

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: Kitchener/Waterloo

OLT Case No.: OLT-22-004383

OLT Lead Case No.: OLT-22-002377

Legacy Lead Case No.: PL210104

OLT Case Name: 30 Duke Street Limited vs. Kitchener (City)

REPLY Re: REQUEST FOR REVIEW OF DECISION

Hal Jaeger

Friends of Olde Berlin Town


obtfriends@gmail.com, 519-341-6007

December 9, 2025

Ben Bath, Case Coordinator
Ontario Land Tribunal
655 Bay Street, Suite 1500, Toronto, ON M5G 1E5

via email to ben.bath@ontario.ca

Re: OLT-22-002377 - 22 Weber Street West
Reply Submission of Friends of Olde Berlin Town on Request for Review of a Tribunal
Decision Pursuant to Rule 25 of the OLT's Rules of Practice and Procedure

[1] Friends of Olde Berlin Town ("FOBT") has reviewed the responses of the City of Kitchener ("City") and the Appellant to FOBT's Request for Review of the Decision of Members Faghani and Ingram issued September 17, 2025 (the "Decision"). Pursuant to the direction of the Tribunal issued on Oct. 29, 2025, FOBT submits the following Reply.

[2] FOBT notes that:

- a) there are no concerns regarding FOBT's list of requested minor corrections to the OLT Decision included as Appendix D of the Request for Review.
- b) neither the City nor the Appellant contest FOBT's account of the appeal as laid out in Para. 5 of the Request for Review and the Affidavits of Hal Jaeger and Neil Baarda – with one substantial exception. The dispute over the decision at the Oct. 30, 2024 CMC and the handling thereafter is addressed in Para. 8-13, below.

[3] As to the arguments presented by the Appellant, FOBT offers the following replies.

Rule 25.7.a: The Decision is outside of the Tribunal's jurisdiction

[4] The Appellant denies that the Decision is outside of the Tribunal's jurisdiction in prescribing the means by which the City must implement designations and zoning regulations. They deny that *Brigade Holdings Corporation and Vive Development Corporation et al. v. Kitchener (City)* (2024 CanLII 126182 (ON LT)) demonstrates that the Tribunal may not determine whether height is restricted by a by-law (Appellant Response, pp. 2-3). But this does not respond to FOBT's claim. FOBT asserts that the Tribunal may not deny the direction of a regulation because it is not formed in the Tribunal's preferred manner.

[5] The Appellant then asserts, without any proof, that the manner in which height is regulated in the by-law was not a key determinant in the Decision (Appellant Response, p. 2). FOBT denies that the Appellant can know what is a major determinant in the minds of the Members. Moreover, the Appellant does not contest the actual evidence. The Appellant does not:

- a) offer an alternative interpretation of Para. 39, 44 and 48 of the Decision,
- b) address the plain-English minimum rear yard setback in the existing ZBL (Exhibit 1, JDB, P 2054),

- c) offer a re-interpretation of its own Expert Witness' testimony, as addressed in Para. 11 and 12 of the Request for Review, or
- d) address the summary of the Expert Witnesses' findings in Para. 13-14 of the Request for Review.

[6] Moreover, the Appellant had their counsel and land-use planning witness attempt to establish that height was not regulated in the by-law, via the Neighbourhood Planning Review (Exhibit 1, JDB, P 3384-3389), the Appeal Letter of the OPA and ZBA (Exhibit 1, JDB, P 730), and *viva voce* testimony at the hearing. Their repeated effort, sustained over six years, suggests that whether height was regulated was indeed a key determinant.

[7] A more standard Appellant response – if available – would be to clarify that height is not regulated in the by-law and that, therefore, the Tribunal made no error. That the Appellant shifts instead to defending the Tribunal's right to prescribe the means by which a regulation must be formed and that the manner in which height is regulated in the by-law was not, in any event, a significant determinant of the case, suggests that the Appellant concedes that a) height is regulated in the by-law and b) the Decision erred in determining that it is not. To overcome the existence of height restrictions in the ZBL acknowledged by all the expert witnesses, the Decision takes an extraordinary step to prescribe the means by which a binding regulation must be formed.

Rule 25.7.b.i: The Tribunal violated the rules of natural justice or procedural fairness in not permitting evidence based on the in-effect designations and zoning

[8] As noted above, the Appellant and their witness' affidavit dispute FOBT's account of the decision at the Oct. 30, 2024 CMC and ensuing events. In response to the De Marinis affidavit which supports the assertions of the Appellant, FOBT shares an expanded reiteration of the facts in the appended affidavit (December 2025 Affidavit of Neil Baarda).

