redevelopment of 18 and 28 Weber. One of her main concerns was the negative impact the proposed tower would have on potential future development on the sites abutting this proposed tower and the negative precedent it would establish. She testified that if another tower was to be built next to the Property on Weber, with the same typology, height, and balconies, only 2.4 m or 4 m apart, the towers, "would be too close".

[70] During cross-examination, when she was asked how it is possible to assess overlook when there are no adjacent towers, she responded that the City has to assess "future potential". She elaborated that the City needs to consider scenarios where the sites "could get consolidated" and there would be a request for the same relief as on this site, and what the impact would be. Furthermore, with respect to the cultural

heritage resources on the adjacent sites, Ms. Fahimian testified that those resources do not need to be demolished, and that they could "be integrated as part of the design of [a] Tower".

[71] Finally, she testified that if the Applications were approved, other applicants will look for the same amendments to build along Weber, meaning similar towers with insufficient separation and overlook.

[72] In closing submissions, counsel for the Appellant argued that Ms. Fahimian's testimony uncovered "an inherent, internal inconsistency in the City's case". She elaborated that Ms. Fahimian was interested in protecting the adjacent properties for their future hypothetical development with towers, while Mr. Schneider and Ms. Choudry are concerned that the Revised Proposal is too tall given the surrounding built form. She argued that these concerns are at odds with each other.

Finding

[73] As a starting point, the Tribunal accepts that the Guidelines should be applied with flexibility, that they are not policy and do not carry the same weight as policies under official plans. Regarding the intent of the UDM, as it relates to Tall Buildings, policy 9.1.1 states:

> …the expectation is not for every project to meet every guideline in all cases. A project may fall short (within reason) of a guideline if it compensates by exceeding targets for other (related) guidelines, or if the project demonstrates justifiable design solutions to achieve a guideline's intention through other means.

[74] The Tribunal accepts Ms. Sinclair's evidence that the Revised Proposal is a compact building, with visual interest, and meets the intent of the UDM. Notably, the UDM states "compact point towers are preferred for intensification areas and smaller sites". The Tribunal accepts Ms. Sinclair's reasons that in this case step backs would not result in achieving more beneficial design outcomes (for example reduce shadow impacts or help with massing). No evidence was provided to the contrary. As previously

established, the proposed building will still appear tall and does not have unacceptable adverse impacts.

[75] Furthermore, much of Ms. Fahimian's evidence focused on the adverse impacts that the Revised Proposal would have on future proposals on the abutting properties, and the negative precedent it would set. These assertions are speculative. There is no evidence before the Tribunal that the abutting lots are being redeveloped or are intending to be developed within a certain timeframe. The evidence before the Tribunal suggests there are valid constraints on the abutting lots which will prevent tall towers from being built. Only if the abutting lots consolidate with properties next to them will tall development be possible. Even so, what that development will look like is unknown, and there is no intention of any proposal before the Tribunal. In addition, each development application is evaluated based on its own unique circumstances and applicable policies, and determined based on its own merits. Therefore, the argument of setting a bad precedent is not very persuasive.

[76] While Ms. Fahimian spoke mainly about the impact of the Revised Proposal on abutting lots, she failed to acknowledge that there would be adequate separation to the rear yard (14 m versus the 9.8 m recommendation in the UDM based on the formula). She did not discuss any adverse impacts from the rear yard separation as her main adverse impacts related to privacy and overlook issues regarding the abutting lots. She did mention that there would be hindrance of sky views because the tower would be perceived as too tall. However, as noted earlier, there is no height restriction in the ZBL. Simply because a building appears "too tall" does not mean the intent of the Guidelines is not met; especially since the Tribunal has found there is no unacceptable adverse impacts.

[77] Finally, the Tribunal accepts counsel for the Appellant's argument that there appears to be an inherent inconsistency in the City's case. Ms. Fahimian appears to be in favour of tall buildings, or at least acknowledges that tall buildings are a possibility on Weber, while Mr. Schneider and Ms. Choudry, as will be discussed further below,

believe tall buildings do not belong in the Civic Centre Neighbourhood. While there seems to be an inconsistency, the Tribunal finds that what the case boils down to is whether the Revised Proposal itself makes sense based on a complete analysis. This analysis includes the reasons, or justifications, as to why certain guidelines are not met, and whether there are any actual adverse impacts. If so, the analysis continues as to how can the adverse impacts be mitigated. In this case, as discussed previously, the Tribunal accepts the reasons why some guidelines in the UDM are not met, but finds overall that the Revised Proposal meets the intention of the UDM as it relates to Tall Buildings, including separation and overlook.

UDM Tall Buildings – Outdoor Amenity Area

[78] Both witnesses agreed that there is no requirement in the current ZBL for minimum amenity space.

[79] Under Part C of the UDM, section 11 (Outdoor Amenity Areas – Multiple Residential and Institutional Development), the following two sections are provided:

> An outdoor amenity area shall be provided for all residential and institutional developments having a residential component that contains more than either 20 residents or 20 dwelling units and provide a minimum of 2.0 square metres of common outdoor amenity space at ground level for either each resident or each dwelling unit.
>
> Notwithstanding the above, each residential or institutional development having a residential component shall have a minimum of 40.0 square metres of outdoor amenity area. [emphasis added]

[80] According to Ms. Sinclair, the proposed ZBA states “a minimum amenity area of 1,500 square metres shall be provided and shall include balconies and common amenity space.” Additionally, there would be a requirement that “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.” Ms. Sinclair explained that Part C of the UDM was prepared 15 years ago and was intended for low density, multiple residential developments, such as townhouses, which would have larger pieces of land. This guideline speaks to outdoor common spaces at ground level.

According to Ms. Sinclair, most tower intensification projects cannot provide ground level outdoor amenity spaces, and therefore, amenity is provided through the rooftops and balconies. She explained that, as a result of the witness statements, one of the proposed residential units on the Site Plan has now changed and is intended to be a common amenity space. For example, the initially proposed 168 residential units has changed to 167 residential units. She further explained that if the calculation that is intended to be on the ground level is applied to all of the proposed building (including balconies and common amenity spaces), the proposed ZBA far exceeds the requirement in the UDM as it relates to outdoor amenity space.

[81] Ms. Fahimian testified that the Revised Proposal would not meet the requirement of outdoor amenity space when considering the formula in the guideline (which according to her calculation was over 500 m^2). However, counsel for the Appellant argued that the second provision in section 11 of Part C of the UDM expressly supersedes the rate and requires a minimum of 40 m^2 for the “residential development”. Of note, Ms. Fahimian’s Witness Statement calculates outdoor amenity space using the stipulated formula, whereas the formula in the UDM is for common outdoor amenity area.

[82] Under cross-examination, Ms. Fahimian said that balconies are private, and not shared, although she did concede that a “small roof top” amenity area was added to the Site Plan. In closing submissions, counsel for the City stated that when Ms. Sinclair was asked to provide an example of the City allowing private balconies to be counted toward amenity space under the ZBL, she was unable to do so. He argued that private balconies are not permitted to be counted as outdoor amenity spaces in the ZBL. Counsel for the Appellant argued that the City did not take Ms. Sinclair to specific provisions in the ZBL that prohibit balconies to be included in outdoor amenity spaces.

Finding

[83] The Tribunal accepts Ms. Sinclair's evidence that the proposed ZBL meets the intention of the guideline regarding outdoor amenity space. The Tribunal finds that when reading both paragraphs of the guideline, the intention is to have an outdoor amenity space at a minimum of "40 square metres". By enshrining the minimum standard of "40 square metres", whereas the current ZBL has no requirement whatsoever, the Revised Proposal aims to meet the minimum guideline. It is also reasonable to assume residents of this dwelling (rental, one-bedroom units in a MTSA across the street from Downtown centre) are not expecting to have a great amount of outdoor facility with their building. Balconies are a viable, welcomed feature which will allow for outdoor amenities, and there is no evidence to suggest balconies are specifically excluded from the consideration of outdoor amenity space in the ZBL, or guideline itself. Ms. Fahimian suggested that balconies are private, rather than shared. Although she interprets this to mean they cannot be included in the calculation of "common amenity area at ground level", the Tribunal finds that there is no evidence that specifically excludes balconies and given the Revised Proposal itself (rental apartment building), it makes sense to include balconies as part of the outdoor amenity space in the calculation. In any event, the Tribunal finds the intention of "outdoor amenity" as well as "common amenity" has been met via the room and roof top amenity space, and indoor common amenity room.

AGREED FACTS AND ISSUES – CULTURAL HERITAGE

[84] The witnesses agree the Property is in the Civic Centre Neighbourhood, designated under Part V of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18 ("Heritage Act"). The Civic Centre Neighbourhood was approved in 2007, and the associated Civic Centre Neighbourhood Heritage Conservation District Plan ("District Plan") was adopted thereafter. There is agreement that the purpose for the District Plan is to be a policy framework to ensure that heritage attributes and character of the neighbourhood can be conserved as the neighbourhood changes over time, and that Weber has area specific

policies which need to be considered when new development is proposed. The area specific policies are discussed below.

[85] The contested issues relate to adverse impacts on cultural heritage resources and the district itself meeting some of the Weber guidelines, including meeting the angular plane and the front and rear yard setback requirements.

Adverse Impacts to Cultural Heritage Resources and Civic Centre Neighbourhood

[86] Mr. Currie opined that the proposed building does not conflict with the objectives and principles of the District Plan and does not result in impacts to surrounding cultural heritage resources. When considering the Weber policies in the District Plan, Mr. Currie testified that there is recognition that Weber is designated as “High Density Commercial Residential”, and that according to policy 3.3.5.2(d) of the District Plan:

> (d) Where redevelopment is proposed on vacant or underutilized sites, new development shall be sensitive to and compatible with adjacent heritage resources on the street with respect to height, massing, built form and materials. [emphasis added]

[87] He stated that there is no definition of “compatible” in the District Plan, and therefore the City OP definition of “compatible” was used in the Heritage Impact Assessment (“HIA”), which was provided to the City. As has been discussed earlier in the Decision, a key component of the “compatibility” definition is “adverse impacts”. Accordingly, Mr. Currie used the InfoSheet #5, which was prepared by the Ministry of Culture in 2005 to assist planners in cultural heritage matters. The InfoSheet #5 includes a list of what negative impacts on cultural heritage resources can include. Mr. Currie identified each criterion and testified that there is no adverse impact from the proposed building. For example, he testified that there is no risk of isolation of a property from its 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 or vistas. In fact, he said the District Plan does not identify what significant views or vistas are (where some other district plans do).

Nevertheless, 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.

[88] Additionally, he stated that even a shorter building of two storeys would have the same result. As for the two neighbouring churches, which have been identified as landmarks, the proposed building would not obstruct their views. He reiterated that simply seeing a tall building in the Civic Centre Neighbourhood was not an obstruction. In his opinion, under the “obstruction” criteria, there would have to be obstruction of the view of something significant that needs to be maintained and therefore would result in a negative adverse impact. When asked specifically at what point does a development have an impact on cultural heritage resources, his short answer was “when any of the criteria was not met, or if the development was not on Weber and in the middle of the Civic Centre Neighbourhood … therefore the impact would have to be assessed”. He testified that there may be potential impact to adjacent buildings as a result of construction activities and mitigation measures, such as motivation for vibration impacts are recommended in the HIA.

[89] Ms. Choudry’s evidence primarily related to the fact that the District Plan focuses on built heritage typologies and not land use. Her rationale was that the Civic Centre Neighbourhood recognizes architectural, streetscape, and historical character rather than use. She testified that, since the District Plan was put in place, not a single tall building was approved or built in the Civic Centre Neighbourhood, including on Weber. Ms. Choudry testified that the proposed building would impact the integrity of the Civic Centre Neighbourhood as a whole, adversely impacting its architectural, contextual, and streetscape character. She testified that a proposed building with deficient setbacks and no step back was not appropriate for the Civic Centre Neighbourhood. With that said, she did not provide a detailed analysis of adverse impacts from a cultural heritage perspective on the adjacent properties, nor a more general adverse impact analysis, such as Mr. Currie’s. She said that she had a different approach regarding “compatibility” and that there had to be consideration for the context, scale, massing of

the building, and the fact that it must be “in harmony” with its surroundings. Put simply, she testified that the height of the proposed building would be overpowering, and this was the main reason it was incompatible with the broader Civic Centre Neighbourhood.

Finding

[90] The Tribunal prefers the evidence of Mr. Currie. He was the only witness who did an in-depth analysis of potential negative impacts. Although FOBT asserted in its written closing submissions that InfoSheet #5 is invalid authority, as it is an educational pamphlet used alongside Provincial Policy Statement, 2005 to aid planners in evaluating applications, the Tribunal finds that it is a helpful tool. It outlines potential negative impacts and therefore allows proposals to be assessed against those criteria. Additionally, neither FOBT nor the City raised any concerns or objections to the use of the InfoSheet #5 during Mr. Currie’s cross-examination. Furthermore, the Tribunal does not accept Ms. Choudry’s assertions that, simply because the proposed building is tall, it will negatively impact the Civic Centre Neighbourhood. This proposed building will be situated along Weber, a location intentionally thought to be high density, not in the centre of the Civic Centre Neighbourhood, with no evidence of adverse impacts on any cultural heritage resources next to it or in proximity within the Civic Centre Neighbourhood.

[91] Counsel for the City argued that Mr. Currie’s evidence focused on adverse impacts to the immediately adjacent heritage properties but “lacked an analysis of impacts to on the District more broadly” and that Mr. Currie did not analyze cumulative impacts. The Tribunal finds that Mr. Currie had testified that, just because a building is tall, does not mean it has negative impacts to the Civic Centre Neighbourhood. His explanation was that the location of the proposed building, which is so close to Downtown and not within the center of the Civic Centre Neighbourhood, is a significant reason as to why the proposed build form is appropriate. The Tribunal accepts this as adequate rationale for the analysis of broader impacts for the Civic Centre Neighourhood. As for cumulative impacts, counsel for the City did not take the Tribunal

to any guideline or policy which directs an assessment of cumulative impacts. In summary, the Tribunal finds that there are no adverse impacts from the Revised Proposal on the surrounding cultural heritage resources, nor the Civic Centre Neighbourhood as a whole.

Angular Plane Guideline

[92] According to policy 6.9.4 of the District Plan, there are nine design guidelines which apply to developments along Weber. Among the list, the angular plane guideline ("APG") was the most contentious. The APG 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.

[93] As a starting point, Mr. Currie discussed the intent of the APG, which according to him, is for the tall buildings to have less of an impact on residential properties and not jeopardize their continued residential use. As such, he looked at the land use designation in the Secondary Plan, which identifies properties on the south side of Roy Street as "Office Residential Conversion", and properties on the north side of Roy Street as "Low Rise Residential" (in the centre of the Civic Centre Neighbourhood). He opined that, if the intent of the APG is to protect the low-rise residential buildings, the office conversion acts as a transition, or buffer, between the high density uses on Weber and the low-rise residential areas in the Civic Centre Neighbourhood. Therefore, he applied the starting point of the angular plane analysis at the edge of the low-rise residential buildings (north side of Roy Street rather than the south side of Roy Street). Using this logic, he concluded that the proposed building met the 45-degree angular plane. In addition, Mr. Currie said that, even if the proposed building did not meet the angular plane, the crucial point remained to be the impact from not meeting the angular plane. In this case, he was clear that there was no adverse impact from the proposed building and reiterated that tall buildings do not negate the heritage value of adjacent buildings.

[94] Furthermore, Mr. Schneider agreed with counsel for the Appellant that the proposed building was separated from the established low rise residential neighbourhood by approximately 58 m. This was so because the south side of Roy Street was a buffer for the north side of Roy Street (residential) area.

[95] Moreover, Mr. Currie noted that use of the word “where feasible” in the APG imports a level of flexibility. He explained that this qualifier allows one to consider the massing of the proposed building given the shape of the proposed lot, which is narrow and long. If what results as massing is not feasible, then the APG can be abandoned, or the APG can still apply and the need to analyze the adverse impacts resulting from the height comes into play. At that point, the conclusion of whether or not it should be built, given the impacts, will be determined. Under cross-examination, Mr. Currie agreed with counsel for the City that, based on the visual evidence provided, a building of about 35 units at eight storeys could be built on the Property, within the 45-degree angular plane. Mr. Currie explained that the visual evidence provided by the Appellant was a depiction of what a potential building could look like if it met all the Weber Heritage Guidelines (“WHGs”). Mr. Currie’s evidence was that a built form that met the strict WHGs was neither desirable nor good planning.

[96] Mr. Currie agreed with counsel for the City that something could be built, but he questioned whether it would be feasible. In fact, he said the visual depiction “sure looked like it was not feasible … but maybe someone would disagree.” As for comparison purposes, counsel for the City submitted that a proposed building of eight storeys at 50 Weber has step backs, which meant that it met the intent of the angular plane, even when this proposed building exceeded the angular plan. Mr. Currie agreed that having step backs meets the intent of the APG, but he did not agree that it resulted in less negative impact. Specifically, he did not agree with counsel for the City that “if meeting the [angular plane] by a little would be better”. He testified that sometimes a small numerical exceedance has more of an adverse impact than a higher numerical exceedance. He stated that each site has to be evaluated on a site-by-site basis, and it boils down to the adverse impact.

[97] Ms. Choudry's evidence regarding the angular plane focused on the typology since, as she previously testified, typology was the focus of the District Plan. She stated that the houses on Roy Street are residential (they look like residential buildings), they are zoned residential in the ZBL and the City OP allows for residential uses. She confirmed that the angular plane should be measured from the "rear of the property line" because that was the wording of the APG. She did not agree with Mr. Currie that the angular plane should be measured from the edge of the low-rise residential buildings, nor did she agree with what counsel for the City termed "front lot line of a non-adjacent property across the street". Under cross-examination, she agreed with counsel for the Appellant that the District Plan does not define "residential property" and there is nothing in the District Plan which states how one should interpret "residential property". As such, she relied on the definition in the ZBL and the broader definition of "residential property". She testified that using the land use designation is not an acceptable approach in determining what constitutes "residential property" because future designations can change and "she cannot predict what will happen", but the intent of the APG is to protect the originally constructed residential build forms as part of the residential neighbourhood from potential adverse impacts.

[98] With respect to adverse impacts, her evidence was that a 19-storey building, with no step backs after the first floor, incompatible rear yard step back, and lack of design articulation and height, all contribute to the negative impact. While Ms. Choudry mentioned impacts in her Witness Statement, for example, introducing step backs may decrease shadow impact, she did not provide evidence of any adverse impacts from shadows. Further, she testified at the Hearing that she did not assess adverse impacts to the immediate adjacent properties.

[99] Regarding feasibility, Ms. Choudry agreed with Counsel for the Appellant that the language suggests flexibility, but she said it does not mean the angular plane needs to be applied "incorrectly". The intent should be to meet the angular plane and if going past it, there needs to be mitigative measures provided.

Finding

[100] The Tribunal understands Mr. Currie's explanation regarding his measurement of the angular plane from the edge of the low-rise residential buildings (north side of Roy Street rather than the south side of Roy Street). With that said, a plain reading of the APG suggests that the intent is to protect residential properties, and the starting point of measuring is the rear property line of said residential properties. Mr. Currie testified that the focus should be on land use, and therefore, the land designation of "Office Residential Conversion" acts as a buffer. The name "Office Residential Conversion" itself suggests that there is potential of people living in the build form, irrespective of whether the build form gets converted into an office.

[101] To Ms. Choudry's point, the land use may change in the future. Therefore, in this case, the Tribunal prefers Ms. Choudry's evidence and finds that the angular plane should be measured from the rear property line of the residential properties on the south side of Roy Street, and the proposed building does not meet the 45-degree angular plane when measured from the properties on the south side of Roy Street.

[102] With that said, even if the proposed building does not meet the 45-degree angular plane, the language of "feasible" and the suggestion to "minimize visual impacts" within the APG suggests that the key consideration is what impact will occur if the 45-degree angular plane is not met. In this case, Mr. Currie was quite clear that there is no adverse impact. No impact from shadows (as provided by the Shadow Study) and no impact on heritage resources, as discussed earlier. Ms. Choudry did not provide adequate evidence of adverse impacts. As such, the Tribunal finds the intent of the APG has been met as there are no adverse impacts from not meeting the APG.

Front Yard and Rear Yard Setback

[103] Both Mr. Currie and Ms. Choudry agreed that, according to s. 41.2(2) of the Heritage Act, in the event of a conflict between a district plan and a zoning by-law that affects a particular designated district, the district plan prevails. It was accepted that a

district plan has policies for high density development, and that these polices are more restrictive than the applicable zoning by-law. With that said, the WHGs' requirement of the rear yard setback in the Heritage District Plan is 15 m. The ZBL requirement for the rear yard setback is 7.5 m, or one half the building height, whichever is greater. In this case, the ZBL would require a rear yard set back of 28 m. The Applications request a rear yard setback of 14 m. Mr. Currie testified that the intent of the WHGs is met and that there is no impact by the 1 m difference in the WHGs. Ms. Choudry did not provide evidence or reasoning regarding the rear yard setback and how it may be inadequate, given the WHGs.

[104] The Tribunal accepts that, in this case, the rear yard setback requirement follows the District Plan, as per s. 41.2(2) of the Heritage Act, and accepts Mr. Currie's evidence regarding the rear year setback finding that the rear yard setback of 14 m is appropriate.

[105] Regarding the front yard setback, the WHGs in the Heritage District Plan require:

> 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.

[106] The ZBL requirement for the front yard setback is 3 m. Mr. Currie testified that the intent of the WHGs is to have the front yard setback be consistent. In his analysis of the front yard setbacks on Weber, he concluded that there is much variability and not much consistency on Weber. Based on visual evidence submitted by the Appellant, the range of front yard setbacks are from 0 m to approximately 9.5 m. With respect to the adjacent properties, Mr. Currie testified that 18 Weber has a much deeper front yard setback at 12.88 m, and is an outlier, while 28 Weber has a front yard setback of 7.34 m. Of note, these measurements are from the existing property lines and do not consider the road widening required by the Region. Mr. Currie testified that the proposed building would have a front yard setback of 3 m (0 m with the road widening) and is within the range of setbacks. During cross-examination, Mr. Currie explained

that, in terms of the proposed building being aligned “with the building that is most similar to the predominant setback on the street”, the proposed building is not aligned. However, if the intent of the WHGs is considered, the key is to look at the impact that results if the proposed building is not aligned. In this case, he concluded that there is no significant impact. Therefore, the proposed building front yard setback is consistent and meets the intent of the WHGs.

[107] Ms. Choudry testified that the 0 m front yard setback is not appropriate because it “disrupts the established character” of Weber. With that said, during cross-examination, she agreed with counsel for the Appellant that the general intent of the WHGs is to attempt alignment along the street. She clarified that she would use “consistent” and she agreed that there is a range of frontages along Weber.

[108] The Tribunal finds that the Revised Proposal meets the intent of the WHGs with respect to the front yard setback. The Tribunal accepts that the 3 m front yard setback (0 m with the road widening) is within the range of front yard setbacks and is set back enough so that it does not result in any adverse impacts. The Tribunal preferred the evidence of Mr. Currie as it was thoughtful and provided adequate rationale, as compared to Ms. Choudry. No further rationale or analysis was provided by Ms. Choudry to support her assertion that a 3 m front yard setback (0 m with the road widening) disrupts the established character of Weber. What the Tribunal heard was that there is a range of front yard setbacks with no consistency. Therefore, the front yard setback proposed is acceptable.

SUMMARY FINDINGS

[109] The Property is located within a MTSA and Strategic Growth Area, as defined by the PPS 2024, and within the designated Built-Up Area, and in the Urban Area in the Region OP. The Revised Proposal will create a tall building at the edge of the Civic Centre Neighourhood, across from the Downtown of the City.

[110] The evidence established that the Property is currently underutilized (parking lot) and does not represent a sustainable use of land. The Revised Proposal entails a compact urban development that will provide transit supportive density that is consistent with the PPS 2024, including the provisions of a full range of housing (rental units) and intensification in proximity to transit. The height of the proposed building is appropriate and provides a transition in height from the unlimited heights permitted on the south side of Weber to the lower density uses internal to the Civic Centre Neighbourhood. The building is compatible with the surrounding land uses with no unacceptable adverse impacts. Therefore, the Revised Proposal conforms with the policies in the City OP, which requires residential intensification to be designed to respect the existing character, with a high degree of sensitivity to surrounding context.

[111] Furthermore, the evidence demonstrated that the Revised Proposal met the intent of the UDM regarding Tall Buildings, especially as it relates to separation and overlook. With respect to the cultural heritage issues, the evidence showed that the Revised Proposal will have no impact on the surrounding cultural heritage resources identified in the District Plan and will not impact the heritage value and attributes of the Civic Centre Neighbourhood.

[112] The Tribunal finds that the Revised Proposal has sufficient regard for matters of provincial interest under s. 2 of the Act. It is consistent with the PPS 2024 and conforms to the City OP and Region OP, both of which promote intensification in underutilized sites within the Built-Up Urban Area. The Revised Proposal has sufficient regard for the UDM, is consistent with the objectives of the District Plan, represents good planning, and is in the public interest.

ORDER

[113] **THE TRIBUNAL ORDERS THAT** the appeals are allowed, and the City of Kitchener Official Plan and Zoning By-law No. 85-1 are amended, as set out in **Attachment 1** and **Attachment 2** to this Order.

[114] The Tribunal authorizes the municipal clerk of the City of Kitchener to assign numbers to the Official Plan Amendment and Zoning By-law for record keeping purposes.

"Yasna Faghani"

YASNA FAGHANI
MEMBER

"Gregory J. Ingram"

GREGORY J. INGRAM
MEMBER

ATTACHMENT 1

AMENDMENT NO. TO THE OFFICIAL

PLAN OF THE CITY OF KITCHENER

CITY OF KITCHENER

22 Weber Street Wet

INDEX

AMENDMENT NO. TO THE OFFICIAL PLAN

OF THE CITY OF KITCHENER

SECTION 1 – TITLE AND COMPONENTS

This amendment shall be referred to as Amendment No. XX to the Official Plan of the City of Kitchener. This amendment is comprised of Sections 1 to 4 inclusive and Schedule 'A'.

SECTION 2 – PURPOSE OF THE AMENDMENT

The purpose of this amendment is to add a Special Policy to the 1994 Official Plan to increase the maximum permitted density on the subject lands and to amend Map 9 to add a Special Policy Area.

SECTION 3 – BASIS OF THE AMENDMENT

The subject lands are located at 22 Weber Street West. The subject lands are designated High Density Commercial Residential in the Civic Centre Neighbourhood Secondary Plan, which forms part of the 1994 Official Plan. The High Density Commercial Residential designation in the Civic Centre Secondary Plan permits multiple dwellings and recognizes the proximity of the Civic Centre Neighbourhood to the higher intensity land uses of the Downtown and the location of the property on a primary road. The subject lands are also located within a Protected Major Transit Station Area (PMTSA) which is considered a primary intensification area.

An Official Plan Amendment is required to add a Special Policy to permit a maximum Floor Space Ratio (FSR) of 7.95 prior to any development occurring on the lands.

This will bring this site into conformity with the Regional Official Plan as well as the City of Kitchener Official Plan which directs intensification to Major Transit Station Areas.

The subject lands are located in close proximity to multiple LRT Stops and are identified in the Regional Official Plan and the City of Kitchener 2014 Official Plan as being within a Major Transit Station Area (MTSA). The proposed development includes multiple residential development at a density that supports both transit and active transportation.

The proposed development will implement the vision as set out in the Official Plan for lands within a MTSA as being a compact, dense and transit supportive site. The subject lands are a vacant parcel, strategically located at the periphery of the Civic Centre Neighbourhood, immediately adjacent to the downtown and is buffered from the stable residential area at the interior of the neighbourhood by the Office Residential Conversion designation. Its prominent location makes it ideal for the density proposed.The maximum floor space ratio, setbacks for the building, minimum amenity space, as well as bicycle parking will be regulated in the site-specific amending zoning by-law to ensure urban design elements are implemented and onsite constraints are addressed.

The proposal is consistent with the 2024 Provincial Planning Statement and conforms to the Regional Official Plan, as it promotes walkability, is transit-supportive, maximizes the use of existing and new infrastructure, and assists in development of this area as a compact and complete community through the broad range of uses. The proposed development implements the redevelopment vision for the Major Transit Station Area as prescribed in both the current and newly adopted Official Plan and is, therefore, good planning.

SECTION 4 – THE AMENDMENT

1. The 1994 City of Kitchener Official Plan is hereby amended as follows:
   a) Part 3, Section 13.1.3 Special Policies is amended by adding new 13.1.3.XX thereto as follows:

      "XX. Notwithstanding the High Density Commercial Residential land use designation and policies:

      i. The maximum permitted Floor Space Ratio shall be 7.95.

   c) Map 9– Civic Centre Neighbourhood Plan for Land Use is amended by adding a Special Policy Area to the lands municipally known as 22 Weber Street West.

ATTACHMENT 2

PROPOSED BY – LAW

XXXXX, 2025

BY-LAW NUMBER ___

OF THE

CORPORATION OF THE CITY OF KITCHENER

(Being a by-law to amend By-law 85-1, as amended, known as
the Zoning By-law for the City of Kitchener)
22 Weber Street West

WHEREAS it is deemed expedient to amend By-law 85-1 for the lands specified above;

NOW THEREFORE the Ontario Land Tribunal enacts as follows:

1. Schedule Number 121 of Appendix “A” to By-law Number 85-1 are hereby amended by changing the zoning applicable to 22 Weber Street West, in the City of Kitchener, from Commercial Residential Three Zone (CR-3) to Commercial Residential Three Zone (CR-3) with Special Regulation Provision XXXR and Holding Provision XXXH.

2. Appendix “D” to By-law 85-1 is hereby amended by adding Section XXXR thereto as follows:

XXXR

Notwithstanding Section 46.3, Section 6.1.2a), and 6.1.2b)vi) of this By-law, within the lands zoned Commercial Residential Three Zone (CR-3), shown as affected by this subsection, on Schedule 121 of Appendix “A”, a Multiple Dwelling shall be permitted in accordance with the following:

Design Standards & Parking

a. The maximum Floor Space Ratio shall be 7.95.

b. The maximum Building Height shall be 19 storeys and 59 metres.

c. The minimum Front Yard shall be 0.0 metres.

d. For portions of the building up to 5.0 metres in height, the minimum Rear Yard shall be 8.0 metres.

e. For portions of the building greater than 5.0 metres in height, the minimum Rear Yard shall be 14 metres.

f. The minimum Side Yard shall be 2.5 metres.

g. The minimum landscape area shall be 5%.

h. Dwelling Units shall be permitted on the ground floor within either a mixed-use or multiple dwelling building.

i. Exclusive use patio areas are not required for ground floor units.

j. Rear Yard Access requirements do not apply.

k. The minimum ground floor height shall be 4.5 metres.

l. The second storey shall be stepped back a minimum of 2.0 metres above the ground floor.

m. The minimum Class A Bicycle Parking Stall requirement shall be 1 per dwelling unit, located within the unit or within a secure bicycle storage room.

n. The minimum Class B Bicycle Parking Stall requirement shall be 6.

o. The minimum parking requirement shall be 0 spaces per unit.

p. The minimum visitor parking requirement shall be 0 spaces per unit.

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

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.

s. Geothermal Energy Systems shall be prohibited.

t. <u>Balconies shall not permitted on the rear building elevation.</u>

u. The maximum percentage of façade openings (windows or entrances) on the rear building elevation shall be limited to 15% of the total rear façade area.

3. Appendix “F” to By-law 85-1 is hereby amended by adding Section XXXH as follows:

XXXH

Notwithstanding Section 46.1 of this By-law, within the lands zoned CR-3 and shown as affected by this subsection on Schedule Numbers 84 and 121 of Appendix "A":

No residential use shall be permitted until a detailed transportation (road) and stationary noise study has been completed and implementation measures recommended to the satisfaction of the Regional Municipality of Waterloo or the City of Kitchener. The detailed stationary noise study shall review stationary noise sources in the vicinity of the site, the potential impacts of noise (e.g. HVAC systems) on the on-site sensitive points of reception and the impacts of the development on adjacent noise sensitive uses.

4. This By-law shall come into effect only upon approval of Official Plan Amendment No. XX, for 22 Weber Street West, but upon such approval, the provisions hereof affecting such lands shall be deemed to have come into force on the date of passing hereof.

Tab 2

Tab 2 Ontario Land Tribunal Rules of Practice and Procedure (Excerpts)

Made under subsection 13(1) of the *Ontario Land Tribunal Act, 2021*

Effective: December 2, 2024

Excerpts from https://olt.gov.on.ca/wp-content/uploads/OLT-Rules-and-Procedures.html

RULE 1

GENERAL MATTERS

1.3 Interpretation of the Rules These Rules shall be liberally interpreted to offer the best opportunity for a fair, just, expeditious and cost-effective resolution of the merits of the proceedings.

1.6 Tribunal May Exempt From Rules The Tribunal may grant all necessary exceptions from these Rules or from any procedural order, or grant other relief as it considers necessary and appropriate, to ensure that the real questions in issue are determined in a fair, just, expeditious and cost-effective manner.

1.7 Failure to Comply With Rules The Tribunal expects compliance with these Rules and adherence to Tribunal orders arising from the application of these Rules by all parties and participants. If a party or participant to any proceeding has not complied with a requirement of these Rules or a Tribunal order, such as a procedural order and any requirement included therein, then the Tribunal has the discretion to determine the consequences of non-compliance and may grant necessary relief or exercise any of its powers authorized by legislation or regulation.

RULE 8

ROLE AND OBLIGATIONS OF A PARTY

8.1 Role and Obligations of a Party Subject to Rule 8.2 below, a person conferred party status to a proceeding before the Tribunal shall participate fully in the proceeding, and by way of example may:

a. Identify issues arising from a notice(s) of appeal for the approval of the Tribunal;
b. Bring or respond to any motion in the proceeding;
c. Receive copies of all documents and supporting information exchanged, relied upon or filed in connection with any hearing event conducted in the proceeding;
d. Present opening and closing submissions at the hearing;
e. Present and examine witnesses and cross-examine witnesses not of like interest;
f. Claim costs or be subject to a costs award when ordered by the Tribunal; and
g. Request a review of the Tribunal's decision or order as set out in Rule 25.

RULE 17

ADJOURNMENTS

17.1 Hearing Dates Fixed Hearing events will take place on the date set unless the Tribunal agrees to an adjournment. Adjournments will not be allowed that may prevent the Tribunal from completing and disposing of its proceedings within any applicable prescribed time period.

17.2 **Requests for Adjournment if All Parties Consent** If all of the parties agree, they may make a written request to adjourn a hearing event. The request must include the reasons, a suggested new date, and the written consents of all parties. However, the Tribunal may require that the parties attend in person or convene an electronic hearing to request an adjournment wherein the Tribunal will consider its powers under Rule 17.5, even if all of the parties consent. The consenting parties are expected to present submissions to the Tribunal on the application of any prescribed time period to dispose of the proceeding.

17.3 **Requests for Adjournment without Consent** If a party objects to an adjournment request, the party requesting the adjournment must bring a motion at least 15 days before the date set for the hearing event. If the reason for an adjournment arises less than 15 days before the date set for the hearing event, the party must give notice of the request to the Tribunal and to the other parties and serve their motion materials as soon as possible. If the Tribunal refuses to consider a late request, any motion for adjournment must be made in person, at the beginning of the hearing event.

17.4 **Emergencies Only** The Tribunal will grant last minute adjournments only for unavoidable emergencies, such as illnesses so close to the hearing date that another representative or witness cannot be obtained. The Tribunal must be informed of these emergencies as soon as possible.

17.5 **Powers of Tribunal upon Adjournment Request** The Tribunal may,

a. grant the request.
b. grant the request and fix a new date or, where appropriate, the Tribunal will schedule a case management conference on the status of the matter;
c. grant a shorter adjournment than requested;
d. deny the request, even if all parties have consented;
e. direct that the hearing proceed as scheduled but with a different witness, or evidence on another issue;
f. grant an indefinite adjournment, if the Tribunal finds no substantial prejudice to the other parties or to the Tribunal's schedule and the Tribunal concludes the request is reasonable for the determination of the issues in dispute. In this case, a party must make a request, or the Tribunal on its own initiative may direct, that the hearing be rescheduled or resumed as the case may be;
g. convert the scheduled date to a mediation or case management conference; and
h. make any other appropriate order.

RULE 25

REVIEW OF A TRIBUNAL DECISION OR ORDER

25.1 **Tribunal's Powers on Review** When exercising its powers pursuant to section 23 of the *OLT Act*, unless specifically excluded by legislation, Rules 25.2 to 25.11 shall govern.

25.2 **Request for Review of Tribunal Decision** The Chair shall consider a person's request for a review of a decision, approval, or order if the person files the request in electronic format as directed by the Tribunal, with the information set out in Rule 25.3. The Chair may further direct that two hardcopies of the request be filed. A request for review does not stay the effect of the original decision, approval or order unless the Chair so orders.

