

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: December 24, 2024

CASE NO(S): OLT-23-000992

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant: DiCenzo Construction Company Limited
Subject: Request to amend the Official Plan – Failure to adopt the requested amendment
Description: To permit the development of two mixed-use residential buildings at 30-storeys and 39-storeys connected by a 3-storey to 4-storey podium containing 741 dwelling units, 297 square metres of commercial floor area at grade, 4,824 square metres of amenity area with 366 vehicle parking spaces contained within a parking structure and a total of 388 bicycle parking spaces (378 long term bicycle parking spaces and 10 short term bicycle parking spaces)

Reference Number: UHOPA-23-009
Property Address: 117 Jackson Street East
Municipality/UT: City of Hamilton
OLT Case No.: OLT-23-000992
OLT Lead Case No.: OLT-23-000992
OLT Case Name: DiCenzo Construction Company Limited v. Hamilton (City)

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

Applicant and Appellant: DiCenzo Construction Company Limited
Subject: Application to amend the Zoning By-law – Neglect to make a decision
Description: To permit the development of two mixed-use residential buildings at 30-storeys and 39-storeys connected by a 3-storey to 4-storey podium containing 741 dwelling units, 297 square metres of commercial floor area with 366 vehicle parking

spaces contained within a parking structure and a total of 388 bicycle parking spaces (378 long term bicycle parking spaces and 10 short term bicycle parking spaces)

Reference Number: ZAC-23-024
 Property Address: 117 Jackson Street East
 Municipality/UT: City of Hamilton
 OLT Case No.: OLT-23-000993
 OLT Lead Case No.: OLT-23-000992

Heard: October 7 to October 17, 2024 by Video Hearing

Parties

Counsel

DiCenzo Construction Company Limited

David Bronskill
 Caroline Jordan

City of Hamilton

Patrick MacDonald

DECISION DELIVERED BY J. INNIS AND ORDER OF THE TRIBUNAL

[Link to the Order](#)

INTRODUCTION AND BACKGROUND

[1] The matter before the Tribunal was an appeal by DiCenzo Construction Company Limited (“Applicant”) pursuant to s. 22(7) and s. 34(11) of the *Planning Act* (“Act”) due to failure of the City of Hamilton (“City”) to make a decision within the statutory timelines, concerning an Official Plan Amendment (“OPA”) and an associated Zoning By-law Amendment (“ZBA”) (together as “Applications”) for the property known municipally as 117 Jackson Street East (“Subject Property”).

[2] The Applications would facilitate the development of two mixed-use residential buildings with a proposed height of 30 storeys and 39 storeys respectively, attached by a four-storey podium. The Proposal would contain a total of 741 residential units.

[3] The central issue, in this case, is whether the proposed development balances appropriately the provincial and municipal policy objectives, particularly intensification and land optimization, without negatively impacting the prominence of the Niagara Escarpment in the City's downtown. The Tribunal acknowledges the City's desire to preserve the Niagara Escarpment's prominence but, for the reasons outlined below, finds that the Applications appropriately balance this goal with the need to address the housing shortage by building transit-oriented and sustainable development, using existing infrastructure, in an area designed to accommodate growth.

LEGISLATIVE FRAMEWORK

[4] In making its Decision, the Tribunal must have regard for matters of Provincial interest as set out in s. 2 of the Act, as well as the instruments must be consistent with the new Provincial Planning Statement 2024 ("new PPS"), in effect at the date of this Decision. In the case of the OPA, the Tribunal must evaluate the Proposal against the purpose and intent of the Urban Hamilton Official Plan ("UHOP"). As for the ZBA, the Tribunal must determine conformity with the Official Plan as modified by the proposed OPA.

[5] Further, the Tribunal must be satisfied that the proposed instruments are representative of good land use planning and are in the public interest.

[6] The UHOP was adopted on July 9, 2009, and came into effect on August 16, 2013, with some policies, schedules, maps and appendices still under appeal at the Tribunal, none of which affect the Subject Property. A Municipal Comprehensive Review of the UHOP was completed and approved as OPA No. 167 ("OPA 167"). The Ministry of Municipal Affairs and Housing modified OPA 167, approving it on November 4, 2022, and the Parties considered the amended OPA 167 that included the modifications made through Bill 150, *Planning Statute Law Amendment Act, 2023* and Bill 162, *Get it Done Act, 2024*.

SUBJECT PROPERTY AND SURROUNDING AREA

[7] Currently used as a surface parking lot, the Subject Property is rectangular in shape and has an approximate area of 4,969.9 square metres (“m²”). It contains two frontages; one consisting of 131 metres (“m”) with an existing driveway access along Jackson Street East, and another 43 m frontage along Catherine Street South.

[8] The Subject Property is in the Corktown Neighbourhood, within the City’s downtown. Corktown is comprised of a mixed-use community that contains numerous institutional uses (including schools, post secondary and churches), a medical district with a hospital, commercial uses, low-rise residential clusters, along with mid-rise and tall buildings scattered throughout the community, a rail corridor and GO bus/train stations. Located at the south end of the community, is the impressive Niagara Escarpment, a UNESCO Biosphere Reserve and naturalized area.

[9] Throughout the downtown area, a variety of tall buildings, both completed and approved, can be found including:

- 100 Main Street East – 43 storeys (existing)
- 82-114 King Street East – 36 storeys (approved)
- 75 James Street South – 34 storeys (under construction)
- 150 Charlton Avenue East – 33 storeys (existing)
- 20-22 George Street – 32 storeys (existing)
- 213 King Street West – 30 storeys (under construction)
- 10 Bay Street North – 30 storeys (existing)
- 43-51 King Street East and 60 King William Street – 30 storeys (existing)

- 15 Queen Street South – 24 storeys (existing)
- 140-150 Main Street West – 26 storeys (existing)
- 163 Jackson Street West – 32 storeys (under construction)
- 200 Jackson Street West – 23 storeys (existing)
- 25 Main Street West – 22 storeys (existing)
- 108 James Street North – 22 storeys (approved)
- 67 Caroline Street South – 22 storeys (existing)
- 55 Hess Street South – 21 storeys (existing)
- 181 Jackson Street West – 20 storeys (existing)
- 41 Wilson Street – 30 storeys (under construction)
- 360 King Street East – 25 storeys (existing)
- 101 Hunter Street East – 28 storeys (approved)

[10] Immediately north of the Subject Property is a city owned unassumed alleyway that is currently used for parking and storage by Landmark Place, a 43-storey, high-rise residential building, with commercial uses in the podium base of the building. Built in 1974, this is the tallest building in the downtown. The property adjacent to Landmark Place, to the east is occupied by a gas station, and the remainder of the block is developed with a one-storey commercial building. Further north of Main Street East are several high-rise offices and residential buildings that contain a 14-storey (48 m in height) office tower, a 16-storey residential tower, and a 12-storey (41 m in height) residential building.

[11] There are two commercial parking lots to the east of the Subject Property and the southeast corner of the block contains a one-storey commercial building. East of Walnut

Street South, is a newly constructed 26-storey residential tower with a seven-storey above-grade parking structure, at the rear, along Jackson Street East.

[12] The southeast corner of Jackson Street East and Catherine Street South is Linden Hall, a nine-storey student residence. A surface parking lot with a two-level parkade is located to the rear of this building with partial frontage onto Jackson Street East. Along Jackson Street East, there are multiple three-storey, semi-detached residential buildings that have a combination of uses from commercial and office space, a one-storey commercial building, and surface parking lots.

[13] The west side of Catherine Street South consists of a mix of surface parking, a two-storey commercial building and a one-storey commercial plaza located at the rear. Further west across Bowen Street is a four-storey commercial building with multiple two- to -three-storey mixed-use buildings, and a vacant lot at the southeast corner of Main Street West and John Street South.

[14] The Subject Property is readily accessible by transit. It is approximately 200 m from the Hamilton GO Centre, has access to the Hamilton Street Rail bus routes and within walking distance to two proposed Light Rail Transit Lines (“LRT”), with a stop approximately 160 m to the north.

[15] Identified as part of the Downtown Urban Growth Centre, the Subject Property is located within the Downtown Hamilton Secondary Plan (“DHSP”) and is designated as Downtown Mixed Use within the UHOP. They are zoned Downtown Central Business District (D1, H17, H19, and H20) Zone in the City’s Zoning By-law No. 05-200 (“ZBL”), which permits mixed use developments. Located within the Special Figure 1 of the ZBL, there is a permitted maximum building height for the Subject Property identified as 93 m for the westerly portion, and 89 m for the easterly portion.