[9] The disagreement, as far as FOBT is concerned, lies in the interpretation of the extent of the ruling. As attested in the attached affidavit and argued in Para. 20-32 of the Request for Review, FOBT maintains that the Oct. 30, 2024 CMC decision issued no ruling regarding the in-effect designation and zoning on the surrounding lands and how that might influence Issues related to compatibility. FOBT maintains that the Tribunal was wrong to deny evidence on the in-effect designations and zoning on the surrounding properties and would have been equally wrong to do so via the Oct. 30, 2024 CMC.

[10] FOBT agrees that OPA 49 and ZBA 2024-065 were not on the Issues List as legislation, policy, by-law or guidelines governing the Subject Property. That is entirely standard, as the Subject Property was not covered by OPA 49 and ZBA 2024-065. It is also entirely standard for the surrounding properties' designation and zoning to **not** appear on the Issues List. The evidence pertaining to the in-effect designations and zoning on the surrounding properties is nonetheless needed to properly assess compatibility against the currently existing context.

[11] In terms of potential prejudice, the Appellant knew well that compatibility against a new context was under discussion since the Neighbourhood Planning Review (Exhibit 1, JDB, P 3384-

3389) and the Pre-Submission Consultation (Exhibit 3, WSC, P 150-152) in 2019. The Appellant also saw the material in Expert Witness Barton's Witness Statement (December 2025 Affidavit of Neil Baarda, Para. 5).

[12] By contrast, the prejudice to FOBT in not permitting **any** discussion of the in-effect designations and zoning on surrounding properties is much greater, as any possibility of addressing the relative weight that might be accorded the evolving context was eliminated. Similarly, any arguments that FOBT might have advanced in Closing Submissions regarding the Clergy principle were rendered moot. The timing of the ruling was also extremely prejudicial to FOBT. It was delivered so late -- in the midst of the FOBT's witness' testimony (December 2025 Affidavit of Neil Baarda, Para. 9) -- as to prevent FOBT any opportunity to adjust or prepare evidence to the satisfaction of the Tribunal. Had FOBT conceived even the possibility that the Tribunal might deny the evidence altogether, it could have shared its concerns with Expert Witness Barton, as opposed to risking having his evidence, which leaned heavily on the new policy regime to address compatibility, dismissed as "*not helpful, nor persuasive*" (Decision, Para. 33).

[13] FOBT notes that it suggested, in the face of the uncertainty over the rules, that all parties be permitted to submit evidence based on their differing approaches and to likewise permit cross-examination based on the differing approaches.

Rule 25.7.b.ii: The Tribunal violated the rules of natural justice or procedural fairness in not permitting evidence that FOBT would have introduced via an examination of the City's Expert Witnesses

[14] FOBT agrees with the Appellant (Appellant Response, p. 4) that the Tribunal may control the questioning of witnesses – ***so long as it is reasonable and achieves a fair hearing process***. The fairness is under dispute. The City's position was not known prior to the release of the Witness Statements. The denial of FOBT's opportunity to examine the City's Witnesses resulted in the denial of the introduction of key evidence, including evidence about InfoSheet#5, ROPA 6 Policy 2.F.3, and evidence contained in the Municipal Record. The Appellant offers no rebuttal of the arguments in Para. 35-36 of the Request for Review.

Rule 25.7.c.i: Error of Law by not Applying the Required Tests Re: Conformity to the OP

[15] The Appellant argues that the focus on unacceptable adverse effects, to the exclusion of an analysis of the other two constituent elements of Kitchener's OP's definition of compatibility, 'mutual tolerance' and 'capacity for harmonious co-existence' is appropriate and standard practice. The Appellant claims that an investigation into an analysis of 'mutual tolerance' and 'capacity for harmonious co-existence' would be an "*overly formulaic*" exercise not supported by case law (Appellant Response, pp. 5-6). FOBT agrees that the focus on unacceptable adverse effects, to the exclusion of an analysis of mutual tolerance and capacity of harmonious co-existence, may be entirely appropriate -- *where compatibility is not defined in an OP*. But compatibility is defined in Kitchener's OP, and the Tribunal, as an alternate decision maker, must

use the Kitchener OP definition of compatibility to make its determination. Moreover, the Tribunal is not bound by past decisions of the Tribunal, and this case deserves case-specific findings. The Appellant offers no rebuttal of the arguments in Para. 53-57 of the Request for Review.

Rule 25.7.c.ii: Error of Law by not Applying the Required Tests Re: Conformity to the HDP

[16] The required test is conformity to the HDP. Contrary to the Appellant’s suggestion, not violating s. 41.2(1) of the OHA, while necessary, is not synonymous with achieving conformity with the HDP.