25.3 **Contents of a Request** A party making a request for review shall file notice of such request with the Chair within 30 days of the date of the Tribunal's written decision and copy the request and all supporting material to all other parties. Such notice shall include:

a. the requestor's full name, address, telephone number and e-mail address;

b. the full name, address, telephone number and e-mail address of the requestor's representative (if any);

c. the requestor's or representative's signature;

d. the reasons for the request;

e. the desired result of the review (such as a change or alteration to the decision or a rehearing of the proceeding);

f. any documents that support the request, including copies of any new evidence that was unavailable at the hearing;

g. an affidavit stating the facts relied upon in support of the request;

h. a statement as to whether the requestor has or will submit an application for or judicial review or seek to appeal to the court; and

i. the filing fee (cheque or money order payable to the Minister of Finance) charged under section 11 of the *OLT* Act or other applicable legislation.

25.4 **Initial Screening of the Request** The Tribunal will not consider a request for review if:

a. the request does not include the information required by Rule 25.3;

b. the request is made by a non-party;

c. the request is not filed within 30 days of the date of the Tribunal's written decision unless the Chair determines that there is a valid and well-founded reason to extend this time; or

d. it is a second request by the same party raising the same or similar issues.

25.5 **Filing and Serving a Response to a Request for Review** Parties shall not respond to a request for review until and unless directed by the Tribunal. The Tribunal may require any or all other parties to provide, by a specific date, a response to the request. The Tribunal may identify the issues to address in the response. The response to a request for review shall include the reasons for the response, any supporting documents, and an affidavit stating the facts relied upon in the response. The response shall be served on the other parties and filed with the Chair.

25.6 **Power of the Chair to Dispose of the Request** Subject to Rule 25.7, the Chair may exercise their discretion to:

a. dismiss the request for review, in which case, the decision, approval or order remains in force and effect;

b. order an in person, electronic or written motion for review before the Tribunal to consider the request and submissions as directed in Rule 25.5; or

c. grant the request for review, in whole or in part.

The parties will be notified by the Tribunal in the event the Chair directs a motion or rehearing of the proceeding. A different Member or panel of the Tribunal may be assigned by the Chair to conduct the motion for review or the rehearing.

25.7 **The Exercise of the Chair's Discretion** The Chair may exercise their discretion and grant a request and order a rehearing of the proceeding only if the Chair is satisfied that the request for review raises a convincing and compelling case that the Tribunal:

a. acted outside its jurisdiction;
b. violated the rules of natural justice or procedural fairness, including those against bias;
c. made an error of law or fact such that the Tribunal would likely have reached a different decision;
d. heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or
e. should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

25.8 **The Motion to Review** A Tribunal Member or panel assigned by the Chair to conduct a motion to review may, after receiving submissions from the parties, order a rehearing of all or part of the proceeding only if satisfied that the request raises a convincing and compelling case in respect of one or more of the issues set out in clauses a) to e), inclusive, of Rule 25.7. Should the Tribunal Member or panel that conducts the motion determine that the requestor has not satisfied this requirement, then the request shall be dismissed and the decision, approval or order that is the subject of the request shall remain in force and effect.

25.9 **Procedure on Motion** The Tribunal's Rules on Motions generally apply to a motion to review unless the Tribunal directs otherwise.

25.10 **The Review Hearing** The Tribunal Member or panel that conducts the review hearing shall rehear the appeal or application, in whole or in part, as either directed by the Chair or the decision arising from the motion to review, and may review, confirm, rescind, change, alter or vary any decision, approval or order made by the Tribunal.

25.11 **The Chair May Initiate a Request** The Chair may initiate a Request for Review and exercise their discretion under Rule 25.7 upon notice with reasons to all parties to a proceeding and within a reasonable time after that Tribunal decision, approval or order is made.

Tab 3

Tab 3 Ontario Land Tribunal Act, 2021 S.o. 2021, chapter 4, Schedule 6 (Excerpts)

Current: November 28, 2022 - e-Laws currency date (October 7, 2025)

Excerpts from https://www.ontario.ca/laws/statute/21o04

Witnesses and evidence

18 (1) At any stage of a proceeding, the Tribunal may,

(a) examine any of the following persons:

(i) a party to the proceeding,

(ii) a witness in the proceeding, or

(iii) a person who has made a submission to the Tribunal with respect to the proceeding, other than a party;

(b) require a party to the proceeding to produce evidence or a witness for examination by the Tribunal; or

(c) require a person referred to in subclause (a) (iii) to produce evidence for examination by the Tribunal.

Disclosure to parties

(2) The Tribunal shall disclose any evidence it receives in a proceeding to the parties.

Limits on examination

(3) The Tribunal may limit any examination or cross-examination of a witness,

(a) if the Tribunal is satisfied that all matters relevant to the issues in the proceeding have been fully or fairly disclosed; or

(b) in any other circumstances the Tribunal considers fair and appropriate.

Review

23 Unless another Act specifies otherwise, the Tribunal may review, rescind or vary any order or decision made by it in accordance with the rules.

Appeal

24 (1) Unless another Act specifies otherwise, an order or decision of the Tribunal may be appealed to the Divisional Court, with leave of that court on motion in accordance with subsection (3), but only on a question of law.

Exception, consolidated hearings

(2) Despite subsection (1) or any other Act, there is no appeal from a decision of the Tribunal in a consolidated hearing under section 21.

Notice to Tribunal

(3) A person appealing an order or decision of the Tribunal shall give notice of the motion for leave to appeal to the Tribunal.

Tribunal entitled to be heard

(4) The Tribunal is entitled to be heard on the argument of the appeal, including on the motion for leave to appeal.

No liability for costs

(5) Neither the Tribunal nor any member of the Tribunal is liable for any costs in connection with an appeal under this section.

Tab 4

Tab 4 More Homes Built Faster Act, 2023, S.o. 2022, chapter 21, Schedule 9 (Excerpts)

Excerpt from https://www.ontario.ca/laws/statute/s22021

SCHEDULE 9 PLANNING ACT

(4) Section 16 of the Act is amended by adding the following subsections:

Updating zoning by-laws

(20) No later than one year after the official plan policies described in paragraph 1 or 2 of subsection (21) come into effect, the council of the local municipality shall amend all zoning by-laws that are in effect in the municipality to ensure that they conform with the policies.

Same

(21) The official plan policies referred to in subsection (20) are as follows:

1. Policies listed in subsection 17 (36.1.4).

2. Policies set out in the official plan of a local municipality that,

i. delineate an area surrounding and including an existing or planned higher order transit station or stop, and identify the minimum number of residents and jobs, collectively, per hectare that are planned to be accommodated within the area, and

ii. are required to be included in an official plan to conform with a provincial plan or be consistent with a policy statement issued under subsection 3 (1).

Tab 5A

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: June 28, 2021 **CASE NO(S).:** PL210104

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 v. 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 West
Municipality:	City of Kitchener
Municipality File No.:	20/013/W/JVW
OLT Case No.:	PL210104
OLT File No.:	PL210105

Heard: June 23, 2021 by video hearing

APPEARANCES:

Parties	**Counsel**
30 Duke Street Limited	J. Meader
City of Kitchener	L. MacDonald
Regional Municipality of Waterloo	F. McCrea
Hal Jaeger and Aaron Scriver	P. Kraemer

MEMORANDUM OF ORAL DECISION DELIVERED BY HUGH S. WILKINS ON JUNE 23, 2021 AND ORDER OF THE TRIBUNAL

[1] 30 Duke Street Limited ("Appellant") appealed the failure of the City of Kitchener ("City") to make decisions with respect to the Appellant's applications for official plan and zoning by-law amendments regarding the property located at 22 Weber Street West ("subject property").

[2] On June 23, 2021, the Tribunal held a Case Management Conference ("CMC") at which it addressed process issues, the identification of Parties and Participants, the identification of issues for adjudication at the hearing, the preparation of a draft Procedural Order and Issues List, and opportunities for settlement discussions.

Process Issues

[3] It was brought to the Tribunal's attention that the Regional Municipality of Waterloo ("Region") received short notice of the CMC. It was also informed that several individuals who reside in the vicinity of the subject property may not have received notice. In addition, it was found that notice of only 29 days was provided to those who were served.

[4] The Parties consented to, and the Tribunal directed, the continuation of the CMC with abridged notice of 29 days. The Tribunal directed that a second CMC will be held

for which further notice will be given. The Parties agreed to circulate and review the City's list of property owners and residents in the vicinity of the subject property entitled to notice and to identify any individuals who did not properly receive any notice of the CMC. The Tribunal directed that the Parties submit forthwith a list of those persons to the Tribunal's Case Coordinator and the Tribunal will then provide directions through the Case Coordinator on the service of notice of the second CMC. At the second CMC, the Tribunal will entertain any further requests for Party or Participant status.

Requests for Status at the CMC

[5] At the CMC, the Tribunal received requests for Party status from the Region, Hal Jaeger and Aaron Scriver.

[6] The Region stated that the subject property is located within its jurisdiction and that the Region is a commenting authority for the proposed instruments. None of the Parties objected to the Region having Party status, and the Tribunal granted it status as requested.

[7] The Friends of Olde Berlin Town ("Friends") also requested Party status. It is an unincorporated neighbourhood association comprised mostly of residents who live in the vicinity of the subject property. It set out adverse impact, affordability, transition, compatibility, heritage conservation, environmental and process issues that it wishes to raise at the hearing. As the Friends is not a corporate entity, Hal Jaeger and Aaron Scriver, requested Party status in its place. They are members of the Friends. They reside in close proximity to the subject property and have the same concerns and issues as the Friends regarding the proposed instruments. They stated that steps would likely be taken to have the Friends incorporated. They would then seek to be replaced by the Friends as a Party after incorporation is completed. Based on their proposed issues, none of the Parties objected to the granting of Party status to Mr. Jaeger and Mr. Scriver. The Tribunal granted them status as requested.

[8] Several individuals requested Participant status. They expressed concerns including heritage conservation, compatibility, building height, shadowing and other related issues. None of the Parties objected to any of these requests for Participant status. The Tribunal granted Participant status to:

- Daniel Ariza
- Neil Baarda
- Ilona Bodendorfer
- Richard Buck
- Taijwant (Tony) Geer
- Cathryn Harris
- Bob Jansen
- Adam Joncas
- Donna Kuehl
- North Waterloo Region Branch of Architectural Conservancy Ontario
- Gail Pool

[9] The Tribunal notes that a number of written requests for Participant status were filed with the Tribunal, but not provided to the Appellant. These requests were made by Maaike Asselbergs, Roy Cameron, Simon Euteneier, and Monica Weber. Copies of these written requests for status will be forwarded to the Parties and will be considered at the second CMC.

Identification of Issues and the Preparation of a draft Procedural Order and Issues List

[10] Mr. Jaeger and Mr. Scriver stated that they have prepared a draft Issues List. The City and the Region indicated that they have not yet identified issues for adjudication. The Parties agreed to work together to prepare a draft Procedural Order and Issues List to be considered at the second CMC.

Opportunities for Settlement Discussion

[11] The Parties expressed an interest in pursuing settlement discussions and possibly Tribunal-assisted mediation. They agreed to have discussions prior to the second CMC on a pathway forward for settlement discussions and possibly mediation.

Scheduling of a further CMC and other Items

[12] As noted above, the Parties agreed to the holding of a second CMC. The Tribunal scheduled it for early October 2021.

[13] Mr. Jaeger and Mr. Scriver expressed interest in having the City hold a public meeting to address the proposed official plan and zoning by-law amendment applications. If such a meeting is to be held, the Tribunal recommends that it be held before the second CMC so that any individuals at the public meeting who decide to seek status in this proceeding have an opportunity to do so at the second CMC.

ORDER

[14] The Tribunal orders that the Region, Mr. Jaeger and Mr. Scriver are Parties in this proceeding.

[15] The Tribunal orders that the individuals listed in paragraph [8] above are Participants in this proceeding.

[16] The Tribunal directs that the Parties create a list of any persons who were entitled to, but did not receive, notice of the CMC and to submit the list to the Tribunal's Case Coordinator forthwith. Directions from the Tribunal on the service of notice of the second CMC will then be provided.

[17] The Tribunal directs that the Parties file a draft Procedural Order and Issues List with the Tribunal by no later than **Monday, October 4, 2021**.

[18] The Tribunal orders that a further CMC will be held by video hearing on **Tuesday, October 5, 2021** commencing at **10 a.m.** At this CMC, the Tribunal will entertain any further requests for Party or Participant status, review and finalize a draft Procedural Order and Issues List, and set hearing dates, if possible.

[19] Parties and participants are asked to log into the video hearing at least **15 minutes** before the start of the event to test their video and audio connections:

https://global.gotomeeting.com/join/326164837

Access code: 326 164 837

[20] Parties and participants are asked to access and set up the application well in advance of the event to avoid unnecessary delay. The desktop application can be downloaded at **GoToMeeting** or a web application is available: https://app.gotomeeting.com/home.html.

[21] Persons who experience technical difficulties accessing the GoToMeeting application or who only wish to listen to the event can connect to the event by calling into an audio-only telephone line: (Toll Free): 1 888 299 1889 or +1 (647) 497-9373. The access code is **326 164 837**.

[22] Individuals are directed to connect to the event on the assigned date at the correct time. It is the responsibility of the persons participating in the hearing by video to ensure that they are properly connected to the event at the correct time. Questions

prior to the hearing event may be directed to the Tribunal's Case Coordinator having carriage of this case.

[23] This Member is not seized.

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

Tab 5B

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: November 29, 2021 **CASE NO(S).:** PL210104

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 v. Kitchener (City)

Heard: October 5, 2021 by video hearing

APPEARANCES:

Parties	**Counsel**
30 Duke Street Limited	J. Meader
City of Kitchener	L. MacDonald
Regional Municipality of Waterloo	F. McCrea
Hal Jaeger and Aaron Scriver	P. Kraemer

MEMORANDUM OF ORAL DECISION DELIVERED BY HUGH S. WILKINS ON OCTOBER 5, 2021 AND ORDER OF THE TRIBUNAL

[1] This Decision arises from a Case Management Conference ("CMC") held on October 5, 2021 regarding the appeals filed by 30 Duke Street Limited ("Appellant") of the failure of the City of Kitchener ("City") to make decisions with respect to the Appellant's applications for official plan and zoning by-law amendments regarding the property located at 22 Weber Street West ("subject property").

[2] It was the second CMC in this proceeding. At the CMC, the Tribunal addressed process issues, the identification of Participants, the identification of issues, the preparation of a draft Procedural Order, opportunities for settlement discussions, and the scheduling of both a further CMC and the hearing.

Process Issues

[3] At the initial CMC, held on June 23, 2021, the Tribunal was informed that several individuals who reside in the vicinity of the subject property may not have received proper notice of that CMC. The Tribunal directed that the Parties file a list of those persons who were entitled to, but were not provided, notice of the first CMC and directed that they be served with notice of the second CMC. This would provide them opportunities to request status, if they wished.

[4] At the second CMC, the Appellant filed a further Affidavit of Service of Notice of CMC. It informed the Tribunal that all persons who were entitled to notice, but were not initially given proper notice of the first CMC, had now been properly served with notice of the second CMC. The Tribunal marked the Affidavit of Service as Exhibit 3 in the Tribunal record for this proceeding.

Requests for Participant Status

[5] At the initial CMC in this proceeding, the Tribunal granted Participant status to 11 individuals. At the second CMC, the Tribunal considered nine additional requests for Participant status. These were made by:

- Maaike Asselberg
- Roy Cameron
- Peter Eglin
- Simon Euteneier
- Sally Gunz
- John Ryrie
- Social Development Centre Waterloo Region
- Trudy Wagner
- Monica Weber

[6] These individuals raised concerns, including heritage conservation, affordable housing, compatibility, building height, shadowing, and other related issues. None of the Parties objected to these requests for Participant status and the Tribunal granted them, as requested.

[7] No requests for Party status were made at the second CMC.

Identification of Issues and the Preparation of a draft Procedural Order and Issues List

[8] At the second CMC, the Appellant stated that the Parties had prepared draft issues lists. The Parties undertook to consolidate them and file with the Tribunal a finalized list along with a draft Procedural Order. To date, finalized versions of these documents have not yet been filed with Tribunal.

Opportunities for Settlement Discussions

[9] At the second CMC, the Parties continued to express an interest in pursuing settlement discussions and possibly Tribunal-assisted mediation. The Tribunal encouraged the Parties to engage in such discussions and to request Tribunal-assisted mediation, if needed.

Scheduling of a further CMC and Hearing Dates

[10] The Parties requested the scheduling of a further CMC to address any further requests for Participant status, settlement discussion opportunities, and the possible need for motions. A final Procedural Order and Issues List will also be determined at the CMC. The Tribunal scheduled the CMC for early December 2021.

[11] The Parties also requested that the Tribunal schedule a 20-day hearing for the appeal. They identified the witnesses that they propose to call and the time that they estimate that each will need. The Tribunal scheduled the hearing to commence in late August 2022.

ORDER

[12] The Tribunal orders that the individuals listed in paragraph [5] above are Participants in this proceeding.

[13] The Tribunal orders that a further CMC will be held by video hearing on **Friday, December 3, 2021** commencing at **10 a.m.** At this CMC, the Tribunal will entertain any further requests for Participant status, settlement discussion opportunities, and the possible need for motions and it will finalize the Procedural Order and Issues List.

GoTo Meeting: https://global.gotomeeting.com/join/447352581
Audio-only telephone line: Toll-Free 1-888-455-1389 or +1 (647) 497-9391
Access Code: 447-352-581

[14] The Tribunal orders that the hearing in this matter will commence by video hearing on **Monday, August 29, 2022** at **10 a.m.** Twenty days have been set aside.

GoTo Meeting: https://global.gotomeeting.com/join/862056077
Audio-only telephone line: Toll-Free 1-888-455-1389 or +1 (647) 497-9391
Access Code: 862-056-077

[15] Parties and Participants are asked to log into the CMC and hearing at least **15 minutes** before the start of the event to test their video and audio connections.

[16] Parties and Participants are asked to set up the video hearing application well in advance of the events to avoid unnecessary delay. The desktop application can be downloaded at **GoToMeeting** or a web application is available: **https://app.gotomeeting.com/home.html.**

[17] Persons who experience technical difficulties accessing the GoToMeeting application or who only wish to listen to the event can connect to the event by calling into an audio-only telephone line. The **Access Code** is **as indicated above**.

[18] Individuals are directed to connect to the events on the assigned dates at the correct time. It is the responsibility of the persons participating in the CMC and hearing by video to ensure that they are properly connected to the events at the correct time. Questions prior to the hearing events may be directed to the Tribunal's Case Coordinator having carriage of this case.

[19] There will be no further notice.

[20] This Member is not seized.

“Hugh S. Wilkins”

HUGH S. WILKINS
MEMBER

Tab 5C

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: December 10, 2021 **CASE NO(S).:** PL210104

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 West
Municipality:	City of Kitchener
Municipality File No.:	20/013/W/JVW
OLT Case No.:	PL210104
OLT File No.:	PL210105

Heard: December 3, 2021 by Video Hearing ("VH")

APPEARANCES:

Parties	**Counsel/Representative***
30 Duke Street Limited ("Applicant")	J. Meader
City of Kitchener ("City")	L. MacDonald
Regional Municipality of Waterloo ("Region")	F. McCrae
Friends of Olde Berlin ("Friends")	H. Jaeger*

MEMORANDUM OF ORAL DECISION DELIVERED BY BLAIR S. TAYLOR ON DECEMBER 3, 2021 AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The Tribunal held its third Case Management Conference ("CMC") on this matter for which another panel of the Tribunal had set down a four-week hearing to commence on August 29, 2022.

[2] The matter before the Tribunal concerned appeals of applications for an Official Plan Amendment ("OPA") and a Zoning By-law Amendment ("ZBA") for the lands known municipally as 22 Weber Street W.

[3] In the lead up to this CMC, the Tribunal had been provided with Articles of Incorporation, another request for participant status, and another draft of a Procedural Order and Issues List ("PO").

[4] For the reasons set out below, the Tribunal assigned party status to the Friends of Olde Berlin ("Friends"), granted participant status to Kathryn Forler, directed a resubmission of the Applicant's revised plans, and set a fourth CMC for April 4, 2022.

DECISION

[5] At the CMC of June 28, 2021, the Tribunal had awarded party status to Hal Jaeger and Aaron Scriver, but had denied party status to the Friends as it was not yet incorporated.

[6] In the lead up to the hearing, Articles of Incorporation were filed with the Tribunal and marked as Exhibit 1 to the CMC for the Friends. At the request of Mr. Jaeger and Mr. Scriver, and on consent of all the parties, the Tribunal assigned that party interest to the Friends, released Mr. Jaeger and Mr. Scriver, and directed that Mr. Jaeger forthwith provide the Articles of Incorporation to counsel for the Applicant.

[7] Exhibit 2 is the request for participant status for Kathryn Forler. On consent of all the parties, the Tribunal awarded participant status to Ms. Forler.

[8] Exhibit 3 is the most recent draft of the PO.

[9] Of note from Exhibit 3 is Issue 39 entitled “Change to Applications”:

> The proposed applications submitted to the City of Kitchener were for a 15 storey proposed development. In their appeal, the Appellant requested an increase to 19 storeys for which the City of Kitchener has not received any revised submissions. The proposed applications received and reviewed by the City of Kitchener and the Region of Waterloo, and before the OLT, are for a 15 storey building. The City and Region have not undertaken any evaluation of the potential impacts of a 19 storey proposed development. (Emphasis added).

[10] As the Tribunal had Exhibit 3 before it, the Tribunal inquired of counsel for the Applicant if the Applicant was intending to pursue a 19-storey development?

[11] Counsel for the Applicant responded that it was her client’s intent to do so and that the draft PO made provision for a revised proposal on or before February 28, 2022.

[12] The Tribunal noted that it was the intent of a Procedural Order and Issues List to provide for a fair and transparent hearing process, and that four additional storeys of

height could potentially *inter alia*: increase the number of units, the overall density, the number of required parking spaces, the number of vehicles, and, depending on the building design, the sun/shadow analysis.

[13] To that end, the Tribunal inquired what process the Applicant intended on following: a formal resubmission of its applications or simply attempting to proceed within the context of the hearing to date, and when all this might occur? The response was that counsel believed it could simply occur as part of the procedure to date and that the materials could be supplied by the end of the year.

[14] Counsel for the City submitted that the Tribunal had no jurisdiction to consider a revised proposal for 19 storeys and that if there were a revised proposal it would require new supporting reports and come in a formal resubmission with all supporting materials.

[15] Counsel for the Region, and Mr. Jaeger agreed that the Issues List could not be finalized as the parties needed to know exactly what was being proposed.

[16] The Tribunal raised with all the parties the subject of alternative dispute resolution and/or Tribunal-led mediation. All the parties were conceptually agreeable but inasmuch as the responding parties had no actual revised plans, they were not in a position to seek formal instructions.

[17] The Tribunal, having heard from all the parties, refused to consider finalizing the draft PO as there was a revised proposal coming forth, which none of the other parties have seen. The Tribunal advised counsel for the Applicant that the parties needed to have the revised proposal in hand in order to fully appreciate what was being proposed before an Issues List could be finalized. To do otherwise would be extremely prejudicial to the City and other opposing parties.

[18] Thus, the Tribunal directed the following;

a. The draft PO (Exhibit 3) will be held in abeyance;

b. The Applicant shall make a fulsome formal resubmission to the City on or before **December 31, 2021** and copy all the parties;

c. The City will utilize its normal protocol and process for the resubmission;

d. The Tribunal set a **fourth CMC for April 4, 2022 commencing at 10 a.m. by VH,** at which time the Tribunal may:

i. Hear any motion (following the Tribunal's Rules of Practice and Procedure) with respect to its jurisdiction to consider a 19 storey development proposal notwithstanding that the applications to the City were for 15 storeys;

ii. Consider any new requests for party status and participant status as a result of the resubmission;

iii. Hear submissions with regard to the draft PO found at Exhibit 3;

iv. Hear any submissions with regard to any off-line discussions on the use of alternative dispute resolution or Tribunal-led mediation; and

v. Consider appropriate future hearing steps.

[19] The **fourth CMC on Monday April 4, 2022, shall commence at 10 a.m. by VH.**

[20] Parties are asked to log into the video hearing at least **15 minutes** before the start of the event to test their video and audio connections:

https://global.gotomeeting.com/join/613665325

Access code: 613-665-325

[21] Parties and participants are asked to access and set up the application well in

advance of the event to avoid unnecessary delay. The desktop application can be downloaded at **GoToMeeting** or a web application is available: https://app.gotomeeting.com/home.html

[22] Persons who experience technical difficulties accessing the GoToMeeting application or who only wish to listen to the event can connect to the event by calling into an audio-only telephone line: +1 (647) 497-9373. The access code is 613-665-325.

[23] Individuals are directed to connect to the event on the assigned date at the correct time. It is the responsibility of the persons participating in the hearing by video to ensure that they are properly connected to the event at the correct time. Questions prior to the hearing event may be directed to the Tribunal's Case Coordinator having carriage of this case.

[24] There will be no further notice.

[25] I am not seized.

[26] Scheduling permitting, I may be available for case management purposes.

[27] This is the Order of the Tribunal.

"*Blair S. Taylor*"

BLAIR S. TAYLOR
MEMBER

Tab 5D

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: April 08, 2022 **CASE NO(S).:** OLT-22-002377

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.:	OLT-22-002377
Legacy Case No.:	PL210104
OLT File No.:	OLT-22-002377
Legacy File No.:	PL210104
LPAT 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
LPAT Case No.:	PL210104
LPAT File No.:	PL210105

Heard: April 4, 2022 by video hearing by ("VH")

APPEARANCES:

Parties	**Counsel/Representative***

30 Duke Street Limited (“Applicant”)	J. Meader
City of Kitchener (“City”)	K. Hughes
Region of Waterloo (“Region”)	F. McCrae
Friends of Olde Berlin Town (“Friends”)	H. Jaeger*

MEMORANDUM OF ORAL DECISION DELIVERED BY BLAIR S. TAYLOR ON APRIL 4, 2022 AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The Tribunal held its fourth Case Management Conference (“CMC”) with regard to this matter.

[2] The Applicant, in an abundance of caution arising from the recent Divisional Court decision (City of Toronto v. 445 Adelaide Street West Inc. 2022 ONSC 1471), requested the adjournment of the 20 day hearing set to commence on **Monday, August 29, 2022**, to enable it to file a heritage permit with the City, to set a further CMC to finalize a revised draft Procedural Order (“PO”), and set a new hearing date for 2023.

[3] With the consent of the parties, the Tribunal adjourned the hearing on the merits set to commence on **Monday, August 29, 2022,** set the date of **Friday, September 30, 2022**, for the fifth CMC, and set a 20 day hearing to commence on **Monday, March 13, 2023**, all for the reasons set out below.

DECISION

[4] In the lead up to this CMC, the Applicant had filed its new plans with the City, and had circulated a revised draft PO (Exhibit 1).

[5] However, in the interim, the Divisional Court released its decision in the

aforementioned City of Toronto v. 445 Adelaide Street West Inc. case where the Divisional Court found that the Tribunal did not have jurisdiction to deal with a land use planning matter when a heritage permit application had not been filed.

[6] As the lands relevant to this hearing fall within a heritage conservation district, the Applicant advised the Tribunal that it intended to file its heritage application permit by the end of **April 2022**, and thereafter the City would have a 90 day window to deal with the application. This application process and timing would not enable the parties to complete the requirements of the draft PO in time for the hearing set for **Monday, August 29, 2022.**

[7] Thus, the request by counsel for the Applicant was to adjourn the hearing set for **Monday, August 29, 2022**, set another CMC for **Friday, September 30, 2022** and set a new 20 day hearing for early **2023**.

[8] The other parties were canvassed and in light of the new heritage permit application and timing for processing, all agreed with the recommendations by counsel for the Applicant.

[9] Hence the Tribunal adjourned the **Monday, August 29, 2022**, hearing.

CMC

[10] The Tribunal set a fifth CMC for **Friday, September 30, 2022**, commencing at **10 a.m.** by VH.

[11] The Tribunal will at that time hear a status update from the parties, and may hear a request to consolidate the anticipated heritage permit appeal with this matter.

[12] Parties and participants are asked to log into the video hearing at least **15 minutes** before the start of the event to test their video and audio connections:

https://global.gotomeeting.com/join/687587165

Access code: 687-587-165

[13] Parties and participants are asked to access and set up the application well in advance of the event to avoid unnecessary delay. The desktop application can be downloaded at **GoToMeeting** or a web application is available: https://app.gotomeeting.com/home.html

[14] Persons who experience technical difficulties accessing the GoToMeeting application or who only wish to listen to the event can connect to the event by calling into an audio-only telephone line: **(647) 497-9373 or Toll Free 1-888-299-1889**. The access code is **687-587-165**.

[15] Individuals are directed to connect to the event on the assigned date at the correct time. It is the responsibility of the persons participating in the hearing by video to ensure that they are properly connected to the event at the correct time. Questions prior to the hearing event may be directed to the Tribunal's Case Coordinator having carriage of this case.

[16] There will be no further notice of the CMC

[17] I am not seized of the CMC.

NEW HEARING

[18] The Tribunal also set a new 20 day hearing for **Monday, March 13, 2023**, commencing at **10 a.m.** by VH.

[19] Parties and participants are asked to log into the video hearing at least **15 minutes** before the start of the event to test their video and audio connections:

https://global.gotomeeting.com/join/719383509

Access code: 719-383-509

[20] Parties and participants are asked to access and set up the application well in advance of the event to avoid unnecessary delay. The desktop application can be downloaded at **GoToMeeting** or a web application is available: https://app.gotomeeting.com/home.html

[21] Persons who experience technical difficulties accessing the GoToMeeting application or who only wish to listen to the event can connect to the event by calling into an audio-only telephone line: **(647) 497-9373 or Toll Free 1-888-299-1889**. The access code is **719-383-509**.

[22] Individuals are directed to connect to the event on the assigned date at the correct time. It is the responsibility of the persons participating in the hearing by video to ensure that they are properly connected to the event at the correct time. Questions prior to the hearing event may be directed to the Tribunal's Case Coordinator having carriage of this case.

[23] There will be no further notice of the hearing.

[24] I am not seized of the hearing.

NEW PARTICIPANT

[25] The Tribunal on consent of all the parties granted participant status to Neil Jensen.

DRAFT ("PO")

[26] The Tribunal had before it a draft PO (Exhibit 1) which had anticipated the 20 day hearing commencing on **Monday, August 29, 2020**.

[27] The draft PO will require significant revision with regard to the dates and timing for the exchange of witness statements etc., and possibly new or perhaps refined issues.

[28] The Tribunal's hearing schedule is a scarce public resource that must be carefully managed to optimize its availability to all, especially in these Covid times.

[29] Thus, the Tribunal directed that the proposed submission of the Hearing Plan (for the 20 day hearing on the merits) in paragraph 22 be increased from 10 days to 65 days so that any surplus hearing day or days that might arise for example from the settlement of issues, or the scoping of issues might be effectively used by the Tribunal.

[30] The Tribunal tasked the counsel for the Applicant to coordinate with the parties and prepare a revised draft PO and on consent forward it to the Case Coordinator on or before **Friday, September 23, 2022**, for review prior to the fifth CMC.

[31] This is the Order of the Tribunal.

"Blair S. Taylor"

BLAIR S. TAYLOR
MEMBER

Tab 5E

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: December 02, 2022 **CASE NO(S).:** OLT-22-002377
(Formerly) PL210104

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 West
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 West
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

Heard: October 26, 2022, by video hearing

APPEARANCES:

Parties	**Counsel/Representative***
30 Duke Street Limited ("Applicant/Appellant")	Jennifer Meader
City of Kitchener ("City")	Lesley MacDonald
Region of Waterloo ("Region")	Andy Gazzola
Friends of Olde Berlin Town ("FOBT")	Hal Jaeger*

DECISION DELIVERED BY D. CHIPMAN AND ORDER OF THE TRIBUNAL

INTRODUCTION AND CONTEXT

[1] The Tribunal originally set this Case Management Conference ("CMC") to organize for hearings of the merits of appeals filed regarding an official plan amendment ("OPA") and zoning by-law amendment ("ZBA") related to land owned by the Appellant.

Another panel of the Tribunal has set down a four-week hearing to commence on March 13, 2023.

[2] The Tribunal was advised by Ms. Meader, counsel to the Appellant that the Subject Land is located within the Civic Centre Neighbourhood Heritage Conservation District ("CCNHCD"), are designated under Part V of the *Ontario Heritage Act* and as such, any new development on the Subject Land is subject to the policies of the Civic Centre Neighbourhood Heritage Conservation District Plan ("CCNHCD Plan") and therefore a *Heritage Act* permit is required.

[3] Although the CCNHCD Plan recognizes that this property is vacant, the City refused the *Heritage Act* Permit application and the Applicant appealed to the Ontario Land Tribunal ("OLT"), pursuant to subsection 42(6) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18.

[4] The Tribunal was informed by Ms. Meader that the purpose of this CMC was to seek the Tribunal's determination on a request to consolidate the heritage permit file (OLT Case No.: OLT-22-004383) with that of the OPA and ZBA file (OLT Case No.: OLT-22-002377) and to review the draft Procedural Order ("PO") in relation to the Phasing of the hearing.

[5] The Subject Land is municipally known as 22 Weber Street West, Lot 5, Plan 390, in the City of Kitchener.

[6] The proposed development of the Subject Land can be described as construction of a new 19-storey multiple residential building, having 162 total units and 24 parking spaces.

[7] The Subject Land is designated ‘High Density Commercial Residential’ in the Civic Centre Secondary Plan. The High Density Commercial Residential designation permits a range of uses, including free standing multiple residential buildings at a maximum Floor Space Ratio (“FSR”) of 4.0. The OPA proposes to retain the existing designation but with an increased FSR permission of 8.0.

[8] The ZBA application requests the Subject land be rezoned Commercial Residential Three Zone with Site Specific Provisions in order to permit the development as proposed:

1. A minimum front yard setback of 0.8 metres is proposed along King Street East, whereas a minimum front yard of 3.0 metres is required.
2. A minimum rear yard setback of 15.0 metres is proposed, whereas a minimum setback of one half the building height is required.
3. A maximum Floor Space Ratio of 8.0 is proposed, whereas a maximum Floor Space Index of 4.0 is permitted.
4. A minimum landscape area of 8% whereas a minimum area of 10% is required. A minimum of 24 parking spaces whereas a minimum of 183 spaces are required.

PARTICIPANT STATUS REQUEST

[9] The Tribunal received a Participant status request from Kae Elgie, who has made presentations before City Council raising concerns with design guidelines as they relate to heritage conservation. Having canvassed the Parties and receiving no opposition, the Tribunal grants the requester Participant status.

PROCEDURAL ORDER AND ISSUES LIST

[10] The Tribunal considered the following Phasing Plan which was submitted on consent by the Parties that would have the matter proceed in two phases as a result of the addition of the *Heritage Act* permit:

- Phase 1 – The Official Plan Amendment and Zoning By-law Amendment; and
- Phase 2 – The *Ontario Heritage Act* Permit to be scheduled upon issuance of the Tribunal's written Decision in respect of Phase 1 as per, section 42 (1) of the *Ontario Heritage Act* which prescribes that no owner of property in a designated Heritage Conservation District may alter any part of a property or erect or demolish a building without obtaining approval from the municipality by way of a heritage permit.

[11] The Tribunal considered Rule 16.1 of the Tribunal's *Rules of Practice and Procedure* in granting the consolidation which states:

> **CONSOLIDATION**
>
> **16.1 Combining Proceedings or Hearing Matters Together**
> The Tribunal may order that two or more proceedings be consolidated, heard at the same time, or heard one after the other, or stay or adjourn any matter until the determination of any other matter subject to any applicable statutory or regulatory restrictions.

[12] The Tribunal finds that a consolidation of the Applicant's OPA and ZBA planning appeals (OLT Case No. OLT-22-002377) with the *Heritage Act* permit appeal (OLT-22-4383) is the most effective and expeditious manner in which to proceed.

[13] The consolidation of these appeals will not cause prejudice to any of the Parties; but rather, will allow for comprehensive planning considerations to be made in a two-phase hearing process, while at the same time effect efficiencies in the resources of the parties and the Tribunal.

[14] This manner will eliminate the need for a duplication of the evidence and avoids a situation where there are inconsistent findings of fact.

[15] The Tribunal having the benefit of an updated revised draft PO, inclusive of an Issues List containing issues related to sections 41.2.2, 42(1) and 68(3) of the *Heritage Act*, reviewed the contents and deems the PO as being final, in full force and effect for the purpose of governing the required procedures leading up to and including the hearing.

[16] The Tribunal also directs counsel to ensure that the PO includes submission of a hearing plan at least 30 days prior to the scheduled hearing.

[17] The Tribunal directs that Case Nos. OLT-22-002377 and OLT-22-004383 are consolidated.

ORDER

[18] The Tribunal confers Participant status on Kae Elgie.