[16] Furthermore, the ZBL identifies three holding provisions for the subject Property as follows:

- Holding Provision H17 - limits development to a maximum height of 44.0 metres and is to be lifted conditional to: a) The owner demonstrating that sufficient land assembly has occurred to achieve the minimum lot area and lot frontage requirements of the Zoning By-law; b) The owner demonstrating that the proposal conforms to policies of the Downtown Hamilton Secondary Plan through the submission of and approval of studies, including: shadow impact study, pedestrian level wind study, visual impact assessment, traffic impact study, and functional servicing report; c) The owner demonstrates that the Proposal does not exceed the height of the Niagara Escarpment; and, d) That conditional site plan approval be received.
- Holding Provision H19 - limits development to a maximum height of 44.0 m and is to be lifted conditional to: a) The owner entering into a Section 37 Agreement to secure provision of Community Benefits.
- Holding Provision H20 - limits development to a maximum height of 22.0 m and is to be lifted condition to: a) The owner demonstrates how any development having the effect of removing all or part of rental housing will be replaced.

THE PROPOSAL

[17] The Proposal is for a high-rise development that features two slender towers atop a four-storey podium that extends the entire frontage of Jackson Street East. The podium's first three-storeys have been pulled back from the street line to allow for a widened public realm that may contain landscaping and streetscaping amenities. The four storey is a mid-rise element that has been set back from the podium edge to accommodate indoor amenities for the buildings. The two towers exceed the recommended minimum 25 m tower separation distance established in the City's Tall Building Guidelines ("TBG") and provides for a 30 m separation distance between the towers and adjacent properties. The

west tower (“Tower A”) is 30 storeys (96 m in height) and the east tower (“Tower B”) is 39 storeys (122 m in height).

[18] The Proposal contains approximately 297m² of commercial space at ground level, 4,824 m² of amenity areas, and a total of 741 residential units. The residential units would be comprised of the following mix:

- 61 studio units (8%)
- 286 one-bedroom units (38%)
- 150 one-bedroom plus den units (20%)
- 212 two-bedroom units (28%)
- 42 two-bedroom plus den units (6%)

[19] The statistical summary of the Proposal is as follows:

Item	Statistic
Site Area (pre-widening)	5,552.44 sq m
Total Proposed GFA	44,033 sq m
Residential GFA	43,736.1 sq m
Height (west tower)	30 storeys 95.8 m, 101.8 m (including mechanical)
Height (east tower)	39 storeys 122.65 m, 128.65 m (including mechanical)
Residential Units	741
Amenity Space	4,824 sq m

Vehicular Parking	366
Bicycle Parking	388

[20] The proposed OPA is seeking to amend the UHOP, Volume 2, Chapter B.6.0-Hamilton Secondary Plans, section B.6.1 Downtown Hamilton Secondary Plan by creating a site-specific policy area for the Subject Property to permit a maximum building height of 96 metres for Tower A and 122 metres for Tower B.

[21] The proposed ZBA is seeking to change the zoning of the Subject Property from the Downtown Central Business District (D1, H17, H19, and H20) to a site specific Downtown Central District (D1, XXX) zone in order to permit a mixed use development and permit modifications for the D1 Zone that include the following:

- a. increase the building base façade in height from 7.5 m to 16 m along both Catherine Street and Jackson Street South;
- b. to not require a step back from the building base façade for up to 20 percent of each tower, whereas a minimum step back of 3 m is required; and,
- c. to increase the maximum building heights permitted on the Subject Property:
 1. Tower A from 93 m to 96 m
 2. Tower B from 89 m to 122 m

AGREED UPON FACTS

[22] The Parties have agreed to the following facts and opinions, as filed in advance of the hearing:

- The redevelopment of the Subject Property in the form of two tall buildings with heights of up to the greater of 30-storeys or the height of the Niagara

Escarpment, can: have regard for matters of Provincial interest identified in the *Planning Act*; be consistent with the new PPS; and the UHOP and the DHSP.

- The City issues are related to built form, massing and transition in scale and urban design, and is specifically related to the overall height of the buildings.
- The tower floor plates are less than the recommended 750 m² maximum tower floor plate size in the City's TBG and are appropriate tower floor plates of 665 m² (west tower) and 722 m² (east tower) from floors 5 to 28 (west tower) and floors 5 to 37 (east tower).
- The height and massing of the proposed podium, as illustrated in the architectural plans, is appropriate given the existing and planned surrounding development context.
- Regarding the range of housing types, it is agreed that in the City's opinion, an appropriate residential unit mix would be when each development provides three-bedroom units that make up a minimum of 5% of the total units and the total amount of larger units (consisting of two and three-bedroom units) makes up a minimum of 25% of the total residential units.
- The issue of Climate Change and Energy Efficiency, is no longer a concern with the Proposal. The Proposal, with the *proviso* that it will include the following list of sustainable design elements in letter format, prepared by the Applicant's architectural/design consultant and agreed to by the Applicant?:
 - i. Providing a minimum of 10% of all required parking spaces to be EV-ready spaces.
 - ii. Utilizing permeable pavers at-grade to reduce run-off.
 - iii. Incorporating green roof elements on top of the podium and towers where possible.

- iv. Installing low-flow fixtures.
- v. Adding carshare spaces.
- vi. Adding bicycle parking spaces.
- vii. Additional sustainable design elements will be identified through the detailed design stage and implemented as part of the Site Plan Control Application such as target of percentage of glazing vs. insulated walls, HVAC strategy/source(s), amongst others.

WITNESSES

[23] Upon review and consideration of their respective curriculum vitae and Acknowledgement of Experts' Duty forms, the Tribunal qualified the following eight experts, on consent of the Parties, to provide opinion evidence:

For the Applicant:

- David Falletta, land use planning
- Tom Kasprzak, urban design
- Andrew Siliadas, wind engineering
- Pascal Monat, civil engineering

For the City:

- Daniel Barnett, Land Use Planning
- Hanqing Wu, Wind Engineering
- Zivki Panovski, -Civil Engineering
- Edward Winter, Urban Design

APPLICANT'S POSITION

Provincial Policy

[24] It was the opinion of Mr. Falletta that the Applications have regard for matters of provincial interest. In particular, the orderly development of safe and healthy communities; within an appropriate growth location; provides a full range of housing; and promotes sustainable development that supports public transit. Additionally, he expressed his opinion that the Proposal was a well-designed built form that would foster a sense of place and contribute to a high-quality, safe, accessible, attractive, and vibrant public space.

[25] The new PPS Policy 2.4.1.3 (b) which states that planning authorities shall “identify the appropriate scale of development in Strategic Growth Areas and transitions to adjacent areas”, was an area of disagreement amongst the Parties. It was the opinion of Mr. Falletta that the Applications were consistent with this policy and Counsel for the Applicant provided evidence that Mr. Burnette initially confirmed, in his Report to Council, recommending refusal of the Applications, that the Proposal did in fact conform to a similarly worded policy in the Growth Plan for the Greater Golden Horseshoe. This change in opinion by Mr. Burnette was only identified through cross-examination.

[26] Mr. Falletta opined that the Applications align with the policies of the new PPS as the Proposal supports the emphasized need to intensify underutilized land to increase housing supply, by prioritizing intensification and optimizing the efficient use of urban land and infrastructure, especially in a Strategic Growth Area (“SGA”), Major Transit Station Areas (“MTSA’s”) and the City’s downtown Urban Growth Centre (“UGC”). Mr. Falletta opined that the City placed insufficient weight on these policies and the emphasis on optimization of lands and existing infrastructure.

[27] The minimum density within an MTSA, served by light rail is 160 people/jobs per hectare. In response to Mr. Barnett’s concerns regarding the Proposal’s density, Mr. Falletta testified that Mr. Barnett’s comparison suggesting that the Proposal’s 741 dwelling

units would result in approximately 1,353 units per hectare is misleading. This is because it was the opinion of Mr. Falletta that the 160 people/jobs per hectare target refers to gross density (which includes all lands such as roads and parks), and that the calculation for the Proposal used by Mr. Barnett represents net density, which results in the density appearing significantly higher.

[28] Mr. Falletta opined that the City will need to leverage all available opportunities for new housing in the downtown area to meet housing forecast and provincial targets, and that further optimizing the Subject Property with its existing infrastructure and access to public transit, commercial and employment opportunities, assists the City in its population targets and thus, conforms to the new PPS and UHOP.

[29] Testimony by Mr. Falletta asserted that while there is no dispute regarding the suitability of the lands for significant intensification, the central issue is whether the Proposal represents optimal use of the lands, infrastructure, and transit investments, in line with relevant provincial policies. It was the opinion of Mr. Falletta that the City has given insufficient weight and consideration to provincial policy and elevated certain policies in the DHSP to a binding threshold, effectively restricting the potential for increased heights on the Subject Property, noting that the new PPS does not give priority to the Niagara Escarpment as an “artificial determinant of height”. He emphasized that, in his opinion, the City failed to review applicable policy documents “as a whole” and provincial policy was insufficiently prioritized.