[17] Conformity is a specific and high requirement. The test could have been ‘have regard for’ or ‘be consistent with’, but the test requires conformity. The HDP does not allow for substitutions to the clear, written direction in the Plan based on the sensibilities of the decision-makers – even if an Expert Witness argues otherwise.

[18] FOBT agrees with the Appellant that guidelines, generally speaking, do not require adherence, as do policies. However, FOBT still maintains that the HDP Weber St guidelines in s. 6.9.4 carry extra weight as clarification of whether conformity to Policy 3.3.5.2.d) is achieved. Furthermore, ROPA 6, enacted April 11, 2023, elevates the standing of the HDP guidelines via Policy 2.F.3., which reads as follows:

“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.” (Exhibit 1, JDB, P 1409-10, emphasis added).

[19] Any attempt at denying the applicability of ROPA 6, on the basis of the Clergy Principle, cannot stand, as Schedule 1, s. 3(2) of [Bill 150](#), which covers ROPA 6, states

Conformity with official plan as approved

(2) Any decision of a municipality or the Ontario Land Tribunal made under the Planning Act, as well as any by-law passed or public work undertaken by a municipality, on or after the date on which the approval of an official plan or an amendment to an official plan is deemed to have been given under subsection 1 (3) must conform with the official plan, as approved or amended, while that approval is in effect. (emphasis added)

[20] FOBT was not afforded an opportunity to present the import of ROPA Policy 2.F.3, despite the policy featuring on the Issues List as Issue 8c), because it was denied the opportunity to examine the City’s Heritage Witness.

Rule 25.7.c.iii: Errors of Fact

[21] FOBT agrees with the Appellant (Appellant Response, p. 8) that a fair summary is indeed not misrepresentation. But ‘summarizing’ in a manner that directly contradicts statements of an Expert Witness under cross examination (Request for Review, Para. 11 & 76-79) is misrepresentation. Expert Witness Sinclair also did not challenge the existence or intent of the

location-dependent height limit introduced via the rear-yard setback regulation (Request for Review, Para. 10 & 12).

[22] The Appellant (Appellant Response, p. 8) asserts that the Decision does not err, as FOBT argues it does in Paragraphs 83-87 of the Request for Review, and argues that “‘hinderance of sky views,’ ‘enclosed streetscape,’ and ‘overwhelming scale’ are not identified in the definition of adverse impacts in the City’s Official Plan”. Kitchener’s OP defines ‘adverse impacts’ as

“may include but will not be limited to: shadows over private amenity areas or on building façades for an unacceptable duration, issues of privacy, overlook conditions, negative microclimatic impacts, light pollution (such as light trespass or glare), odour, vibration, noise pollution urban heat island effects, visual clutter or obstruction of views and/or vistas.” (Exhibit 1, JDB, P 1855, emphasis added).

[23] It is within the scope of the City’s Urban Design Planner to determine that ‘hinderance of sky views,’ ‘enclosed streetscape,’ and ‘overwhelming scale’ constitute adverse impacts.

[24] The Appellant asserts that there was no error on height regulation in the by-law (Appellant Response, p. 8). The argument and counter-arguments are addressed above, in reference to Rule 25.7.a.

[25] The Appellant does not address specifically three other errors of fact identified by FOBT in paragraphs 80-82, 96-100 and 101-102 of the Request for Review.

[26] As to the Appellant’s concerns with the requested remedies, FOBT offers its preferences and understands that it is the Tribunal’s right to select the remedy of its choosing. FOBT takes its direction from [Section 23](#) of the OLT Act, which states “*Unless another Act specifies otherwise, the Tribunal may review, rescind or vary any order or decision made by it in accordance with the rules.*”

Thank you for your consideration,

A handwritten signature in black ink, appearing to read 'H. Jaeger', with a horizontal line extending from the end of the signature.

Hal Jaeger

Co-Representative of FOBT

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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)

December 2025 Affidavit of Neil Baarda

I, Neil Baarda of the City of Kitchener, in the Regional Municipality of Waterloo, in the Province of Ontario, AFFIRM and say as follows:

1. I have knowledge of the matters hereinafter deposed. Where anything is affirmed herein, I verily believe it to be true.
2. I write this affidavit in support of the Friends of Olde Berlin Town (“FOBT”) Reply Statement to the Chair’s Disposition Letter of October 29, 2025 regarding the Section 23 Request for Review of the September 17, 2025 Decision of Members Y. Faghani and G. Ingram on OLT Case No.: OLT-22-002377 (30 Duke Street Limited v Kitchener (City), [2025 CanLII 96327 \(ON LT\)](#))¹ (“the Decision”).
3. I attended the Oct. 30, 2024 CMC and the Hearing.
4. The Oct. 30, 2024 CMC determined that the Subject Property was not subject to OPA 49 and ZBA 2024-065 because the Subject Property was specifically excluded from the scope of the two bylaws (CMC Decision, Para. 12)². The decision flowing from the Oct. 30, 2024 CMC was not based on the Clergy Principle and made no determination as to the allowable context.
5. On March 19, 2025 and March 26, 2025, FOBT re-submitted Expert Witness Barton’s Witness Statement on Land-Use to the Tribunal, copying all the Parties. In both cases, he made minor revisions in reply to concerns expressed by Counsel to the Applicant-Appellant (“AA”). Copies of both of FOBT’s messages to the Tribunal are attached together as Exhibit S to Hal Jaeger’s October 15, 2025 affidavit.
6. On the morning of April 22, 2025, at the start of the hearing, the Tribunal determined that FOBT would be permitted to address the admissibility of evidence on the in-effect designations and zoning on the surrounding properties during Opening Submissions, as opposed to during Preliminary Matters.
7. When, in the course of Opening Submissions, FOBT addressed the value of considering the in-effect designations and zoning on the surrounding properties, the AA objected on the basis that FOBT was “*into argument about Clergy*”, and the Tribunal ruled that any argumentation on the admissibility of evidence on the in-effect designations and zoning on the surrounding properties would need to be delivered later in the hearing. The Tribunal ruled that “*Ms. Meader is indicating that you're making your case for the Clergy instead of just speaking to it. That's something you want to address later.*” The Tribunal did not issue any ruling on the admissibility of evidence on the in-effect designations and zoning on the surrounding properties.
8. On the afternoon of April 23, 2025, in the course of FOBT’s cross-examination of the AA’s land-use witness, the AA objected that Expert Witness Sinclair “*analyzed the Subject Lands according to the policy context that was in place at the time the applications were submitted, the Clergy Principle.*” FOBT Co-Representative Hal Jaeger suggested, in the face

¹ September 17, 2025 Decision of Members Y. Faghani and G. Ingram on OLT Case No.: OLT-22-002377 (30 Duke Street Limited v Kitchener (City), [2025 CanLII 96327 \(ON LT\)](#)), Tab 1, FOBT Review Request Book of Documents

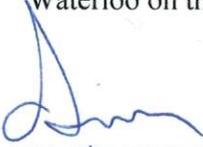
² Oct. 30, 2024 CMC Decision issued November 21, 2024, 30 Duke Street Limited v Kitchener (City), [2024 CanLII 118331](#) (ON LT), Tab 5G, FOBT Review Request Book of Documents

of the uncertainty over the rules, that all parties be permitted to submit evidence based on their differing approaches and to likewise permit cross examination based on the differing approaches. FOBT stated that, "We understand that the Subject Property is still required to be compatible with the surrounding context. We understand the context to include the current contextual designations and zoning surrounding the subject lands, as well as the existing built form". The Tribunal forbade FOBT to pose questions to Sinclair on the in-effect designations and zoning on the surrounding properties on the basis that she had not included such analysis in her Witness Statement. The Tribunal ruled that "We will not permit any further questions [of Expert Witness Sinclair] that hinge on deeper content within the new documents [OPA 49 and ZBA 2024-065]" because "she [Sinclair] has not used any of that criteria in her analysis." Again, the Tribunal did not issue any ruling on the admissibility of evidence on the in-effect designations and zoning on the surrounding properties.

9. On the afternoon of April 25, 2025, as Expert Witness Barton was conveying evidence on the in-effect designations and zoning of surrounding properties, the AA objected and asserted that the Tribunal had already determined at the CMC of Oct. 30, 2024 that the current designation and zoning on the surrounding properties would not be considered at the Hearing. FOBT stated that it agreed that the Subject Property was exempt from OPA 49 and ZBA 2024-065 but does not regard the decision of the Oct. 30, 2024 CMC as making any determination about the allowable context against which the compatibility of the proposed development was to be assessed. The Tribunal then ruled that "analyzing this subject property with respect to its impact within the context of the new OPA and ZBA creates a prejudicial situation for the Appellant" and refused to hear evidence based on the in-effect designations and zoning on the surrounding properties.

10. I affirm this Affidavit in support of the Request for Review of the Decision and for no other improper purpose.

AFFIRMED BEFORE ME at the City of Kitchener, in the Regional Municipality of Waterloo on the 5th of December, 2025

Duncan Henderson

Notary



Neil Baarda