[19] The Tribunal directs that Case Files Nos. OLT-22-002377 and OLT-22-004383 are consolidated.

[20] The Tribunal Orders that the Procedural Order, attached hereto as Attachment 1 shall be in force and effect for the purpose of governing the required procedures leading up to and including the hearing commencing on March 13, 2023.

[21] A 20-day merit hearing is scheduled to proceed by video hearing commence on **Monday, March 13, 2023,** at **10 a.m.** Parties and participants are asked to log into the video hearing at least **15 minutes** before the start of the event to test their video and audio connections:

https://global.gotomeeting.com/join/719383509
Access Code: 719-383-509

[22] Parties and participants are asked to access and set up the application well in advance of the event to avoid unnecessary delay. The desktop application can be downloaded at **GoToMeeting** or a web application is available: **https://app.gotomeeting.com/home.html**.

[23] Persons who experience technical difficulties accessing the GoToMeeting application or who only wish to listen to the event can connect to the event by calling into an audio-only telephone line: **Toll-Free 1-888-299-1889 or +1 (647) 497-9373**. The **Access Code** is **as indicated above**.

[24] Individuals are directed to connect to the event on the assigned date at the correct time. It is the responsibility of the persons participating in the video hearing to ensure that they are properly connected to the event at the correct time. Questions prior to the hearing event may be directed to the Tribunal's Case Coordinator having carriage of this case.

[25] This Procedural Order now applies to the consolidated hearing and provides direction on the organization of the hearing and requirements before the hearing.

[26] This Member may assist with case management, however, is not seized of the hearing.

[27] No further notice of the hearing is required.

“D. Chipman”

D. CHIPMAN
MEMBER

OLT-22-002377 – Attachment 1

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

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 West
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 West
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.22

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

PROCEDURAL ORDER

1. The Tribunal may vary or add to the directions in this procedural order at any time by an oral ruling or by another written order, either on the parties' request or its own motion.

Organization of the Hearing

2. The hearing will proceed in two phases:

   a. Phase 1 – The Official Plan Amendment and Zoning By-law Amendment; and

   b. Phase 2 – The Ontario Heritage Act Permit, to be scheduled upon issuance of the Tribunal's written Decision in respect of Phase 1.

3. The Phase 1 video hearing will begin on **Monday, March 13, 2023** at **10 a.m.** at the following link:

   GoTo Meeting: https://global.gotomeeting.com/join/719383509
   Audio-only telephone line: Toll-Free 1-888-299-1889 or +1 (647) 497-9373
   Access Code: 719-383-509

4. A further case management conference or telephone conference event may be scheduled if a party or the Tribunal wishes to convert the hearing to an in-person event. Any request for a further case management conference shall be made on or before 75 days prior to the scheduled video hearing.

5. The parties' initial estimation for the length of the Phase 1 hearing is **20** days. The parties are expected to cooperate to reduce the length of the hearing by eliminating redundant evidence and attempting to reach settlements on issues where possible.

6. The parties and participants identified at the case management conferences are set out in Attachment 1.

7. The issues are set out in the Issues List attached as Attachment 2. There will be no changes to this list unless the Tribunal permits, and a party who asks for changes may have costs awarded against it.

8. The order of evidence shall be as set out in Attachment 3 to this Order. The Tribunal may limit the amount of time allocated for opening statements, evidence in chief (including the qualification of witnesses), cross-examination, evidence in reply and final argument. The length of written argument, if any, may be limited either on the parties' consent, subject to the Tribunal's approval, or by Order of the Tribunal.

9. Any person intending to participate in the hearing should provide a mailing address, email address and a telephone number to the Tribunal as soon as possible – ideally before the case management conference. Any person who will be retaining a representative should advise the other parties and the Tribunal of the representative's name, address, email address and the phone number as soon as possible.

10. Any person who intends to participate in the hearing, including parties, counsel and witnesses, is expected to review the Tribunal's Video Hearing Guide, available on the Tribunal's website.

11. In the event of consolidation with further appeals, all Parties and Participants accepted at any CMC shall be conferred standing at the consolidated hearing without the need for any further applications.

Requirements Before the Phase 1 Hearing

12. A party who intends to call witnesses, whether by summons or not, shall provide to the Tribunal and the other parties a list of the witnesses and the order in which they will be called. This list must be delivered on or before **November 21, 2022** and in accordance with paragraph 24 below. A party who intends to call an expert witness must include a copy of the witness' Curriculum Vitae and the area of expertise in which the witness is prepared to be qualified.

13. Expert witnesses in the same field shall have a meeting on or before **December 16, 2022** and use best efforts to try to resolve or reduce the issues for the hearing. Following the experts' meeting the parties must prepare and file a Statement of Agreed Facts and Issues with the Tribunal case co-ordinator on or before **January 13, 2023**.

14. An expert witness shall prepare an expert witness statement, which shall list any reports prepared by the expert, or any other reports or documents to be relied on at the hearing. Copies of this must be provided as in paragraph 16 below. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Tribunal may refuse to hear the expert's testimony.

15. Expert witnesses who are under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence as in paragraph 16 below. A party who intends to call a witness who is not an expert must file a brief outline of the witness' evidence, as in paragraph 15 below.

16. On or before **January 27, 2023**, the parties shall provide copies of their witness and expert witness statements to the other parties and to the Tribunal Case Coordinator and in accordance with paragraph 24 below.

17. On or before **January 27, 2023**, a participant shall provide copies of their written participant statement to the other parties in accordance with paragraph 24 below. A participant cannot present oral submissions at the hearing on the content of their written statement, unless ordered by the Tribunal.

18. On or before **February 24, 2023**, the parties shall provide copies of their visual evidence to all of the other parties in accordance with paragraph 24 below. If a model will be used, all parties must have a reasonable opportunity to view it before the hearing. All models shall be shared electronically.

19. On or before **February 17, 2023**, the parties shall provide copies of their reply witness statements and expert's reply witness statements to the other parties and to the Tribunal case co-ordinator and in accordance with paragraph 24 below.

20. The parties shall cooperate to prepare a joint document book which shall be shared with the Tribunal Case Coordinator on or before **March 3, 2023**.

21. A person wishing to change written evidence, including witness statements, must make a written motion to the Tribunal. *See Rule 10 of the Tribunal's Rules with respect to Motions, which requires that the moving party provide copies of the motion to all other parties 15 days before the Tribunal hears the motion.*

22. A party who provides written evidence of a witness to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the

Tribunal at least 7 days before the hearing that the written evidence is not part of their record.

23. The parties shall prepare and file a preliminary hearing plan with the Tribunal on or before **January 6, 2023** with a proposed schedule for the hearing that identifies, as a minimum, the parties participating in the hearing, the preliminary matters (if any to be addressed), the anticipated order of evidence, the date each witness is expected to attend, the anticipated length of time for evidence to be presented by each witness in chief, cross-examination and re-examination (if any) and the expected length of time for final submissions. The parties are expected to ensure that the hearing proceeds in an efficient manner and in accordance with the hearing plan. The Tribunal may, at its discretion, change or alter the hearing plan at any time in the course of the hearing.

24. All filings shall be submitted electronically. Electronic copies may be filed by email, an electronic file sharing service for documents that exceed 10MB in size, or as otherwise directed by the Tribunal. The delivery of documents by email shall be governed by the *Rule* 7.

25. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Tribunal's Rule 17 applies to such requests.

This Member is not seized.

So Orders the Tribunal.

ATTACHMENT 1

LIST OF PARTIES AND PARTICIPANTS

A. PARTIES

PARTIES		COUNSEL/REPRESENTATIVE
1.	**30 Duke Street Limited**	**Turkstra Mazza Associates** 15 Bold Street Hamilton, ON L8P 1T3 **Jennifer Meader** Email: jmeader@tmalaw.ca Tel: (905) 529-3476
2.	**City of Kitchener**	**Legal Services Department** 200 King Street West, 4th Floor Kitchener, ON N2G 4G7 **Lesley MacDonald** Email: Lesley.MacDonald@kitchener.ca Tel: (519) 741-2200 ext. 7267 **Katherine Hughes** Email: katherine.hughes@kitchener.ca Tel: (519) 741-2200 ext. 7266
3.	**Region of Waterloo**	**Legal Services Department** 150 Frederick Street, 3rd Floor Kitchener, ON N2G 4J3 **Fiona McCrea** Email: fmccrea@regionofwaterloo.ca Tel: (519) 575-4518
4.	**Friends of Olde Berlin Town**	55 Margaret Avenue Kitchener, ON N2H 4H3 **Hal Jaeger** Email: obtfriends@gmail.com Tel: (519) 341-6007

B. PARTICIPANTS

1.	Daniel Ariza	dariza347@gmail.com
2.	Neil Baarda	neil.baarda@gmail.com
3.	Ilona Bodendorfer	synergistic_solutions@sympatico.ca
4.	Richard Buck	richard@crbucklaw.com
5.	Taijwant (Tony) Greer	taijwant@gmail.com
6.	Cathryn Harris	drcathrynharris@gmail.com
7.	Bob Janzen	bob.janzen46@gmail.com
8.	Adam Joncas	adamjoncas@hotmail.com
9.	Gail Pool	gail.richard.pool@gmail.com
10.	North Waterloo Region Branch of Architectural Conservancy Ontario	rowell01@sympatico.ca
11.	Donna Kuehl	adeline@sympatico.ca
12.	Peter Eglin	peglin@wlu.ca
13.	Trudy Wagner	twagner29@live.ca
14.	Simon Euteneier	stonehouserent@gmail.com
15.	Sally Gunz	sgunz@uwaterloo.ca
16.	Roy Cameron	cameron@uwaterloo.ca
17.	Monica Weber	monicaweber10@gmail.com
18.	Social Development Centre of Waterloo Region	sdcwr@waterlooregion.org
19.	John Ryrie	jryrie_04@sympatico.ca
20.	Kathryn Forler	kathrynforler@gmail.com
21.	Maaike Asselberg	masselbergs@sentex.ca

22.	Kathryn Forler	kathrynforler@gmail.com
23.	Neil Jensen	neil.jensen@outlook.com
24.	Kae Elgie	kaeelgie@yahoo.com

ATTACHMENT 2

ISSUES LIST

Note: The identification of an issue does not mean that all parties agree that such issue, or the manner in which the issue is expressed, is appropriate or relevant to the determination of the Tribunal at the hearing. The extent to which the issues are appropriate, within the jurisdiction of the OLT, or relevant to the determination at the hearing will be a matter of evidence and argument at the hearing.

	Matters of Provincial Interest (Section 2 of Planning Act)	**Party**
1	Do the proposed Official Plan and Zoning By-law amendment applications (the "proposed applications") have sufficient regard to the matters of provincial interest listed in section 2(d), (n), (p) and (r)?	FOBT
	Provincial Policy Statement	
2	Are the proposed Official Plan Amendment and Zoning By-law Amendment applications (the proposed applications) consistent with the PPS, including but not limited to, policies 1.1.3.2, 1.1.3.3, 1.1.3.4, 2.6 and 4.6?	City FOBT
	Growth Plan for the Greater Golden Horseshoe	
3	Do the proposed applications conform to the Growth Plan, including but not limited to, Guiding Principle 1.2.1, and policies in sections 2.2.2, 2.2.4, 2.2.6, 4.1, and 4.2.7?	City FOBT
	Region of Waterloo Official Plan	
4	Do the proposed applications conform to the Region of Waterloo Official Objective 3.8?	FOBT
5	Do the proposed applications conform to the Urban Area Development policies in chapter 2.D (2.D.1, 2.D.2, 2.D.6, 2.D.10)?	City FOBT
6	Do the proposed applications conform to the Liveability in Waterloo Region policies in chapter 3 (3.A, 3.B, 3.C, 3.G.1, 3.G.6)?	City FOBT

7	Do the proposed Official Plan Amendment and proposed Zoning By-law Amendment implement all requirements to address noise from stationary and transportation sources in conformity with the Regional Official Plan, including Sections 2.G.10, 2.G.13, 2.G.14, 2.G.15 and 2.G.16, including but not limited to an appropriate holding provision?	Region
	City of Kitchener Official Plan	
8	Do the proposed applications conform to the Urban Structure policies in Part C (3.C.2.9, 3.C.2.10, 3.C.2.17, 3.C.2.20, and 3.C.2.22)?	City FOBT
9	Do the proposed applications conform to the Housing policies in Section 4 (4.C.1.7, 4.C.1.8, 4.C.1.9, 4.C.1.13, and 4.C.1.19)?	City FOBT
10	Do the proposed applications conform to the Private Greenspace and Facilities policies in Section 8 (8.C.1.21 and 8.C.1.23)?	City FOBT
11	Do the proposed applications conform to the Urban Design objectives in Section 11 (11.1.1 through 11.1.8)?	City FOBT
12	Do the proposed applications conform to the Urban Design policies in Section 11 (11.C.1.4, 11.C.1.11, 11.C.1.12, 11.C.1.21, 11.C.1.29, 11.C.1.30, 11.C.1.31, 11.C.1.32, and 11.C.1.33).	City FOBT
13	Do the proposed applications conform to the Cultural Heritage Resources objectives in Section 12 (12.1.2)?	City FOBT
14	Do the proposed applications conform to the Cultural Heritage Resources policies in Section 12 (12.C.1.1, 12.C.1.10,12.C.1.14, 12.C.1.19, 12.C.1.21, 12.C.1.23, 12.C.1.26, 12.C.1.27, and 12.C.1.29??	City FOBT
15	Do the proposed applications conform to the Active Transportation objectives in Section 13 (13.1.1, 13.1.3, and 13.1.7)?	City
16	Do the proposed applications conform to the Transportation policies in Section 13 (13.C.1.4.d, 13.C.1.6, 13.C.1.13, 13.C.3.12, 13.C.7.3, 13.C.7.4, 13.C.8.2, and 13.C.8.4)?	City
17	Do the proposed applications conform to the City of Kitchener Official Plan objective 3.2.5?	FOBT

	City of Kitchener Civic Centre Secondary Plan	
18	Do the proposed applications conform to the General Policies in Section 13.1.1 (13.1.1.1, and 13.1.1.7)?	City FOBT
19	Do the proposed applications conform to the Land Use Designation policies in Section 13.1.2 (13.1.2.8)?	City FOBT
	Kitchener Zoning By-law	
20	Are the proposed on-site required and visitor vehicle parking rates, appropriate for the scale, proposed use, and number of dwelling units proposed with the development?	City
21	Are the proposed on-site secured and visitor bicycle parking rates appropriate for the scale, proposed use, and number of dwelling units proposed with the development?	City
22	Do the requested site specific zoning regulations address compatibility between the proposed development, the existing community, and the planned function of the immediate area, including: adequate setbacks from existing low density uses, maximum building heights and step backs regulations to regulate built form, setbacks for surface parking facilities from the public realm, as well as setbacks and step backs from other properties? Do the requested site specific zoning regulations address adequate setbacks and driveway visibility triangles? Does the driveway width comply with zoning regulations and Regional Requirements for Access By-law and policy?	City FOBT Region
	Kitchener Urban Design Manual	
23	What weight should be given to the Kitchener Urban Design Manual?	Applicant
24	Does the proposed development complement adjacent built form through compatible height, scale, massing, and materials?	City FOBT
25	Does the base of the proposed development meet the built form guidelines for a Tall Building?	City FOBT

26	Does the proposed development achieve sufficient transition to the adjacent existing and planned built form of the adjacent properties? Is there a suitable transition in scale, massing, building height, building length and intensity through setbacks, step backs, landscaping, and compatible architectural design/material selection?	City FOBT
27	Does the proposed development meet the tower separation guidelines for a Tall Building?	City FOBT
28	Does the proposed development exceed the target overlook guidelines for a Tall Building?	City
29	Does the proposed development provide a sufficient step back from the base to mitigate the potential wind impact on the public realm?	City
30	Does the proposed development include a sufficient shared outdoor amenity area?	City FOBT
31	Is the proposed building height compatible and aligned with adjacent neighbouring properties?	City FOBT
32	Does the proposed development appropriately mitigate the unwanted microclimate impact on surrounding properties, such as wind and shadow impacts?	City FOBT
33	Do the proposed applications respect the Major Transit Station Area guidelines, including but not limited to the following guidelines? a) Compatibility (section 02.2.6, p. 5, items 2 and 4) b) Cultural and Natural Heritage (section 02.2.7, p. 5, item 1) c) Built Form (section 02.3.1, p. 6, items 2 and 4) d) PARTS Central (section 02.4.2, p. 12, item 7)	FOBT
34	Do the proposed applications respect the Tall Buildings guidelines, including but not limited to the following guidelines? a) Relative Height, For towers adjacent to low-rise surrounding areas (p. 6) b) Compatibility (p. 15) c) Heritage, When a tall building is adjacent to a built heritage resource (p. 16, items 1, 3 and 4)	FOBT
35	Do the proposed applications respect the City-Wide guidelines, including but not limited to the following guidelines? a) Focal Points & Gateways (section 01.2.5, p. 15, item 4),	FOBT

	b) Cultural & Natural Heritage (section 01.2.8, p. 18, item 7) c) Built Form (section 01.3.1, p. 19, item 9) d) Site Function (section 01.3.3, p. 23, items 8 and 9)	
	Civic Centre Neighbourhood, Heritage Conservation District Plan (HCD Plan)	
36	Are the proposed applications consistent with the Heritage District Objective, Principles, and Policies in the HCD Plan (Section 3.1, 3.2, 3.3.3, and 3.3.5.2, Recommendation 4.2.1 on "High Density Commercial Residential Designation" and Bullets 2 and 7 of Guideline 6.9.4)?	City FOBT
37	Are the proposed applications consistent with the Architectural Design Guidelines in the HCD Plan (Section 6.6 and 6.9.4)?	City FOBT
38	Does the proposed development provide a 45 degree angular plane measured from the rear property line to provide transition in scale from proposed development down to adjacent lands?	City FOBT
	Other	
39	What consideration, if any, should be given to: a) the policies proposed for the Civic Centre Secondary Plan via the Secondary Plan Review, including but not limited to policies 16.D.2.2, 16.D.9.4, 16.D.9.6 and 16.D.9.9; b) Region of Waterloo Official Plan Amendment No. 6 as adopted; and c) The PARTS Central Plan?	FOBT Applicant
40	Do the proposed applications represent good planning and are they in the public interest?	FOBT
	Phase 2: Ontario Heritage Act Permit	
41	Is there sufficient information before the Tribunal to issue a Heritage Permit pursuant to section 42 of the Ontario Heritage Act?	City

42	Do the proposed applications have sufficient regard to the Ontario Heritage Act, including but not limited to, sections 41.2.2, 42(1) and 68(3)?	FOBT

ATTACHMENT 3

ORDER OF EVIDENCE

1. 30 Duke Street Limited
2. Friends of Olde Berlin Town
3. City of Kitchener
4. Region of Waterloo
5. 30 Duke Street Limited in reply

ATTACHMENT 4

SUMMARY OF FILING DATES

EVENT	DATE
List of Witnesses	November 21, 2022
Expert Witness Meetings	December 16, 2022
Hearing Plan	January 6, 2023
Agreed Statement of Facts & Remaining Issues	January 13, 2023
Participant Statements	January 27, 2023
Witness and Expert Witness Statements	January 27, 2023
Reply Witness Statements	February 17, 2023
Visual Evidence	February 24, 2023
Joint Document Book	March 3, 2023
OLT Hearing Commences	March 13, 2023

Meaning of terms used in the Procedural Order:

*A **party** is an individual or corporation permitted by the Tribunal to participate fully in the hearing by receiving copies of written evidence, presenting witnesses, cross-examining the witnesses of the other parties, and making submissions on all of the evidence. An **unincorporated group** cannot be a party and it must appoint one person to speak for it, and that person must accept the other responsibilities of a party as set out in the Order. Parties do not have to be represented by a lawyer and may have an agent speak for them. The agent must have written authorisation from the party.*

***NOTE** that a person who wishes to become a party before or at the hearing, and who did not request this at the case management conference (CMC), must ask the Tribunal to permit this.*

*A **participant** is an individual or corporation, whether represented by a lawyer or not, who may make a written submission to the Tribunal. A participant cannot make an oral submission to the Tribunal or present oral evidence (testify in-person) at the hearing (only a party may do so). Section 17 of the Ontario Land Tribunal Act states that a person who is not a party to a proceeding may only make a submission to the Tribunal in writing. The Tribunal may direct a participant to attend a hearing to answer questions from the Tribunal on the content of their written submission, should that be found necessary by the Tribunal.* A participant may also be asked questions by the parties should the Tribunal direct a participant to attend a hearing to answer questions on the content of their written submission.

A participant must be identified and be accorded participant status by the Tribunal at the CMC. A participant will not receive notice of conference calls on procedural issues that may be scheduled prior to the hearing, nor receive notice of mediation. A participant cannot ask for costs, or review of a decision, as a participant does not have the rights of a party to make such requests of the Tribunal.

***Written evidence** includes all written material, reports, studies, documents, letters and witness statements which a party or participant intends to present as evidence at the hearing. These must have pages numbered consecutively throughout the entire document, even if there are tabs or dividers in the material.*

***Visual evidence** includes photographs, maps, videos, models, and overlays which a party or participant intends to present as evidence at the hearing.*

*A **witness statement** is a short written outline of the person's background, experience and interest in the matter; a list of the issues which he or she will discuss ; and a list of reports or materials that the witness will rely on at the hearing.*

*An **expert witness statement** should include his or her (1) name and address, (2) qualifications, (3) a list of the issues he or she will address, (4) the witness' opinions on those issues and the complete reasons supporting their opinions and conclusions and*

(5) a list of reports or materials that the witness will rely on at the hearing. An expert witness statement must be accompanied by an acknowledgement of expert's duty.

*A **participant statement** is a short written outline of the person's or group's background, experience and interest in the matter; a statement of the participant's position on the appeal; a list of the issues which the participant wishes to address and the submissions of the participant on those issues; and a list of reports or materials, if any, which the participant wishes to refer to in their statement.*

Additional Information

*A **summons** may compel the appearance of a person before the Tribunal who has not agreed to appear as a witness. A party must ask a Tribunal Member or the senior staff of the Tribunal to issue a summons through a request. (See Rule 13 on the summons procedure.) The request should indicate how the witness' evidence is relevant to the hearing. If the Tribunal is not satisfied from the information provided in the request that the evidence is relevant, necessary or admissible, the party requesting the summons may provide a further request with more detail or bring a motion in accordance with the Rules.*

***The order of examination of witnesses** is usually direct examination, cross-examination and re-examination in the following way:*

- *direct examination by the party presenting the witness;*
- *direct examination by any party of similar interest, in the manner determined by the Tribunal;*
- *cross-examination by parties of opposite interest;*
- *re-examination by the party presenting the witness; or*
- *another order of examination mutually agreed among the parties or directed by the Tribunal.*

Tab 5F

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: September 13, 2024 **CASE NO(S).:** OLT-22-002377
(Formerly PL210104)

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 W
Municipality/UT:	Kitchener/Waterloo
OLT Case No:	OLT-22-004383
OLT Lead Case No:	OLT-22-002377
Legacy Lead Case No:	PL210104

Heard: August 27, 2024, by Video Hearing

APPEARANCES:

Parties	**Counsel**
30 Duke Street Limited	Jennifer Meader
City of Kitchener	Katherine Hughes
Region of Waterloo	Fiona McCrea
Friends of Old Berlin Town	Hal Jaeger

MEMORANDUM OF ORAL DECISION DELIVERED BY YASNA FAGHANI AND GREGORY J. INGRAM ON AUGUST 27, 2024 AND ORDER OF THE TRIBUNAL

INTRODUCTION AND BACKGROUND

[1] This was a Case Management Conference ("CMC") to re-open a file placed in "closed status" by the Tribunal since August 2023. The matter concerns an appeal by 30 Duke Street Limited ("Appellant") of the City of Kitchener's ("City") failure to make a decision with respect to the Appellant's applications for Official Plan ("OP") and Zoning By-Law ("ZBA") amendments regarding the property located at 22 Weber Street West ("Subject Property").

[2] The proposed amendments would facilitate the construction of a new 19-storey multiple residential building, having 162 total units and 24 parking spaces.

[3] On December 2, 2022, the Tribunal Ordered that this appeal, case number OLT-22-002377, and the accompanying *Heritage Act* permit appeal, case number OLT-22-4383, be consolidated and a 20-day Hearing was scheduled to proceed on March 13, 2023.

[4] In January 2023, the Appellant, on consent of the City and Region of Waterloo ("Region"), requested an adjournment of the Hearing *sine die* due to changes in the governing legislation and policy that may impact the Subject Property and the development proposal. The Tribunal granted the adjournment. Sometime thereafter, this matter was placed on "closed status" by the Tribunal.

AFFIDAVIT OF SERVICE AND STATUS REQUESTS

[5] There were no issues or concerns with the Affidavit of Service sworn on August 12, 2024.

[6] The Tribunal received two requests for Participant status from Mica Sadler and Ron Brohman. Both individuals were in support of the Proposed Development and reside in the vicinity of the Subject Property. The Parties all consented to the status requests. The Tribunal granted Participant status to both individuals.

PROCEEDINGS UPDATE

[7] Counsel for the Appellant advised that the City undertook a conformity exercise given the changes to the legislation. In that process, it decided to exempt the Subject Property from the conformity exercise because it was under appeal. As such, Counsel for the Appellant submitted that it is no longer necessary to wait until new legislation comes into force. Her client wished to proceed with an appeal based on the planning documents in force at the time of the original application. She advised that she had

made updates to the issues list (“IL”) reflecting the impact of the changes to the legislation and submitted a draft procedural order (“PO”). She requested a 15-day Hearing be scheduled sometime between April and August 2025.

[8] Both counsel for the City and Region confirmed Counsel of the Appellant’s submissions and supported proceeding with a 15-day Hearing.

[9] Mr. Jaeger, the representative for the Friends of Old Berlin Town, submitted that he wished to wait until the new Zoning By-law and OP came into force before setting Hearing dates. He submitted that this would allow sufficient time to make changes to the IL in reference to the new polices and guidelines and provide an opportunity for additional Participants to request status since many neighbours have moved out of the area and new individuals have since moved in and may have concerns that should be heard.

[10] In response, Counsel for the Appellant submitted that it is not necessary to further delay the process and wait until the new ZBA and OP comes info effect since it has been decided that the Subject Property is exempt from any changes related to these planning instruments. Counsel welcomed the idea of working with the Parties on adding any issues which reflect the current law or changing any issues because of applicable policies at the provincial level. She proposed a further CMC be scheduled to finalize the IL and PO after October 20, 2024, once the new planning documents are in force. Additionally, neither counsel for the Appellant, City or Region had issues with additional Participants being considered.

[11] After hearing submissions from all Parties, the Tribunal scheduled a CMC and a 15-day Hearing, with details outlined further below in this Decision. The Tribunal also confirmed that it will consider any additional Participant status requests and permit current Participants to update their statements for consideration at the next CMC. No additional Party status requests will be considered.

MEDIATION/SETTLEMENT

[12] Counsel for the Appellant advised that informal settlement discussions with Counsel for the City have been ongoing. The Parties were made aware of Tribunal-led mediation, and indicated that they are not opposed to mediation, but that it is premature to determine whether that will be required. The preferred route is to continue settlement discussions outside of the formal Tribunal process.

HEARING PLANNING

[13] As discussed above, the Tribunal heard submissions from the Parties regarding the next steps concerning this case. In summary, the Parties anticipate calling between four to eight witnesses and requested 15 days for a Hearing. They also requested that a further CMC be set in October 2024.

[14] A further CMC will commence on **Wednesday, October 30, 2024**, beginning at **10 a.m.** by video, as per the connection details outlined below in paragraph [15]. The purpose of the second CMC is to receive an update from the Parties, consider any additional Participants, review the PO, finalize the IL and confirm the number of days scheduled for the Hearing.

[15] The Tribunal scheduled a 15-day Hearing to commence on **Monday, April 14, 2025,** at **10 a.m.** by video, excluding **Friday, April 18, 2025**, and **Monday, April 21, 2024,** as the Tribunal will not be sitting on these dates. The further CMC and the 15-day Hearing are scheduled to proceed as follows:

> **October 30, 2024 at 10 a.m. (one-day CMC)**
> **GoTo Meeting:** https://global.gotomeeting.com/join/709076365
> **Access code:** 709-076-365
> **Audio-only telephone line:** +1 (647) 497-9373 or (Toll-Free) 1-888-299-1889
> **Audio-only access code:** 709-076-365

April 14, 2025 at 10 a.m. (15-day Hearing)

GoTo Meeting: https://meet.goto.com/348282861

Access code: 348-282-861

Audio-only line: +1 (647) 497-9373 or (Toll-Free) 1-888-299-1889

Audio-only access code: 348-282-861

[16] Parties and Participants are asked to log into the Video Hearings at least **15 minutes** before the start of the event to test their video and audio connections.

[17] For all Video Hearings, the Parties and Participants are asked to access and set up the application well before the event to avoid unnecessary delay. The desktop application can be downloaded at **GoToMeeting** or a web application is available: https://app.gotomeeting.com/home.html.

[18] Persons who experience technical difficulties accessing the GoToMeeting application, or who only wish to listen to the event, can connect to the event by calling into an audio-only telephone line.

[19] Individuals are directed to connect to the event on the assigned date at the correct time. It is the responsibility of the persons participating in the Video Hearings to ensure that they are properly connected to the event at the correct time. Questions prior to the hearing event may be directed to the Tribunal's Case Coordinator having carriage of this case.

[20] The Members are not seized, and no further notice is required.

ORDER

[21] **THE TRIBUNAL ORDERS THAT:**

1. A further Case Management Conference and 15-day Hearing will commence as per the details outlined in paragraphs [14] through [19] above.

"*Yasna Faghani*"

YASNA FAGHANI
MEMBER

"Gregory J. Ingram"

GREGORY J. INGRAM
MEMBER

Tab 5G

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: November 21, 2024 **CASE NO(S).:** OLT-22-002377
(Formerly PL210104)

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 W
Municipality/UT:	Kitchener/Waterloo
OLT Case No:	OLT-22-004383
OLT Lead Case No:	OLT-22-002377
Legacy Lead Case No:	PL210104

Heard: October 30, 2024, by Video Hearing

APPEARANCES:

Parties	**Counsel/Representative***
30 Duke Street Limited	Jennifer Meader Anna Toumanians
City of Kitchener	Katherine Hughes
Regional Municipality of Waterloo	Andy Gazzola Fiona McCrea (*In Absentia)*
Friends of Olde Berlin Town	Hal Jaeger*

MEMORANDUM OF ORAL DECISION DELIVERED BY YASNA FAGHANI AND GREGORY J. INGRAM ON OCTOBER 30, 2024 AND ORDER OF THE TRIBUNAL

INTRODUCTION AND BACKGROUND

[1] This was a further Case Management Conference (“CMC”) concerning an appeal by 30 Duke Street Limited (“Appellant”) of the City of Kitchener’s (“City”) failure to make a decision with respect to the Appellant’s applications for an Official Plan (“OP”) and Zoning

By-law Amendment (“ZBA”) regarding the property located at 22 Weber Street West in the City (“Subject Property”).

[2] The proposed amendments facilitate the construction of a new 19-storey multiple residential building, having 162 total units, and 24 parking spaces.

[3] At the CMC on August 27, 2024, a 15-day Hearing was scheduled to commence on April 15, 2025. The Tribunal ordered a further CMC to determine whether changes to the provincial legislation which would have any bearing on the draft Procedural Order (“PO”), to determine if any participants wished to update their statements, and to provide the opportunity for any additional Participant Status requests to be submitted.

PROCEEDINGS UPDATE

[4] The Tribunal confirmed that it did not receive any new Participant Status requests and no Participants updated their statements since the last CMC. As such, the Tribunal ruled that no further Participant Status requests would be considered moving forward.

[5] The Counsel for the Appellant advised that the parties have communicated with each other to update and reflect on the current policies and changes to the Legislation. A draft PO was filed on consent of the parties except for a few issues that were highlighted. The Counsel advised that said highlighted issues dealt with the City’s new Official Plan No. 49 (“OPA 49”) and new Zoning By-law No. 2024-065 (“new ZBL”). These issues were added to the Issued List (“IL”) by Friends of Olde Berlin Town. The Appellant did not agree to said highlighted issues and the Counsel wished to make submissions regarding the Appellant’s concerns. Both Counsels for the City and the Regional Municipality of Waterloo (“Region”) agreed in principle with the draft PO and did not take a position regarding the highlighted issues. Both the City and the Region agreed that the highlighted issues of concern were disputes between the Appellant and Friends of Olde Berlin Town.

[6] The Counsel for the Appellant submitted that the Subject Property is explicitly exempt from OPA 49. In support for her position, she relied on an Excerpt of OPA 49

dated March 18, 2024, marked as **Exhibit 1**. She identified the Subject Property as being outside of the areas where amendments to the OP applied. She advised that the City decided to exempt the Subject Property from the amendments because it was under appeal before this Tribunal. Additionally, she relied on an Excerpt of the new ZBL dated March 11, 2024, marked as **Exhibit 2**, in support of her position that the Subject Property was exempt from the ZBL Amendments. She again identified the areas where the ZBL Amendments applied and then she identified the Subject Property was not included in said areas.

[7] Counsel for the Appellant submitted that this is not a case where the *Clergy* Principle is in question as that Policy and Regulation simply do not apply to the Subject Property. The Counsel for the Appellant further submitted that the purpose of a CMC is to ensure that a merit hearing can proceed as efficiently as possible. She submitted that including inapplicable policies, such as OPA 49 and the new ZBL, runs counter to that purpose.

[8] Mr. Jaeger, the representative of Friends of Olde Berlin Town, advised the City has updated the OP and all the lands surrounding the Subject Property and new zoning has been approved around the Subject Property. He submitted that the merits of the argument when they were first launched no longer apply because of all the changes surrounding the Subject Property and that this appeal separates the Subject Property from the municipal jurisdiction. He requested that the Tribunal reconsider its decision to re-open the appeal. In the alternative, he requested that the Tribunal place predominant weight on the new provincial and municipal guidelines to test the proposal. He recognized the fact that the City exempted the Subject Property from OPA 49 and new ZBL and did so because the Subject Property was under appeal to the Tribunal. He submitted that the Tribunal should “release the matter from [its] jurisdiction and return [it] to the jurisdiction of the City”. He finally submitted that if the matter were to proceed to a hearing, testing the proposal against the new OPA 49 and ZBL would ensure appropriate transition and fairness.

[9] Additionally, Mr. Jaeger advised that the new ZBL was under appeal under a different file and was waiting for a decision from the Tribunal. He requested an adjournment of this Hearing until the decision of that appeal of the ZBA was rendered.

[10] Counsel for the City confirmed that the Subject Property is exempt from OPA 49 and the new ZBL. The new ZBL is currently under appeal regarding two other properties and not related to the Subject Property. The Region confirmed that the OPA 49 is in full force and effect and does exclude the Subject Property.

[11] In response to Mr. Jaeger, the Counsel for the Appellant advised that while the new provincial legislation has been implemented, it is not significantly different from the old version and the main purpose was to consolidate the old provincial legislation with the Growth Plan for the Greater Golden Horseshoe. While she agrees that the regional plan has been revised, the issues related to the amendments will be framed in terms of the *Clergy* Principle and arguments in that regard will follow at the merit Hearing.

[12] After hearing submissions from all Parties and standing down to confer, the Tribunal determined that the OPA 49 is in full force and effect and not under appeal. It specifically exempts the Subject Property from any amendments and as such has no relevance to this matter. Further, the Subject Property is also exempt from amendments to the new ZBL. While there is an appeal before this Tribunal concerning an appeal of the new ZBL, it is unrelated to the Subject Property. As such, the highlighted issues on the draft IL concerning OPA 49 and ZBA are to be stuck out.

[13] The Tribunal received a finalized IL and PO on Thursday, October 31, 2024, reviewed it, approved same and deemed it in force and effect to guide the proceedings of the merit hearing.

MEDIATION/SETTLEMENT

[14] The Counsel for the Appellant advised that settlement discussions have occurred with the City and the Region with the view of narrowing the issues. All counsel agreed that

it was appropriate to proceed this way. The Parties were aware of Tribunal-led mediation and indicated that they are not opposed to mediation, but that it is premature to determine whether that will be required. The preferred route is to continue settlement discussions at this time.

[15] Of note, Mr. Jaeger advised that mediation may assist in this matter, although he agreed it was premature at this time and was not opposed to the matter. He advised that Friends of Olde Berlin Town have asked to be part of settlement discussions but have yet been included in same.

ORDER

[16] **THE TRIBUNAL ORDERS THAT:**

1. The Procedural Order is in full force and effect as it appears in **Schedule 1** below and this matter will proceed to the 15-day Hearing scheduled to commence on April 15, 2024.