[30] Evidence was provided by Mr. Falletta that the new PPS places a clear priority on the optimization of lands, which goes beyond simple intensification. He stated that optimization involves realizing the full potential of a site, ensuring that it supports key planning objectives, including transit orientated development, increased housing supply, appropriate built form, and compatibility with surrounding areas. It was the opinion of Mr. Falletta that the Proposal strikes the right balance among these objectives by aligning with the new PPS’s focus on optimizing land use, the Proposal advances provincial goals for

intensification and sustainable growth, which should be appropriately prioritized in the assessment of this Proposal.

[31] The Applicant, through legal counsel, argued that while the City acknowledges the OPA before the Tribunal, it largely ignores it in its analysis, recommending refusal based on non-conformance with existing policy. Counsel contends that this approach is flawed, highlighting that using policies being amended to justify refusal would result in circular reasoning, as noted in the *Chedoke Terrace Inc., Re*, 1993 CarswellOnt5196.

[32] In regard to the Applications, supporting a full range and mix of housing, on September 17, 2024, the City's Planning Committee approved an OPA and the re-zoning application for 1600 Upper James Street that required 17% of the units to be two- or three-bedrooms, along with three affordable housing units. In contrast, the Proposal would consist of 34% of units to be two-bedroom or larger, which is double the percentage of larger units in comparison to the approved plan for 1600 Upper James Street. It was the opinion of Mr. Falletta that since the Proposal exceeds the requirements of the two- or three-bedroom units recommended by the City staff and approved by City Council for 1600 James Street, the Application does conform with the new PPS by providing a full range and mix of housing options.

[33] The new PPS underscores the need to intensify underutilized lands, including surface parking lots within SGA's and MTSA'. Mr. Falletta testified that the proposed Applications align with these policies, demonstrating consistency with the PPS by supporting the creation of complete communities through a diverse range of housing options and densities, that meet the needs of both current and future residents; the proposed growth is focused within the SGA's, meets minimum density targets in MTSA's, and promotes economic development and competitiveness, while utilizing existing infrastructure and services.

Urban Hamilton Official Plan (“UHOP”) and Downtown Hamilton Secondary Plan (“DHSP”)

[34] The UHOP Policy A.2.3.1 allocates a population of 820,000 to the City by 2051, which represents an increase of 236,000 people and requires the creation of 110,000 housing units and 122,000 jobs over the next 30 years. As the new PPS instructs planning authorities to utilize the population and employment forecasts derived from the Ontario Population Projections, released by the Ministry of Finance (“MOF”), which indicates that the growth is projected to increase beyond that identified in the UHOP. The Subject Property is located within the Downtown Urban Growth Centre (“UGC”), which is designated as the City’s highest density area, and within proximity to two MTSA’s.

[35] Mr. Falletta provided testimony that the City’s DHSP needs to be updated to reflect the new density targets for the UGC and those provided by the Ontario Population Forecast through the MOF. And further, that the Proposal would assist the City in achieving these targets. He stated that UHOP Policy A.2.3.4.4 requires 80% of all residential development occurring annually is to occur within the built-up area and Policy B.2.4.1.3 states that 80% of intensification targets are to be distributed though the built-up area, with 30% being accommodated in the UGC. Mr. Falletta opined that the City will need to leverage all available opportunities for new housing in the downtown area to meet housing forecast and provincial target.

[36] The Subject Property is designated as “Downtown Mixed-Use Area” as identified on Schedule E-1 of the Land Use Designation Map. Mr. Falletta provided testimony that as this designation permits residential and a wide range of commercial/institutional uses, that the proposed application supports the policies intended to increase the number of people who live and work in the downtown, contributing to its planned function as a vibrant people place.

[37] Evidence was provided by Mr. Falletta that Policies E.4.4.7 and E.4.4.8 define the scale of the Downtown Mixed-Use Area, identifying that its density and height shall be set

out in the secondary Plan, but that a higher density for housing is encouraged and may be integrated with business uses on the ground floor.

[38] It was the opinion of Mr. Falletta, that the Proposal aligns with the policy objectives, of the Downtown Mixed-Use area as outlined in the UHOP in supporting the City's growth and intensification goals, by introducing high-density, transit-supportive development, supporting the plan's vision. Further, the development will revitalize the site, particularly enhancing the street frontages along Jackson Street East and Catherine Street South with active uses, transforming an existing surface parking lot, into a thriving, high-density area. As such, Mr. Falletta opined that the OPA and ZBA conform to the UHOP and, support the policies related to growth targets, density, urban design, urban structure principles, mix of uses, transit supportive, and a vibrant downtown core.

[39] The Subject Property is located within the DHSP, which was adopted by Council on May 9, 2018. The plan was subsequently approved by the Tribunal (formally, the Local Planning Appeal Tribunal), apart from site-specific appeals and the Subject Property was not among those appeals.

[40] The DHSP recognizes an important role of the downtown as a "pre-eminent node" of the City because of its scale, density, functional range of uses, and that it is to be the location for tall buildings. Mr. Falletta opined that, while there is a broad agreement that the Proposal conforms with many policies of the UHOP, there are three key areas of disagreement related to the policy context: height, views and vistas, and shadows.

Heights

[41] Mr. Falletta opined that the Proposal generally conforms with the intent of the UHOP, except for certain policies of the DHSP, which would be addressed through the site-specific OPA, by amending the maximum building height and if approved, the Proposal would comply with the relevant DHSP policies.

[42] It was the opinion of Mr. Kasprzak that the Proposal aligns with the City's TBG, which were approved by Council in 2018, and establishes a framework that guides where tall buildings are appropriate, it provides clarity on how mitigation strategies are to be evaluated, and included specific design guidance around building height, massing transition, sun/shadowing, and building articulation.

[43] Evidence was provided by Mr. Kasprzak that the Proposal aligns with the TBG for the following reasons:

- a. The development is located approximately 140 m from the nearest low-rise residential neighbourhood, well beyond the recommended 12.5 m.
- b. The proposed height preserves views along the identified corridor towards the Niagara Escarpment and does not negatively affect any landmark views or vistas, and it contributes positively to the skyline with well-articulated tower forms and tops.
- c. The Towers are positioned more than the recommended 25 m apart to minimize the loss of sky views, with no obstruction of views to important landmarks.

Views, Vistas, and Visual Integration

[44] Mr. Kasprzak opined that the intent of the policy regarding the Niagara Escarpment is to protect views to and from this natural feature, while maintaining its visual prominence. Views of the Niagara Escarpment are primarily defined along north-south public street corridors, with many downtown streets terminating at the Niagara Escarpment, typically framed by dense tree canopies. Significant views also included those from Sam Lawrence Park, the only public park with views of downtown to the north. Based on the Visual Impact Assessment ("VIA") prepared by Bousfield Inc., Mr. Kasprzak concluded that the Proposal will not negatively impact pedestrian views of the Niagara Escarpment, including

from Catherine Street South as the Subject Property is not at the terminus of any identified corridor.

[45] Regarding the view from Sam Lawrence Park, Mr. Kasprzak stated that the additional height will not affect the sky views over the downtown to the north and that the distance between the Niagara Escarpment and the downtown is a more significant factor in preserving those views. He argued that imposing height restrictions on the Subject Property is arbitrary, as additional height has no impact on views to and from the Niagara Escarpment and contradicts other policy goals, such as creating a distinctive Hamilton Skyline and recognizable landmarks. Specifically, he highlighted the policies aimed at designing towers with distinctive tops, creating focal points along transit lines, and contributing to an interesting skyline. In his view, limiting height to match the Niagara Escarpment's elevation would result in a monolithic skyline, blocking the Niagara Escarpment and preventing buildings from acting as visual focal points and orientation devices from within the public realm.

[46] In terms of compatibility, Mr. Kasprzak asserted that the proposed height is consistent with existing and recently approved towers within the downtown. The Subject Property is in close proximity to other towers, some of which exceed the height of the Niagara Escarpment. Additionally, Mr. Kasprzak finds the proposed height appropriate, given the site's distance from low-rise residential neighbourhoods, located approximately 180 m to the south.

[47] In Mr. Kasprzak's opinion, the proposed amendments to the UHOP and ZBL are appropriate, as they align with urban design principles. The Proposal is compatible with the surrounding area, respecting the built form and character, and will enhance the neighbourhood by intensifying an underutilized site with a well-scaled, high-rise development. This will contribute to the vibrancy and evolution of the City's downtown, improving the public realm with animated ground-floor uses. From an urban design perspective, the Proposal is an appropriate response to the Subject Property's downtown location, with distinct elements that will enhance the City's skyline.