"*Yasna Faghani*"

YASNA FAGHANI
MEMBER

"Gregory J. Ingram"

GREGORY J. INGRAM
MEMBER

Schedule 1

Ontario Land Tribunal
655 Bay Street, Suite 1500, Toronto, ON M5G 1E5
Tel: 416-212-6349 | 1-866-448-2248
Web Site: olt.gov.on.ca

CASE NO(S). : OLT-22-002377
(Formerly PL210104)

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
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OLT Lead Case No:	OLT-22-002377
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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
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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 W
Municipality/UT:	Kitchener/Waterloo
OLT Case No:	OLT-22-004383
OLT Lead Case No:	OLT-22-002377
Legacy Lead Case No:	PL210104

1. The Tribunal may vary or add to the directions in this procedural order at any time by an oral ruling or by another written order, either on the parties' request or its own motion.

Organization of the Hearing

2. The hearing will proceed in two phases:

    a. Phase 1 – The Official Plan Amendment and Zoning By-law Amendment; and

    b. Phase 2 – The Ontario Heritage Act Permit, to be scheduled upon issuance of the Tribunal's written Decision in respect of Phase 1.

3. The Phase 1 video hearing will begin on **April 14, 2025** at **10:00 a.m.** through video link **https://meet.goto.com/348282861.** When prompted, enter the code **348-282-861**.

    GoTo Meeting: https://meet.goto.com/348282861

    Access code: 348-282-861

    Audio-only line: +1 (647) 497-9373 or (Toll-Free) 1-888-299-1889

    Audio-only access code: 348-282-861

4. The parties' initial estimation for the length of the Phase 1 hearing is **15** days. The parties are expected to cooperate to reduce the length of the hearing by eliminating redundant evidence and attempting to reach settlements on issues where possible.

5. The parties and participants identified at the case management conference are set out in **Attachment 1.**

6. The issues are set out in the Issues List attached as **Attachment 2**. There will be no changes to this list unless the Tribunal permits, and a party who asks for changes may have costs awarded against it.

7. The order of evidence shall be as set out in **Attachment 3** to this Order. The Tribunal may limit the amount of time allocated for opening statements, evidence in chief (including the qualification of witnesses), cross-examination, evidence in reply and final argument. The length of written argument, if any, may be limited either on the parties' consent, subject to the Tribunal's approval, or by Order of the Tribunal.

8. Any person intending to participate in the hearing should provide a mailing address, email address and a telephone number to the Tribunal as soon as possible – ideally before the case management conference. Any person who will be retaining a representative should advise the other parties and the Tribunal of the representative's name, address, email address and the phone number as soon as possible.

9. Any person who intends to participate in the hearing, including parties, counsel and witnesses, is expected to review the Tribunal's Video Hearing Guide, available on the Tribunal's website.

Requirements Before the Hearing

10. A party who intends to call witnesses, whether by summons or not, shall provide to the Tribunal and the other parties a list of the witnesses and the order in which they will be called. This list must be delivered on or before **December 16, 2024** and in accordance with paragraph 21 below. A party who intends to call an expert witness must include a copy of the witness' Curriculum Vitae and the area of expertise in which the witness is prepared to be qualified.

11. Expert witnesses in the same field shall have a meeting on or before **January 17, 2025** and use best efforts to try to resolve or reduce the issues for the hearing. Following the experts' meeting the parties must prepare and file a Statement of Agreed Facts and Issues with the Tribunal case co-ordinator on or before **January 31, 2025**.

12. An expert witness shall prepare an expert witness statement, which shall list any reports prepared by the expert, or any other reports or documents to be relied on at the hearing. Copies of this must be provided as in paragraph 14 below. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Tribunal may refuse to hear the expert's testimony.

13. Expert witnesses who are under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence as in paragraph 14 below. A party who intends to call a witness who is not an expert must file a brief outline of the witness' evidence, as in paragraph 14 below.

14. On or before **February 21, 2025**, the parties shall provide copies of their witness and expert witness statements to the other parties and to the Tribunal case co-ordinator and in accordance with paragraph 23 below.

15. On or before **February 21, 2025**, a participant shall provide copies of their written participant statement to the other parties in accordance with paragraph 23 below. A participant cannot present oral submissions at the hearing on the content of their written statement, unless ordered by the Tribunal.

16. On or before **March 10, 2025** the parties shall confirm with the Tribunal if all the reserved hearing dates are still required.

17. On or before **March 28, 2025**, the parties shall provide copies of their visual evidence to all of the other parties in accordance with paragraph 23 below. If a model will be used, all parties must have a reasonable opportunity to view it before the hearing. All models shall be shared electronically.

18. On or before **March 14, 2025**, the parties shall provide copies of their reply witness statements and expert's reply witness statements to the other parties and to the Tribunal case co-ordinator and in accordance with paragraph 23 below.

19. The parties shall cooperate to prepare a joint document book which shall be shared with the Tribunal case co-ordinator on or before **April 4, 2025**.

20. A person wishing to change written evidence, including witness statements, must make a written motion to the Tribunal. *See Rule 10 of the Tribunal's Rules with respect to Motions, which requires that the moving party provide copies of the motion to all other parties 15 days before the Tribunal hears the motion.*

21. A party who provides written evidence of a witness to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the Tribunal at least 7 days before the hearing that the written evidence is not part of their record.

22. The parties shall prepare and file a preliminary hearing plan with the Tribunal on or before **April 4, 2025** with a proposed schedule for the hearing that identifies, as a minimum, the parties participating in the hearing, the preliminary matters (if any to be addressed), the anticipated order of evidence, the date each witness is expected to attend, the anticipated length of time for evidence to be presented by each witness in chief, cross-examination and re-examination (if any) and the expected length of time for final submissions. The parties are expected to ensure that the hearing proceeds in an efficient manner and in accordance with the hearing plan. The Tribunal may, at its discretion, change or alter the hearing plan at any time in the course of the hearing.

23. All filings shall be submitted electronically. Electronic copies may be filed by email, an electronic file sharing service for documents that exceed 10MB in size, or as otherwise directed by the Tribunal. The delivery of documents by email shall be governed by the *Rule* 7.

24. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Tribunal's Rule 17 applies to such requests.

ATTACHMENT 1

PARTIES & PARTICIPANTS

Parties

1. **30 Duke Street Limited**
   TMA Law
   25 Main Street West, Suite 2010
   Hamilton, ON L8P 1H1
   Jennifer Meader
   Tel: 905.529.3476
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   Anna Toumanians
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   Email: atoumanians@tmalaw.ca

2. **City of Kitchener**
   200 King Street West, 4th Floor
   Kitchener, ON N2G 4G7

   Katherine Hughes
   Tel: 519.741.2200ext.7266
   Email: katherine.hughes@kitchener.ca

3. **Region of Waterloo**
   150 Frederick Street, 3rd Floor
   Kitchener, ON N2G 4J3

   Fiona McCrea and Andy Gazzola
   Tel: 519.575.4518 / 226-750-5016
   Email: fmccrea@regionofwaterloo.ca / agazzola@regionofwaterloo.ca

4. **Friends of Olde Berlin Town**
   55 Margaret Avenue
   Kitchener, ON N2H 4H3
   Hal Jaeger
   Tel: 519.341.6007
   Email: obtfriends@gmail.com

Participants

1.	Daniel Ariza	dariza347@gmail.com
2.	Neil Baarda	neil.baarda@gmail.com
3.	Ilona Bodendorfer	synergistic_solutions@sympatico.ca
4.	Richard Buck	richard@crbucklaw.com
5.	Taijwant (Tony) Greer	taijwant@gmail.com
6.	Cathryn Harris	drcathrynharris@gmail.com
7.	Bob Janzen	bob.janzen46@gmail.com
8.	Adam Joncas	adamjoncas@hotmail.com
9.	Gail Pool	gail.richard.pool@gmail.com
10.	North Waterloo Region Branch of Architectural Conservancy Ontario	rowell01@sympatico.ca
11.	Donna Kuehl	adeline@sympatico.ca
12.	Peter Eglin	peglin@wlu.ca
13.	Trudy Wagner	twagner29@live.ca
14.	Simon Euteneier	stonehouserent@gmail.com
15.	Sally Gunz	sgunz@uwaterloo.ca
16.	Roy Cameron	cameron@uwaterloo.ca
17.	Monica Weber	monicaweber10@gmail.com
18.	Social Development Centre of Waterloo Region	sdcwr@waterlooregion.org
19.	John Ryrie	jryrie_04@sympatico.ca
20.	Kathryn Forler	kathrynforler@gmail.com
21.	Maaike Asselberg	masselbergs@sentex.ca
22.	Micah Sadler	mica@sadlerrealty.ca
23.	Ron Brohman	r.f.brohman@gmail.com

ATTACHMENT 2

ISSUES LIST

Note: The identification of an issue does not mean that all parties agree that such issue, or the manner in which the issue is expressed, is appropriate or relevant to the determination of the Tribunal at the hearing. The extent to which the issues are appropriate, within the jurisdiction of the OLT, or relevant to the determination at the hearing will be a matter of evidence and argument at the hearing.

	Matters of Provincial Interest (Section 2 of Planning Act)	**Party**
1	Do the proposed Official Plan and Zoning By-law amendment applications (the "proposed applications") have sufficient regard to the matters of provincial interest listed in section 2(d), (n), (p) and (r)?	FOBT
	Provincial Policy Statement 2020 and Provincial Planning Statement 2024	
2	a) Are the proposed Official Plan Amendment and Zoning By-law Amendment applications (the proposed applications) consistent with the PPS 2020, including but not limited to, policies 1.1.3.2, 1.1.3.3, 1.1.3.4, 2.6 and 4.6? *(Issue may no longer apply in light of PPS 2024)*	City FOBT
	b) Are the proposed Official Plan Amendment and Zoning By-law Amendment applications (the proposed applications) consistent with the PPS 2024, including but not limited to, sections 2.1.3, 2.1.4, 2.1.6 a), 2.2.1, 2.3.1, 2.4.1, 2.4.2.3, 4.6.1, 4.6.3, 6.1.1, 6.1.5, 6.1.6, 6.1.7, 6.1.11, and 6.1.12?	City FOBT
	Growth Plan for the Greater Golden Horseshoe	
3	Do the proposed applications conform to the Growth Plan, including but not limited to, Guiding Principle 1.2.1, and policies in sections 2.2.2, 2.2.4, 2.2.6, 4.1, and 4.2.7? *(Issue may no longer apply in light of PPS 2024)*	City FOBT
	Region of Waterloo Official Plan	
4	Do the proposed applications conform to the Region of Waterloo Official Objective 3.8?	FOBT

5	Do the proposed applications conform to the Urban Area Development policies in chapter 2.D (2.D.1, 2.D.2, 2.D.6, 2.D.10)?	City FOBT
6	Do the proposed applications conform to the Liveability in Waterloo Region policies in chapter 3 (3.A, 3.B, 3.C, 3.G.1, 3.G.6)?	City FOBT
7	Do the proposed Official Plan Amendment and proposed Zoning By-law Amendment implement all requirements to address noise from stationary and transportation sources in conformity with the Regional Official Plan, including Sections 2.G.10, 2.G.13, 2.G.14, 2.G.15 and 2.G.16, including but not limited to an appropriate holding provision?	Region
	Region of Waterloo Official Plan Amendment 6	
8	What consideration, if any, should be given to the following policies of OPA 6:	Applicant
	a) Do the proposed applications conform to Policy 2.C.2.2.(f) and general objective bullet #8 (Chapter 2, page 3) regarding cultural heritage conservation?	FOBT
	b) Do the proposed applications conform to Policy 2.D.2.8, regarding the appropriate location of major intensification?	FOBT
	c) Do the proposed applications conform to Policy 2.F.3, regarding intensification on properties designated under the OHA?	FOBT
	d) Do the proposed applications conform to Policy 2.I.5.1, regarding exceeding intensification and density targets?	FOBT
	e) Do the proposed applications have sufficient regard to Objective 3.A., bullet 1, regarding supporting a range of housing?	FOBT
	City of Kitchener Official Plan	
9	Do the proposed applications conform to the Urban Structure policies in Part C (3.C.2.9, 3.C.2.10, 3.C.2.17, 3.C.2.20, and 3.C.2.22)?	City FOBT
10	Do the proposed applications conform to the Housing policies in Section 4 (4.C.1.7, 4.C.1.8, 4.C.1.9, 4.C.1.13, and 4.C.1.19)?	City FOBT
11	Do the proposed applications conform to the Private Greenspace and Facilities policies in Section 8 (8.C.1.21 and 8.C.1.23)?	City FOBT

12	Do the proposed applications conform to the Urban Design objectives in Section 11 (11.1.1 through 11.1.8)?	City FOBT
13	Do the proposed applications conform to the Urban Design policies in Section 11 (11.C.1.4, 11.C.1.11, 11.C.1.12, 11.C.1.21, 11.C.1.29, 11.C.1.30, 11.C.1.31, 11.C.1.32, and 11.C.1.33).	City FOBT
14	Do the proposed applications conform to the Cultural Heritage Resources objectives in Section 12 (12.1.2)?	City FOBT
15	Do the proposed applications conform to the Cultural Heritage Resources policies in Section 12 (12.C.1.1, 12.C.1.10,12.C.1.14, 12.C.1.19, 12.C.1.21, 12.C.1.23, 12.C.1.26, 12.C.1.27, and 12.C.1.29??	City FOBT
16	Do the proposed applications conform to the Active Transportation objectives in Section 13 (13.1.1, 13.1.3, and 13.1.7)?	City
17	Do the proposed applications conform to the Transportation policies in Section 13 (13.C.1.4.d, 13.C.1.6, 13.C.1.13, 13.C.3.12, 13.C.7.3, 13.C.7.4, 13.C.8.2, and 13.C.8.4)?	City
18	Do the proposed applications conform to the City of Kitchener Official Plan objective 3.2.5?	FOBT
	City of Kitchener Civic Centre Secondary Plan	
19	Do the proposed applications conform to the General Policies in Section 13.1.1 (13.1.1.1, and 13.1.1.7)?	City FOBT
20	Do the proposed applications conform to the Land Use Designation policies in Section 13.1.2 (13.1.2.8)?	City FOBT
	Kitchener Zoning By-law	
21	Are the proposed on-site secured and visitor bicycle parking rates appropriate for the scale, proposed use, and number of dwelling units proposed with the development?	FOBT
22	Do the requested site specific zoning regulations address compatibility between the proposed development, the existing community, and the planned function of the immediate area, including: adequate setbacks from existing low density uses, maximum building heights and step backs regulations to regulate	City FOBT Region

	built form, setbacks for surface parking facilities from the public realm, as well as setbacks and step backs from other properties? Do the requested site specific zoning regulations address adequate setbacks and driveway visibility triangles? Does the driveway width comply with zoning regulations and Regional Requirements for Access By-law and policy?	
	Kitchener Urban Design Manual	
23	What weight should be given to the Kitchener Urban Design Manual?	Applicant
24	Does the proposed development complement adjacent built form through compatible height, scale, massing, and materials?	City FOBT
25	Does the base of the proposed development meet the built form guidelines for a Tall Building?	City FOBT
26	Does the proposed development achieve sufficient transition to the adjacent existing and planned built form of the adjacent properties? Is there a suitable transition in scale, massing, building height, building length and intensity through setbacks, step backs, landscaping, and compatible architectural design/material selection?	City FOBT
27	Does the proposed development meet the tower separation guidelines for a Tall Building?	City FOBT
28	Does the proposed development exceed the target overlook guidelines for a Tall Building?	City
29	Does the proposed development provide a sufficient step back from the base to mitigate the potential wind impact on the public realm?	City
30	Does the proposed development include a sufficient shared outdoor amenity area?	City FOBT
31	Is the proposed building height compatible and aligned with adjacent neighbouring properties?	City FOBT

32	Does the proposed development appropriately mitigate the unwanted microclimate impact on surrounding properties, such as wind and shadow impacts?	City FOBT
33	Do the proposed applications respect the Major Transit Station Area guidelines, including but not limited to the following guidelines? a) Compatibility (section 02.2.6, p. 5, items 2 and 4) b) Cultural and Natural Heritage (section 02.2.7, p. 5, item 1) c) Built Form (section 02.3.1, p. 6, items 2 and 4) d) PARTS Central (section 02.4.2, p. 12, item 7)	FOBT
34	Do the proposed applications respect the Tall Buildings guidelines, including but not limited to the following guidelines? a) Relative Height, For towers adjacent to low-rise surrounding areas (p. 6) b) Compatibility (p. 15) c) Heritage, When a tall building is adjacent to a built heritage resource (p. 16, items 1, 3 and 4)	FOBT
35	Do the proposed applications respect the City-Wide guidelines, including but not limited to the following guidelines? a) Focal Points & Gateways (section 01.2.5, p. 15, item 4), b) Cultural & Natural Heritage (section 01.2.8, p. 18, item 7) c) Built Form (section 01.3.1, p. 19, item 9) d) Site Function (section 01.3.3, p. 23, items 8 and 9)	FOBT
	Civic Centre Neighbourhood, Heritage Conservation District Plan (HCD Plan)	
36	Are the proposed applications consistent with the Heritage District Objective, Principles, and Policies in the HCD Plan (Section 3.1, 3.2, 3.3.3, and 3.3.5.2, Recommendation 4.2.1 on “High Density Commercial Residential Designation” and Bullets 2 and 7 of Guideline 6.9.4)?	City FOBT
37	Are the proposed applications consistent with the Architectural Design Guidelines in the HCD Plan (Section 6.6 and 6.9.4)?	City FOBT
38	Does the proposed development provide a 45 degree angular plane measured from the rear property line to provide transition in scale from proposed development down to adjacent lands?	City FOBT
	Other	

39	What consideration, if any, should be given to The PARTS Central Plan?	Applicant
40	Do the proposed applications represent good planning and are they in the public interest?	FOBT
	Phase 2: Ontario Heritage Act Permit	
41	Is there sufficient information before the Tribunal to issue a Heritage Permit pursuant to section 42 of the Ontario Heritage Act?	City
42	Do the proposed applications have sufficient regard to the Ontario Heritage Act, including but not limited to, sections 41.2.2, 42(1) and 68(3)?	FOBT

Tab 6

Tab 6 Ontario Land Tribunal Hearings Guide (Excerpts)

Updated: December 2, 2024

Excerpt from https://olt.gov.on.ca/wp-content/uploads/Hearings-Guide.html

What is the order of presentation at a hearing?

The OLT can direct the order in which parties make statements and present evidence. This is often set in a procedural order. In some instances, the decision-maker whose decision is being appealed (i.e., the Director, Risk Management Official, Inspector, Registrar or Deputy Registrar, municipality, approval authority, committee of adjustment) will present their case first and call each of their witnesses. In other cases, the OLT may wish to hear from the appellant or applicant first because it is more efficient to focus on the disputed issues.

At the beginning of the hearing, parties may give brief opening statements addressing what they feel are the issues in the case before the OLT, a summary of the evidence they intend to present, the names of the witnesses that they intend to call, and the amount of time they feel they will need to present their case.

After opening statements and any preliminary procedural matters, the parties call witnesses in the order directed by the OLT. In most cases, witnesses will give evidence through direct examination, cross-examination and re-examination in the following way:

- direct examination by the party presenting the witness;
- direct examination by any party of similar interest, in the manner determined by the OLT;
- cross-examination by parties of opposite interest;
- re-examination by the party presenting the witness on issues that arise for the first time during cross-examination

After the parties have presented their evidence, the party that proceeded first will have the chance to present any additional evidence, in response to the evidence of another party(s). This is called reply evidence and it is limited to evidence that could not have been reasonably expected during their initial presentation of evidence.

When all the evidence has been heard, each party can make a final submission. This closing statement gives the parties a chance to summarize the important facts that they are relying on, to summarize any points of law or policy that they think are relevant for the OLT's consideration, and to persuade the OLT to accept their argument or position.

At any time during the hearing, the OLT may ask questions of parties, witnesses, lawyers or representatives.

Tab 7

Valentin Pintea *Appellant*

v.

Dale Johns and
Dylan Johns *Respondents*

and

National Self-Represented Litigants Project,
Pro Bono Ontario and
Access Pro Bono *Interveners*

Indexed as: Pintea *v.* Johns

2017 SCC 23

File No.: 37109.

2017: April 18.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Civil procedure — Contempt of court — Required knowledge — Self-represented plaintiff failing to comply with case management orders and failing to attend case management meetings after having moved without filing change of address with court as required — Case management judge striking claim, finding plaintiff in contempt of court and awarding costs to defendants — Majority of Court of Appeal affirming decision — Dissenting judge finding that plaintiff's failure to attend case management meetings not act of contempt and that costs award significantly disproportionate consequence for failing to file change of address — Actual knowledge of impugned orders necessary for plaintiff to be found in contempt — Action restored and costs award vacated — Alberta Rules of Court, Alta. Reg. 124/2010, r. 10.52(3)(a)(iii).

Valentin Pintea *Appelant*

c.

Dale Johns et
Dylan Johns *Intimés*

et

National Self-Represented Litigants Project,
Pro Bono Ontario et
Access Pro Bono *Intervenants*

Répertorié : Pintea *c.* Johns

2017 CSC 23

N° du greffe : 37109.

2017 : 18 avril.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Procédure civile — Outrage au tribunal — Connaissance requise — Défaut par un demandeur non représenté de se conformer à des ordonnances relatives à la gestion de l'instance et de se présenter à des rencontres de gestion d'instance après avoir déménagé sans communiquer au tribunal son changement d'adresse comme il était tenu de le faire — Décision de la juge chargée de la gestion de l'instance radiant la demande, déclarant le demandeur coupable d'outrage au tribunal et adjugeant les dépens en faveur des défendeurs — Arrêt de la Cour d'appel confirmant cette décision à la majorité — Opinion dissidente concluant que le défaut du demandeur de se présenter aux rencontres de gestion d'instance ne représentait pas un outrage au tribunal et que la condamnation aux dépens constituait une conséquence disproportionnée par rapport à l'omission d'avoir communiqué le changement d'adresse — Preuve de la connaissance réelle par le demandeur des ordonnances en cause requise pour justifier sa condamnation pour outrage au tribunal — Rétablissement de l'action en justice et annulation de la condamnation aux dépens — Alberta Rules of Court, Alta. Reg. 124/2010, art. 10.52(3)(a)(iii).

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 124/2010, r. 10.52(3)(a)(iii).

Authors Cited

Canadian Judicial Council. *Statement of Principles on Self-represented Litigants and Accused Persons*, September 2006 (online: https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf; archived version: http://www.scc-csc.ca/cso-dce/2017SCC-CSC23_1_eng.pdf).

APPEAL from a judgment of the Alberta Court of Appeal (Martin, McDonald and Veldhuis JJ.A.), 2016 ABCA 99, [2016] A.J. No. 432 (QL), 2016 CarswellAlta 772 (WL Can.), affirming a decision of the Court of Queen's Bench (Kenny J.). Appeal allowed.

Colin Feasby, *Sean Sutherland* and *Adam LaRoche*, for the appellant.

Duncan C. Boswell and *Alyssa J. Duke*, for the respondents.

Ilan Ishai and *Ranjan Agarwal*, for the intervener the National Self-Represented Litigants Project.

Andrew Bernstein, *Jeremy Opolsky* and *Leora Jackson*, for the interveners Pro Bono Ontario and Access Pro Bono.

The judgment of the Court was delivered orally by

[1] KARAKATSANIS J. — The common law of civil contempt requires that the respondents prove beyond a reasonable doubt that Mr. Pintea had actual knowledge of the Orders for the case management meetings he failed to attend.

[2] The case management judge failed to consider whether Mr. Pintea had actual knowledge of two of the three Orders upon which she based her

Lois et règlements cités

Alberta Rules of Court, Alta. Reg. 124/2010, art. 10.52(3)(a)(iii).

Doctrine et autres documents cités

Conseil canadien de la magistrature. *Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat*, septembre 2006 (en ligne : https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_fr.pdf; version archivée : http://www.scc-csc.ca/cso-dce/2017SCC-CSC23_1_fra.pdf).

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Martin, McDonald et Veldhuis), 2016 ABCA 99, [2016] A.J. No. 432 (QL), 2016 CarswellAlta 772 (WL Can.), qui a confirmé une décision de la Cour du Banc de la Reine (juge Kenny). Pourvoi accueilli.

Colin Feasby, *Sean Sutherland* et *Adam LaRoche*, pour l'appelant.

Duncan C. Boswell et *Alyssa J. Duke*, pour les intimés.

Ilan Ishai et *Ranjan Agarwal*, pour l'intervenant National Self-Represented Litigants Project.

Andrew Bernstein, *Jeremy Opolsky* et *Leora Jackson*, pour les intervenantes Pro Bono Ontario et Access Pro Bono.

Version française du jugement de la Cour rendu oralement par

[1] LA JUGE KARAKATSANIS — Suivant les règles de la common law relatives à l'outrage au tribunal en matière civile, les intimés doivent prouver hors de tout doute raisonnable que M. Pintea connaissait réellement l'existence des ordonnances fixant la tenue des rencontres de gestion d'instance auxquelles il a omis d'assister.

[2] La juge chargée de la gestion de l'instance a omis de se demander si M. Pintea connaissait réellement l'existence de deux des trois ordonnances

decision. The respondents concede that the requirements of Rule 10.52(3)(a)(iii) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, were not met with respect to these two Orders.

[3] As a result, the finding of contempt cannot stand.

[4] We would add that we endorse the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council.

[5] The appeal is allowed, the action is restored and the costs award vacated.

Judgment accordingly.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Calgary.

Solicitors for the respondents: Gowling WLG (Canada), Calgary.

Solicitors for the intervener the National Self-Represented Litigants Project: Bennett Jones, Toronto.

Solicitors for the interveners Pro Bono Ontario and Access Pro Bono: Torys, Toronto.

sur lesquelles elle a basé sa décision. Les intimés concèdent que les conditions d'application du sous-al. 10.52(3)(a)(iii) des *Alberta Rules of Court*, Alta. Reg. 124/2010, n'étaient pas réunies à l'égard de ces deux ordonnances.

[3] En conséquence, la conclusion selon laquelle il y a eu outrage au tribunal ne saurait être maintenue.

[4] Nous tenons à souligner que nous souscrivons à l'*Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat* (2006) (en ligne) établi par le Conseil canadien de la magistrature.

[5] L'appel est accueilli, l'action en justice est rétablie et la condamnation aux dépens est annulée.

Jugement en conséquence.

Procureurs de l'appelant : Osler, Hoskin & Harcourt, Calgary.

Procureurs des intimés : Gowling WLG (Canada), Calgary.

Procureurs de l'intervenant National Self-Represented Litigants Project : Bennett Jones, Toronto.

Procureurs des intervenantes Pro Bono Ontario et Access Pro Bono : Torys, Toronto.

Tab 8

COURT OF APPEAL FOR ONTARIO

CITATION: Girao v. Cunningham, 2020 ONCA 260
DATE: 20200421
DOCKET: C63778

Lauwers, Fairburn and Zarnett JJ.A.

BETWEEN

Yolanda Girao

Plaintiff (Appellant)

and

Lynn Cunningham and Victor Mesta

Defendant (Respondent)

Yolanda Girao, acting in person

David Zuber and Michael Best, for the respondent

Heard: September 26, 2019

On appeal from the judgment of Justice Peter Cavanagh of the Superior Court of Justice, sitting with a jury, dated March 3, 2017, from the order on the threshold motion, dated April 20, 2017, with reasons reported at 2017 ONSC 2452, and from the costs order, dated July 20, 2017, with reasons reported at 2017 ONSC 4102.

Lauwers J.A.:

I. OVERVIEW

[1] The appellant, Yolanda Girao, was injured in a car accident. The respondent, Lynn Cunningham, was at fault. The appellant claimed that her injuries caused her to suffer pain in her back and neck that eventually became

chronic, and other symptoms including major depression. She claimed $500,000 in general damages and $500,000 in special damages.

[2] The jury found the respondent to be fully liable for the accident, and awarded the appellant $45,000 in general damages and $30,000 in special damages for past loss of income.

[3] Ms. Cunningham was represented by counsel appointed by her insurer. In these reasons I will occasionally refer to the respondent as the "defence" for convenience.

[4] After the case had gone to the jury, the defence moved to dismiss the action on the basis that the appellant had not met the statutory threshold to qualify for general damages – having sustained a serious and permanent impairment of important physical, mental, or psychological function under s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8. The trial judge allowed the motion and dismissed the appellant's claim for general damages. He also reduced her damages award for loss of income to $0 to account for statutory accident benefits received by the appellant from her insurer. The trial judge then awarded partial indemnity costs against the appellant in the amount of $205,542.38 plus $106,302.96 in disbursements, for a total of $311,845.34.

[5] The appellant was self-represented at trial, as she was on the appeal. She used a Spanish interpreter throughout.

[6] The appellant set out a number of grounds of appeal on the merits in her notice of appeal and her supplementary notice of appeal, tangentially referencing the threshold motion. In her factum, she also appealed the threshold decision. The respondent complained about the irregular form of the appeals but did not claim prejudice. Making due allowance for the appellant's status as self-represented, I would deem her appeal to have been properly brought on all these grounds.

[7] I would allow the appeal and order a new trial. This is one of those rare civil cases in which a new trial should be ordered because "the interests of justice plainly require that to be done," in the words of this court in *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.), at para. 68. The appellant has shown that a "substantial wrong or miscarriage of justice has occurred": s. 134(6) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and see *Vokes Estate v. Palmer*, 2012 ONCA 510, 294 O.A.C. 342, at para. 7.

II. THE TRIAL CONTEXT

[8] The appellant immigrated to Canada from Peru in 1999. She had been employed by a commercial bank in Peru and hoped to do the same work in Canada. However, she was unable to overcome her difficulty with the English language. She undertook more physical work and at the date of the accident was employed as a cleaner.

[9] The appellant experienced a traumatic event at the age of 18 when she was sexually assaulted. She experienced another traumatic event at Sheridan College in Toronto when she was belittled by an instructor. Then came the accident on June 19, 2002.

[10] The appellant pursued statutory accident benefits under the *Insurance Act* against her insurer, Allstate, for the injuries she suffered in the accident. Eventually, the appellant and Allstate settled the statutory accident benefits claim, on February 28, 2006, for a lump sum payment of $82,300 in addition to all amounts which had been received by the date of the settlement. The total settlement included $890.64 for transportation, $6,252 for housekeeping, $91,246.24 for income replacement, $28,360.43 for medical expenses, and $32,667.32 for medical rehab. The appellant's accident benefits claim was supported by several expert reports, including a series of reports summarized and gathered into a single report by Dr. Harold Becker.

[11] Allstate's considerable involvement in the action was largely driven by the groundless claim in Ms. Cunningham's statement of defence, rejected by the jury, that the accident had been caused by an unidentified motorist. There was no evidence to support this claim. Ms. Cunningham refused to accept even 1 percent fault for the accident. The allegation in the statement of defence obliged the appellant to sue her own insurer Allstate in order to recover under the unidentified motorist endorsement in the event that the jury accepted the

unidentified motorist claim. Allstate's participation as a party added significantly to the complexity and the costs of the trial for no good purpose. While in his costs decision the trial judge was not unduly critical of the defence for drawing in Allstate by asserting the claim against an unidentified motorist, his negative view is shown in that he made a Sanderson Order in favour of Allstate for its costs of $98,813.06 against the respondent.

III. THE POSITIONS OF THE PARTIES AT TRIAL

[12] The appellant asserted that she was happy and productive before the accident. She was working as a cleaner. While she acknowledged the traumatic events in her past, she asserted that she had recovered from both before the accident.

[13] After the accident the appellant claimed that she developed chronic pain and other symptoms, including major depression that the appellant asserts was caused by the accident. These injuries were acknowledged by the statutory accident benefits insurer and resulted in the statutory accident benefits settlement. At the date of the trial the appellant was on disability, receiving Ontario Disability Support Program (ODSP) payments.

[14] In this action the appellant claimed general damages for pain and suffering and for economic losses that were not fully covered by statutory accident benefits.

[15] The defence's position was that this was a minor motor vehicle accident not causally related to Ms. Girao's physical, emotional, psychiatric, or mental problems. The statutory accident benefit settlement provided Ms. Girao with more money, over four years, than she would have earned as a cleaner, and that accounted for her failure to get new employment and for her approach to this action. Her real motive is not compensation for actual injuries caused by the accident but secondary gain; she is a malingerer.

[16] The nub of the defence position was expressed in the defence's statement, which the trial judge included in his charge to the jury:

> All the experts retained by Ms. Cunningham had denied that Ms. Girao has sustained a permanent and serious impairment that can be related to the June 19, 2002 motor vehicle accident, and have provided opinions that Ms. Girao's depression, [temporomandibular joint] issues, chronic pain, and fibromyalgia claims are wholly and utterly unrelated to the accident, and that Ms. Girao has features of secondary gain pre-accident depression.
>
> Even the doctors treating Ms. Girao, including Dr. Manohar, have provided the same psychiatric diagnosis of Ms. Girao in 2012, of that of major depressive disorder with psychotic features in partial remission that she had in 2001 with Dr. Sanchez.

[17] The defence used a three-point strategy to persuade the jury to accept the defence theory. First, the defence asserted and relied on the truth of psychiatrist Dr. Sanchez's pre-accident letter of opinion dated October 12, 2001 concerning the appellant's pre-accident state; the defence did not call Dr. Sanchez as a

witness. Second, the defence raised and promoted the secondary gain theory using the statutory accident benefits settlement. Third, the defence worked to exclude from the jury and from the trial record the substantive expert evidence that justified the settlement, particularly evidence that gave a different portrait of the psychological effects the appellant claimed to have suffered from the accident than the defence's portrayal based on the Sanchez report.

[18] The statutory accident benefits settlement was portrayed by the defence as an undeserved windfall. The appellant was thrust into the position of accounting for the settlement, said to be undeserved, but was prevented from putting before the jury the evidence that justified the settlement.

IV. THE ISSUES

[19] I will confine my reasons to four elements of substantial trial unfairness:

1. the preparation, content, delivery and use of the so-called "Joint Trial Brief";
2. the defence's treatment of expert evidence;
3. the defence's use of information about the appellant's accident benefits insurance settlement;
4. the role of the trial judge and counsel where one party is self-represented.

[20] I will then consider the appellant's challenge of the trial judge's refusal to strike the jury, and conclude with the threshold decision.

V. ANALYSIS

(1) Issue One: The "Joint Trial Brief"

[21] On the eve of trial, the defence dropped a massive and selectively redacted 16 volume "Joint Trial Brief" on the appellant, who has substantial difficulty with the English language, something of which the defence was well aware. The content of the Brief can be summarized as falling into several categories: medical records, notes, and reports; employment, educational, and tax records; and documents relating to the collision and insurance claims. The Brief became the basis of the trial record in an unfair way that was inconsistent with the trial practice directions of this court.

(a) The Governing Principles

[22] It is clear law that: "The goal of a trial judge in supervising the assembly of a trial record is completeness and accuracy, so that the panel of this court sitting on the appeal can discern without difficulty exactly what was before [the trial judge] at any moment in the course of the trial": *1162740 Ontario Ltd. v. Pingue*, 2017 ONCA 52, 135 O.R. (3d) 792, at para. 14. This court has given instructions on the preparation and use of document briefs, for example, in *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523, at paras. 127-128, and in *Pingue*, at paras. 39-40.

[23] Any document introduced by any party that does not become a numbered exhibit should become a lettered exhibit. The important distinction between

numbered exhibits and lettered exhibits is that, subject to the trial judge's discretion, lettered exhibits do not go in with the jury during its deliberations, but numbered exhibits do: *Pingue*, at para. 17.

[24] As a more general observation, it is customary for experts to prepare reports, which counsel provides to the parties and to the judge. The admissible evidence of the expert is normally understood to be the oral evidence, particularly in jury trials. However, the best practice in jury trials is to make expert reports lettered exhibits in order to preserve the integrity of the trial record for the purpose of an appeal: *Pingue*, at para. 21.

[25] The problem in this case with the trial record went further. It is quite usual in civil actions for counsel to prepare an agreed trial document brief containing documents that are admitted as authentic and admissible. See J. Kenneth McEwan, *Sopinka on the Trial of an Action*, 3rd ed. (Toronto: LexisNexis, 2016) at pp. 66-72. In *Blake v. Dominion of Canada General Insurance Company*, 2015 ONCA 165, 331 O.A.C. 48, at para. 54, Brown J.A. emphasized the necessity of ensuring that the record reflects the document's intended use:

> When a document brief is tendered at trial, the record should reflect clearly the use the parties may make of it. Such use may range from the binder's acting merely as a convenient repository of documents, each of which must be proved in the ordinary way, through an agreement about the authenticity of the documents, all the way to an agreement that the documents can be taken as proof of the truth of their contents. Absent an agreement by the parties on the permitted use of a

> document brief, the trial judge should make an early ruling about its use.

[26] Counsel typically agree on a list of documents and one party attends to the brief's preparation. As observed in *Iannarella*, at para. 128: “It is regrettably not unusual, however, for counsel to differ on the precise basis on which a document in the brief is being tendered or whether it was to have been included, as the implications materialize in the course of the trial.” *Pingue* stated, at para. 40:

> [I]t is necessary for counsel to clarify to the court and to each other the extent to which the authenticity of each document in the proffered document brief is accepted…. If, as is too often the case, counsel has not done so, it is the trial judge’s responsibility to get the requisite clarity when the documents are made exhibits, especially concerning a document's hearsay content.

[27] This discipline of judicial oversight applies even more forcefully where one party is self-represented and the opposing lawyer prepares the brief, and in a jury trial where the brief goes into the jury room.

(b) The Principles Applied

[28] The Joint Document Brief was prepared by the defence without input from the appellant, despite the misleading label: “Joint”. There is no good explanation for its late delivery, which put the appellant at a disadvantage leaving her to run from behind through the course of the trial.

[29] The volumes in the Joint Document Brief were made numbered exhibits. The trial judge's approach was to simply accept all the volumes. He said, when he marked vol. 16 as exhibit one:

> [M]y assumption is for the most part, the documents are going to be admissible. And, rather than marking them first for identification and changing it, I thought I would do it the other way around.

It does not appear from the record that the trial judge later excluded any documents from the Brief tendered by the defence.

[30] Dr. Becker's report supporting the appellant's account of her injury was initially made a numbered exhibit. It was later struck, but no copy was then filed as a lettered exhibit. This failure obliged the appellant to add it as well as some other reports to the appeal book in order to ensure that they were available to this court on the appeal.

[31] Some of the medical reports favouring the appellant's claim in the statutory accident benefits file were included in the Joint Document Brief but they were redacted by the defence in order to excise any opinion evidence favourable to Ms. Girao.

[32] I would not consider the flaws in the management of the trial record to be fatal to trial fairness in this case, but they unfairly enabled the defence's strategy of keeping expert evidence favourable to the appellant from the jury and from the trial record.

[33] In my view, counsel and the court should have addressed the following questions, which arise in every case, in considering how the documents in the joint book of documents are to be treated for trial purposes:

1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?
2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?
3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?
4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?
5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?
6. Does any party object to a document in the document book, if it has not been prepared jointly?

[34] It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings.

[35] In my view, none of these issues or questions are novel. The answers to these questions are not implicit in the filing of a joint document book and must be expressly addressed on the record or by written agreement. The problem

frequently comes because the parties have not turned their minds to the issues in sufficient detail before the document book is tendered as an exhibit. This must change as a matter of ordinary civil trial practice. Had the trial judge taken himself, counsel and Ms. Girao through this list of questions relating to the document book, some of the problems identified in these reasons could have been avoided.

(2) Issue Two: The Use of Expert Evidence

[36] Two issues concerning the use of expert evidence arose in this trial that are especially concerning. The first relates to the trial judge's refusal to allow Dr. Becker to testify as to his opinion as to Ms. Girao's injuries. He was the director of the clinic whose team members examined Ms. Girao in connection with her statutory accident benefits claim. Dr. Becker authored the covering report in which he summarized the reports of the team members, including the psychiatrist Dr. Rosenblat.

[37] The second relates to the use of Dr. Sanchez's opinion. This was adduced by the defence to substantiate its theory that, before the accident, the appellant suffered from the same mental problems that she manifested after the accident.

[38] The admissibility of these opinions engages two intertwined sets of governing principles, the first related to expert evidence, and the second to the use of ss. 35 and 52 of the *Evidence Act*, R.S.O. 1990, c. E.23 to permit the

introduction into evidence of medical reports without the need to call the doctors who prepared them.

(a) The Governing Principles on Expert Evidence

[39] The threshold requirement for the admission of expert evidence has four elements: the evidence must be relevant; it must be necessary in assisting the trier of fact; no other evidentiary rule should apply to exclude it; and the expert must be properly qualified, assuming there is no novel science issue. Then the trial judge must execute the gatekeeper function. See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 19. See also *R. v. Abbey*, 2017 ONCA 640, 140 O.R (3d) 40, *per* Laskin J.A., at paras. 47-48. These four threshold elements implicitly give rise to another element: Can a person who has expertise, but who is not qualified as an expert witness under r. 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, still provide opinion evidence?

[40] The short answer is that such a person can give opinion evidence as this court affirmed in *Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721, leave to appeal refused, [2015] S.C.C.A. No. 198. It was a case about the quantum of damages for injuries suffered in a car accident. Simmons J.A. identified two types of witnesses with special expertise who can provide opinion evidence but who are not expert witnesses as described in r. 4.1.01 and Form 53: The first are “participant experts,” who form opinions based on their

participation in the underlying events, such as treating physicians. The second are “non-party experts,” who are retained by a non-party to the litigation and who form opinions based on personal observations or examinations that relate to the subject matter of the case, but for another purpose. One example would be a medical examination of a claimant for statutory accident benefit insurance purposes: see *Westerhof*, at para. 6. (*Westerhof* implicitly overrules the trial decision to the contrary reached in *Beasley v. Barrand*, 2010 ONSC 2095, 101 O.R. (3d) 452.)

[41] Simmons J.A. held, at para. 60, that both participant experts and non-party experts may give opinion evidence without complying with rule 53.03:

> I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:
>
> - the opinion to be given is based on the witness’s observation of or participation in the events at issue; and
> - the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

(b) The Governing Principles Regarding the *Evidence Act*

[42] Dr. Sanchez’s letter was adduced by the defence in order to substantiate its theory that the appellant was suffering before the accident from the same mental problems that she manifested after the accident. The defence wanted to rely on the words of Dr. Sanchez’s opinion as being true. This would be to use

Dr. Sanchez's statement for the truth of its content, making it hearsay evidence. Hearsay evidence "is presumptively inadmissible because – in the absence of the opportunity to cross-examine the declarant at the time the statement is made – it is often difficult for the trier of fact to assess its truth": *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 1.

[43] There are certain exceptions to the hearsay rule under which a statement may be adduced for its truth value. Two such exceptions, hedged about with additional protections, are found in ss. 35 and 52 of the *Evidence Act*.

[44] Section 35 of the *Evidence Act* relates to business records. If a record is made "in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act," then the record is admissible as evidence of such act: s. 35(2).

[45] Section 52 of the *Evidence Act* relates to medical reports and is more expansive than s. 35. It permits the court to allow the report to be admitted into evidence without the need to call the practitioner. The opinion can then be accepted for the truth of its contents. However, the trial judge must, at the request of a party, oblige the medical practitioner to testify in order to permit cross-examination. See *Kapulica v. Dumancic*, [1968] 2 O.R. 438 (C.A.); *Reimer v. Thivierge*, [1999] 46 O.R. (3d) 309, at paras. 12-15; see also *Doran v. Melhado*, 2015 ONSC 2845. See generally Michelle Fuerst, Mary Anne

Sanderson, and Donald Ferguson, *Ontario Courtroom Procedure*, 4th ed. (Toronto: Lexis Nexis Canada, 2016), c. 41.

[46] The respective roles of the two sections have been distinguished in several cases. Section 35 is not a proper basis on which to admit opinion evidence. In *Westerhof*, Simmons J.A. said, at para. 103:

> Because these reports were tendered under s. 35 of the *Evidence Act*, the opinions concerning causation were not admissible for the truth of their contents: *Robb Estate v. Canadian Red Cross Society* (2001), 152 O.A.C. 60 (Ont. C.A.), at para. 152; *McGregor v. Crossland*, [[1994] O.J. No. 310] 1994 CanLII 388 (Ont. C.A.) at para. 3. Further, the appeal record contains no indication that notice was served for the admission of these reports under s. 52 of the *Evidence Act*. [Emphasis added.]

[47] In *Robb Estate v. Canadian Red Cross Society* (2001), 152 O.A.C. 60 (Ont. C.A.), the court noted, at para. 152: "Section 52 differs from s. 35 in that it permits the admission of opinions and diagnoses contained in medical reports signed and prepared by qualified practitioners… Section 52 was designed as an alternative to oral testimony."

[48] In *McGregor v. Crossland*, [1994] O.J. No. 310 (Ont. C.A.) the court noted, at para. 3:

> We do not think that the diagnosis … is admissible under s. 35. It does not relate to "any act, transaction, occurrence or event". If the notes were to be admissible at all this would have had to have been under s. 52 of the *Evidence Act*.

(c) The Principles Applied

[49] Ms. Girao served a notice of intent under ss. 35 and 52 of the *Evidence Act* and listed many of her medical reports including the reports prepared by Dr. Becker and Dr. Rosenblat. She did not include the report prepared by Dr. Sanchez.

[50] On September 16, 2011, defence counsel served a request to admit on Ms. Girao under r. 51 of the *Rules of Civil Procedure* requesting her to admit to "[t]he facts set out in the attached report of Dr. A. Sanchez dated October 12, 2001". Ms. Girao responded on September 20, 2011 stating that she "denies the facts set out in the attach [sic] report of Dr. Sanchez which are not accurate." Defence counsel then served a notice under s. 35 of the *Evidence Act*, dated September 26, 2011, which listed several medical reports and which gave notice that the defence could rely on the evidence of various healthcare providers, including Dr. Sanchez, by either calling them to testify or by filing their reports.

[51] Allstate later served a notice of intention under both ss. 35 and 52 of the *Evidence Act* listing a number of medical records including Dr. Sanchez's report and his clinical notes and records.

(i) Dr. Becker's Opinion

[52] The expert evidence most favourable to the appellant was contained in the covering report authored by the director of the clinic, Dr. Becker, in which he summarized the reports of the team members who examined Ms. Girao in

connection with her statutory accident benefits claim. The most important was a psychiatry report authored by Dr. Rosenblat.

[53] However, the trial judge only permitted Dr. Becker to testify about the system for determining a person's entitlement to statutory accident benefits for catastrophic impairment, but not about the substance of his report. In his jury charge, the trial judge effectively expunged Dr. Becker's limited evidence, telling the jury that it was not in issue.

[54] As I noted earlier, the defence worked to exclude the substantive expert evidence that justified the statutory accident benefits settlement from the jury and from the trial record. Consider the positive view of Ms. Girao's claim expressed by Dr. Rosenblat, whose opinion was incorporated in Dr. Becker's accident benefits report:

> Ms. Girao is a woman who has functioned well for most of her life outside of three specific areas. There is a significant history of a highly traumatic rape at the age of 18 from which she recovered. There was also a possible major depressive episode about one year prior to the accident from which she had full recovery. Furthermore, she had been suffering some back pain, again approximately a year prior to the accident. After the accident she developed gradually worsening bodily pains. She only began experiencing her depression approximately six months after the accident. Because her depression came on so many months after the onset of pain, it is clear that her pain triggered her depression and therefore her accident played a substantial role in precipitating her second depression. It is likely that her earlier rape and possible episode of

> depression predisposed her to the impact of this motor vehicle accident.

[55] Dr. Rosenblat concluded: “Clearly this motor vehicle accident has played a substantial role in her current psychiatric functioning.”

[56] The defence did not want these opinions favourable to Ms. Girao to reach the jury. Dr. Becker’s report was initially admitted as exhibit 61 when it was put to Dr. Finkle, the defence psychiatrist, in cross-examination, but it was later “struck as an exhibit,” according to a note in the exhibits list. The basis on which the trial judge struck the exhibit has not been put before this court, nor was the report included in the trial record as a lettered exhibit. Ms. Girao included a copy in her Appeal Book.

[57] I can see no reasonable legal basis on which the evidence of Dr. Becker could be excluded in light of the governing principles regarding s. 52 of the *Evidence Act* noted earlier. It is not unusual in an assessment of a claimant for statutory accident benefits for there to be a summative report attaching the individual reports of multiple specialized assessors who prepared reports within their field of expertise. The usual approach would have the author of the summative report, in this case Dr. Becker, called as a witness by the appellant to provide his opinion. That is what the appellant tried to do in this case. The defence would have cross-examined Dr. Becker and, if necessary and if so inclined, the other assessors like Dr. Rosenblat, whose opinions underpinned Dr. Becker’s summative opinion.

[58] In my view it was an error not to allow Dr. Becker to testify about the substance of his report and it was also an error to exclude his report from the record, given that Ms. Girao had served a notice under s. 52 of the *Evidence Act*. Dr. Becker should have been allowed to testify about what reliance he placed on Dr. Rosenblat (and others), subject to any demand by the defence to require Dr. Rosenblat to be available for cross-examination.

[59] There is an actuating judicial perspective within which these principles operate, well-expressed by Barr J.: "[I]t should be remembered that any time a court excludes relevant evidence the Court's ability to reach a just verdict is compromised": *Hunter v. Ellenberger* (1988), 25 C.P.C. (2d) 14 (Ont. H.C.).

[60] Allowing the defence experts to testify and offer opinions contrary to Dr. Becker and Dr. Rosenblat presented a skewed picture to the jury and was grossly unfair to the appellant.

(ii) Dr. Sanchez's Opinion

[61] The defence asserted and relied on the truth of Dr. Sanchez's 2001 letter of opinion concerning the appellant's pre-accident state but did not call Dr. Sanchez as a witness. The importance of that opinion is shown by the fact that the defence placed it in the statement of its position that the trial judge expressed in his jury charge, which I repeat for convenience:

> Even the doctors treating Ms. Girao, including Dr. Manohar, have provided the same psychiatric diagnosis of Ms. Girao in 2012, of that of major

> depressive disorder with psychotic features in partial remission that she had in 2001 with Dr. Sanchez.

[62] Dr. Sanchez's report is two pages long and concludes with the "Impression" that the appellant was then suffering from a: "Major Depressive Disorder With Psychotic Features in partial remission." She had been referred to Dr. Sanchez by her family doctor, Dr. Malicki.

[63] The appellant objected to the use of Dr. Sanchez's opinion at the trial when defence counsel asked her about Dr. Sanchez's report.

> Ms. Girao: Your Honour, the content of this report, I told the jurors. He hasn't brought Dr. Sanchez, so…
>
> The Court: Just, just…
>
> Ms. Girao: … he hasn't, I mean, so he can be cross-interrogated about this.
>
> The Court: The witness wasn't allowed to address this document as part of her evidence-in-chief on the basis that it was not evidence.
>
> Defence Counsel: Right. But, this is cross-examination Your Honour.
>
> The Court: I know, but it's cross-examination on evidence.
>
> Defence Counsel: No. It's cross-examination on the statements made, which is different in, then it's [sic] prior inconsistent statements which then is admissible. And, that's….
>
> The Court: We marked all these documents as….

> Defence Counsel: As exhibits, as business records.
>
> The Court: Yes.
>
> Defence Counsel: Right.
>
> Ms. Girao: Your Honour….
>
> The Court: So, it's in evidence. You gave your evidence about this. And, she's answered your questions, I think, with respect to it. Let's just carry on.

[64] And the questioning regarding Dr. Sanchez continued, taking up several pages of the transcript. I interpret this exchange as Ms. Girao's objection, as a lay person, to the use by the defence of the Sanchez report for the truth of its contents without the defence producing Dr. Sanchez as a witness in accordance with s. 52 of the *Evidence Act*.

[65] The exchange shows the way in which making the Joint Document Brief an exhibit made it easy for the defence to use the evidence for its hearsay purposes. This is what defence counsel did with Dr. Sanchez's report, but without calling him.

[66] Defence counsel stated that Dr. Sanchez's report was in evidence under s. 35 of the Ontario *Evidence Act*, related to business records. It is also worth noting that as a result of the notice given by Allstate, Dr. Sanchez's report was also in under s. 52 of the Ontario *Evidence Act* related to medical reports.

[67] Dr. Sanchez's report loomed large in the cross-examination of the appellant, the cross-examination of other medical witnesses, and in the argument.

[68] I note that in his general jury instruction about medical records, the trial judge made comments about hearsay evidence:

> [The] record makers "impression", opinion or diagnosis recorded in these records, is not admissible for its truth unless the record maker testified before you about that opinion and you accept the evidence of that person. By opinion I mean an impression or a diagnosis of what in the opinion of a healthcare profession was wrong with the plaintiff and why.

[69] However, the trial judge did not bring this caution home to the jury with respect to Dr. Sanchez's opinion. His jury charge including his review of the evidence ratified the defence's abuse of the opinion for hearsay purposes.

[70] In his summary of the defence position, the trial judge told the jury:

> After the accident, Ms. Girao's pre-existing mental health issues and depression continued to worsen unabated as they had been leading up to the accident. Ms. Girao, despite working for some time after the accident, then went off work and pursued litigation as a full time job and began receiving accident benefits payments from her accident benefits carrier, eventually resulting in a large settlement that paid Ms. Girao $8,000 … more per year by not working.
>
> Ms. Girao's progressive mental illness and psychiatric problems continued to worsen and Ms. Girao used the motor vehicle accident as the scapegoat of all her problems regarding her inability to adapt to life in Canada, her difficulties with English, her worsening pre-

> existing mental health issues, past memories and familial problems in raising her children.

[71] In his summary of the evidence, the trial judge made extensive reference to evidence about Dr. Sanchez in the appellant's testimony in-chief and in cross-examination. Dr. Maliki, the appellant's one-time family doctor who had referred her to Dr. Sanchez was cross-examined on his report. Dr. Sanchez's opinion also came up in the evidence of the appellant's one-time psychiatrist, Dr. Manohar, who testified that she was her psychiatrist from 2005 to June 2012. Dr. Manohar was cross-examined about Dr. Sanchez's report. Dr. Finkle, the defence psychiatrist, was cross-examined by the appellant regarding Dr. Sanchez's report. The trial judge's jury instructions including his summary of the evidence was provided to the jury.

[72] The trial judge made no reference to Dr. Sanchez's report in his threshold ruling or in the costs endorsement.

(iii) Discussion

[73] I infer that the defence used s. 35 of the *Evidence Act* as the basis for introducing Dr. Sanchez's opinion letter in order to avoid having to call him as a witness and to avoid exposing him to cross-examination. Defence counsel then proceeded to cross-examine Ms. Girao on Dr. Sanchez's opinion. He also put the opinion to several other witnesses, as noted earlier, and relied on it in the defence portion of the jury charge. Allstate used s. 52 as the basis of its notice

but did not call Dr. Sanchez, even though the appellant had objected to his evidence.

[74] In my view, the trial judge should have held that s. 35 of the *Evidence Act* is not the proper way to get medical opinion evidence in for the truth of its contents, which is what the defence did with Dr. Sanchez's opinion. Section 35 relates to business records and the ordinary notations made in such records. As the cases hold, where the report is that of a medical practitioner, s. 52 is applicable. But, once the plaintiff objected, as she did, the trial judge was required to refuse to admit Dr. Sanchez's report for the truth of its contents unless he was presented for cross-examination. On this basis, the hearsay content of Dr. Sanchez's opinion was not admissible for any purpose, yet it formed a substantial plank in the defence position, and was amplified in the jury instructions. This error of law was procedurally and substantively unfair to Ms. Girao.

(iv) Conclusion

[75] Ms. Girao properly served a notice under s. 52 of the *Evidence Act* and was entitled to refer to and rely upon Dr. Becker's report, and the reports that it summarized and attached including Dr. Rosenblat's report. She was entitled to summon Dr. Becker as a witness, as she did, and was entitled to have Dr. Becker explain his opinion to the jury. And if the defence wished to dispute Dr.

Becker's report, counsel could have cross-examined him, and then could have required Dr. Rosenblat to come and testify as to his psychiatric opinion.

[76] A straightforward and conventional application of s. 52 of the *Evidence Act* to Dr. Becker's report was the only way in which a reasonably level playing field could have been maintained in this action. As it was, because the trial judge effectively disqualified Dr. Becker and his evidence, Ms. Girao was left to fend for herself in a pitched battle with seasoned trial lawyers, with one hand effectively tied behind her back.

[77] The injustice was compounded because the defence was able to extract from and rely on the hearsay value of Dr. Sanchez's opinion without calling him so that he too could be subject to cross-examination. The trial judge did not recognize Ms. Girao's objection to Dr. Sanchez's report going into evidence as an objection that obliged the defence to summon Dr. Sanchez to give *viva voce* evidence and to be subject to cross-examination. The jury heard a one-sided story.

[78] These combined errors alone, in my view, are a sufficient basis upon which to allow the appeal.

(3) Issue Three: The Use of Information about Insurance

[79] The statutory accident benefits settlement played an out-sized role in the defence's strategy. It formed the basis of the defence's attack on Ms. Girao's evidence, her credibility and her reliability, and the credibility and reliability of the

witnesses she called in support of her case, including the experts. Was evidence about the settlement properly admitted? In my view it was not, as I explain in this section of the reasons.

[80] To set the context, the old law was that in a civil action a jury must be discharged automatically if something happened at the trial from which the jury might reasonably infer that the defendant was insured. The belief was that a jury sympathetic to the plaintiff would not hesitate to reach into the defendant's insurer's deep pocket to excessively compensate the plaintiff. The mention of insurance no longer necessarily results in the jury's automatic discharge, because the court understands that juries share the general public awareness that motor vehicles are insured. See *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092.

[81] If anything, the fact the jurors are savvy about car insurance leans in the other direction. Jurors are aware that larger insurance awards can increase the costs of the car insurance premiums they pay. The Ontario Law Reform Commission noted that one speculative explanation for the tendency of juries to make lower awards than judges was "the jurors' self-interest in keeping insurance premiums low": *Report on the Use of Jury Trials in Civil Cases* (Toronto: Ontario Law Reform Commission, 1996), at p. 28.

[82] The change in the judicial approach does not mean it is open season in the treatment of evidence about insurance in jury trials.

[83] Insurance defendants have seen it to their litigation advantage in some tort actions, as in this case, to seek to have details of the plaintiff's previous statutory accident benefits settlement revealed to the jury. This has also occurred when the tort settlement preceded the statutory accident benefits dispute.

[84] The issue is whether some or all of the details of the statutory accident benefits settlement can be admitted into evidence in the related tort trial arising out of the same accident in the examinations and cross-examinations of parties and witnesses, and in argument.

[85] Trial courts have wrestled with this issue and the cases are mixed. Judges have been somewhat hesitant in admitting the evidence, recognizing the possible impact on the jury to the prejudice of the plaintiff.

[86] I begin by describing the litigation dynamic set by Ontario's system for compensating people injured in motor vehicle accidents. I then address the law of evidence in that context.

(a) Ontario's system for compensating people injured in motor vehicle accidents

[87] Ontario has a hybrid system for compensating people injured in motor vehicle accidents. One component is the modified at-fault tort system. The other component is the no-fault statutory accident benefits system. The policy basis for the hybrid system was explained by this court in *Meyer v. Bright* (1993), 15 O.R. (3d) 129, [1993] O.J. No. 2446 (C.A.), at para. 6. The plaintiff's access to the at-

fault tort system is limited, but the plaintiff is given access to no-fault accident benefits for income loss and medical and rehabilitation expenses. The system is based on “an exchange of rights wherein the accident victim loses the right to sue unless coming within the statutory exemptions, but receives more generous first-party benefits, regardless of fault, from his or her own insurer.” The system is “designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims.” See also *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776, (C.A.), *per* Laskin J.A., at para. 7, and *Cadieux (Litigation Guardian of) v. Cloutier*, 2018 ONCA 903, 143 O.R. (3d) 545, at paras. 10-11, 85-86, leave to appeal refused, [2019] S.C.C.A. No. 63.

[88] The intersection between the two components of the system occurs when the statutory accident benefits are reconciled with the award of tort damages under s. 267.8 of the *Insurance Act*. Although the two sources of compensation are independent, there is some overlap and s. 267.8 is intended to prevent double recovery by the plaintiff. The functioning of the system is explained in *Cadieux* at paras. 22-24.

[89] As noted in *Basandra v. Sforza*, 2016 ONCA 251, 130 O.R. (3d) 466, at para. 21, affirmed in *Cadieux*, the statutory scheme sets up benefits silos: “Section 267.8 of the *Insurance Act* creates several categories of statutory accident benefits to be taken into account as possible reductions in a jury award: [the first silo is] income loss and loss of earning capacity (s. 267.8(1)); [the

second silo is] health care expenses, which includes attendant care costs by definition under s. 224(1) of the Act (s. 267.8(4)); and [the third silo is] other pecuniary losses such as housekeeping costs (s. 267.8(6)).” The tort award is to be reduced by the amount of statutory accident benefits received by the plaintiff on the basis of these three silos.

[90] The trial judge reconciles the no-fault benefits received by the plaintiff with the award of tort damages after the jury’s damages verdict by reducing the tort award: *Basandra*, at para. 20. The jury has no role in this exercise. The practice in civil jury trials is to include a jury instruction that they are to “make their award, if any, on a gross basis with no deduction for any collateral benefits” on the basis that the trial judge will make any required adjustment: *Malfara v. Vukojevic*, 2014 ONSC 6604, at para. 1, *per* Firestone J.

(b) The Governing Principles of the Law of Evidence

[91] It is trite law that evidence is admissible if it is relevant to a fact in issue in the case and is not subject to an exclusionary rule. The trial judge also has discretion to refuse to admit evidence where its prejudicial effect would exceed its probative value: *Draper v. Jacklyn* (1969), [1970] S.C.R. 92. That case involved graphic photographs of a motorist’s injuries that were admitted at trial. While holding that the photographs were properly admitted, Spence J. said at p. 98:

> The occasions are frequent upon which a judge trying a case with the assistance of a jury is called upon to determine whether or not a piece of evidence technically admissible may be so prejudicial to the opposite side that any probative value is overcome by the possible prejudice and that therefore he should exclude the production of the particular piece of evidence.

[92] This principle applies generally and beyond physical evidence along with the trial judge's residual discretion to exclude evidence. See *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 44; *R. v. Meddoui*, [1991] 3 S.C.R. 320, at para. 3; and *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, 138 O.R. (3d) 584, at paras. 29-32.

[93] I bring both lenses, relevance and prejudicial effect/probative value, to bear on the admissibility of the evidence of a statutory accident benefits settlement in a tort action.

(i) Relevance

[94] The first question is whether evidence of the details or existence of the statutory accident benefits settlement is relevant to a fact in issue in the tort action. "Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely": *R. v. Truscott* (2006), 216 O.A.C. 217 (C.A.), at para. 22. In a civil trial, the material facts in issue are set in general by the nature of the cause of action and

defence and then more specifically by the pleadings: *Rules of Civil Procedure*, r. 25.06(1).

[95] The limited case law shows that defendants have pursued several avenues to argue that the details of the statutory accident benefits settlement are relevant in the tort action and should be revealed to the jury.

[96] The less contentious avenue has been to allege the plaintiff's failure to use the settlement proceeds to mitigate future losses, as in *Farrugia v. Ahmadi*, 2019 ONSC 4261, and *Peloso v. 778561 Ontario Inc*. (2005), 28 C.C.L.I. (4th) 10 (Ont. S.C.).

[97] In *Farrugia*, the trial judge did not permit the defence to reveal the totality of the settlement to the jury but did permit questions on several benefits on the basis that the pleadings had put them in dispute. He permitted questions on caregiver expenses, attendant care expenses, and housekeeping and home maintenance expenses: at para. 29. The plaintiff had used some of the proceeds to renovate her house.

[98] In *Peloso*, the trial judge permitted the defence to ask questions about the plaintiff's lack of compliance with treatment recommendations on the basis of the allegation that she had failed to mitigate her future losses. Instead of using the money for the recommended treatments, the plaintiff bought a house. The trial judge reduced the damages 30 percent for the plaintiff's failure to mitigate: at para. 377.

[99] The more contentious avenue has been to claim that the benefits settlement eroded the plaintiff's motivation to work, thereby increasing the future income losses the defendant will be required to pay through the tort award. This avenue has been rejected by trial judges on the basis of relevance, as in *Ismail v. Flemming*, 2018 ONSC 5979, or on the basis that it was excessively prejudicial to the plaintiff, as in *Farrugia*, which I consider in the next section

[100] In *Ismail* the trial judge granted an order prohibiting questions by the defence as to "any suggestion, submission, argument or other reference at trial to the effect that the receipt of collateral benefits is relevant to [the plaintiff's] motivation to work": at para. 37. He acknowledged, at para. 17, that "there was an intuitive logic to the defendants' contemplated line of questioning and argument, and their corresponding assertions of relevance," but he largely rejected that logic, relying in part on the trial and appellate decisions in *Kitchenham v. AXA Insurance*, 23 C.C.L.I. (4th) 76 (Ont. S.C.), rev'd on other grounds, 229 O.A.C. 249 (Div Ct.), rev'd on other grounds, 2008 ONCA 877, 94 O.R. (3d) 276.

[101] In *Kitchenham*, the tort settlement came before the benefits trial.[1] The benefits carrier wanted to argue that the plaintiff could work, which would have reduced the carrier's liability to pay income replacement benefits, alleging that

[1] Benefits actions were abolished by Schedule 3 of the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, S.O. 2014, c. 9. It came into force on January 1, 2015.

the plaintiff, having been enriched by the tort settlement, lacked the financial incentive to work. The motion judge in *Kitchenham* said, at para. 53, that "documents relating to the settlement of the tort claim have no relevance to the present proceedings," and refused to order the production of the tort settlement documents. His view on this issue was accepted by the Divisional Court and by this court.

[102] The motion judge in *Kitchenham* explained, at para. 52:

> The best that [the defendant insurer] could do was to suggest that the quantum of the settlement might affect the plaintiff's motivation to return to work. However, the issue to be determined at trial is whether or not the plaintiff is disabled from working, not whether the plaintiff has a financial incentive to work. A wealthy person might have no incentive to work at all, yet would still be entitled to loss of income benefits if he were disabled from doing so. [Emphasis added.]

[103] Doherty J.A. agreed with the motion judge and noted, at para. 14:

> The issue in the benefits action is whether the plaintiff is disabled and unable to work. The impact, if any, of the settlement in the tort action on the plaintiff's motivation to work and the extent to which the plaintiff is actually disabled are both so speculative as to be beyond even the generous notion of relevance applied at this [discovery] stage of a proceeding[.]

[104] The trial judge in *Ismail* found, at para. 32, that *Kitchenham* applied in principle whether the tort settlement came first or the statutory accident benefits settlement. He prohibited the defence from making any suggestion that the receipt of collateral benefits affected the plaintiff's motivation to work.

[105] The defence argues that the *Ismail* trial judge's reliance on *Kitchenham* was misplaced; it is distinguishable because it was a benefits action, not a tort action like this case.

[106] There is a basic difference between benefits actions like *Kitchenham* and tort actions like *Ismail*. In tort actions the statutory accident benefits must be accounted for in the final tort award under the *Insurance Act.* The same is not true for benefits actions in which there is no direct relationship between the tort settlement and the benefits settlement. That said, they are similar from the perspective of the trier of fact, for whom, as Doherty J.A. stated in *Kitchenham*: "The issue in the benefits action is whether the plaintiff is disabled and unable to work." That is a substantive issue in tort actions including this one; motivation to work is relevant to credibility but credibility is a collateral and testimonial issue.

[107] The defence submits that the governing authority is *McLean v. Knox*, 2013 ONCA 357, 306 O.A.C. 203, which effectively elevated the plaintiff's credibility to the equivalent of a fact in issue of substantive relevance. In my view, this submission overstates the effect of *McLean.*

[108] In *McLean* the plaintiff was a passenger injured in a car accident in which the driver was intoxicated. He sued the driver and the bar that overserved him. The jury awarded the plaintiff general damages but did not award him anything for future income loss. The trial judge set aside the jury's verdict on future income loss and substituted his own award of $117,200. This court allowed the bar's

appeal. Gillese J.A. noted, at para. 24, that “it cannot be said that there was no evidence on which the jury could reject a claim for future income loss.” To the contrary, she found, at para. 23:

> There was evidence that the plaintiff earned as much income, or more, following the accident as he had earned before the accident. Also, the plaintiff suffered from serious credibility issues in respect of his income and his motivation to work. In addition, there was evidence that the plaintiff had alternative job opportunities available to him.

[109] This sets the context for the sentence on which defence counsel relies, in para. 24: “Even assuming that the defence evidence on the plaintiff's injuries was ‘uncontradicted and uncontested’, as the trial judge found, that evidence was not determinative of the question of future income loss - credibility and motivation to work were also relevant to such a determination” (emphasis added).

[110] I would not give effect to the respondent’s argument regarding the effect of *McLean* for two reasons: First, *McLean* did not elevate the plaintiff’s credibility to the equivalent of a fact in issue of substantive relevance. This is not the jurisprudential point on which the case turned. The court was not expressing a general principle of broad application, but was merely commenting on the actual evidence in the case. The defence adduced positive evidence showing that the plaintiff earned more after the accident than before and that he had other job opportunities he had not taken. No doubt the plaintiff did not fare well in cross-examination in light of that evidence, hence the reference to his poor credibility.

Even with his acknowledged injuries, the jury did not believe that he was unable to work because he had been working.

[111] Second, the court in *McLean* was not using the word "relevant" in the sense of specifying a norm for future cases but as a description of the plaintiff's failure to establish the credibility of his claim to be unable to work.

[112] In my view, a plaintiff's motivation to work is a collateral issue related to the credibility of the assertion that she or he is unable to work. How much evidence will be permitted on the issue of the plaintiff's alleged malingering or motivation to work is a matter for the trial judge's discretion in considering the balance of prejudicial effect and probative value, to which I now turn.

(ii) The prejudicial effect/probative value balance

[113] The second question in the admissibility of evidence is whether its prejudicial effect would exceed its probative value. In *Farrugia*, the defendants argued that the plaintiff had misspent the proceeds of her statutory accident benefits settlement. Because she could have used the funds to reduce her future losses, she had failed to mitigate the damages she sought in the tort action.

[114] The trial judge refused to allow the total amount of the settlement to be revealed to the jury but did allow evidence about certain components of the settlement to be adduced, for two reasons. First, he pointed to reasoning prejudice that disclosure of the total settlement could create in the minds of the jury. He found, at para. 27, that questions on the totality of the settlement "would

create a prejudicial effect in the minds of the jury that would exceed the probative value of those questions, as would any answer as to the receipt of those funds or the use to which they were put." He added that: "This prejudicial effect would be all the more pronounced because of the lack of materiality for asking those questions in the first place."

[115] Second, the trial judge in *Farrugia* pointed to the unfairness of the position in which the plaintiff would be left as a form of "double jeopardy." He noted, at para. 28:

> In my view, permitting a question about the totality of the accident benefits settlement received and any related question would expose Ms. Farrugia to double jeopardy. She would be subject to the impact of both the prejudicial effect of that question, as well as the fact that the very same accident benefits will be deducted under the *Insurance Act*, where applicable, from any award the jury makes.

[116] The trial judge in *Farrugia* assessed relevance against the pleading. In his view it "was overly broad and failed to provide any other basis to establish how such a question would be relevant": at para. 27. He did permit limited cross-examination, as I will explain.

[117] In the same vein, while the trial judge in *Ismail*, at para. 10, cited *McLean v. Knox*, he then pointed out, at para. 33, that the defence's challenge was not focussed on preventing double recovery, but on "quite a different purpose", being to form the "basis for suggesting that the plaintiff is not really disabled, but

effectively choosing not to work because her receipt of collateral benefits undermines her motivation to work." This he saw as a purpose related purely to credibility.

[118] In *Ismail*, the trial judge canvassed several policy considerations implicated by the suggestion that the plaintiff was not actually disabled but rather lacked the motivation to work because she had received statutory accident benefits. Noting the statutory entitlement to no-fault benefits and the fact that most people injured in a motor vehicle accident would claim them, the trial judge said, at para. 34: "In my view, use of collateral entitlements premised on *disability* to support arguments of *ability*, in order to undermine residual claims for recovery not addressed by such collateral benefits, seems not only ironic but unfair." He cautioned that such an argument could be made "in every case where a plaintiff has received collateral benefits, regardless of idiosyncratic concerns about credibility." He worried that this avenue of attack could create a perverse incentive under which, in order "to avoid having their legitimate and possibly greater claims for future income loss being compromised," plaintiffs "legitimately disabled by motor vehicle accidents, and unable to work, [would] … refrain from aggressively pursuing all collateral benefits otherwise properly available to them."

(iii) Credibility

[119] Several decisions have highlighted the plaintiff's credibility as the basis for allowing full exploration of the benefits settlement by the defence. It is fair to say

that credibility is often especially in issue when the plaintiff's complaint relates to soft tissue injuries or to the psychological effects of a motor vehicle accident that lack objective markers. See for example *Djermanovic v. McKenzie*, 2014 ONSC 1335, 32 C.C.L.I. (5th) 96, at para. 40.

[120] Can the holdings from *McLean* and *Kitchenham* be reconciled? I do not read them to be inconsistent. *Kitchenham* identified the substantive fact in issue as the plaintiff's ability to work. *McLean* noted that the plaintiff's credibility in asserting the inability to work can be tested with positive evidence and in cross-examination leading to the jury finding the plaintiff not to be credible.

[121] The core issue is whether the plaintiff is able to return to work, not the motivation to work, as Doherty J.A. noted in *Kitchenham*. The plaintiff's burden is to prove his or her inability to work. The defence asserts that the plaintiff is able to return to work. Typically, the evidence will involve a physical examination of the plaintiff including medical reports, a psychological examination where psychological injury is alleged, the testimony of other witnesses, evidence such as surveillance showing the plaintiff doing something he or she claimed not to be able to do, and effective cross-examination.