[48] Mr. Kasprzak asserted that the proposed built form, setbacks, and height were acceptable given the context of the downtown, which already includes numerous other tall buildings. He also provided evidence that the Proposal had no adverse impacts on views of the Niagara Escarpment along existing corridors identified in the DHSP; and further that, the additional height of the towers would not effect these views either. As such, it was his opinion that these aspects of the Proposal conform to the urban design policies of the UHOP and the DHSP.

Shadow Impacts

[49] Mr. Kasprzak addressed the shadow impacts of the Proposal noting that Policy 6.1.4.37 of the DHSP requires that no new net shadows be cast on identified key civic gathering spaces between 10 a.m. and 4 p.m. during the spring and fall equinox. The Shadow Study prepared by Bousfield Inc. shows that the Proposal will cause some shadowing on Prince's Square, an identified key civic gathering space, located northeast of the Subject Property, that contains a walkway, some trees and benches, and would appear to be an extension of the adjacent Courthouse. The new net shadowing would occur between 10 a.m. and 10:50 a.m. on March 21st and 10 a.m. and 10:36 a.m. on September 21. The shadowing is from Tower A only and it is incrementally mitigated by a shadow that would be caused by the existing as-of-right zoning envelope. The shadows on Prince's Square lasts only 36 minutes on September 21, a day with a higher average temperature, and with the warmer weather in September, the park is more likely to be used for seating or passive recreation at that time.

[50] Additionally, Mr. Kasprzak testified that the alternative shadow study produced by Mr. Winter that was based on proposed variations and adjustments to the building's placement, that would still result in net new shadows on Prince's Square, meaning an OPA would still be required. Further, Mr. Kasprzak provided evidence that the proposed alternative by Mr. Winter would only result in a reduction of the net new shadowing by a mere four minutes. It was the opinion of Mr. Kasprzak that Prince's Square was not a typical park and no evidence on the contrary was provided. He opined that while this is not

sufficient to justify net new shadowing, it is relevant to understanding any potential impact on the park's role and function.

[51] In summary, it was the opinion of Mr. Falletta that regarding the intensification policies within the UHOP, specifically B.2.4.1.4. b), d) and e), the building heights conform for the following reasons:

- a. The proposed buildings' heights of 30- and 39-storeys are consistent with the neighbourhood character, which includes buildings up to 43 storeys. The Proposal aligns with the established pattern of tall buildings in the UGC, particularly, in transit-served areas.
- b. The proposed buildings are compatible with the surrounding area in terms of use, scale, form and character. Compatibility, as defined by the UHOP policies, means land uses and building forms that can coexist harmoniously, not necessarily identical. These commercial and residential uses are compatible with the surrounding mixed-use area and permitted under the ZBL. The three-storey podium fits well with the low-rise buildings on Jackson Street East and Catherine Street South, while the tower elements are in scale with the downtown's taller buildings, which include towers up with 43-storeys.
- c. The Proposal aligns with the urban structure, which designates the UGC as the primary area for high density and intensification. The urban structure policies set a minimum density target of 500 persons/jobs per hectare for the downtown UGC. Thus, the Proposal supports and implements this vision by directing high-density, mixed-use development at the highest scale withing the Downtown UGC.
- d. Also, relying on the opinion of Mr. Kasprzak, who asserts that the Proposal is compatible with the exiting neighbourhood, aligns with the City's TBG, and

supports the urban design policies in the UHOP and DHSP for this downtown area.

- e. A viewshed analysis was conducted for the Proposal in accordance with the DHSP with the purpose of identifying critical areas where specific setbacks for build form were needed to maintain or enhance the views and viewsheds. It noted three significant conclusions: Significant views of the Niagara Escarpment are visible along north-south corridors, particularly, south of the King Street; Building height and placement, specifically the base relative to the road, impacted views; and views of Hamilton harbour are not significant from downtown public lands due to distance and topography.
- f. The City approved a rezoning application for lands at 43-51 King Street East and 60 King William Street, which proposed two 30-storey towers exceeding the height of the Niagara Escarpment. The DHSP was not yet in effect, and the staff report stated that the plan “was informative, but not determinative”. In evaluating the proposed heights of the buildings in those applications, staff concluded that their distance from the Niagara Escarpment meant that the additional heights would not interfere with the visual prominence of the Niagara Escarpment.

[52] Mr. Falletta opined that the Proposal conforms to the general intent of the UHOP and the DHSP regarding height. He provided evidence that the Proposal will integrate harmoniously into the downtown built form and will not compromise the visual prominence of the Niagara Escarpment. The Proposal will protect views of the Niagara Escarpment along the key north-south streets, including Catherine Street South, and will not impact views from the public realm. The Subject Property is located approximately 966 m from the Niagara Escarpment and is adjacent to an existing 43-storey tower and other existing buildings taller than the height of the Niagara Escarpment located further south and as such, the additional height will respect, rather than challenge the visual prominence of the Niagara Escarpment.

[53] Lastly, Mr. Falletta relies on the expert opinion of Mr. Kasprzak, who asserts that the additional height will not negatively impact views of or from the Niagara Escarpment and that the Proposal was assessed on its own merits, in line with the applicable policies.

City of Hamilton Zoning By-law No. 05-200

[54] Mr. Falletta provided evidence that the Subject Property is zoned as D1 (Downtown Central Business District), allowing for multiple dwellings with a maximum height of 89 m for the western portion of the property and 89 m for the eastern portion. He cited that the zoning also includes a 7.5 m maximum building base façade height along Jackson Street East and Catherine Street South, with a 4.5 m setback for any building portion under 7 m in height. The proposed apartment use aligns with the existing D1 zoning, however, Mr. Falletta opined that the Application seeks rezoning to increase the building base façade height, overall height, and other development regulations to accommodate the proposal.

[55] Three Holding Provisions (H17, H19 and H20) apply to the Subject Property. It was the opinion of Mr. Falletta that H17 applies to developments exceeding 44 m in height and requires studies such as shadow impacts, pedestrian-level wind impacts, visual impact, and functional servicing reports. Further, he stated that H19 was no longer applicable as it contended with Section 37 Agreements to secure Community Benefits, and as H20 contends with rental housing and none existed on the Subject Property, as such it too was no longer relevant.

Wind Impacts

[56] A Pedestrian Level Wind Study prepared by GradientWind Engineers & Scientists, dated December 9, 2022 and an addendum to the Pedestrian Level Wind Study prepared by GradientWind Engineers & Scientist, dated August 4, 2023, were submitted in support of the Applications.

[57] UHOP Policy B.3.3.3.2 requires that new development shall be designed to minimize impacts on neighbouring buildings and public spaces by minimizing the impacts of wind conditions and DHSP Policy 6.1.4.38 states that buildings shall be sited, massed, and designed to reduce and mitigate wind impacts on the public realm and pedestrian wind levels shall be suitable for sitting and standing.

[58] Based on wind tunnel testing, meteorological data, and experience with similar developments across the Greater Toronto Hamilton Area by Mr. Siliasas, he testified that the wind conditions for the Proposal will be acceptable for pedestrian use throughout the year, including seasonal variations. He recommended mitigation measures for the amenity terraces on levels 4 and 5 to ensure comfort during summer months for sitting and other activities. He also concluded that public sidewalks, laneways, and surface parking within and surrounding the Subject Property are expected to be comfortable for walking year-round, with minor exceptions during two seasons, during the winter months, for a portion of the laneway along the north elevation and part of the surface parking to the east. He opined that these winter conditions are not expected to significantly impact pedestrian traffic, as these locations are isolated and not expected to see frequent use.

[59] Mr. Falletta stated that the proposed Holding Provision is unnecessary and conflict's with the Province's goal of expediting development. He asserted that any required wind mitigation is best addressed during the site plan control process, as development proposals typically evolve after OPA and ZBA approvals, incorporating more detailed design elements. Mr. Falletta opined that the wind study and addendum already demonstrate that the Proposal conforms to the applicable policies of the UHOP and DHSP.

[60] Lastly, Counsel for the Applicant identified during cross-examination that in contrast to Mr. Siliasas, Dr. Wu did not conduct a site visit, was not familiar with the surrounding uses and had not reviewed the Proposal, and as such, the evidence provided by Dr. Wu respecting any potential mitigation prior to the re-zoning approval should not be given the same consideration as Mr. Siliasas.

Servicing

[61] Evidence was provided by both Parties that having reviewed and commented on the servicing submission by the Applicant, all outstanding servicing issues had been addressed, apart from the servicing proposal for a second fire line connection. This issue is driven by the Ontario Building Code (“OBC”) requirements and the concerns by the City, that the existing watermain servicing capacity for Catherine Street South was unable to provide for the necessary fire flows:

OBC Clause 3.2.9.7 (4): buildings exceeding 84 metres in height, as measured from grade to the ceiling level of the top storey, must be served by no fewer than two sources of water supply from a public water system.