[122] Motivation to work is a collateral issue that the defence can raise in cross-examination to test the plaintiff's credibility as to why he or she is not working. Can evidence in the form of the details of the benefits settlement be used in the plaintiff's cross-examination?

[123] Cross-examining counsel are afforded broad scope for cross-examining a witness on matters related to credibility: *R. v. Krause*, [1986] 2 S.C.R. 466, [1986] S.C.J. No. 65, at para. 17. But there are limits.

[124] One limit flows from the trial judge's ruling excluding certain evidence that fails the test of relevance or the prejudicial effect/probative value balance. Examining counsel cannot go down the forbidden road.

[125] Another limit is the collateral fact rule, stipulated by Peter J. Sankoff, *The Law of Witnesses and Evidence in Canada*, (Toronto: Thomson Reuters Canada Limited, 2019), at c. 12.5(a):

> [W]hile a witness may be properly questioned as to any matter that is relevant to credibility, *independent evidence may not be introduced to contradict the answer that the witness gave*. It follows that if on cross-examination a witness is asked questions by opposing counsel solely with a view to attacking the credibility of that witness, any answers provided are conclusive and cannot be contradicted by the calling of independent evidence to show that the answers might be untrue.

[126] In Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018), the authors give a special caution regarding juries at s. 16.136: "Juries, in particular, could be influenced by suggestions made in cross-examination, but not subsequently proved. Most juries would assume that a responsible counsel would not make such suggestions unless there was some justification for them in his or her brief."

[127] The trial judge can also place limits on cross-examination where it lacks a good faith basis: *Lyttle*, at para. 66; takes "cheap shots": *R. v. F. (J.E.)* (1993), 16 O.R. (3d) 1, [1993] O.J. No. 2589 (C.A.), at para. 51; or is "sarcastic, personally abusive and derisive": *R. v. Bouhsass* (2003), 169 C.C.C. (3d) 444 (Ont. C.A.), at para. 11. As noted by Doherty J.A. in *R. v. R. (A.J.)* (1994), 20 O.R. (3d) 405, [1994] O.J. No. 2309 (C.A.), at para. 27: while counsel is entitled to conduct a vigorous cross-examination, "[n]o counsel can abuse any witness." This is the point of r. 53.01(2) of the *Rules of Civil Procedure*.

[128] The trial judge in *R. v. Hawke*, (1974), 3 O.R. (2d) 201, [1974] O.J. No. 1856 (Ont. H.C.), made a pertinent comment at para. 29, rev'd on other grounds (1975), 22 C.C.C. (2d) 19, [1975] O.J. No. 2200 (Ont. C.A.): "And I would think that in appropriate situations, any trial Judge would at least protect the witness who was asked a demeaning question where the Judge has reason to believe it is without foundation or for some ulterior motive."

(c) The Emerging Principles

[129] Several principles emerge from this discussion.

[130] First, the trial judge has broad discretion to control the proceedings to ensure that trial fairness results.

[131] Second, Ontario's hybrid motor vehicle accident compensation system has as its primary concern the adequate compensation of injured persons. The reconciliation of benefits and tort damages aims to prevent double recovery. As

noted, the practice in civil jury trials is to include an instruction to the jury to make their award of damages on a gross basis with no deduction for any collateral benefits. The reconciliation of the receipt of benefits and tort damages is not expected to be controversial in most instances. The task is left to the trial judge in order to take it out of contention before the jury. Perhaps that statutory allocation of responsibility to the judge reflects a recognition that the jury might otherwise be tempted to do some informal discounting of the damages award to take account of the statutory accident benefits the plaintiff has already received.

[132] Third, it falls to the trial judge in a tort action to decide contextually whether and to what extent evidence about the statutory accident benefits settlement is to be admitted. The principles of evidence law guide the decision. The first question is whether evidence of the details or existence of the statutory accident benefits settlement is relevant to a fact in issue in the tort action. The second question is whether the probative value of the evidence would exceed its prejudicial value. Striking the balance engages the trial judge's discretion.

[133] Fourth, evidence regarding some of the individual benefits received in the statutory accident benefits settlement would be relevant and admissible if the allegation is made that the plaintiff's abuse of a benefit will have an impact on the calculation of the tort damages. For example, if the defence pleads that the plaintiff failed to use the earmarked settlement proceeds to mitigate certain related future losses, as in *Farrugia* and *Peloso*, then certain details of a

settlement will be directly relevant to whether the defendant or the plaintiff is liable to the future losses. The plaintiff is free to use proceeds of a settlement as he or she sees fit, but in some circumstances it is appropriate to require the plaintiff to account for the expenditure of settlement funds.

[134] There is a two-fold proviso: the pleadings must have put the issue into dispute with appropriate particularity; and there must be an air of reality to the issue, to be assessed in a *voir dire*, which is supported by evidence and admissible expert evidence if necessary. In my view, the same proviso would apply to a defence allegation that the plaintiff is malingering or lacks the motivation to work.

[135] Fifth, the totality of the statutory accident benefits settlement would rarely be relevant and would usually be more prejudicial than probative, particularly in a jury trial, even when the defence alleges that the plaintiff is malingering or lacks the motivation to work. These allegations are easy to make and difficult for the plaintiff to defuse. The plaintiff's burden to prove his or her inability to work is especially heavy for soft tissue injuries, chronic pain, and psychological injury such as depression where objective evidence is lacking. The accusation of malingering prejudicially adds to the plaintiff's evidentiary burden by sowing suspicion in the minds of the jury. The accusation of malingering can form the basis of withering cross-examination of the plaintiff and allow counsel to repeat the malingering accusation in the examination and cross-examination of other

witnesses. In this way, the allegation of malingering can achieve narrative heft by repetition as a mnemonic reminder to the jury of the defence's theory.

[136] Sixth, there are public policy grounds for being cautious. Permitting the benefits settlement to undermine the tort claim can expose the plaintiff to unfairness, as Leitch J. noted in *Ismail*, at para. 34, which I repeat for convenience: the "use of collateral entitlements premised on *disability* to support arguments of *ability*, in order to undermine residual claims for recovery not addressed by such collateral benefits, seems not only ironic but unfair." In *Farrugia*, Emery J. called it a form of double jeopardy. I agree with their observations. Further, making the evidence of statutory accident benefits settlement generally admissible in tort actions can create a perverse incentive on the plaintiff to keep the statutory accident benefits claim alive so that it does not become a defence weapon in the tort action. However, it is a general principle of our law that settlements are to be encouraged, not discouraged.

[137] Finally, where evidence of the statutory accident benefits settlement is in evidence before the jury, the jury instructions should carefully explain how the motor vehicle accident compensation system in Ontario functions, including the fact that the plaintiff was entitled to the statutory accident benefits, and the distinct roles of the trial judge and the jury in setting the tort damages and accounting for benefits received so that the jury can understand the reasons for the allocation of the roles. The jury should be instructed not to reduce the award

of damages because it believes that the benefits have compensated the plaintiff adequately for the accident. The current rather sparse standard instruction is not adequate.

(d) The Principles Applied

[138] In my view Ms. Girao's trial did not satisfy most of these principles. I address them in the same order as the previous section.

[139] First, the trial judge in this case gave the standard instruction to the jury and the defence argues that nothing more was required of him. I disagree for the reasons set out earlier. The prejudice of introducing evidence of a statutory accident benefits settlement must be carefully balanced against its probative value. The current practice of requiring the jury to establish damages on a gross basis, while leaving the trial judge the task of giving credit for benefits received, does not stop the jury from falling prey to reasoning prejudice.

[140] Second, the record before this court does not show the trial judge's reasoning process on admitting the statutory accident benefits settlement documents: the rationale for their admission based on relevance or the prejudicial effect/probative value balance is therefore not evident from the record. The trial judge permitted the defence to rely on the settlement and to cross-examine Ms. Girao on it. The settlement documents and details were included in volume 16 of the joint trial brief, which was slipped in as the first trial exhibit on

the first day of the trial. Ms. Girao did not object to the admission of this material, probably because she did not know that she could.

[141] Third, unlike *Ferrugia*, *Ismail* and *Peloso*, there was no clear basis on which the details of the benefits settlement should have been admitted. There is nothing in the statement of defence that put the benefits settlement in issue. In my view, there was no basis upon which to admit the evidence of Ms. Girao's statutory accident benefits settlement or to allow the defence to cross-examine Ms. Girao on its details. Based on the pleadings, nothing in the cross-examination was relevant to a material fact at issue.

[142] Fourth, the defence sought to reveal the total benefits settlement to the jury in order to underpin the assertion that Ms. Girao was malingering and unmotivated to work.

[143] As previously noted, in his summary of the defence position, the trial judge told the jury in his charge: "Ms. Girao, despite working for some time after the accident, then went off work and pursued litigation as a full time job and began receiving accident benefits payments from her accident benefits carrier, eventually resulting in a large settlement that paid Ms. Girao $8,000 … more per year by not working."

[144] The defence alleged that Ms. Girao's health issues were wholly unrelated to the accident and that her claim had features of "secondary gain". In oral argument, counsel for the respondent agreed that the defence claim was

essentially that Ms. Girao was malingering. He asserted that malingering was a psychological diagnosis according to the *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed., issued by the American Psychiatric Association, (Washington DC: American Psychiatric Publishing, 2013). The DSM-V identifies malingering as a "condition," not a "disorder," at p. 726-727. That would make all trial questions regarding the influence of the statutory accident benefits settlement relevant. However, neither the statement of defence nor the factum before this court identified Ms. Girao's alleged malingering as an issue.

[145] Moreover, the transcript reveals that the whole thrust of the cross-examination was to portray the settlement as an unearned windfall to which Ms. Girao wanted to add another unearned windfall:

> Defence Counsel: Okay. So, using this simple math, ma'am, you acknowledge you were paid $85,000 by Allstate from 2002 through to 2006, under less than 4 years. And, you've also acknowledged, using the simple math, that's approximately $21,000 a year. Correct? You've acknowledged this.
>
> Ms. Girao: Okay. Okay.
>
> Defence Counsel: Okay. But, yet, ma'am, now you acknowledge, for a full year at work at Hallmark you were only getting paid for, more or less a year, $13,000. Correct?
>
> Ms. Girao: Okay.
>
> Defence Counsel: So, ma'am, your cleaning toilets and making $13,000 a year. You're not working, and Hallmark [sic], and Allstate Insurance Company is

paying you $8,000 more a year for not working. Correct? You made money by not working. Correct?

Ms. Girao: But, I was sick.

Defence Counsel: Ma'am, you agree with me, you had additional $8,000 a year in income by not working. Correct?

Ms. Girao: Okay. Okay.

Defence Counsel: Ma'am, before the morning break we talked about the fact that you're receiving $8,000 more a year by staying home as opposed to working. Do you remember that?

Ms. Girao: Yes.

Defence Counsel: Okay. Thank you. Now, and then, when you went on ODSP in 2008....

Ms. Girao: Yes.

Defence Counsel: Right. You started receiving $21,000 a year from ODSP. Correct?

Ms. Girao: That's correct.

Defence Counsel: So, ma'am, from 2002 through to, at least, 2006, you didn't have to work because you were getting more money from your accident benefit carrier than you were cleaning toilets in a building and working 40 hours a week. Yes?

Ms. Girao: Yes.

Defence Counsel: Yes. And, then from 2008 up until the present day, you don't have to work either because you're getting all that money from ODSP, which is more

> than you'd make if you were cleaning toilets again. Correct?
>
> Ms. Girao: Well, just by the way, cleaning toilets, it's not something that someone should be ashamed of. It's a dignified piece of work. Okay?

[146] Given the pleadings and the material facts at issue, there was minimal, if any, probative value in this mocking and belittling cross-examination on the benefits settlement. It was highly prejudicial to Ms. Girao, having the perverse effect identified in *Ismail* of using "collateral entitlements premised on *disability* to support arguments of *ability*". The trial judge did nothing.

[147] In my view the trial was unfair to Ms. Girao for all of these reasons, quite apart from my earlier conclusion that the combined errors in addressing the medical evidence alone are a sufficient basis upon which to allow the appeal.

(4) Issue Four: The role of the trial judge and counsel where one party is self-represented

[148] The overarching principle is that the trial judge is responsible for controlling proceedings to ensure trial fairness. Trials involving self-represented litigants can be especially challenging.

(a) The Governing Principles

[149] Numerous trial fairness concerns arise for self-represented litigants. In *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470, at para. 4, the Supreme Court endorsed the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) issued by the Canadian Judicial Council. The

Statement provides guidance to the judiciary on how to ensure litigants "understand and meaningfully present their case, regardless of representation": at p. 2. The enumerated principles appear under the following headings: promoting rights of access, promoting equal justice, and responsibilities of the participants in the justice system. The *Statement* sets out directions for the judiciary, court administrators, self-represented persons, and members of the bar. The section on promoting equal justice is particularly relevant. It states:

> 1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.
>
> 2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
>
> 3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.
>
> 4. When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:
>
>   a. explain the process;
>
>   b. inquire whether both parties understand the process and the procedure;

> c. make referrals to agencies able to assist the litigant in the preparation of the case;
>
> d. provide information about the law and evidentiary requirements;
>
> e. modify the traditional order of taking evidence; and
>
> f. question witnesses.

[150] In *Morwald-Benevides v. Benevides*, 2019 ONCA 1023, 148 O.R. (3d) 305, I surveyed some of the responsibilities that trial judges have to self-represented litigants, and noted, at para. 34:

> It is no longer sufficient for a judge to simply swear a party in and then leave it to the party to explain the case, letting the party flounder and then subside into unhelpful silence. As this court has noted, "it is well-accepted that trial judges have special duties to self-represented litigants, in terms of acquainting them with courtroom procedure and the rules of evidence": *Dujardin v. Dujardin*, 2018 ONCA 597, 423 D.L.R. (4th) 731, at para. 37, repeated in *Gionet v. Pingue*, 2018 ONCA 1040, 22 R.F.L. (8th) 55, at para. 30. The court added, at para. 31 of *Gionet*: "In ensuring that a self-represented litigant has a fair trial, the trial judge must treat the litigant fairly and attempt to accommodate their unfamiliarity with the trial process, in order to permit them to present their case", citing *Davids v. Davids* (1999), 125 O.A.C. 375, at para. 36. See also *Manitoba (Director of Child and Family Services) v. J.A.*, 2006 MBCA 44, at paras. 19-20.

[151] Although fairness concerns may animate how a trial judge exercises control over their courtrooms, there are clear limits to a trial judge's duty to assist a self-represented litigant. The actuality and the appearance of judicial

impartiality must be maintained. As Brown J.A. said in *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at para. 22: “A defendant is entitled to expect that a claim of liability brought against it will be decided by the same rules of evidence and substantive law whether the plaintiff is represented by counsel or self-represented.” In order to preserve fairness in a trial, “the trial judge must, of course, respect the rights of the other party”: *Davids*, at para. 36.

[152] Turning now to counsel’s duties as officers of the court. I note that the professional ethical obligations of a lawyer toward a self-represented litigant is fairly limited under the Law Society of Ontario’s *Rules of Professional Conduct*: see Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2000, (as amended), ch. 7, s. 7.2-9.[2] I would further note that lawyers have more general ethical obligations when acting as an advocate, such as the duty to bring to the court’s attention any binding authority that the lawyer considers to be directly on point that has not been mentioned by an opponent: see generally, *Rules of Professional Conduct*, ch. 5, s. 5.1-2.

(b) The Principles Applied

[153] I pointed out several fairness problems earlier in these reasons. There is no need to repeat them.

[2] Effective October 1, 2014, the Law Society approved new *Rules of Professional Conduct*, modelled on the Federation of Law Societies of Canada's *Model Code of Professional Conduct*.

[154] In this case the defence advanced evidentiary positions that were problematic on legally complex topics. In advancing those positions, the defence ought to have assisted the trial judge, as officers of the court, with the legal issues embedded in the positions. Ms. Girao needed the active assistance of the trial judge to deal with those positions.

[155] In my view, it was open to the trial judge faced with a legally contentious issue to require counsel to assist. In this trial, for instance, the trial judge could have asked for a briefing note on the interplay of ss. 35 and 52 of the *Evidence Act* in relation to the medical evidence, including the relevant authorities. The same would apply to the introduction of the evidence of the totality of the statutory accident benefits settlement on which there are several relevant cases.

[156] The impression left by the limited trial record is that the trial judge allowed himself to be led by trial counsel's arguments. Ms. Girao, a self-represented, legally unsophisticated plaintiff who struggled with the English language, was left to her own devices. Fairness required more, consistent with the expectations placed on the trial judge by *Statement of Principles on Self-represented Litigants and Accused Persons.*

[157] These are additional reasons for finding the trial to have been unfair to Ms. Girao.

(5) Striking the Jury

[158] The appellant moved to strike the jury under s. 108(3) of the *Courts of Justice Act* and r. 47.02 of the *Rules of Civil Procedure*. The trial judge refused but his reasons are not in the record on appeal. The appellant submits that the trial judge erred in refusing her motion and seeks an order for a new trial before a judge sitting without a jury.

(a) The Governing Principles

[159] The principles governing the discharge of a jury and appellate review were set out in *Kempf v. Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241, by Epstein J.A. for the majority, at para. 43, and by Laskin J.A. who dissented but not on this point, at para. 118. Both relied on *Cowles v. Balac* (2006), 83 O.R. (3d) 660, leave to appeal refused, [2006] S.C.C.A. No. 496.

[160] The respondent relies on the premise underlying these decisions: “[T]he moving party has a substantial onus because trial by jury is a fundamental right”: *McDonald-Wright v. O’Herlihy*, 2007 ONCA 89, 220 O.A.C. 110, at para. 13, *per* Gillese J.A., who cited *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.). The respondent also relies on *McDonald-Wright* to support her position that the trial judge did not err in declining to strike the jury

[161] To paraphrase several principles invoked by Epstein J.A. in *Kempf*, at para. 43 (5) and (7): Complexity of a case is a proper consideration in

determining whether a jury notice should be struck, and that relates not only to the facts and the evidence, but also to the legal principles that apply to the case. Trial judges are presumed to know the law and to be able to explain it to a jury.

[162] In *Kempf*, at para. 119, Laskin J.A. said: “The question for the trial judge is simply this: will justice to the parties be better served by dismissing or retaining the jury?” This standard has been cited in numerous cases: see e.g. *Cowles*, at para. 37; *Graham v. Rourke* (1990), 75 O.R. (2d) 622, [1990] O.J. No. 2314, at para. 6. In *Graham*, Doherty J.A. continued at para. 6: “In many situations that discretion may, with equal propriety, be exercised for or against discharging the jury.”

[163] As Laskin J.A. further pointed out in *Kempf*, at para. 119, in assessing whether a trial judge exercised discretion appropriately about whether to retain or discharge a jury, “context matters. Although the right to a trial by jury in a civil case is an important right, it is far from absolute.”

[164] One contextual issue clearly at play with respect to Ms. Girao is the degree to which, if at all, a trial judge should consider a party’s self-represented status, among other factors, when determining whether to strike a jury. I addressed this issue in the immediately preceding section of these reasons.

[165] The cases in which the principles have been expressed have tended to be family law cases in which there is no jury. But there are cases in which a party’s self-represented status was a factor considered by the trial judge in determining

whether to strike a jury notice. In *Desjardins v. Arcadian Restaurants Ltd.* (2005), 77 O.R. (3d) 27 (Ont. S.C.), the defendant filed a jury notice but then later brought a motion to strike the jury several months before trial. The self-represented plaintiff opposed the motion. The motion judge initially dismissed the motion to strike without prejudice to the defendant on the belief that "with proper instructions to the plaintiff and to the jury, [he] would be able to manage the trial in a manner that would be perceived by the jury to be fair to both sides": at para. 12. However, he left it open to the defendant to renew the motion at trial. When the defendant renewed the motion closer to trial, the motion judge granted the motion to strike the jury notice, noting that the self-represented status of the plaintiff has made the case "unduly complicated" so that the trial would be prolonged as a result: at para. 11(i) and (ii). He explained: "I have now come to the conclusion that it will virtually be impossible to provide the assistance I anticipate the plaintiff will require at trial in a manner that ensures that the defendant will not be placed at a significant disadvantage in the eyes of the jury": at para. 13. See also *Belende c. Greenspoon*, 2006 Carswell 9135.

(b) The Principles Applied

[166] This case involved medical evidence that was not markedly different from the factual issues and legal principles routinely handled by juries in cases involving motor vehicle accidents and medical malpractice.

[167] The respondent relies on *McDonald-Wright*, but I note Gillese J.A.'s statement, at para. 15:

> The trial judge also considered the character of the jury and concluded that the jurors were dedicated, took their responsibilities seriously and had the benefit of experienced counsel who knew their cases thoroughly and were exceptionally skilled at presenting evidence before a jury. [Emphasis added.]

This excerpt identifies one of the critical elements missing from this jury trial: the presence on both sides of experienced counsel.

[168] The presence of a jury might well inhibit a trial judge in providing assistance to a self-represented litigant. In both *Desjardins* and *Belende*, the self-represented status of the plaintiff was clearly a significant factor that weighed in favour of striking the jury.

[169] This is a case where the trial judge should have reconsidered his decision not to strike the jury as the trial unfolded and difficulties in trying this case fairly mounted through the long days of the trial.

- The appellant was self-represented and did not know the law.
- She was testifying and conducting cross-examinations through an interpreter and the transcript excerpts in the appeal record show that difficulties occurred from time to time as the evidence unfolded.
- She faced two sets of experienced and highly active jury counsel.
- When the defence objected to a question or a statement made by Ms. Girao, as it frequently did, the jury had to be taken out so that argument could take place and appropriate instructions given, usually to her. This

> added to the trial time and to the frustrations of all involved, and likely to Ms. Girao's detriment.

[170] In my view, the self-represented status of a litigant is a factor that might unduly complicate or lengthen the trial, leading the trial judge to conclude that prudence suggests the jury be discharged. As noted by Epstein J.A. in *Kempf*, "in many cases the 'wait and see' approach is the most prudent course to follow": at para. 43 (9). As the trial unfolds, the trial judge becomes better able to assess the capacity of the self-represented party to present the case, whether as a plaintiff or a defendant. While remaining mindful of the substantive but not absolute right to a trial by jury, the trial judge then is positioned to determine whether justice to the parties would be better served by dismissing or retaining the jury.

[171] While I recognize that the right to a jury trial in a civil action has been recognized as fundamental, it is not absolute and must sometimes yield to practicality. I should not be understood as stating that the presence of a self-represented litigant should invariably lead to the dismissal of a civil jury. In many if not most cases, a trial judge should be able to fairly manage a civil jury trial with a self-represented litigant, with the willing assistance of counsel acting in the best traditions of officers of the court.

[172] In my view, the trial judge erred in failing to revisit his decision not to strike the jury.

[173] The appellant asks that this court order the case to be retried by a judge sitting without a jury. This court has from time to time reversed a trial judge for striking a jury notice, directing a new trial before a judge and jury: see e.g. *Kempf,* at para. 78. While s. 134(1) of the *Courts of Justice Act* gives this court broad jurisdiction to make remedial orders, I have found no cases in which this court has directed that a new trial proceed without a jury. In my view the prudent response to the appellant's request is to refuse the order she seeks and to leave it to the trial judge to determine whether the jury should be discharged should a new trial proceed.

(6) The Threshold Decision

[174] I have outlined above the skewed orientation in the evidence that went to the jury. This orientation also made its way into the trial judge's threshold decision. In the threshold motion, the trial judge "incorporate[d] by reference the review of the evidence in [the] jury charge": at para. 6. Although he did not otherwise refer to the opinion of Dr. Sanchez, it underpinned the trial judge's basic approach. Because some of the best evidence that supported the statutory accident benefits settlement was excluded by the trial rulings, there was little to oppose the defence's evidence. Dr. Sanchez's opinion also provided the trial judge with a lens through which he looked askance at the other medical evidence Ms. Girao led. Because of the basic unfairness that permeated the trial, I would set aside the ruling on the threshold motion.

VI. DISPOSITION

[175] At trial, the appellant functioned as a legally-untrained, self-represented, non-English speaking litigant in testifying, examining and cross-examining through a Spanish interpreter. She was faced with a phalanx of defence counsel, two representing Ms. Cunningham, and two representing Allstate Insurance Company of Canada. The trial was 20 days long, involved many witnesses, and considered complex medical evidence.

[176] Ms. Girao was entitled to but did not get the active assistance of the trial judge whose responsibility it was to ensure the fairness of the proceeding. As a self-represented litigant, she was also entitled to, but did not get, basic fairness from trial defence counsel as officers of the court. The trial judge was also entitled to seek and to be provided with the assistance of counsel as officers of the court, in the ways discussed above. This did not happen.

[177] I would allow the appellant's appeal, set aside the judgment and orders, and order a new trial. I would award the costs of this appeal and of the trial to the appellant, including her disbursements. If the parties cannot agree on the quantum the appellant may file a written submission no more than five pages in length, in addition to receipts for disbursements, within 10 days of the date of this decision, and the respondent may respond within an additional 10 days.

Released: April 21, 2020

P Lauwers J.A.

I agree Fairburn A.C.J.O.

I agree B. Zarnett J.A.

Tab 9

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: April 08, 2025 **CASE NO(S).:** OLT-24-000546

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. .990, c. P.13, as amended

Appellant:	Brigade Holdings Corporation and Vive Development Corporation
Appellant:	Charles Preston Kitchener Holdings Inc. and Vive Development Corporation
Subject:	City of Kitchener Protected Major Transit Station Area By-law No. 2024-065
Description:	To implement an updated zoning framework for protected major transit station areas within the City of Kitchener
Reference Number:	By-law No. 2024-065
Property Address:	All properties within Protected Major Transit Station Areas
Municipality/UT:	Kitchener / Waterloo
OLT Case No.:	OLT-24-000546
OLT Lead Case No.:	OLT-24-000546
OLT Case Name:	Brigade Holdings Corporation and Vive Development Corporation et al. v. Kitchener (City)

PROCEEDING COMMENCED UNDER subsection 9(1) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6

Request by:	City of Kitchener
Request for:	Request for Directions

Heard: February 21, 2025 in writing

APPEARANCES:

Parties	**Counsel**
Brigade Holdings Corporation and Vive Development Corporation ("Weber St. Appeals")	Kim Mullin Mithea Murugesu
Charles Preston Kitchener Holdings Inc. and Vive Development Corporation ("Charles St. Appeals")	Kim Mullin Mithea Murugusu
City of Kitchener ("City")	Alex Ciccone Katherine Hughes

DECISION DELIVERED BY AARON SAUVE AND ORDER OF THE TRIBUNAL

Link to Final Order

INTRODUCTION

[1] This Decision arises from a Motion for Directions brought in writing seeking an Order pursuant to subsection 34(31) of the *Planning Act*, RSO 1990 c P13 ("PA") that Protected Major Transit Station Areas By-law 2024-065 ("BL") is in effect as of the date the By-law was passed, March 18, 2024, for the properties identified in the By-law, except the following properties that have filed appeals:

i. 698, 704 and 710 Charles Street East; and

ii. 79 Weber Street East.

[2] The materials before the Tribunal on the Motion were contained in the Motion Record of the Corporation of the City of Kitchener, and included the Affidavit of Registered Professional Planner John Zunic, a City employee. The Tribunal reviewed the CV and Acknowledgement of Expert Duty of Mr. Zunic and finds that he is able to

provide expert opinion evidence in the field of Land Use Planning. After a review of the materials, the Tribunal adopts the uncontested evidence of Mr. Zunic.

BACKGROUND

[3] The BL was passed pursuant to section 34 of the PA, and the appeals ("Appeals") are made pursuant to section 34(19) of the PA.

[4] The City received two Appeals of the BL. The first Appeal was filed on behalf of Charles Preston Kitchener Holdings Inc. and Vive Development Corporation. The second appeal was filed on behalf of Brigade Holdings Corporation and Vive Development Corporation.

[5] A motion to dispense the Appeals under section 34(25) of the PA ("Motion") was heard September 13, 2024. The decision of the Tribunal on that Motion was issued December 9, 2024..Following the issuance of the Motion decision on December 9, 2024, the Parties consented to site-specific scoping of the appeals and subsequently the City brought the Motion which is presently before the Tribunal.

[6] Pursuant to Section 34(31) of the PA, the Tribunal may, before these Appeals have been finally disposed of, make an Order providing that any part of the BL not in issue in the appeal be deemed to have come into force on the day the by-law was passed.

[7] Section 34(32) of the PA allows the Tribunal to make such an Order on its own initiative or pursuant to a motion. In this case, the Order is being requested by way of a Motion, on consent of all the Parties.

ARGUMENTS AND ANALYSIS

[8] Mr. Zunic informed the Tribunal of the rationale for the partial approval of the BL in his Affidavit. His opinion can be outlined as such:

a. The BL expands development permissions compared to the currently in force regulations in the City's Zoning By-law that apply to these lands, and implements OPA 49 which is required by the PA. The BL pre-zones land for increased development permissions, streamlining the development process. Once the BL is in force, it will result in fewer site-specific zoning by-law amendments and minor variances, which are time-consuming and add expense to projects.

b. The City is currently faced with a number of PA applications that would no longer be required once the BL is in force for the properties identified in the By-law (excluding the properties subject to this Appeal).

c. Once the BL is in force for the properties identified in the By-law, a number of proposed developments will be able to proceed straight to site plan and/or building permit review. This will address the Provincial goal of providing housing more quickly where it is needed most, lowering barriers to the development community and reducing unnecessary planning application reviews by the City.

d. It is Mr. Zunic's professional planning opinion is that it is appropriate and in the broader public interest that the BL be brought into force while permitting Appellants to maintain any legitimate planning issues on a site-specific basis.

FINDINGS

[9] The Tribunal is satisfied by the evidence provided by Mr. Zunic, through his uncontroverted testimony provided by way of Affidavit. The Tribunal finds that the un-appealed ZBL satisfies all legislative tests, as detailed above, and warrants approval.

FINAL ORDER

[10] **UPON APPEAL** to this Tribunal, and after the hearing of the motion in writing pursuant to s. 34(32) of the *Planning Act*, to make an order providing that part of By-law No. 2024-065 not in issue be deemed to have come into force on the day the by-law was passed, and the Tribunal having granted the motion.

[11] **THE TRIBUNAL ORDERS THAT** By-law 2024-065 of the City of Kitchener save and except for the provision of said by-law being relating to 698, 704 and 710 Charles Street East and 79 Weber Street East, being the appealed portions, shall be deemed to have come into force on March 18, 2024. .

"A. Sauve"

A. SAUVE
MEMBER

Tab 10

OLT Case No. OLT-22-002377

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

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

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 Submission

Friends of Olde Berlin Town
May 9, 2025

Hal Jaeger
Neil Baarda
Co-Representatives

obtfriends@gmail.com

Introduction

1. Friends of Olde Berlin Town ("FOBT") takes issue with the Official Plan Amendment and Zoning Bylaw Amendment applications for 22 Weber St. W. (the "Applications") in OLT Case 22-002377 (30 Duke Street Limited v. Kitchener (City)). In particular, FOBT takes issue with the Applications' inadequate regard for the Tall Building Guidelines ("TBG") and the Civic Centre Neighbourhood Heritage Conservation District Plan ("HDP"). We oppose 30 Duke Street Limited's request to:

a) double the Floor Space Ratio ("FSR") from 4.0 to 7.95;
b) reduce the front yard setback from 3m to 0m;
c) reduce the rear yard setback from
    i. 7.5m or one half the building height, whichever is greater, to
    ii. 14m for a tower of 59m in height; and
d) reduce the minimum landscaped area from 10% to 5%.

2. FOBT is a community group representing concerned neighbours within the Civic Centre Neighbourhood Heritage Conservation District ("HCD") in pursuit of a compatible, inclusive development of 22 Weber St. W. While FOBT supports development of the present-day surface parking lot on the Subject Property, we maintain the degree of relief sought would impose excessively on adjacent heritage properties and harm the HCD by:

a) compromising the streetscape views of heritage assets,
b) limiting sunlight and skyviews,
c) detracting from neighbourhood character,
d) setting a precedent for further erosion of context along the perimeter of the HCD, and
e) undermining the willingness of nearby property owners to maintain the heritage resources in their care.

3. The adverse impacts to be considered with regard to an HDP can extend beyond the traditional concerns of shadow, wind, privacy, etc., applied in decisions on zoning of non-heritage resources. The adverse impacts to be considered with regard to this particular HDP include the visual and aesthetic impacts set out in the applicable policies and guidelines of the HDP. The visual impact of concern is primarily that seen from the public sphere; in other words, from the perspective of people walking along both sides of the surrounding public sidewalks, unless otherwise noted.

4. As these arguments may be read by members of the public who have not followed the entire hearing, the Tribunal has determined that FOBT may not frame arguments in the context of the in-force designations and zoning (OPA 49 and ZBA 2024-065) on the adjacent and surrounding lands.

Evidence

5. The evidence was delivered via Expert Witnesses Sinclair (Land Use and Urban Design) and Currie (Cultural Heritage), for the Applicant-Appellant ("30 Duke"); Barton (Land Use), for FOBT; and Schneider (Land Use), Fahimian (Urban Design) and Choudhry (Cultural Heritage) for the City of Kitchener ("City").

30 Duke's Evidence – Land Use and Urban Design

6. Expert Witness Sinclair spoke to Land Use and Urban Design on behalf of 30 Duke and concluded (Para 124-129, Witness Statement Compendium ("WSC") p. 77-78) that the Applications meet the tests

and appropriately consider the City of Kitchener Urban Design Manual ("UDM"). She recommended that the Tribunal approve the Applications.

7. Sinclair asserted that the Applications have regard for Matters of Provincial Interest a) - s) (Para. 60 WSC p. 21-26). Issues List item #1 cites only Matters of Provincial Interest 2 d), n), p) and r) as under dispute. FOBT urges the Tribunal to recognize that a lack of regard for one or more Matters of Provincial Interest or policies of the PPS is fully dispositive of the Applications.[1]

8. Sinclair argued the Applications would provide attainable rental housing in a Strategic Growth Area. However, in aiming at 'attainable' rather than affordable housing, she confirmed that the pricing will be out of reach to 60% of Kitchener's population[2].

9. Sinclair claimed the Applications would provide for an improved streetscape along Weber St. W. Under cross, when asked "Do you accept that the desired pedestrian and public realm is a matter to be determined by the community, staff and council?", Sinclair replied, "I would agree that in terms of the pedestrian realm, I think there's a number of people that have a degree of interest in that" (Apr. 24, 11:36)[3]. It is self-evident and uncontested that the oblique views of the buildings, which contribute to the streetscape, along the north side of Weber St W would be reduced/eliminated, if a build at the Subject Property were to be set so close to the front property line.

10. Sinclair asserted, both in her Witness Statement (Ex. 3, p.76-77) and *viva voce* (Apr. 22,2025 14:26) that, "If approved, the Proposed Development will assist the City in meeting intensification targets including minimum intensification targets within MTSAs." Under cross, Sinclair stated, "In my opinion, just because you're in an MTSA, it doesn't automatically qualify you to have significant intensification or height" (Apr. 24, 12:18) and conceded that she was unaware of the density in the City Hall Protected Major Transit Station Area ("PMTSA") (Apr. 24, 13:34). She said it was possible that the minimum target has already been achieved (Apr. 24, 13:34). Barton established that the target was surpassed in 2019 *viva voce* (Apr. 25, 14:21).

11. Sinclair argued the Applications would provide for a transition in height from the unlimited height permitted on the south side of Weber Street to the lower-density uses internal to the Civic Centre Neighbourhood. Barton, Schneider, Fahimian and Choudhry denied that an appropriate transition would be delivered to the immediate neighbours within the HCD.

12. Sinclair argued that the Applications would be compatible with surrounding land uses and impose no unacceptable adverse impacts. Again, Barton, Schneider, Fahimian and Choudhry denied that a 59m tower with limited setbacks and no stepbacks could be compatible with the surrounding 2-4 storey builds. Sinclair acknowledged that the proposal does not meet the TBG. The non-adherence to the rear

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[1] Northgate v. Waterloo (Region), 2023 CanLII 50968 (ON LT) at para 56.

[2] 30 Duke is proposing to offer 'attainable' housing, a term introduced by the development industry. While not numerically defined, 'attainable' housing applies to housing more expensive than affordable housing, but still within reach of the remainder of the community. 'Affordable housing' is a defined term, meaning housing that consumes no more than 30% of a households' income for a household with low to moderate income. 60% of Kitchener's households have been determined to be of low to moderate income. Therefore, 60% of the population would not be able to afford the housing proposed to be built at the Subject Property (p. 54, Affordable Housing Strategy Phase 2: Housing Needs Assessment).

[3] All timestamps are approximate and refer to dates in 2025.

yard setback and the TBG was seen as a substantial source of incompatibility by Fahimian. Barton, Schneider, Fahimian and Choudhry all denied that the recess above the first floor, at the front of the proposed build, met the stepback requirement.