National Fire Protection Association (“NFPA”) 24 (2022 Edition) Clause 5.5: connections to public water systems shall be arranged to be isolated as permitted in clause 6.2.9, which states that all connections to private fire service mains for fire protection systems shall be arranged in accordance with one of criteria under this clause.

[62] Both Parties concurred that the Proposal must be serviced by no fewer than two sources of water supply from a public water system in accordance with the OBC.

[63] The Applicant proposed a servicing solution that includes two separate fire supply lines from Jackson Street East, complete with an isolation valve between the supply lines so that each fire supply line may be isolated and operated independently. It was the opinion of Mr. Monat that this approach is common where a secondary watermain is either unavailable or inadequate, and thus, the proposed servicing meets the requirements of the OBC and the NFPA, and the City’s servicing requirements in Section D of the Comprehensive Development Guidelines and Financial Policies Manual, dated 2019 and the Water Works By-law Resource Manual. Mr. Monat provided evidence that the existing watermain on Jackson Street East has the capacity required to service the Proposal and further that isolation valves are a common practice.

[64] Relying on the expert opinion of Mr. Monat, in which he confirmed that the Proposal can be adequately serviced by municipal infrastructure and complies with the OBC and the

City requirements, Mr. Falletta opined that the Proposal conforms to the UHOP Policies B.2.4.1.4 f) and C.5.3.13 and aligns with the infrastructure servicing policies outlined in the new PPS.

Noise Impacts

[65] Mr. Falletta testified that a noise study was completed by dBA Acoustical Consultants Inc., dated November 2022, and submitted to the City, along with an addendum, dated August 1, 2023, and it identified that the noise of idling trains is acceptable based on the required noise guidelines for both the 30- and 39-storey towers, and that stationary noise sources would be adequately addressed through the design of the buildings and use of the recommended Sound Transmission Class (“STC”) rated glass, as such no impacts were identified.

[66] Lastly, the existing as-of-right zoning permits for a building up to a height of 44 m without the need for a holding provision on this issue, as such it was the opinion of Mr. Falletta that a holding provision should not be required for a taller building. Mr. Falletta opined that the City’s request for a Holding Provision regarding noise was unnecessary. Over the past two years, the City has not conducted a peer review of the Noise Study submissions, despite having ample time to do so. Mr. Falletta provided evidence that given the City’s failure to review the study and request a Holding Provision so that they may peer review would be unreasonable. Additionally, noise impacts will be addressed as part of the site plan control process, a Holding Provision would therefore only cause delays and additional costs.

Record of Site Condition

[67] A Record of Site Condition (“RSC”) is a provincially regulated mandatory filing and as such, it was determined by Mr. Falletta that the RSC would best be addressed through the required site plan control and building permit processes. Furthermore, Mr. Falletta opined that as the existing zoning on the Subject Property permits a 44 m tall building

without the need for a Holding Provision regarding a RSC, it is not necessary to implement a Holding Provision for a taller building when it is mandated to be fulfilled prior to building permit issuance.

[68] Mr. Falletta concluded that both the OPA and ZBA are consistent with the new PPS, represents good planning and is in the public interest for the reasons he expressed throughout his witness statement and testimony.

CITY EVIDENCE

Provincial Policy

[69] Mr. Barnett testified that while the City has not yet delineated MTSA's in its official plan, in accordance with the recently enacted new PPS, the Subject Property is located within 500 m of both the Hamilton GO Centre to the southwest and the planned Mary Street LRT Station to the north, and as such, would be deemed within the radius requirement for an MTSA. However, the Proposal would provide for a density of 1,353 units per hectare, greatly exceeding the minimum density targets for MTSA's of 160 residents per hectare. It was noted by Mr. Barnett that the existing zoning permissions would permit approximately 615 dwelling units and that would represent approximately 1,126 units per hectare. Further, he opined that the existing permissions would facilitate additional dwelling units through an expansion to the mid-rise element, beyond the 1,126 units per hectare. Mr. Barnett therefore opined that the existing height restrictions would be consistent with the new PPS.

[70] Evidence was provided by Mr. Barnett that Policy 2.4.1.3 b) of the new PPS, directs planning authorities to identify the appropriate type and scale of developments in strategic growth areas. He opined that the City, through the DHSP, identifies the type and scale of development and seeks to balance the need for intensification with the preservation of the area character, particularly reflecting the height of the Niagara Escarpment.

[71] As the new PPS policies requires an appropriate range and mix of housing options, Mr. Barnett provided his opinion that because the Proposal does not provide any three-bedroom units, and as such, it does not adequately accommodate a diverse mix of housing options.

[72] Upon review of the Applicant's SitePlan Tech Inc. submission dated August 22, 2024, Mr. Panovski provided evidence that the servicing proposal failed to meet the requirements for the OBC by providing for a second fire line connection and to ensure capacity of the existing watermain system on Catherine Street South to provide for the required fire flows. As such, Mr. Barnett proffered that the policies of the new PPS pertaining to the need for adequate infrastructure to support the Proposal, are not met.

[73] As such it was Mr. Barnetts' opinion that the Proposal is not consistent with the new PPS, as it does not comply with the height restrictions identified in the DHSP, it does not provide for three-bedroom units that would constitute an appropriate range and mix of housing; adequate infrastructure to support the Proposal does not currently exists for the Subject Property; and further the permitted existing heights for the Subject Property comply with the minimum density targets for MTSA's.

Urban Hamilton Secondary Plan ("UHOP") and the Downtown Hamilton Secondary Plan ("DHSP")

[74] Evidence was provided by Mr. Barnett that the policies of the UHOP permit a mixed-use development and further defer to the DHSP, in respect to permitted density and height on the Subject Property.

Height

[75] The Subject Property is identified as "High Rise-2" on Map B.6.1-2, for maximum building height of up to 30-storeys and Mr. Barnett opined that the DHSP restricts the scale of the development to a maximum height of up to 30-storeys and to the height of the

Niagara Escarpment, as Policy 6.1.4.18 b) states that “new tall buildings shall be no greater than the height of the top of the Escarpment as measured between Queen Street and Victoria Avenue”.

[76] Mr. Barnett further summarized the following based on the DHSP Summary Report, which provides rational for the policies:

- The Niagara Escarpment is a UNESCO Biosphere Reserve;
- The Niagara Escarpment is a powerful visual feature due to its height and striking landscape character that terminates the vistas looking southwards on several downtown streets;
- The Niagara Escarpment is the prominent feature that is visible at the terminus of several streets in the downtown due to its close proximity, height, and forested natural character;
- Through consultation the public emphasized the significance of the Niagara Escarpment as a defining feature of Hamilton’s unique identity and that the height of new buildings should not be taller than the top of the Escarpment.
- According to Hamiltonian’s the Niagara Escarpment has a distinctive ecological, geological and natural heritage value for the City of Hamilton and is a unique character defining element for the City, development should respect the cultural significance of the Niagara Escarpment to the City and the scenic quality it plays in providing context and framing downtown Hamilton; and
- As a result, the principal of establishing a maximum building height that respect the height of the Niagara Escarpment is based on this fundamental value and has been incorporated into the policies of the Downtown Hamilton Secondary Plan, TBG, and implementing Zoning By-law.

[77] It was the opinion of Mr. Barnett that the City's efforts to determine the height of the Niagara Escarpment above sea level at various points throughout the downtown and including this information as an Appendix in the DHSP, demonstrates the importance the City had placed on policy pertaining to building heights in relation to the Niagara Escarpment. He further provided evidence that Catherine Street South is identified as an important view corridor to the Niagara Escarpment, and that the height permitted was determined based on the height of the Niagara Escarpment. Policy 6.1.2 h) states that:

The Niagara Escarpment is an essential part of the character and appearance of the City; views of the Escarpment are important assets to protect. The Niagara Escarpment meanders through the City of Hamilton providing a natural backdrop to the Downtown, access to a unique environment, and a home to a diverse ecosystem of international significance a UNESCO World Biosphere Reserve. The Downtown Hamilton Secondary Plan recognizes the importance of the relationship between topography and building height and the impacts on significant views to and of the Niagara Escarpment.

[78] Mr. Barnett opined that the height of the Proposal does not conform with DHSP policies cited below for the following reasons:

- Policy 6.1.4.12 e) - Tower B of the Proposal seeks to establish a height of 39-storeys, which exceeds the maximum height of 30-storeys permitted for lands identified as High-Rise 2;
- Policy 6.1.4.14 - restricts maximum building height to be no greater than the height of the Niagara Escarpment and the proposal seeks to exceed the height of the Escarpment; the Proposal has Tower A exceeding that height by 3 m, and Tower B by 33 m;
- Policy 6.1.4.15 – clarifies that the height of a building on one site is necessarily a precedent for development on adjacent or nearby sites. The majority of the existing buildings in the area that exceed the height of the Niagara Escarpment, where either constructed or approved, prior to the adoption of the policies restricting height;

- Policy 6.1.4.18 b) – reiterates that new tall buildings shall be no greater in height than the top of the Niagara Escarpment;
- Policy 6.1.4.19 – directs that the TBG shall apply to all tall building development and shall be used by the City when evaluating tall building developments.

[79] The Downtown Hamilton TBG Study (“Study”) was undertaken to prepare for the establishment of the TBG. In evaluating the top ten tallest buildings in and around the downtown at the time, the study concluded that only three had heights greater than the Niagara Escarpment, and the remaining had heights equal to or less than the height of the Niagara Escarpment. The Study also evaluated a number of approved developments that had not yet been constructed at the time, and only one of these buildings exceeded the height of the Niagara Escarpment. The tallest building in the downtown is Landmark Place, with a height of 127 m and the Proposal would become the second tallest building with a height of 122 m. Therefore, it was the opinion of Mr. Barnett that the Study demonstrates that the majority of the buildings in and around the downtown are either at or below the height of the Niagara Escarpment.

[80] Through his analysis, Mr. Barnett evaluated five other tall building developments, submitted subsequent to the completion of the Study, that either exceeded or proposed to exceed the height of the Niagara Escarpment. He determined that two of the buildings had applications which predated the Council approved DHSP, two more had their heights reduced, and one was approved by the Committee of Adjustment and was not supported by City planning staff.

[81] Mr. Barnett provided evidence that the TBG reiterates the policy direction that building heights are not to exceed the height of the Niagara Escarpment; that tall buildings are to be spaced apart to minimize the loss of sky views; that the views of the Niagara Escarpment should be preserved, that development be assessed with respect to impacts on views to and from the Niagara Escarpment; and they stipulate that tall buildings

minimize shadow impacts on public spaces. Therefore, it was the opinion of Mr. Barnett that as the Proposal does not adequately address the TBG, and as such, it does not conform with the DHSP Policy 6.1.4.19.

[82] In regard to the transition in scale, it was the opinion of Mr. Winter that the Proposal could relate better to the existing neighbourhood, particularly in transitioning between Main Street East and the mid-rise along Jackson Street East, and low-rise neighbourhoods one block further south, on the south side of Hunter Street. Given the physical distance, Mr. Winter suggests that a stronger mid-rise component above the podium would relate better to the area south of the Subject Property.

Visual Impacts

[83] In addition to s. 3.6 of the TBG requiring development to maintain and enhance viewing opportunities towards the Niagara Escarpment, minimize the loss of sky views, and provide an assessment of impacts on views to and from the Niagara Escarpment, Mr. Barnett also provided the following DHSP policies in regard to the Proposal's potential for visual impacts (underlined for emphases):

- Policy 6.1.10.3 - identifies the Niagara Escarpment is the prominent feature that is visible at the terminus of several streets in the downtown due to its close proximity, height, and forested natural character. The Niagara Escarpment is a UNESCO Biosphere Reserve that separates lower Hamilton from the upper urban area above. The Niagara Escarpment is a powerful visual feature due to its height and striking landscape character that terminates the vistas looking southwards on several downtown streets.
- Policy 6.1.10.4 - outlines that the Niagara Escarpment is part of Hamilton's unique identity and contributes significantly to the character of the downtown. Significant views to this natural feature shall be protected.

- Policy 6.1.10.5 - significant view locations and corridors are identified on Appendix C Downtown Hamilton Viewshed Analysis. Visual impact guidelines and a VIA shall be prepared in accordance with the TBG.
- Policy 6.1.10.6 - a VIA may be required for development located on streets identified as View Corridors to the Niagara Escarpment and properties identified as Locations Where There May Be Impacts to Views.
- Policy 6.1.10.7 - a VIA shall be required for development on properties identified as Locations Where Impacts to Views.
- Policy 6.1.10.8 - development shall be required to provide setbacks, step backs, or reduced height in order to mitigate the impact of the Proposal on existing views.

[84] As the Subject Property is located within an identified view corridor, a VIA was required and prepared for the Applications by Bousfields Inc. and included an evaluation of before and after views from York Boulevard Gateway, Bayfront Park and Sam Lawrence Park.

[85] It was the opinion of Mr. Barnett that views of the Niagara Escarpment and in some instances the harbour as well, would be impacted by the Proposal from the sites evaluated. He opined that the two proposed towers in combination with Landmark Place, and a recently approved 28-storey building (located at 101 Humber Street East and not part of the VIA), would create a substance wall of buildings in this area that would have adverse visual impacts from Sam Lawrence Park. Further, it was his opinion that this would be exacerbated by buildings that would exceed the height of the Niagara Escarpment and as such, the Applications do not conform with the policies of the DHSP with respect mitigating the impacts of development on views.

Shadow Impacts

[86] A Sun Shadow Study was prepared by Bousfield Inc., dated December 2022, and a Planning Addendum letter dated September 22, 2023, was reviewed by Mr. Barnett and it was determined that the Proposal conforms to the DHSP Policy 6.1.4.35, pertaining to the sun coverage requirements on public sidewalks. It was suggested by Mr. Barnett that the language of the policy “very clearly prohibits any net new shadows onto Prince’s Square, does not permit new net shadows whether they are significant or incremental” and that the intentions behind this is to prevent an incremental cumulative impact from multiple developments.

[87] Prince’s Square, which is one of five sites identified in the DHSP, as a primary gathering space. It is located approximately one block from the Subject Property, and it was the evidence of Mr. Winter that that proposed towers do in fact cast net new shadows on Prince’s Square, creating negative impacts to the gathering space and the existing trees. Further, he noted that if the Proposal could be revised to move the towers by approximately 7.5 m, it would result in a reduction in the shadow impacts, and while zero impacts are not possible, a revision by the Applicant would be an attempt to have as minimal shadow impact as possible.

[88] Mr. Barnett argued that the proposed new shadowing on Prince’s Square is significant. At the spring equinox, the proposed 51 minutes of shadowing represents 14.2% of the 360-minute period between 10 a.m. and 4 p.m.. At the fall equinox, 36 minutes of new shadowing represents 10% of the same time frame. It was the opinion of Mr. Barnett that this amount of new shadowing is substantial and does not constitute an incremental increase.

[89] Mr. Barnett opined that the Proposal’s shadowing on Prince’s Square would reduce the park’s usability and is unjustified. He provided evidence that while the existing trees provide some shade, they allow sunlight to filter through and the new shadow would block sunlight entirely, harming the trees and reducing the square’s light access. It was

therefore his opinion that the additional net new shadow would impact the enjoyment and use of the square, contrary to the goal of preserving sunlight within a civic space.

City of Hamilton's Zoning By-law No. 05-200

[90] Testimony was provided by Mr. Barnett that the current ZBL balances the need for intensification with the vision of the DHSP, ensuring that tall buildings respect the character of the area and the prominence of the Niagara Escarpment. He further opined that the proposed ZBA facilitates a build form that exceeds the existing height of the Niagara Escarpment as seen from key locations, and that the Proposal would cast net new shadows on Princes' Square.

[91] Mr. Barnett opined that Holding Provisions with respect to Engineering, Noise Impacts, Wind Impacts, and the Record of Site Condition are required to ensure that the proposed ZBA conforms to the respective provincial policies and those of the UHOP and DHSP.

Wind Impacts

[92] Dr. Wu testified that the proposed 30 and 39-storey towers are likely to cause increased wind activity at the ground level due to the deflection of stronger winds from higher elevations. He noted that uncomfortable wind conditions were predicted at two test locations at grade during GradientWind's wind tunnel tests, though no mitigation measures were provided in the final report or addendum. Further, Dr. Wu opined that the gust calculation methodology used by GradientWind, which employs an averaging procedure may underestimate peak gusts, that could potentially compromise both comfort and safety. It was the opinion of Dr. Wu that additional wind tunnel testing to assess and develop effective wind mitigation measures for the Subject Property and future surroundings, as well as clearly defining the procedure for gust calculations.

[93] It was the opinion of Mr. Barnett, based on the evidence provided by Dr. Wu, that without wind mitigations, issues caused by the build form exist and additional testing is required to ensure that mitigation measures will be effective in reducing wind. Further, he opined that the Proposal has not been able to demonstrate appropriate conditions on adjacent lands and on the public realm, and therefore, it lacks conformity with Policy 3.3.3.2 of the UHOP and Policy 6.1.4.38 of the DHSP.