13. Witness Sinclair argued the Applications would allow for intensification within the HCD without the removal of any heritage attributes while ensuring the conservation of all existing heritage attributes on adjacent properties. It was uncontested that the proposal does not call for the removal of a heritage resource. Nonetheless, Sinclair lacks the expertise to opine on whether the surrounding heritage resources could be conserved in the face of the new environment proposed by the Applications.

14. Sinclair argued the Applications need not conform to the guidelines in the UDM. She suggested the matter was open to negotiation between 30 Duke and the City. Under cross, Sinclair conceded that a reasonable interpretation of 'guidelines', in this instance, includes that municipal planning staff are to be permitted a degree of flexibility in applying the guidelines in *their* assessment of applications and informing *their* recommendation to Council (Apr. 24, 11:35). Sinclair, furthermore, acknowledged that the province's general call for intensification is not license to ignore urban design guidelines (Apr. 24, 11:55). Fahimian agreed that there can be flexibility in applying the UDM guidelines, but stated that the intent of the UDM must be preserved.[4] Fahimian asserted that the intent of the setbacks and stepbacks of the TBG and zoning was not being preserved. She asserted that the proposal does not meet even 50% of the TBG's physical separation requirement. She asserted that there would be adverse impacts, including visual impacts and a compromise of the skyviews and natural light.

15. There was substantial difference between the representation of the context delivered with Sinclair's Witness Statement and her *viva voce* evidence. Contrary to her Witness Statement (PJR, WSC, p. 185), her v*iva voce* evidence confirmed the residential uses (Apr. 24, 10:50) and the aesthetic value of the buildings and streetscape along the south side of Roy Street (Apr. 24, 10:46).

16. Her Witness Statement asserted that "Weber Street has a variety of built forms, setbacks and building heights" (Para 22, WSC p. 11). Under cross, she stated that the existing heights along Weber St W, within the Heritage District range from 1-4 storeys, with the possibility that the churches might be closer to the equivalent of 5 storeys (Apr. 24, 10:34).

17. Under cross, she conceded that the existing builds directly opposite the Subject Lands on the south side of Weber St W include a 2 ½ storey build, with sloped roof situated at 17 Weber St W and that the tallest building on the south side of Weber St W, opposite the HD, measures 11 storeys (Apr. 23, 14:22). There was no dissension from the other Expert Witnesses as to Sinclair's conceded uses and heights on the surrounding lands.

18. When asked, "Do you agree that the lands on the north side of Weber St. W. are subject to substantially different policies and regulations than those on the south side of Weber St. W.?", Sinclair responded, "Yes, there's different designations and different zoning on the north side of Weber Street and the south side of Weber Street. And one is in the urban growth center." To the follow-up question, "The other one's in the heritage district, right?", Sinclair replied, "That is correct" (Apr. 24, 10:33).

[4] See "Church" at para 32, guidelines "are important component considerations in the Board's overall evaluation of the appropriateness of the proposed development's design in relation to its surroundings."

19. Sinclair introduced a faulty argument in discussing the height permitted under the Commercial Residential Three (CR-3) Zoning on the Subject Property. Sinclair asserted that there was no height limit. Barton and Schneider disagreed, asserting that height limitations were established in two ways,

- via the combination of the Floor Space Ratio regulation, lot size and setback/stepback requirements and
- via the combination of the rear yard setback regulation and the distance from the rear of a build to the rear property line.

Under cross, Sinclair acknowledged that, "an FSR limit of four influences the achievable height on the Subject Lands" and that, using the proposed tower footprint and the FSR of 4.0, about 9 or 10 storeys could be built on the Subject Lands (Apr. 24, 10:27). The fault in the argument is that the relief sought on to the Floor Space Ratio limit and the rear yard setback regulation is predicated on the absence of a specific, non-derived height limit. As the Tribunal knows, there is no license to increase the limit on one zoning regulation until it aligns with the maximum provisions of another. The argument is all the more spurious as the very regulations from which the proposal seeks relief are specifically constructed so as to limit massing and control its placement on the lot.

20. The evidence from the FOBT cross of Sinclair shows that the Applicant approached the City on two separate occasions in 2019, via the Neighbourhood Planning Review (JDB p. 3384-89) and the Pre-Submission Consultation (WSC, p. 150-53) in pursuit of a similar proposal with a Floor Space Ratio of 6.0. City Planning Staff considered the request and explained that it could not be supported. Sinclair explained, "There was no desire at that time to stay within the regulations." (Apr. 24, 10:28).

21. The question was posed: "Would a proposal that satisfies the CR-3 zoning regulations without amendment adhere better to the City of Kitchener OP?". Sinclair replied, "If it meets the CR zoning, it presumably then meets the FSR, you wouldn't need an official plan amendment. That being said, obviously, there's always a right as a landowner to amend those policies and designations" (Apr. 24, 13:38). At no point did Sinclair assert that the High Density Commercial Residential ("HDCR") designation or the CR-3 zoning on the Subject Property failed to conform to the Region of Waterloo Official Plan ("ROP") or were inconsistent with the Provincial Planning Statement 2024 ("PPS") or the Planning Act.

30 Duke's Evidence – Heritage

22. Expert Witness Currie spoke to Cultural Heritage on behalf of 30 Duke and concluded (Para 53, WSC p. 347) that the Applications are consistent with the objectives of the HDP.

23. Currie underpinned his argument in stating that "*the CCNHCD Plan acknowledges that the Weber Street area is anticipated to have higher density developments and taller buildings*" (Para 58, WSC p. 350). However, Currie is misrepresenting the HDP. Choudhry notes, "*The Plan does recognize that there might be development, and it might be in conflict with the Plan*" (Apr. 30, 11:36):

> *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. Similar to Victoria Street, this designation is identified in the Municipal Plan as one intended to recognize the area's proximity to downtown and primary roads. Zoning in this area is generally CR-3, permitting a range of residential, commercial, office and service uses, with a floor space ratio of 4 and no height restrictions. Potential infill or redevelopment along Weber Street could have a negative*

impact on the heritage character of the area if not undertaken in a sensitive manner, particularly as this street contains nearly half of the oldest buildings in the District (HDP, P. 2394, JBD, emphasis added*).*

24. Currie described the process for evaluating conformity with the HDP as follows (Para 49, WSC p. 345):

1) Identify the potentially relevant policies and guidelines in the HDP;
2) Reduce the set of potentially relevant policies and guidelines to those that are actually relevant;
3) Assess each policy or guideline for potential conflict;
    a) In the event of conflict with the wording, assess whether there is still a conflict with the intent;
    b) In the event of a conflict with both wording and/or intent, assess each policy or guideline for adverse impacts as per InfoSheet #5.

25. Currie then walked the Tribunal through his assessment process and concluded there were no conflicts or that, when there were, they resulted in no adverse impacts.

26. Currie is relying on an invalid authority. InfoSheet #5 (JDB, p. 2579, 2597-2600) was an educational pamphlet with no legal standing shared by the Ministry of Culture in 2006, alongside PPS 2005. PPS 2005 is no longer a valid authority. InfoSheet #5 is no longer included on the Ministry's website. Even when PPS 2005 was a valid authority, InfoSheet #5 was not policy. Per InfoSheet #5:

> "**Note: This InfoSheet was developed to assist participants in the land use planning process and to understand the PPS, 2005 policies related to the conservation planning of cultural heritage and archaeological resources. The information in the InfoSheet should not be relied upon as a substitute for specialized legal or professional advice in connection with any particular matter*" (JDB, p. 2600).

27. Currie identified five guidelines in HDP Section 6.9.4. (JDB, p. 2343) pertaining to Weber St. W., as requiring interpretation. FOBT asks the Tribunal to consider three guidelines, bullets #2, #6, and #7.

28. Regarding 6.9.4, bullet #2, "*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*", Currie ignored the direction of the guideline and substituted his own criteria. Currie opined that there is no consistent front-yard setback along Weber St. W., and, therefore, the Applications' proposed front-yard setback falls in the range of neighbouring properties along Weber (Para 53b, WSC p. 347). The guideline, by comparison, requires alignment "with the *building that is most similar to the predominant setback on the street",* which is 28 Weber St. W. Currie claimed a potential 3m road widening by the Region of Waterloo as another reason to not follow the guideline. A potential road widening has no bearing on the capacity to align with 28 Weber St. W.

29. Regarding 6.9.4, bullet #6, "*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*", Currie stated that a stepback is provided at the second floor (Para 53e, WSC p. 347). *Viva voce*, Currie agreed that the third and above floors protrude to the front, in line with the first storey (Apr. 25, 12:45 & 30 Duke VE, p. 35). Barton, Schneider, Fahimian and Choudhry asserted that the recess does not meet the intent or function of a

required stepback.

30. Regarding 6.9.4, bullet #7, "*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*", Currie offered five different arguments.

31. Similar to Sinclair, Currie argued (**1**) that guidelines differ from policies and need not be met (Apr. 24, 15:31), in opposition to ROPA6 Policy 2.F.3 which states

> *"Where development occurs on properties designated under the Ontario Heritage Act, the intensification targets in Table 3 are encouraged to be met through context-sensitive infill that conserves cultural heritage attributes. This development will consider Statements of Cultural Heritage Value and be consistent with any applicable Heritage Conservation District guidelines" (JDB, p. 1409, emphasis added).*

In contrast, Choudhry agreed that flexibility can be extended, but, like Fahimian, maintained that the intent must be met (Apr. 30, 13:30). Choudhry asserted that the intent of the guidelines was not being met (Apr. 30, 13:48).

32. In his two HIAs and Witness Statement, Currie asserted (**2**) that the angular plane should not be struck at the rear property line, because the abutting properties to the rear were designated Office-Residential Conversion, as opposed to Low Rise Residential-Preservation, like the properties on the north side of Roy St (HIA, JDB, p. 311; Para 53, WSC p. 349), again substituting his own criteria. Under cross, Currie acknowledged that the properties to the rear were/are zoned for residential use (Apr. 25, 13:03). Currie did not contest that the properties are being used as residences (Apr. 25, 12:45). Currie also acknowledged (Apr. 25, 12:57) that Choudhry's arguments in Paragraphs 54-58 of her Witness Statement (WSC p. 598-599), as reiterated below by Choudhry, under direct examination, are worth considering:

> "*The subject property abuts 27 Roy Street and 31 Roy Street. They both have residential uses. They're both zoned R-5. Another thing that I'd like the board to consider is that, in addition to these factors, the policy doesn't say anything about land use and zoning or reference the Secondary Plan designation. It simply says that any buildings taller than five stories abutting a residential property. The current zoning regulations permit a variety of uses, including residential uses. Both of these properties, those being 27 Roy Street and 31 Roy Street, are located within an existing low rise residential neighborhood. And were originally built as residential buildings. Even with the office residential conversion land use designation in the secondary plan that we've heard about, and that the HIA mentioned, it is assumed that any business or commercial use would be taking into account their residential built form typology*" (Choudhry, viva voce, Apr. 30, 11:55).

33. Currie (**3**) went on to present examples of other builds that do not stay under a 45-degree angular plane struck from the property line (Apr. 24, 16:09). The examples included several side-yard to rear-yard transitions and builds approved prior to the enactment of the HDP. These are all poor examples that do not inform the rear yard to rear yard transition under discussion, as per the guideline.

34. Currie suggested the guideline, even if not met, could, (**4**) nonetheless, be waived as it produced no unacceptable adverse shadow impacts (Apr. 24, 15:12). To support his claim, Currie turned to the shadow impact analysis introduced by Sinclair, which is a tool of analysis applied to any property,

whether heritage designated or not. Currie never addressed the adverse impact identified in the guideline itself: "*to minimize visual impacts on adjacent property owners"*, again substituting his own criteria.

35. Finally, Currie asserted that (5) the "*where feasible*" clause meant that the guideline need not be applied, if it rendered a development along Weber St. W. economically unfeasible. Currie contested the economic feasibility of complying with the angular plane guideline (as well as guideline 6.9.4, bullet #2) (Apr. 24, 16:02). A determination of economic feasibility is not within the scope of Currie's expertise. Moreover, if the guidelines are to be repealed in the face of economic feasibility, the eventual outcome could well be the erosion and elimination of the HCD. This interpretation is logically inconsistent with the HDP's goal of preserving the HCD.

36. Returning to the rightful origin of the angular plane, Currie admitted that his interpretation does not hold up in the following exchange under cross (Apr. 25, 13:05):

Question: "*The Angular plane guideline in the [HD] Plan says that you have to measure it from the rear property line, right?"*

Currie: "*It does."*

Question: "*You've measured it here from across the street, right?"*

Currie: "*Correct*."

Question: "*You'd agree with me, the policy does not say, measure it from a non-adjacent property across the street."*

Currie: "*It does not. Sorry, I don't mean to laugh. I'm just agreeing with you. I see the, anyways. Yeah, it does not."*

Ultimately, Currie acknowledged that "the proposed development does not meet the angular plane guideline when it's measured from the rear property line" (Apr. 25, 11:49), as stipulated in the guideline.

37. During cross-examination, Currie acknowledged that, under Section 41.2(2) of the *Ontario Heritage Act*, in the event of a conflict between a HDP and a municipal by-law, the HDP prevails (Apr. 25, 12:27).

FOBT's Evidence – Land Use

38. A lack of funds prevented FOBT from presenting a full complement of Expert Witnesses. FOBT engaged Expert Witness Martindale, who prepared a report on the Heritage Impact Assessment (HIA) and Heritage Permit Application (HPA) (JBD p. 3072), which was delivered before the Municipal Heritage Committee in March 2022 (JBD p. 4456) and City Council in August 2022 (JBD p. 2877). He remained available throughout the scheduled window for Expert Witness Meetings in December 2022. However, 30 Duke did not engage in the Expert Witness Meetings and then had these proceedings adjourned without the consent of FOBT in January 2023. Since the resumption of the proceedings, Martindale's wife fell ill, and he is now winding down his practice. We would have been pleased to have the City's Heritage Witness comment on Martindale's report, and, more generally, to provide evidence via the City's witnesses.

39. FOBT did not seek to establish Barton as an Urban Design Expert as his credentials do not match those of the Applicant's or the City's Witnesses, even though Barton has previously delivered evidence

to the Tribunal on Urban Design[5]. We did ask that he be granted license to opine on Urban Design, to a limited degree, with less accorded weight (Apr. 28, 11:45), in a similar manner to the approach adopted by the Tribunal with Witness Fahimian regarding Land Use (Apr. 29, 15:49).

40. Expert Witness Barton spoke to Land Use on behalf of FOBT and concluded (Paragraphs 115-21, Pages 501-503, Exhibit 3 WSC) that the Applications lack appropriate regard for the existing and planned context, and

- lack sufficient regard to the Matters of Provincial Interest in Sections 2 (d), (n), (p) and (r) of the Planning Act;
- are not consistent with Provincial Planning Statement, 2024, in particular with Policies 2.4.1.3., 4.6.1. and 4.6.3, 6.1.1., 6.1.7, 6.1.11, and 6.1.12;
- do not conform to the Region of Waterloo Official Plan, specifically objective 3.8, and policies 2.D.1, 3.G.1 and 3.G.6;
- do not conform to the City of Kitchener Official Plan and
- are not consistent with the City of Kitchener Urban Design Guidelines.

Barton concluded that the Applications do not represent good planning and are not in the public interest. He recommended that the Tribunal refuse the Applications.

41. Barton underscored that, while the PPS and Region of Waterloo Official Plan Amendment 6 ("ROPA6") support and encourage exceeding growth, density, and/or intensification targets, they prohibit overriding other PPS policies in pursuit of further growth or intensification (Para 46, WSC p. 482; Apr. 28, 10:16). Barton established that the density target for the City Hall PMTSA was exceeded in 2019 (Apr. 25, 14:41) and that the City is monitoring its growth targets and "ensuring that the city continues to have the potential to accommodate its allocated population and employment growth within its urban area" (Apr. 25, 14:35). He argued that, as such, the City is within its rights to determine where additional density is to be allocated, as per the defined role of the PPS, "Municipal official plans are the most important vehicle for implementation of the Provincial Planning Statement and for achieving comprehensive, integrated and long-term planning. Official plans should coordinate cross-boundary matters to complement the actions of other planning authorities and promote mutually beneficial outcomes" (Para 41, WSC p. 481). Barton argued that when a municipality is achieving the minimum targets, then "the municipality is tasked with identifying appropriate type and scale of development within strategic growth area, as well as transition" (Apr. 25, 15:58).[6] He argued that the City and Region both established Weber St. W. as a clear transition between the top order of intensification that is to be achieved in the Urban Growth Centre and the HCD (Apr. 25, 14:31-14:41). All the Land Use Witnesses agreed that a PMTSA need not be intensified uniformly throughout, and that the density needs to vary according to local context. The import, according to Barton is, "What we're talking about now is whether there is some benefit or planning policy … that indicates [approving these Applications] on this property … is contributing to a planning goal or something that, is desirable" (Apr. 25, 15:45).

42. Barton opined that the requested site-specific designation and zoning regulations will not provide appropriate spatial separation and transition to the existing and planned uses in the immediately adjacent low-rise residential neighbourhood nor to the flanking neighbours. He stated that the 4.0

[5] 919819 Ontario Ltd. v Vaughan (City), 2023 CanLII 23977 (ON LT); Velmar Centre Properties Limited v Vaughan (City), 2022 CanLII 109895 (ON LT)

[6] Whitby Brock Estates Inc. v Whitby (Town), 2022 CanLII 71596 (ON LT) at para 63 supports Barton's approach.

FSI/FSR limit is intended to control massing and scale to ensure that there is a compatible built form built on the property and that the rear yard setback requirement ensures that "height is a function of how close you are to neighboring property" to the rear (Apr. 25, 15:34). "So there's a clear intent here that if you site the building further away from the rear property line, that you can go higher. And that's intended to provide a level of compatibility with those single detached dwelling structures that exists on Roy Street" (Apr. 28, 12:08). He pointed to the Kitchener Official Plan Policy 3.C.2.9 which permits the City to impose requirements affecting the massing and placement of buildings" and Policy 4.C1.9. which states that "A high degree of sensitivity to surrounding context is important in considering compatibility" (Para 69, WSC p. 487), which he asserted indicates that "compatibility doesn't speak only to adverse impact. It's indicating here that a degree of sensitivity to the surrounding context is important in considering compatibility" (Apr. 28, 10:49). He stated that the height is not appropriate, the front and rear yard setbacks are inadequate, and the landscaped area is inadequate. Finally, he noted that it does not represent good planning to establish site-specific Official Plan and Zoning By-Law provisions that are significantly different than the surrounding existing and planned context (Para 115-121, WSC p. 501-503).

City's Evidence- Land Use

43. Expert Witness Schneider spoke to Land Use on behalf of the City and concluded (Para 105-107, WSC p. 539) that the Applications fail the tests. He opined that "the site can be developed with a building of smaller scale, under the current land use designation and zoning regulations, with a more thoughtful placement to achieve compatible infill development that provides housing in this intensification area that is appropriate and compatible with the existing neighbourhood and the Civic Centre Neighbourhood Heritage Conservation District. It is also my opinion that the subject lands can achieve the planned function of the PMTSA without the proposed applications" (Para 106-107, WSC p. 539).

City's Evidence- Heritage

44. Expert Witness Choudhry spoke to Cultural Heritage on behalf of the City and concluded (Para 109, WSC p. 611) that the Applications are incompatible with the overall character of the HCD and are not sympathetic to its character due to its proposed design, height, massing, transition and overall built form. Choudhry stated that "I do not think the proposed development conforms with the District Plan" (Apr. 30, 11:34) and opined that the proposed development does not meet the HDP in failing to meet the guidelines in section 6.9.4.

45. Choudhry opined that the Applications would have a negative impact on the heritage attributes, and character of the HCD. She asserted that the proposed development would (Apr. 30, 11:36):

- overshadow and dominate both of its immediate adjacent properties[7];
- disrupt and not respect the established built form of the streetscape, due to its proposed 0-m setback and current design and height;

[7] The decision in "Church" Para. 48-49 agrees with Choudhry's concept of overwhelming the neighbouring heritage properties, finding, in that case, that "the building functions in isolation of its surroundings without appropriate regard for its immediate context, especially for the immediate heritage context; and it overwhelms and subordinates the physical attributes of these much smaller buildings with little or no regard for the cultural heritage therein. … A tall building with these minimal setbacks, lack of appropriate transition and failure to respond to the particular development limitations and heritage factors of its immediate context all serve to confirm that this development does not represent good planning."

- because of the lack of a meaningful stepback, overpower everything else in its immediate surroundings and fail "to lessen that perception of height, especially to the rear and to the side. … this contributes to the disruption of that existing character and the visual continuity that currently exists on the street"; and
- introduce visual incompatibility in failing to adhere to guideline 6.9.4, bullet #7 and intruding more than half of the building into the 45-degree angular plane.

46. Choudhry opined that "the angular plane should be taken from the rear lot of the subject land, which has a shared property line with 27 and 31 Roy Street" (Apr. 30, 11:57) and that the proposed development "is not capable of existing together in harmony within the area with its current design" (Apr. 30, 13:35).

City's Evidence – Urban Design

47. Expert Witness Fahimian spoke to Urban Design on behalf of the City and concluded (Para 73-77, WSC p. 563-566) that the Applications are not suitable given the site-specific context and should not be approved.

48. Fahimian asserted that the Applications do not conform with the planned function of the HCD and will impact the viewshed from Weber St. W. Fahimian opined that the Applications lack a proper transition to the adjacent low-rise HCD to the rear, making it incompatible with the existing and future built form along Weber St. W. and the existing built form in the HCD.[8] She also opined that consideration needs to be given to the totality of the relief being sought from urban design Official Plan policies, zoning regulations, and the UDM. She asserted that the Applications do not adhere to the City's TBG, specifically that standards for tall building design are not met for tower placement, setbacks, and stepbacks. Fahimian acknowledged that zoning setbacks prevail for the first eight storeys and that, the requirements of the TBG prevail for floors nine and above (Apr. 29, 13:37). Fahimian asserted that the Subject Lands can be developed with a more compatible development within the current land use permissions that still provide additional housing in an intensification area that is appropriate and compatible with the planned function of Weber St. W. and the HCD.

Weighing Evidence

Land Use

49. With respect to land use planning, FOBT suggests the Tribunal prefer the evidence of Expert Witnesses Barton and Schneider over Expert Witness Sinclair.

50. Sinclair addressed matters beyond the Issues List to argue that the Applications are consistent with other policies and guidelines. FOBT urges the Tribunal to recognize that a lack of regard for one or more Matters of Provincial Interest or policies of the PPS is fully dispositive of the Applications.[9] As listed in paragraphs 7-12 herein, FOBT takes issue with six of the nine benefits that Sinclair asserts the Applications, if approved, would deliver (Para 123, WSC, pp 76-77). Sinclair's Witness Statement and

[8] Bayview Ottawa Holdings Ltd. v Ottawa (City), 2021 CanLII 77608 (ON LT) at para 87 agrees, "In order to minimize impact on the character of the streetscape, and to allow the heritage buildings to retain their dominant presence in the streetscape, a gradual transition in height is required. A building that complies with the required angular plane would likely result in one more compatible in terms of height and massing with the streetscape and the HCD."

[9] Northgate v. Waterloo (Region), 2023 CanLII 50968 (ON LT) at para 56.

viva voce evidence under direct examination presented an incomplete and, at times, inaccurate portrayal of the surrounding context. To Sinclair's credit, she readily corrected and completed the account under cross. Sinclair did not address Issue 31, *Is the proposed building height compatible and aligned with adjacent neighbouring properties* (emphasis added) and key policies 6.1.7, 6.1.11, and 6.1.12 in Issue 2a) in her Witness Statement. Sinclair refused to elaborate on some of her broader approaches that informed her opinion on these particular Applications, for example, the appropriate front yard setback from Weber St W for the block between Queen St N and Young St (Apr. 24, 10:39). In particular, Sinclair offered no criteria for assessing compatibility beyond not producing adverse impacts.

51. Barton was unwavering and did not need to change the opinions he presented in his Witness Statement, despite the last-minute requirement to remove all reference to OPA 49 and ZBA 2024-065. He was clear and open under cross. Under both examination and cross examination, Schneider was concise and direct.

Urban Design

52. With respect to urban design, FOBT suggests the Tribunal prefer the evidence of Expert Witness Fahimian over Expert Witness Sinclair.

53. Fahimian is an architect as well as an urban design planner. Combined with her specific role with the City, her opinions should be held in higher regard. Fahimian's acknowledgement of the need to plan for and respect the development potential of flanking lots demonstrates a more reasoned approach than that taken by Sinclair; the position taken by Sinclair may be advocating for her client's taking of the flanking neighbours' development rights. Fahimian's approach to guidelines is more logical than Sinclair's. Both witnesses agree that there can be flexibility in the application of the UDM guidelines. However, taken to its ultimate conclusion, Sinclair's argument that each Applicant and their Planner should have a full say over which guidelines are to be applied and to what extent would render the guidelines meaningless. For the guidelines to be of any value, they must be decided upon with consistency by Council, with the advice of Planning Staff.

Cultural Heritage

54. With respect to Heritage, FOBT suggests the Tribunal prefer the evidence of Expert Witness Choudhry over Expert Witness Currie.

55. While Choudhry was slow and careful with her responses, she was consistent. Her pace accorded with her experience before the Tribunal.

56. Currie was imprecise; like Sinclair, he vaguely described the height of the 1-4 storey buildings along Weber St. W. as of "greater variability" (Apr. 24, 14:13). Currie mischaracterized the HDP (Para. 24 herein). Currie leaned on an invalid authority (Para. 27 herein). Currie ignored the direction of two of the guidelines and substituted his own criteria (Para. 29 & 33 herein). Currie's multiple and logically-inconsistent interpretations of guideline 6.9.4, bullet #7, regarding the 45-degree angular plane speaks volumes. He downplayed the role of HDP guidelines in opposition to the direction of ROPA6 Policy 2.F.3. (Para. 32 herein). He acknowledged that the examples he offered as comparators do not inform the decision at hand (Para. 34 herein). Finally, Currie veered into financial feasibility for support (Para.

36 herein). While Witness Currie may have some familiarity with the interests of his clientele, he is not licensed to speak to financial feasibility; he was qualified as a Heritage witness. Currie acknowledged the flaws in his own arguments and even laughed at his own assertions (Para. 37 herein).

57. FOBT calls on the Tribunal to dismiss Currie's dubious evidence.

Responses to 30 Duke's Closing Submissions

58. Ms. Meader inaccurately conveyed a citation and some evidence. Ms. Meader cited the case of 375-381 Queen Street West Inc. v Toronto (City), 2014 CanLII 103708 (ON LPAT) as a proposal for a 16-storey building that was approved in discussion of a build in a Toronto Heritage Conservation District. In fact, the proposal was for a 7 storey, 30-metre high building containing multiple stepbacks. Due to time limitations and the page-limit on this closing submission, we share only the following three examples of inaccurately conveyed evidence.

59. Ms. Meader writes, "Ms. Fahimian further suggested that the Tall Building Guidelines would supersede as-of-right zoning by-law permissions" (p. 10 of her Closing Submission). Fahimian said zoning prevails for the first eight storeys and the TBG prevail above. There would be no value in establishing TBG if they were superseded by zoning. When Ms. Meader asked, "You're suggesting now, Ms. Fahimian, that the guidelines trump the as-of-right zoning permissions?" Fahimian replied as follows at about 16:18, Apr. 29, 2025:

> "*I think I already answered this question. 1.2[m] requirement in the zoning does not apply to the tall building. That's why we contemplated tall building in order to calculate the physical separation, the side yard setback according to that calculation. So, the 1.2[m] applied to the podium of the building, because it's low rise, midrise-ish typology. So, whatever we had in the zoning is a minimum requirement for any structure to be built. When you are talking about the tower, the 1.2m setback does not apply to the top portion of the tower. So, you can apply 1.2[m] to the podium, which is in the range of two- to four-storey or five-storey. But, we have a separate calculation for the physical separations of the tower. So, we cannot, like you cannot build a tower within 1.2[m] from the property line and then have another tower within 1.2[m]; so that requirement doesn't apply to the top*."

60. Ms. Meader claims that "During cross examination, she [Fahimian] agreed that it [the recently approved project at 900 King St W] did not meet the Tower Separate guidelines" (p. 11 of her Closing Submission). This is not accurate. Fahimian said 900 King St. W. fully met the Tower Separation Guidelines on three sides and met the intent on the fourth side (Apr. 29, 16:07). Fahimian had already elaborated at 15:52 on why the tower at 900 King St. W. was a good fit:

> *"So, in this context, because it was well buffered from the low rise residential, it's in the corner and it was deemed appropriate because the adverse impact was minimal. It was not directly abutting the low-rise residential. It was not directly abutting any heritage-sensitive areas. So, it was well buffered from those. And it was a good location because it was a corner, framing the street and does not have any impact on the civic center, was not close to any of those civic center criteria. So, we identified this is the good location to have the high density. So, it's different from this context."*

61. Ms. Meader claimed that "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 40m2 of outdoor amenity space" (p. 11). This is, again, an inaccurate account of the evidence provided. Fahimian said that that the guideline calls for a minimum of $2m^2$ outdoor common amenity space per unit, with a base minimum of $40m^2$. The following exchange on the matter began at about 3:19pm, Apr. 29, 2025 with a question from Ms. Meader, "And we've enshrined that in the proposed zoning bylaw that 40 meters. But we've actually said 130 square meters of common amenity space, including a minimum of 40 square meters of outdoor common area. That's enshrined in the bylaw, right?". Fahimian replied:

> *"Yeah. But look at those paragraph above [in Urban Design Manual, Part C: Design Standards, Section 11.0, Outdoor Amenity Areas – Multiple Residential and Institutional Developments, (Exhibit 8)]: it says two square meter per number of unit. So, it does not meet exactly what the urban design manual is asking for. This, so 40 square meter is, for example, if you have a 22 units or 25 units, the minimum standard for outdoor amenity is 40. Or, even if you have 12 units, we usually ask for minimum 40 square meter. But, when you exceed certain number of the units, that 40 square meter is not sufficient to accommodate the needs of all those residents. So, we have to use this [two square meter per unit] calculation in order to make sure we have enough space to accommodate all those units. So, it doesn't come that, 400 units, you can still have 40 square meter and 20 units means still need to have 40 a square. So, it doesn't work like that."*

Conclusion

62. FOBT suggests that the Applications' proposed spot-zoning is disconnected, context-agnostic and ignores broader planning and heritage frameworks. Good planning, by contrast, takes into account cumulative impacts, community input, the need for consistency in zoning and appropriate transitions between zones, and the long-term needs and direction of the City. Good planning must be future-oriented, but must also be grounded in the existing context to ensure compatibility.

63. FOBT asks that the Tribunal see that this case must meet two tests. First, on the basis of land-use, zoning and urban design legislation, policies and guidelines and, second, on the basis of cultural heritage legislation, policies and guidelines. We ask that the Tribunal determine that the Applications may fail on ***either*** front, but must demonstrate consistency or conformity with all respective authorities on ***both*** fronts to succeed. In other words, each test is fully dispositive.

64. Regarding Land Use, the City and Region of Waterloo have determined that the rightful location of the transition between the Downtown Urban Growth Centre and the Olde Berlin Town neighbourhood and HCD is Weber St W itself. FOBT sees the Applications as asserting that a substantial transition should be borne within the HCD, across the property lines separating the Subject Property and its immediate heritage-designated neighbours, including adjacent low-rise zoned properties to the north. FOBT finds these arguments advanced in support of the Applications to be unsubstantiated and without merit.

65. Regarding Cultural Heritage, FOBT suggests this decision is unlike most taken by the Tribunal, wherein subsequent redevelopment of surrounding properties may reduce any immediate incompatibilities introduced by an overdevelopment at the Subject Property. If the Tribunal approves these Applications, the owners of the neighbouring properties may no longer be willing to maintain the heritage property in their care, due to a lack of a supportive setting. The implications could cascade

further into the neighbourhood. Consequently, if heritage resources are lost, PPS 2024 Policy 4.6.3., "*Planning authorities shall not permit development and site alteration on adjacent lands to protected heritage property unless the heritage attributes of the protected heritage property will be conserved*" (JBD, p. 1102 emphasis added) will have been violated. Any damage will be irreparable; lost heritage resources cannot be replaced.[10]

66. FOBT suggests that a new path that supersedes the 1994 Secondary Plan and zoning for this neighbourhood was established in 2008, via the adoption of the HDP. FOBT perceives the Applications as challenging this path, more than 15 years later, with a flawed and deficient interpretation. FOBT calls on the Tribunal to dismiss Currie's dubious HIA, HPA, Witness Statement and testimony. Should the Tribunal determine that it cannot approve the HIA and HPA, the Tribunal must refuse the Applications.

67. FOBT calls on the Tribunal to recognize the Applications as:

- Lacking regard for the Ontario Heritage Act,
- Lacking regard for the Planning Act,
- Inconsistent with the Provincial Planning Statement,
- Failing to conform to the Region of Waterloo Region Official Plan (ROP) and Amendment #6,
- Failing to conform to the City of Kitchener Official Plan (OP),
- Inconsistent with the direction of the City's Urban Design Manual (UDM), and
- Failing to conform to the Civic Centre Neighbourhood Heritage Conservation District Plan

We, furthermore, ask that the Tribunal find that the Applications represent poor planning and are not in the public interest.

68. The Tribunal has heard from the City's Expert Witnesses that there is potential to re-develop the site with a build that would align with the direction of the HDP, the zoning and the TBG. No property or development rights would be curtailed, and the Subject Property would not be singled out for unfair treatment, should the Applications be rejected. The Subject Property has seen substantial market uplift from public investment in the Light Rail Transit, the removal of minimum parking requirements, and reduced development charges and parkland dedication fees.

69. FOBT recognizes that all Parties appear to agree that the HDCR designation and CR-3 zoning on the Subject Property are no longer appropriate and that the Subject Property should be developed. The question is only *how*. FOBT perceives that all Parties appear to agree that:

a) The proposal's revised minimum sideyard setback of 2.5m is a step in the right direction
b) The front yard setback under the zoning need not be more than 3.0m. This setback is consistent with both the CR-3 zoning and the direction the City is heading.
c) There can be some flexibility in the interpretation of "*where feasible*" in HDP Site/Area Specific Design Guideline 6.9.4, bullet #7, P. 6.32. The guideline reads "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*." However, for the guideline to hold any meaning and deliver any value, the decision as to the maximum height at which the angular plane is to be struck above grade, at the rear property line, cannot be a matter determined by this Applicant nor their Cultural Heritage consultant.

[10] The decision in "Church" agreed that conservation of the heritage attributes of the adjacent properties took priority over an overly-intensive redevelopment of a surface parking lot.

70. Beyond the above, we perceive that FOBT and the City appear to agree that:

a) given the location and the small interior lot, should the Subject Property be developed to a height in excess of eight storeys, much more rigorous adherence to the TBG will be necessary and
b) the minimum 10% landscaped area must be upheld.

71. Finally, we identify in Appendix A the many aspects of the proposed Zoning Bylaw Amendment on which FOBT makes no comment, and note that, while FOBT is interested in the preservation of the streetscape along Weber St. W., inside the HCD, the means by which a potential road widening in front of the Subject Property may be handled by the Region and/or City is not a matter with which FOBT need be involved.

72. If, despite our submissions, the Tribunal is inclined to approve the Applications, we beseech it to impose strict, time-bound conditions. We ask that any approval include a "use it or lose it" clause, whereby failure to proceed within a defined period would see permissions revert to those in effect at that future time.

73. For the foregoing reasons, FOBT respectfully requests that the Tribunal refuse the Applications or, at least,

a) deny an increase to the Floor Space Ratio,
b) deny a reduction to the front yard setback,
c) deny changes to the rear yard setback, and
d) deny a reduction to the minimum landscaped area

Respectfully submitted this 9th day of May, 2025,

Hal Jaeger
Co-Representative for FOBT

Neil Baarda
Co-Representative for FOBT

FOBT Closing Submission

Appendix A

FOBT makes no comment on items marked with a red asterisk *

PROPOSED BY – LAW

XXXXX, 2025

BY-LAW NUMBER ___

OF THE

CORPORATION OF THE CITY OF KITCHENER

(Being a by-law to amend By-law 85-1, as amended, known as the Zoning By-law for the City of Kitchener)
22 Weber Street West

WHEREAS it is deemed expedient to amend By-law 85-1 for the lands specified above;

NOW THEREFORE the Ontario Land Tribunal enacts as follows:

1. Schedule Number 121 of Appendix "A" to By-law Number 85-1 are hereby amended by changing the zoning applicable to 22 Weber Street West, in the City of Kitchener, from Commercial Residential Three Zone (CR-3) to Commercial Residential Three Zone (CR-3) with Special Regulation Provision XXXR and Holding Provision XXXH.

2. Appendix "D" to By-law 85-1 is hereby amended by adding Section XXXR thereto as follows:

XXXR

Notwithstanding Section 46.3, Section 6.1.2a), and 6.1.2b)vi) of this By-law, within the lands zoned Commercial Residential Three Zone (CR-3), shown as affected by this subsection, on Schedule 121 of Appendix "A", a Multiple Dwelling shall be permitted in accordance with the following:

Design Standards & Parking

a. The maximum Floor Space Ratio shall be 7.95.

b. The maximum Building Height shall be 19 storeys and 59 metres.

c. The minimum Front Yard shall be 0.0 metres.

* d. For portions of the building up to 5.0 metres in height, the minimum Rear Yard shall be 8.0 metres.

* e. For portions of the building greater than 5.0 metres in height, the minimum Rear Yard shall be 14 metres.

* f. The minimum Side Yard shall be 2.5 metres.

g. The minimum landscape area shall be 5%.

* h. Dwelling Units shall be permitted on the ground floor within either a mixed-use or multiple dwelling building.

* i. Exclusive use patio areas are not required for ground floor units.

* j. Rear Yard Access requirements do not apply.

* k. The minimum ground floor height shall be 4.5 metres.

l. The second storey shall be stepped back a minimum of 2.0 metres above the ground floor.

* m. The minimum Class A Bicycle Parking Stall requirement shall be 1 per dwelling unit, located within the unit or within a secure bicycle storage room.

* n. The minimum Class B Bicycle Parking Stall requirement shall be 6.

* o. The minimum parking requirement shall be 0 spaces per unit.

* p. The minimum visitor parking requirement shall be 0 spaces per unit.

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

* 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.

* s. Geothermal Energy Systems shall be prohibited.

* t. Balconies shall not permitted on the rear building elevation.

* ~~s.~~ u. The maximum percentage of façade openings (windows or entrances) on the rear building elevation shall be limited to 15% of the total rear façade area.

* 3. Appendix "F" to By-law 85-1 is hereby amended by adding Section XXXH as follows:

XXXH

Notwithstanding Section 46.1 of this By-law, within the lands zoned CR-3 and shown as affected by this subsection on Schedule Numbers 84 and 121 of Appendix "A":

No residential use shall be permitted until a detailed transportation (road) and stationary noise study has been completed and implementation measures recommended to the satisfaction of the Regional Municipality of Waterloo or the City of Kitchener. The detailed stationary noise study shall review stationary noise sources in the vicinity of the site, the potential impacts of noise (e.g. HVAC systems) on the on-site sensitive points of reception and the impacts of the development on adjacent noise sensitive uses.

* 4. This By-law shall come into effect only upon approval of Official Plan Amendment No. XX, for 22 Weber Street West, but upon such approval, the provisions hereof affecting such lands shall be deemed to have come into force on the date of passing hereof.

Tab 11

Tab 11 More Homes, More Choice Act, 2019 S.o. 2019, chapter 9, Schedule 12 (Excerpts)

Excerpt from https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-108

Explanatory Note

SCHEDULE 12
Planning ACT

The Schedule amends the *Planning Act*. The amendments include the following:

Reduction of decision timelines

Timelines for making decisions related to official plans are changed from 210 to 120 days (see amendments to sections 17, 22 and 34), those related to zoning by-laws are changed from 150 to 90 days (see amendments to sections 34 and 36) and the timeline for making decisions related to plans of subdivision is changed from 180 to 120 days (see amendment to subsection 51 (34)).

Excerpt from https://www.ontario.ca/laws/statute/s19009

SCHEDULE 12
Planning ACT

4 (1) Subsections 22 (7.0.0.1) and (7.0.0.2) of the Act are repealed.

(2) Subsection 22 (7.0.2) of the Act is amended by,

(a) striking out “210” in paragraph 1 and substituting “120”; and

(b) striking out “210” in paragraph 2 and substituting “120”.

6 (1) Subsection 34 (11) of the Act is amended by striking out “150” in the portion before paragraph 1 and substituting “90”.

(2) Subsection 34 (11.0.0.0.1) of the Act is amended by striking out “210” and substituting “120”

(11) Subsection 17 (40) of the Act is repealed and the following substituted:

Appeal to L.P.A.T.

(40) If the approval authority fails to give notice of a decision in respect of all or part of a plan within 120 days after the day the plan is received by the approval authority, any of the following may appeal to the Tribunal with respect to all or any part of the plan in respect of which no notice of a decision was given by filing a notice of appeal with the approval authority:

1. The municipality that adopted the plan.

2. The Minister, if the Minister is not the approval authority.

3. In the case of a plan amendment adopted in response to a request under section 22, the person or public body that requested the amendment.

Tab 12

Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: December 09, 2024 **CASE NO(S).:** OLT-24-000546

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Brigade Holdings Corporation and Vive Development Corporation
Appellant:	Charles Preston Kitchener Holdings Inc. and Vive Development Corporation
Subject:	City of Kitchener Protected Major Transit Station Area By-law No. 2024-065
Description:	To implement an updated zoning framework for Protected Major Transit Station Areas within the City of Kitchener
Reference Number:	By-law No. 2024-065
Property Address:	All properties within Protected Major Transit Station Areas
Municipality/UT:	Kitchener / Waterloo
OLT Case No.:	OLT-24-000546
OLT Lead Case No.:	OLT-24-000546
OLT Case Name:	Brigade Holdings Corporation and Vive Development Corporation et al. v. Kitchener (City)

PROCEEDING COMMENCED UNDER subsection 34 (25) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Request by:	City of Kitchener
Request for:	Request for Dismissal Without a Hearing

Heard: September 13, 2024 by Video Hearing

APPEARANCES:

Parties	**Counsel**
Brigade Holdings Corporation and Vive Development Corporation	Kim Mullins Mithea Murugesu
Charles Preston Kitchener Holdings Inc. and Vive Development Corporation	Kim Mullins Mithea Murugusu
City of Kitchener	Alex Ciccone Katherine Hughes

DECISION DELIVERED BY G.A. CROSER AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] On August 18, 2022, the Region of Waterloo ("Region") passed an amendment to its *Regional Official Plan* ("ROPA 6") which, amongst other things, identified areas surrounding and including the existing ION light rail transit stations as Protected Major Transit Station Areas ("PMTSAs"). ROPA 6 established PMTSAs in municipalities within the Region, including the City of Kitchener ("City").

[2] Following the passage of ROPA 6, and pursuant to Section (s.) 16(15) of the *Planning Act* ("Act"), the City passed By-law 2024-062 ("OPA 49") which amended the City of Kitchener Official Plan ("City OP") to implement ROPA 6 policies with respect to PMTSAs. The City then passed By-law 2024-065 (the "PMTSA By-law") which amended the City of Kitchener Comprehensive Zoning By-law 2019-051 ("ZBL") to implement OPA 49.

[3] Two appeals were filled with respect to the PMTSA By-law (collectively the "Appeals"). The first was filed by Brigade Holdings Corporation and Vive Development Corporation with respect to its property located at 79 Weber Street East ("Weber St.

Appeal”). The second was filed by Charles Preston Kitchener Holdings Inc. and Vive Development Corporation, with respect to properties located at 698, 704 and 710 Charles Street East (“Charles St. Appeal). As the Appellants in both appeals were represented by the same legal team and for ease of reference, this Decision refers to the Appellants in a collective sense.

[4] The City took the position that the Appeals were not valid as they were attempting to appeal building height and density which, in its view, are protected from appeal pursuant to subsections 34(19.5) and (19.6) of the Act. The City sought an Administrative Order from the Tribunal dismissing the Appeals on the grounds that they were based on prohibited grounds. In response, the Tribunal scheduled this Motion to Dismiss (“Motion”) to consider the validity of the Appeals.

EXHIBITS

[5] The following exhibits were marked at the Motion:

1. Motion Record of the Corporation of the City of Kitchener
2. Responding Record of the Appellants Vive Development Corporation, et al.
3. Book of Authorities of Vive Development Corporation, et al.
4. Reply Motion Record of the Corporation of the City of Kitchener

PMTSA BY-LAW

[6] OPA 49 included the delineation of the City’s PMTSAs and established three (3) new land use categories, Strategic Growth Areas A, B and C, “to guide growth and change within these areas”. The PMTSA By-law introduced 4 new strategic growth area zone categories to implement OPA 49’s Strategic Growth Areas, these 4 zones apply exclusively within the City’s PMTSAs (collectively the “Zones”). Each zone has a

maximum height provision. The purpose of the PMTSA By-law was to bring all properties within Protected Major Transit Station Areas into the ZBL by applying the new Strategic Growth Areas, and to implement an updated zoning framework for PMTSA areas.

[7] The City chose to regulate maximum densities throughout the PMTSAs through "carefully calibrated" built-form regulations and use Floor Space Ratios (FSRs) for defining minimum densities. In the City's Staff Report, prepared by Adam Clark and John Zunic for the official plan and zoning By-law amendments ("Staff Report"), it was noted that this policy change, using built-form regulations for maximum densities, would "help unlock low-rise and mid-rise missing middle housing supply", create flexibility for developers, and achieve the intensification minimums of the PMTSA.

Built-Form Regulations

[8] The Staff Report stated that the built-form regulations outlined in the PMTSA By-law, including building length and floor plate area maximums, as well as physical separation, "work in combination" to protect the privacy of new residents, ensure access to light for all units, limit shadow, wind and other impacts on existing and future nearby residents. Counsel for the City explained during oral evidence at the Motion to Dismiss ("Motion") that the setbacks in the PMTSA By-law provide a 2-dimensional building envelope. This building envelope when combined with the regulations for height, length, maximum floor plate area and density, creates a 3-dimensional building envelope ("3D Envelope"). The City has utilized 3D Envelopes in the Zones to regulate density within the City's PMTSAs rather than placing numerical values on maximum densities for each zone.

[9] At the Motion, the City's evidence was that FSR did not work in complex areas nor in areas that were already built-up. Counsel for the City noted that the two PMTSAs in question were complex, with land parcels of all shapes and sizes, dimensions, and

configurations. As such, the City's view was that utilizing built-form regulations created more certainty around the scale and size of building forms than an FSR-based density approach. Counsel referred to these built-form regulations as creating, "when combined, the maximum build-out for development of any site located within a PMTSA."

SUBJECT LANDS

[10] The subject site of the Weber St. Appeal is 79 Weber Street East ("Weber Lands"), which is located within the Queen and Frederick PMTSA. This site is designated Strategic Growth Area-B by OPA 49 and zoned SGA-2 in the PMTSA By-law, the latter includes a regulation that identifies a maximum building height of 8 storeys for lands zoned SGA-2.

[11] The lands for the Charles St. Appeal, being 698, 704 and 710 Charles Street East ("Charles Lands"), are located within the Borden PMTSA. These lands are designated Strategic Growth Area-C by OPA 49 and zoned SGA-3 in the PMTSA By-law, this zone includes a maximum building height limit of 28 storeys.

THE APPEALS

[12] To the Appellants, the PMTSA By-law is inconsistent with planning policies promoting efficient development and land use patterns, transit-supportive development, intensification, compact built-form and with provision of an appropriate mix and range of housing for all income groups, amongst others. The reasons for the Weber St. Appeal, as listed in its Notice of Appeal, are as follows:

1. Appendix A – Zoning Grid Schedule 120 of ZBA 2024-065 zones the Subject Lands SGA-2. The SGA- 2 zone does not reflect the development potential of the Subject Lands or the surrounding planned context. The Subject Lands should instead be zoned SGA-4.

2. Section 21 of ZBA 2024-065 introduces a new section 6.4.3 and Table 6-4 for Zoning Bylaw 2019-051. New Table 6-4 imposes detailed and prescriptive requirements for minimum lot width, minimum lot area, minimum setbacks, maximum building length, maximum floor plate area and physical separation. These built form requirements constrain design solutions and have the potential to increase the costs of construction, thereby limiting the Appellants' ability to provide cost-effective, affordable housing.

[13] The Charles St. Appeal was based on the same reasoning:

1. Appendix A – Zoning Grid Schedule 143 of ZBA 2024-065 zones the Subject Lands SGA-3. The SGA- 3 zone does not reflect the development potential of the Subject Lands, which should instead be zoned SGA-4.

2. Section 21 of ZBA 2024-065 introduces a new section 6.5.2 and Table 6-5 for Zoning Bylaw 2019-051. New Table 6-5 imposes detailed and prescriptive requirements for minimum lot width, minimum lot area, minimum setbacks, maximum building length, maximum floor plate area and physical separation. These built form requirements constrain design solutions and have the potential to increase the costs of construction, thereby limiting the Appellants' ability to provide cost-effective, affordable housing.

LEGISLATIVE FRAMEWORK

[14] Subsections 34 (19.5) and (19.6) of the Act state that there is no appeal in respect of part of a zoning by-law that establishes permitted uses, minimum or maximum density, or minimum or maximum height with respect to buildings and structures on lands in a PMTSA.

No appeal re protected major transit station area – permitted uses, etc.

(19.5) *Despite subsections (19) and (19.3.1), and subject to subsections (19.6) to (19.9), there is no appeal in respect of,*

(a) the parts of a by-law that establish permitted uses or the minimum or maximum densities with respect to buildings and structures on lands in a protected major transit station area that is identified in accordance with subsection 16 (15) or (16); or

(b) the parts of a by-law that establish minimum or maximum heights with respect to buildings and structures on lands in a protected major transit station area that is identified in accordance with subsection 16 (15) or (16). 2017, c. 23, Sched. 3, s. 10 (7); 2022, c. 21, Sched. 9, s. 8 (3).

Same, by-law of a lower-tier municipality

(19.6) *Subsection (19.5) applies to a by-law of a lower-tier municipality that, for municipal purposes, forms part of an upper-tier municipality without planning responsibilities only if the lower-tier municipality's official plan contains all of the policies described in subclauses 16 (16) (b) (i) and (ii) with respect to the protected major transit station area. 2017, c. 23, Sched. 3, s. 10 (7); 2022, c. 21, Sched. 9, s. 8 (4).*

[15] For the sake of completeness, the references to subsection 16 (16) are as follows:

Same, upper-tier municipality

(16) The official plan of an upper-tier municipality with planning responsibilities may include policies that identify the area surrounding and including an existing or planned higher order transit station or stop as a protected major transit station area and that delineate the area's boundaries, and if the official plan includes such policies it must also contain policies that,

(a) identify the minimum number of residents and jobs, collectively, per hectare that are planned to be accommodated within the area; and

(b) require official plans of the relevant lower-tier municipality or municipalities to include policies that,

(i) identify the authorized uses of land in the area and of buildings or structures on lands in the area; and

(ii) identify the minimum densities that are authorized with respect to buildings and structures on lands in the area.

LEGISLATIVE FRAMEWORK

[16] Section 34(25) of the Act states that the Tribunal may, on its own initiative or on the motion of any party ("Party"), dismiss all or part of an appeal without holding a hearing if any of the following apply:

> **Dismissal without hearing**
>
> *(25) Despite the Statutory Powers Procedure Act and subsection (24), the Tribunal may, on its own initiative or on the motion of any party, dismiss all or part of an appeal without holding a hearing if any of the following apply:*
>
> *1. The Tribunal is of the opinion that,*
>
> *i. the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal…*
> […]

[17] While not specifically referenced by the Parties in their Motion materials, the Tribunal is also mindful of s.19 of the *Ontario Land Tribunal Act* ("OLT Act") which includes the following provision:

> **Dismissal**
>
> *19 (1) Subject to subsection (4), the Tribunal may, on the motion of any party or on its own initiative, dismiss a proceeding without a hearing,*
>
> *…*
>
> *(c) if the Tribunal is of the opinion that the proceeding has no reasonable prospect of success*[.]

POSITION OF THE CITY OF KITCHENER

[18] The City stated that s.34(19.5) and (19.6) are not discretionary provisions within the Act. That s.34(19.5) states that there is "no appeal" with respect to parts of a by-law that establish permitted uses, minimum or maximum density, minimum or maximum height with respect to buildings and structures on lands in a Protected Major Transit Station area. Therefore, if the Tribunal finds that the Appeals fall within this category, the Tribunal must dismiss the Appeals.

Zoning/Mapping of the Weber Lands and Charles Lands

[19] It was the City's submission that the "only effective difference" between the Weber Lands current zoning/mapping and that sought by the Weber St. Appeal was the regulation of maximum building height. The Affidavit of the City's planner, John Zunic, opined that the current zoning of the Weber Subject Lands is SGA-2, was identical to the SGA-4 zoning sought by the Appellant, except for the regulation of maximum building height.

[20] The City submitted that to amend the Weber Lands zoning to SGA-4 would require redesignation of the site to Strategic Growth Area-C. This would require an official plan amendment and an amendment to the City's OP was, as the City noted, not subject to this Appeal. At the Motion, Counsel for the Appellants acknowledged this and stated that they were formerly revising the Weber St. Appeal to request a change in zoning from SGA-2 to SGA-3. This amendment would conform to the in-effect land use designation applicable to the Weber Lands and would not require an appeal of the City OP.

[21] Counsel for the City in oral arguments argued that the revised ask for an SGA-3 zone instead of SGA-2 did not alter the fact that the Appellants were seeking to appeal density and height. The City pointed out that the only difference between SGA-2 and SGA-3 was building height and FSR (which controls minimum density).

[22] The City's stance on the Charles St. Appeal, which also appealed its zoning/mapping schedule was identical to the Weber St. Appeal. This too was "fundamentally an appeal for an increase in maximum building height and relief from density regulations." The City submitted that the regulations established through SGA-3 and SGA-4 were "nearly identical" except for building height – lands in SGA-4 have no maximum building height provision. Therefore, the City argued that the Charles St. Appeal should be dismissed as building height is a prohibited ground of appeal.

[23] The Appellants' assertion that they sought different zone categories for the Weber Lands and Charles Lands and were not challenging the specific regulations on height or density, was, to the City, a falsehood. The City argued out that a change to the mapping of the lands in question created a change in the provisions of the PMTSA By-law that applied to the lands referenced in the mapping. In the case of both the Weber Lands and Charles Lands, a change in their respective mapping would result in changes to the provisions of the by-law that included the built-form regulations (the 3D envelopes) that were utilized by the City to establish minimum or maximum densities and heights within the respective PMTSAs.

Applicable built-form regulations for the Weber Lands and Charles Lands

[24] The City explained to the Tribunal that the PMTSA By-law regulated height and density with a number of tools, including the following:

i. Minimum lot width,
ii. Minimum lot area,
iii. Minimum front and exterior side yard setback,
iv. Minimum building base height, maximum building base height,
v. Minimum FSR,
vi. Maximum building height,
vii. Minimum street line ground floor building height,
viii. Minimum façade openings, minimum street line façade openings,
ix. Maximum floor plate area, and physical separation

[25] Counsel for the City, in oral arguments, submitted that the Act does not require PMTSAs to place a numerical value on density in order to protect it from appeal. The City's view was that the wording of Subsection 34(19.5) and (19.6) was "left open" to recognize that there are a number of valid ways to regulate density. Counsel asserted

that the 3D Envelopes were “specifically crafted” and that such regulations were necessary, in the City’s view, to control the “maximum build-out” on each lot within a PMTSA. The City’s stance was that the built-form regulations worked in combination to create the 3D Envelopes for each zone and as such, an appeal of these regulations was, in fact, an appeal against density and height.

POSITION OF THE APPELLANTS

[26] The Appellants argued that the City has incorrectly interpreted s. 34 (19.5) of the Act in that this provision does not insulate PMTSA by-laws from all appeals. Counsel for the Appellants referenced the “Notice of the Passing of a Zoning By-law” issued by the City for the PMTSA By-law which states that,

> ***TAKE NOTICE*** *that pursuant to subsections 34 (19.5) and 34 (19.6) of the Planning Act, there is no right to appeal this by-law subject to the requirements of the abovementioned subsections, except by the Minister of Municipal Affairs and Housing, because it gives effect to policies regarding Protected Major Transit Station Areas described in section 16(16) of the Planning Act. […]*

[27] The Appellants also made the point that the City cannot insulate the PMTSA By-law from appeal by using performance standards to regulate density. Counsel for the Appellants emphasized that s. 34 (19.5) provides “the parts” of by-law that establish density cannot be appealed, and that the City was attempting to employ faulty logic in arguing that it is the entirety of the PMTSA By-law that is protected from appeal. The Appellants submitted that the scope of s.34(19.5) was “narrow” and, in any event, the Appeals were not challenging maximum height and maximum density.

Zoning/Mapping of the Weber Lands and Charles Lands

[28] It was the position of the Appellants that the Appeals sought to have different zone categories applied to the Weber Lands (SGA-2 to SGA-3) and Charles Lands

(SGA-3 to SGA-4), and that these were requests for “mapping changes” and were not directly related to height or density. Rather, the Appellants submitted that its focus was on a consistent application of zones across the City. In the Appellants’ view, the existing zoning of the Weber Lands and Charles Lands did not align with the development potential for the lands in question or the surrounding planned context.

Applicable built-form regulations for the Weber Lands and Charles Lands

[29] The second aspect of the Appeals is against components of section 21 of the PMTSA By-law. The Appellants raised concerns over the City’s “bundling of the performance standards”, its overly prescriptive nature, and impacts on construction costs. To the Appellants, the use of the 3-D Envelope and corresponding built-form standards to regulate density was an attempt by the City to prevent appeals of the zoning by-law amendment.

[30] For the Weber Lands, the Appellants appealed s. 6.4.3 and Table 6-4 for PMTSA By-law. Table 6-4 sets out the built-form regulations for SGA-2 mapped lands:

Table 6-4: Multiple Dwellings, Mixed Use Buildings, and Non-Residential Buildings

Regulation	SGA-2
For Entire Building	
Minimum *lot width*	30.0m(1)
Minimum *lot area*	1,500m^2
Minimum *yard setback*	3.0m
Minimum *floor space ratio*	1.0
Maximum *building height*	8 storeys
Minimum *façade openings*	10%
Minimum *street line façade openings*	20%
Minimum landscape area	20%(2)
For Storeys 7 and Above	
Minimum *yard setback*	6.0m
Maximum *building* length	60.0m
Maximum *floor plate area*	2,000m^2
Transition to Low Rise Zones	
Maximum *building height* within 15m of a *lot* with an SGA-1 *zone* or a *lot* with a *low-rise residential zone*	20.0m(3)
Minimum *yard setback* where the *lot* abuts a *lot* with an SGA-1 *zone* or a *low-rise residential zone*	7.5m

[31] The Charles St. Appeal appealed section 6.5.2 and Table 6-5, which are also located within Section 21 of the PMTSA By-law:

Table 6-5: Multiple Dwellings, Mixed Use Buildings, and Non-Residential Buildings

Regulation	SGA-3 & SGA-4
For Entire Building	
Minimum *lot width*	30.0m(1)
Minimum *lot area*	1,500m^2
Minimum *yard setback*	3.0m
Minimum *building base* height	3 storeys
Maximum *building base* height	6 storeys
Minimum *floor space ratio*	2.0
Maximum *building height* in the SGA-3 *zone*	25 *storeys*
Minimum *street line ground floor building height*	4.5m
Minimum *façade openings*	10%
Minimum *street line façade openings*	20%

For Storeys 7-12	
Minimum *lot width*	30.0m
Minimum *lot area*	1,500m^2
Minimum *front* and *exterior side yard setback*	6.0m
Maximum *building* length	60.0m
Maximum *floor plate area*	2,000m^2
Physical separation	6.0m
For Storeys 13-18	
Minimum *lot width*	36.0m
Minimum *lot area*	1,800m^2
Minimum *front* and *exterior side yard setback*	6.0m
Maximum *building* length	54.0m

[32] Counsel for the Appellants submitted in oral arguments that, while built-form regulations influence density, they do not directly determine density. The Appellants identified the key issue as being whether the above listed built-form regulations functionally or directly determine density. In the view of the Appellants, the 3D Envelopes used for SGA-2 and SGA-3 zones not only regulated height and density, but also other urban design related performance measures. The Appellants' planner, Pierre Chauvin opined in their Affidavit evidence that the internal layout of a building, for example a 1 versus 3-bedroom unit as opposed to the building footprint or floorplate can affect the density of a development. As the number of units on any given floor can vary depending on how the internal demising walls are configured, this affects the overall density of the site in terms of units per hectare.

[33] The Appellants also raised objection to the built-form regulations as having a negative impact on construction efficiency and costs and sought more flexibility in the built-form regulations to permit larger floor plate and fewer stepbacks. Further, the

Appellants raised the argument that the built-form regulations with respect to floor plate size and stepbacks would lead to higher costs and rental rates, ultimately impacting prospective tenants. The Tribunal notes that construction costs are not a valid land use planning ground; therefore, this Member has not included concerns with respect to building costs and profitability in their analysis of the Appeals.

CITY REPLY

[34] In both its Reply Materials and during oral arguments, the City rejected the Appellants' claim that it has attempted to protect the entire PMTSA By-law from appeal through the use of built-form regulations. The City provided the example of "minimum landscaped area regulations" as being a valid ground of appeal. In addition, the City affirmed that the Appellants' revision of the Weber St. Appeal to request zoning from SGA-2 to SGA-3 did not alter the City's stance that a proposed change in the mapping/zoning schedule of the PMTSA By-law was, in effect, a change to maximum building height. The City provided no comment on the language contained in the Notice of the Passing of a Zoning By-law issued by the City for the PMTSA By-law, as quoted in paragraph [**26**].

ANALYSIS AND FINDINGS

[35] There are two aspects to these Appeals, one being the request by the Appellants to amend the strategic growth area zoning that has been applied to the Weber Lands and the Charles Lands. The second relates to the corresponding built-form regulations listed in Tables 6-4 and 6-5, which are found in s. 21 of the PMTSA By-law. For the validity of the Appeals to be considered at this Motion, it is necessary to first determine what is and is not a prohibited ground of appeal as per s. 34(19.5) and (19.6) of the Act.

Do subsection 34(19.5) & (19.6) prohibit appeals within a PMTSA?

[36] The first issue to be considered is whether subsection 34 (19.5) and (19.6) of the Act create blanket immunity for a zoning by-law amendment for a PMTSA. In the Supreme Court of Canada case *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), the decision, delivered by the majority of the court, states at paragraph 120 that,

> *… the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.*

[37] In addition, the Tribunal must remain mindful that statutory interpretation is not based solely on the wording of the Legislation. As referenced by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at paragraph 21:

> *…there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

[38] The Tribunal acknowledges the City's point that subsection 34 (19.5) and (19.6) are not discretionary provisions. However, the language of subsection 34 (19.5) (a) and (b), as listed in paragraph [**14**], are clear that the prohibition on appeals extends only to "*the parts*" of a PMTSA zoning by-law. No linguistic gymnastics are required to interpret the ordinary meaning of the phrase "the parts"; the entire PMTSA zoning by-law amendment is <u>not</u> protected from appeal.

[39] It is unknown if an error was made by the City Clerk in drafting the Notice of the Passing of a Zoning By-law, as referenced in paragraph [**26**], as this was not addressed by the City at the Motion. This Member interprets subsections 34(19.5) and (19.6) as indicative of the fact that there is no legislative intent to completely remove appeal rights

with regards to such by-law amendments. In short, the Tribunal is not persuaded that an appeal could be dismissed pursuant to Subsection 34 (19.5) and (19.6) solely on the basis that the disputed land is located within a PMTSA.

Can building height and density within a PMTSA be appealed?

[40] The Tribunal now turns to the question of whether density and building height are valid ground of appeal for lands within a PMTSA. The City takes the position that the Appeals are prohibited, as the rezoning sought by the Weber St. Appeal and the Charles St. Appeal targets building height and density, which are prohibited ground of appeal. However, this Member has taken a more nuanced interpretation of these terms within the context of s. 34(19.5). In the Member's view, the Legislators have provided guidance with respect to wording of the subclauses s. 34 (19.5) (a) and (b). The subclauses include the words "minimum" and "maximum" with respect to both building height and density. In this Member's view, if the legislative intent was to completely prevent appeals of building height or density within a PMTSA, then these adjectives would have been omitted.

[41] Further, the use of "or" in the subclauses is disjunctive. If the drafters of the legislation had sought to protect both minimum *and* maximum density and both the minimum *and* maximum building height, then the grammatical conjunction "and" would have been inserted in the clauses in place of "or". Therefore, in this Member's view, either the minimum *or* the maximum of a building or structure's height and either the minimum *or* the maximum of density with respect to buildings and structures on lands within a PMTSA are prohibited from appeal. Consequently, while the City may be correct that maximum height and maximum density are invalid grounds of appeal, that is not the same as suggesting that any appeal with respect to density and building height are prohibited by this subsection of the Act.

[42] As such, the Tribunal is of the view that planning matters relating to the height of a building up to but not including the maximum thresholds set by a municipality may be appealable. Consequently, the same applies to minimum building height, if that aspect is considered more germane by the municipality. In a similar vein, matters relating to density that fall below the maximum determined by a municipality or above the minimum determined by a municipality, may also be appealable grounds. Whether an appeal with respect to density can be valid if the municipality has chosen not to apply a numerical formula will be discussed in more detail below. In these Appeals, it is clear by the position taken by the City, that it is the maximum density and maximum height of the buildings and structures within the two applicable PMTSAs and its ability to control maximum build-out, that the City considers prohibited grounds of appeal..

Do the Appeals have a reasonable prospect of success?

[43] This Member would like to address the references to a specific case that was raised in oral arguments as well as in the written Motion materials. The Appellants referenced *Toronto (City) v. East Beach Community Assn*. (East Beach) as a caution to the Member that a balanced approach must be taken and no hasty conclusions be drawn as to the merit of an issue at this stage of the proceeding. This Member is familiar with the 1996 East Beach Decision, which was an appeal to the Ontario Municipal Board, a predecessor to the Tribunal. It is worth noting that the Ontario Municipal Board Act (“OMB Act”) that was in effect in 1996 did not include an equivalent provision to s. 19(1)(c) of the OLT Act, referenced in paragraph [**17**]. The ”dismissal without a Hearing” provisions in the OMB Act permitted the Tribunal to dismiss without a hearing only if the fee prescribed under the Act had not been paid or if a person or public body had not responded to a Board request. Now the Tribunal has broader scope and authority to consider the merits of a matter in the pre-hearing stage, which includes the consideration of whether an appeal has a reasonable chance of success.

Are the Appellants appeals of the zoning/mapping schedules valid?

[44] The City submitted that the only effective difference between SGA-2 and SGA-3 lands, and between SGA-3 and SGA-4 lands is building height. Whereas the Appellants noted in its Notice of Response to Motion of the Appellants, that the Appeals with respect to the zone categories were not directly related to height and that the appeals related to consistency and conformity with the applicable policy documents.

[45] The Tribunal has reviewed the Comparison Table produced by Pierre Chauvin, the Appellants' planning consultant, located at Exhibit I to the Affidavit of Pierre Chauvin ("Chauvin's Table). The Comparison Table compares SGA-2 zones with SGA-3 and SGA-4 zones. The position of the City is that the only "effective" difference between the zones is building height. In fact, the only other difference in the Comparison Table between SGA-2 and SGA-3/4 for buildings up to 12 storeys relates to FSR, which the City is utilizing for minimum density. Differences between SGA-2 and SGA 3 begin at buildings with a height of 13 or more storeys, owing to the fact that such regulations for minimum lot width, setbacks, building length, physical separation, etcetera were "not applicable" for the SGA-2 zone. These differences are only engaged in Chauvin's Table from SGA-2 to SGA-3 when the height of the structure increases. As such, The Tribunal agrees with the City, and finds that the Weber St. Appeal with respect to amending Zoning Grid 120 of the PMTSA By-law from SGA-2 to SGA-3 is dismissed.

[46] With respect to the Charles St Appeal, and its assertion that zoning be changed from SGA-3 to SGA-4 to better suit the "development potential" of the Charles Lands, the Tribunal notes that Chauvin's Table only includes 'Maximum Building Height' as a difference between SGA-3 and SGA-4 zones. Therefore, the Tribunal agrees with the City that the Charles St. Appeal, with respect to the mapping of the Charles Lands, is based on the maximum building height permitted in the two different zones. As such, the Charles St. Appeal with respect to amending Appendix A – Zoning Grid Schedule 143 of the PMTSA By-law from SGA-3 to SGA-4 is dismissed.

Are aspects of the PMTSA By-law built-form performance standards appealable?

[47] The second aspect of the Appeals relates to parts of s. 21 of the PMTSA By-law, specifically Tables 6-4 and 6-5. Counsel for the City argued that the wording of subsection 34(19.5)(b) has been "left open" as there are many forms to control or manage density. The Appellants position is that the prohibition is a narrow one and that the applicable 3D Envelopes use performance measures that encompass more than just height and density.

[48] It was not disputed at the Motion that managing density can be achieved in different forms, nor was it disputed that it is the prerogative of a Municipality to determine how best to manage its density requirements and targets. The Tribunal finds that the City's use of interconnected built-form standards to manage density creates challenges for appeals. In practice, can the Tribunal parse out and hear evidence on individual aspects of the performance standards (e.g., lot width, setback) without making a decision that might establish maximum density?

[49] The Parties both referenced *Dementia Care (London) Inc. v London (City) (*Dementia Care*)* the 2023 Decision of then-Member Braun. In that matter, the Tribunal allowed appeals to proceed to a Hearing where those appeals challenged parts of a PMTSA zoning by-law amendment other than parts establishing uses, heights, and densities. Braun noted that while traffic, parking, shadow impacts, land use compatibility and risks to public health and safety have a relationship to height and density, they are not exclusively related to height and density, and involve other built-form considerations. In the Order, it was stated that the Appellants would not be permitted to raise issues nor to present evidence challenging the use, density and height established by the zoning by-law amendment, save and except to the extent that evidence may be led as to matters of density and height which indirectly relate to the issues raises in the appeal.

[50] In oral arguments at the Motion the City argued that the concerns raised in Dementia Care, such as traffic and shadowing, were “tangential to density at best” whereas in the case at hand, the built-form regulations under appeal were “*all* related to maximum height and maximum density”. The Appellants’ position was that, like Dementia Care, the Appeals were not of the parts of the PMTSA By-law that establish permitted uses, heights, and densities, and that while some of the Appellants’ concerns may have a relationship to height and density, they were not exclusively related to height and density.

[51] The Tribunal finds that the Dementia Care case is distinguishable from the matter at hand given the fact that the Decision was based primarily on impacts and not density or building height. Member Braun, as she then was, did not consider the effect of “packaging” design elements and the affect on provisions establishing height or density at the motion. Rather, it was determined that this aspect of the appeal would be best tested at a full hearing.

[52] This PMTSA By-law is clearly designed to provide the City with more control over development in transit corridors, which includes areas that have development challenges with respect to transitions to more established housing, lot configurations, etcetera. It is not the role of the Tribunal to question the City’s preferred means of regulating maximum density within the two PMTSAs in question. The issue is this – can aspects the performance standards be adjudicated in a standalone manner – meaning, are they so separate and distinct from maximum density (and maximum height) that they have no bearing on, in this case, a protected aspect within a PMTSA?

[53] The built-form regulations used by the City are subordinate to the Act and must have regard to the language and purpose of the relevant enabling provisions. The Tribunal finds that, as the Act does not prescribe the methodology a municipality must use to determine a minimum or maximum density, a municipality is free to use a non-

numerical approach. The City argued that the impacts in Dementia Care, including shadowing, were only “tangential to density”. However, the Staff Report quote in paragraph 8 of this Decision clearly indicates that the built-form regulations do influence shadow, wind, and other impacts on existing and future residents. The Tribunal accepts the Appellants’ position that the utilization of a “bundled” approach to performance standards does not necessarily cancel appeal rights. While there may be challenges in parsing out such aspects when the performance standards are interconnected, it is not the position of the Tribunal, in this matter, to proclaim that the Appeals are impossible.

[54] Therefore, the Appeals of Section 21 of the PMTSA By-law, being Section 6.4.3 and Table 6-4 for the Weber St. Appeal and Section 6.5.2 and Table 6-5 for the Charles St. Appeal, may continue to a Hearing on the merits. This is granted with the caveat that only aspects of the built-form regulations that do not directly drive maximum height or maximum density are permitted to be challenged at the full Hearing. At a full Hearing, the Tribunal will be provided with both expert and legal arguments on the components of the performance standards that do not directly establish maximum height or maximum density. As the City has not provided a numerical figure for maximum density, the Tribunal is cognizant of the fact that these Appeals may be challenging. The Parties are encouraged to utilize mediation to assist with narrowing the issues before the Hearing.

ORDER

[55] **THE TRIBUNAL ORDERS** that the Motion to Dismiss the Appeal without a hearing is granted, in part. The Appeal may proceed to a hearing; however, Charles Preston Kitchener Holdings Inc. and Vive Development Corporation are limited to its appeal of Section 6.5.2 and Table 6-5 of Section 21 of Zoning By-law Amendment No. 2024-065 and are not permitted to raise issues nor to present evidence that exclusively challenge

the permitted uses, maximum density, and maximum height established by Zoning By-law Amendment No. 2024-065 (save and to the extent that evidence may be led as to matters of maximum height and maximum density that indirectly relate to the issues raised in s. 6.5.2 and Table 6-5 in Section 21 of Zoning By-law Amendment No. 2024-065).

"G.A. Croser"

G.A. CROSER
MEMBER