Servicing

[94] Mr. Panovski opined that the proposed servicing solution does not conform with the OBC requirement for two sources of water supply from a public system because “The second source in this case is the watermain on Catherine Street South adjacent to the subject lands....and cannot provide for the required fire flows...”. Further, Mr. Panovski rejected the proposal to implement an isolation valve on Jackson Street East watermain, citing that it would create operational challenges for the City in case of an emergency or necessary maintenance work.

[95] Given the testimony of Mr. Panovski, it was the opinion of Mr. Barnett in which a Holding Provision is the most appropriate course of action, as it would require the Applicant to demonstrate adequate infrastructure capacity to service the Proposal.

Noise Impacts

[96] Mr. Barnett testified that a noise source caused by trains, exceeding the noise guidelines, was identified in a development one block south of the Proposal, which required a peer review. Given this precedent, Mr. Barnett noted that it would be prudent to have the noise study and addendum peer-reviewed to ensure compliance with necessary noise guidelines and thus, conformity with UHOP Policy B.3.6.3.1. He opined that a Holding Provision would allow for the peer-review and ensure all necessary measures and mitigations. Mr. Barnett did testify that the technical elements of the study and specifically the addendum, fall outside the expertise of both himself and City planning staff.

Record of Site Condition (“RSC”)

[97] The testimony of Mr. Barnett identified that as part of the OPA application, a Phase 1 and 2 Environmental Site Assessment were submitted, but a RSC had not yet been provided and according to the City’s policies, a ZBA application may be deferred or subject to conditions, which can be established through a Holding Provision. A Holding Provision condition would require the owner to submit a signed RSC or enter into a conditional building permit agreement with respect to completing a RSC, prior to lifting the Holding Provision. As such, it was the opinion of Mr. Barnett that the issue of Site Condition, as outlined in the UHOP policies, can be addressed through adding a Holding Provision condition.

[98] In conclusion, it was the opinion of Mr. Barnett that the OPA and ZBA are not in the public interest and do not represent good planning.

ANALYSIS AND FINDINGS

[99] The Parties have agreed that the redevelopment of the Subject Property, involving the construction of two tall buildings, with maximum heights up to the greater of 30-storeys or the height of the Niagara Escarpment, have regard for matters of provincial interest. Mr. Falletta’s testimony regarding the primary issue of height differential, was persuasive in that despite the height differential, the Tribunal should support the Proposal, as it is representative of orderly development; fosters safe and healthy communities in an appropriate growth area; promotes sustainable development; and is well-served by public transit. Furthermore, the Tribunal was not persuaded by the City’s evidence that attempted to demonstrate that the height differential of the Proposal is inconsistent or contrary to the City’s TBG. Therefore, the Tribunal concurs with the Applicant’s submissions that the Proposal has regard for matters of provincial interest pursuant to s. 2 of the Act.

[100] There is no dispute that the Subject Property would be located within an MTSA in accordance with the new PPS. As a result, the Tribunal concurs with Mr. Falletta's interpretation that the gross density should be used for comparison to ensure consistency and avoid misleading calculations. It is also important to note that the new PPS sets minimum density targets for MTSA's, not maximums. Both Parties agree that the Subject Property falls within a designated Strategic Growth Area, and the fact that the City has suggested higher densities should be permitted through a mid-rise expansion of the Proposal, effectively supports the rationale in support of increased density. The Tribunal is persuaded by the Applicant's evidence that suggests the City fundamentally supports higher density, but disagrees on built form and design, through a preference for mid-rise architecture, as opposed to higher density with taller design, which, more appropriately reflects minimum density targets in such close proximity to an MTSA. Therefore, the Tribunal finds that the Proposal's density is consistent with the minimum density targets of the new PPS for MTSA's.

[101] The Tribunal prefers the Applicant's evidence which emphasized that the new PPS prioritizes land optimization and extends beyond basic intensification through a more robust Site-Specific design effort to optimally realize the full potential of the Subject Property, ultimately achieving key planning objectives including: transit-orientated sustainable community development; increased housing supply; and appropriate built-form. The Tribunal concurs that the Proposal is consistent, and representative of provincial objectives relating to intensification and optimization.

[102] Regarding the central issue of whether the Proposal appropriately balances the provincial and municipal policy objectives of land optimization without negatively impacting the Niagara Escarpment's prominence, the Tribunal was persuaded by the Applicant's evidence that all policy documents are to be considered in their entirety, rather than focusing on one set of policies to the exclusion of others. The evidence convincingly supported the importance of adopting a comprehensive approach in assessing the Proposal, therefore, enhancing its compatibility, and achieving optimal density, through

appropriate urban design. The Tribunal was not convinced that sufficient weight was given to provincial policies and priorities as submitted by the City, through its evidence.

[103] The Tribunal finds that the Proposal demonstrates a range and mix of housing and is therefore consistent with the new PPS, in this regard. The residential mix includes 34% of the units consisting of two or more bedrooms ultimately exceeding, the range and mix of residential units recently approved for a neighbouring development located at 1600 Upper James Street.

[104] The City recommended refusal based on the DHSP's restriction on building heights to exceed the height of the Niagara Escarpment and the Applicant provided evidence that this approach is flawed, as using the existing policy- one that is being amended - to oppose the very amendment constitutes circular reasoning. The Tribunal concurs with the Applicant's position, finding that relying on the policy being amended to defeat the proposed development is insufficient reasoning. Such an approach would undermine the purpose of the amendment itself.

[105] The Tribunal has carefully considered the Applicant's expert evidence that the Proposal will not negatively or adversely impact views to or from the Niagara Escarpment. In particular, the VIA submitted with the Application, which demonstrates that the proposed height does not interfere with views to or from the Niagara Escarpment, particularly from the public realm on Catherine Street South. The Tribunal finds that regardless of the height of the proposed building, the Niagara Escarpment would still be visible at the street's terminus.

[106] The expert witnesses for the City did raise concerns regarding the potential impact of the additional height on views from elevated sites, such as Sam Lawrence Park. Mr. Barnett opined that the combination of proposed towers that included Landmark Place, and a recently approved 28-storey building, would create a wall of buildings. Thus, detracting from the views of the Niagara Escarpment and its prominence, and that a height exceeding that of the Niagara Escarpment, would only exacerbate this. However, the

Tribunal prefers the evidence from the Applicant, which asserts that the restrictions based solely on the Escarpment's elevation would result in a monolithic skyline that blocks the Escarpment and does not balance the other intended goals of the TBG to create distinctive building top, with an interesting skyline. Further, the Subject Property's distance from the Niagara Escarpment, along with the increased tower separation ensures that the height does not interfere with the prominence of the Niagara Escarpment and enhances the skyline.

[107] The Proposal sustainability exceeds the recommended 12.5 m in distance from the nearest low-rise residential neighbourhood. While Mr. Winter suggests that a stronger mid-rise component above the podium would better align with the low-rise neighbourhood to the south, the Tribunal finds that the transition in scale is appropriate given the current and planned context, especially given the recently approved tall building at 101 Hunter Street East.

[108] In assessing the Proposal's impact on Princes' Square, the Tribunal finds that while the development does cast net new shadows on the square, the increase in shadowing is minimal and does not justify refusal of the Applications. Furthermore, the Tribunal is not persuaded by the position that the proposed shadows would adversely impact the park's use and the health of the existing trees. The incremental shadowing should not significantly impact the function or enjoyment of the space. Furthermore, even if the Proposal was adjusted as recommended by Mr. Winter, the reduction in shadowing would only amount to four minutes, a marginal improvement that does not alter the Tribunal's Decision. While the Tribunal acknowledges the City's concerns regarding the preservation of public spaces, a minimal increase in shadowing would exist regardless through the as-of-right zoning. As such, the Tribunal prefers the evidence of the Applicant, in that the proposal achieves a reasonable balance between the public realm's needs and the broader planning objectives for intensification and development in this area.

[109] The Tribunal finds that the evidence presented regarding wind impacts is not sufficient to justify a holding provision. While Dr. Wu's testimony identified two locations where uncomfortable wind conditions may occur, these conditions were not deemed unsafe. Moreover, the Tribunal accepts the evidence of the Applicant that given the findings by both Parties' experts, and that the Proposal will evolve through the site plan process and that any necessary mitigation measures can and should be addressed through that phase.

[110] The Tribunal also prefers the evidence of Mr. Monat that the proposed servicing solution does conform to the requirements of the OBC by supplying two lines of water supply from a public waster system, that has the capacity to service the needs of the Proposal. The OBC does not specify that the two required sources of water supply from a public system must be provided from two separate watermains. Furthermore, this is also a matter that may be addressed through the site plan process.

[111] The Tribunal further determined that the City's request of a Holding Provision on noise impacts is unnecessary. Evidence provided by the Applicant showed compliance with guidelines and no adverse impacts were identified. Additionally despite the City's failure to peer-review the study in a timely manner, it is not precluded from requiring further noise impact analysis through the site plan process, if genuinely required. Therefore, the Tribunal finds that a holding provision related in this regard would cause unnecessary delays and costs.

[112] A Record of Site Condition is provincially regulated and must be submitted prior to the issuance of a building permit, and the Tribunal would concur with the evidence provided by the Applicant, that a holding provision in this regard is unnecessary. Additionally, the existing zoning of the Subject Property permits a height of 44 m without the need for a holding provision related to record on site condition and makes the imposition of such a provision for a taller building unwarranted.

[113] In conclusion, the Tribunal finds that for the above noted reasons, both the Official Plan Amendment, and Zoning By-law Amendment: have regard for matters of public interest pursuant to s. 2 of the *Planning Act*; are consistent with the 2024 Provincial Planning Statement; conform to the general intent of the Urban Hamilton Official Plan and the Downtown Hamilton Secondary Plan; and represent good planning.

ORDER

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

1. The appeals for the Official Plan Amendment and Zoning By-Law Amendment, are allowed in part, on an interim basis, contingent upon confirmation and satisfaction of those matters identified in paragraph 2 below, and the Official Plan Amendment and Zoning By-law Amendment set out in **Attachment 1 and Attachment 2**, to this interim order, are hereby approved in principle;
2. The Tribunal will withhold its Final Order until the draft Official Plan Amendment and draft Zoning By-law Amendment are in final form satisfactory to the City of Hamilton, the Appellant;
3. The Member will remain seized for the purposes of reviewing and approving the final draft of the Official Plan Amendment, the Zoning By-law Amendment and the issuance of the Final Order; and,

[115] The Tribunal may, as necessary, arrange the further attendance of the Parties by Telephone Conference Call should any matters arise regarding the submission of the final form of the Official Plan Amendment and the Zoning By-law Amendment and the issuance of the Final Order.

“J. Innis”

J. INNIS
MEMBER

Ontario Land Tribunal

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The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal (“Tribunal”). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.

**ATTACHMENT 1
FINAL OFFICIAL PLAN AMENDMENT**

Urban Hamilton Official Plan

Amendment No. _____

THE ONTARIO LAND TRIBUNAL AMENDS THE URBAN HAMILTON OFFICIAL PLAN AS FOLLOWS:

The following text, together with:

- Appendix 'A' – Volume 2: Map B.6.1-1 – _Downtown Hamilton Secondary Plan – Land Use Plan

attached hereto, constitutes Official Plan Amendment No. "X" to the Urban Hamilton Official Plan.

1.0 Purpose and Effect:

The purpose and effect of this Amendment is to establish a Site Specific Policy and amend the maximum building height for the lands located at 117 Jackson Street East to permit the development of a mixed use building with two tower elements at heights of 30- and 39-storeys, exclusive of mechanical penthouse elements.

2.0 Location:

The lands affected by this Amendment are known municipally as 117 Jackson Street East in the former City of Hamilton.

3.0 Basis:

The basis for permitting this Amendment is as follows:

- The Amendment is consistent with the Provincial Planning Statement, 2024;
- The Amendment implements the vision of the Downtown Hamilton Secondary Plan by providing a mix of uses on site and contributing to a range of housing options within Downtown Hamilton;
- The Amendment conforms with the design criteria for High-Rise (Tall) Buildings in the Downtown Hamilton Secondary Plan and the Downtown Hamilton Tall Buildings Guidelines;
- The Amendment will serve Central Hamilton by providing new housing with a mix of residential unit types that will add housing choice for new and existing residents;

- The Amendment will make efficient use of underutilized lands within the Downtown Core in proximity to transit (including higher-order transit), open space, employment, retail, and other services.
- The Amendment will assist in animating Jackson Street East and Catharine Street South and provide continuous street-edges with at-grade mixed-use access.
- The Amendment will provide additional retail/commercial development to service the needs of the community.

4.0 Actual Changes:

4.1 Volume 2 – Secondary Plans

Text Changes:

4.1.1 Chapter B.6.0 – Hamilton Secondary Plans – Section B.6.1 – Downtown Hamilton Secondary Plan.

- a. That Volume 2, Chapter B.6.0 – _Hamilton Secondary Plans, Section B.6.1 – _Downtown Hamilton Secondary Plan be amended by adding a new Site-Specific Policy, as follows:

“Site Specific Policy – Area X”

B.6.1.15.X Notwithstanding Volume 2, Policies B.6.1.4.12, B.6.1.4.14, B.6.1.4.18 b), and B.6.1.4.37, for lands located at 117 Jackson Street East, the maximum building height shall be 124 metres for the eastern tower and 97 metres for the western tower, excluding Mechanical Penthouses.

Map Changes:

- 4.1.2 Volume 2: Map B.6.1-1 – _Downtown Hamilton Secondary Plan – _Land Use Plan be amended by identifying the subject lands as Site Specific Policy Area “X” as shown on Appendix “A”, attached to this Amendment.

5.0 Implementation:

An implementing Zoning By-law Amendment will give effect to the intended uses and performance standards on the subject lands.

This is Schedule “1” to By-law No. 20-___ passed on the ___ day of ___, 20___

**ATTACHMENT 2
FINAL ZONING BY-LAW AMENDMENT**

CITY OF HAMILTON

BY-LAW NO. _____

**To Amend Zoning By-law No. 05-200, Respecting Lands located at
117 Jackson Street East (Hamilton)**

WHEREAS the City of Hamilton Act, 1999, Statutes of Ontario, 1999 Chap.14, Schedule. C. did incorporate, as of January 1st, 2001, the municipality "City of Hamilton";

AND WHEREAS the City of Hamilton is the successor to certain area municipalities, including the former area municipality known as "The Corporation of the City of Hamilton", and is the successor of the former regional municipality, namely, "The Regional Municipality of Hamilton-Wentworth";

AND WHEREAS, the City of Hamilton Act, 1999 provides that the Zoning By-laws of the former area municipalities continue in force in the City of Hamilton until subsequently amended or repealed by the Council of the City of Hamilton;

AND WHEREAS Zoning By-law No. 05-200 was enacted on the 25th day of May, 2005;

AND WHEREAS the Ontario Land Tribunal, in its Decision/Order No. XXX, dated XX day of XXX, 20_, approved the amendment to Zoning By-law No. 05-200 as herein provided;

AND WHEREAS this By-law will be in conformity with the Urban Hamilton Official Plan upon approval of Official Plan Amendment No. ____.

NOW THEREFORE the Ontario Land Tribunal amends Hamilton Zoning By-law 05-200 as follows:

1. That Maps 953 and 995 of Schedule "A" – Zone Maps, of Zoning By-law No. 05-200, be amended by modifying the zoning of the subject lands:
 - From the Downtown Central Business District (D1) (H17, H19, H20) to the Downtown Central Business District (D1, ____) modified Zone, the extent and boundaries of which are shown on a plan hereto annexed as Schedule "A" to this By-law; and,
2. That Schedule "C" – Special Exceptions, of By-law No. 05-200, is hereby amended by adding the following sub-section:
 - "____, Within the lands zoned Downtown Central Business District (D1, ____) identified on Maps 953 and 995 of Schedule "A" to By-law No. 05-200 and described as 117 Jackson Street East, the following special provisions shall apply:
 - (a) Notwithstanding Section 6.0 c) i) and Schedule F – Special Figure 15 – Building Base Façade Height, a building base façade height for Catharine Street South and Jackson Street East of 16.0 m shall be permitted;

- (b) Notwithstanding Section 6.0 c) i) and (a) above, no stepback is required above the building base façade height for a portion of a building exceeding 44.0 metres in height up to a maximum of 20% of the combined exterior façade for each tower;
 - (c) Notwithstanding Section 6.1.3.b ii), a maximum building height of 124 metres is permitted for the eastern tower and a maximum building of 97 metres is permitted for the western tower.
3. That notwithstanding Section 6.1.3.b ii), that Schedule "F" – Special Figure 1 Maximum Building Heights of By-law 05-200 is hereby amended as shown on Schedule B of this by-law to reflect a maximum height of 124 metres for the east tower and 97 metres for the west tower.
 4. That By-law No. ___-___ shall come into force and be deemed to come into force in accordance with Sub-section 34(21) of the *Planning Act* and as described in Decision/Order No. XXX, dated XX day of XXX, 20__.

APPROVED this ___ day of _____ 20__.