

CITY OF HAMILTON

PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT
Planning Division

TO: Chair and Members Planning Committee	WARD(S) AFFECTED: WARD 1
COMMITTEE DATE: September 7, 2011	
SUBJECT/REPORT NO: Application for Amendment to the City of Hamilton Zoning By-law No. 6593 for Lands Located at 252-254 Locke Street South (Hamilton) (PED11147) (Ward 1)	
SUBMITTED BY: Tim McCabe General Manager Planning and Economic Development Department	PREPARED BY: Daniel Barnett (905) 546-2424, Ext. 4445
SIGNATURE:	

RECOMMENDATION:

That approval be given to **Zoning Application ZAR-11-003, by Cynthia Bernstein, Owner**, for a change in zoning from the Community Shopping and Commercial “H” District and the Urban Protected Residential - 1 and 2 Family Dwelling “D” District to the Community Shopping and Commercial “H/S-1644” District, Modified, with a Special Exception, to permit the establishment of a 42 seat commercial outdoor licensed patio in the rear yard and north-east side yard, accessory to the existing 30 seat restaurant, on lands located at 252-254 Locke Street South (Hamilton), as shown on Appendix “A” to Report PED11147, on the following basis:

- (a) That the draft By-law, attached as Appendix “B” to Report PED11147, which has been prepared in a form satisfactory to the City Solicitor, be enacted by City Council.
- (b) That the amending By-law be added to Section 19B of Zoning By-law No 6593 as “S-1644”.

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- (c) That the proposed changes in zoning conform to the Places to Grow Plan, is consistent with the Provincial Policy Statement, and is in conformity with the Hamilton-Wentworth Official Plan and the City of Hamilton Official Plan.
- (d) That upon finalization of the implementing By-law, the subject lands be re-designated from “Single & Double” Residential and “Commercial” to Commercial in the Kirkendall North Neighbourhood Plan.

EXECUTIVE SUMMARY

The purpose of this application is for a change in zoning to permit the establishment of a 42 seat commercial outdoor licensed patio in the rear yard and the north-east side yard, accessory to the existing thirty 30 seat restaurant.

The proposal has merit and can be supported as the proposal conforms to the Places to Grow Plan, is consistent with the Provincial Policy Statement, and conforms to the Hamilton-Wentworth Official Plan, the City of Hamilton Official Plan, and the Kirkendall North Neighbourhood Plan. The proposed rezoning is considered to be compatible with existing development in the surrounding area.

Alternatives for Consideration - See Page 15.

FINANCIAL / STAFFING / LEGAL IMPLICATIONS (for Recommendation(s) only)

Financial: None.

Staffing: None.

Legal: As required by the Planning Act, Council shall hold at least one (1) Public Meeting to consider an application for a Zoning By-law Amendment.

HISTORICAL BACKGROUND (Chronology of events)

Proposal

The subject lands have a lot frontage of 12.2 metres on Locke Street South, and have a lot area of 527.6 square metres (see Appendix “C”). The subject property is zoned, Community Shopping and Commercial “H” District (front portion), and Urban Protected Residential - 1 and 2 Family Dwelling “D” District (rear portion). The requested Zoning By-law Amendment would modify the current zoning to a site-specific Community Shopping and Commercial “H/S-1644” District on Block 1 (see Appendix “B”) in order to permit a 36 seat outdoor licensed patio in the rear yard and a 6 seat outdoor licensed patio in the north-east side yard of the existing restaurant.

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The proposed rezoning will also establish a site-specific Community Shopping and Commercial “H/S-1644” District on Block 2 (see Appendix “B”) to restrict the use to a garage, for the parking of vehicles.

In October, 2009, the applicant submitted an application for a minor variance in order to convert an existing unlicensed patio to a licensed outdoor patio at the rear of an existing restaurant. Through the review of the minor variance application, staff required that the applicant submit a minor site plan to detail the exact layout of the patio. The applicant submitted a minor site plan application on November 16, 2009. The minor variance application was brought before the Committee of Adjustment on November 19, 2009, but was tabled for staff to complete the site plan review process. In February, 2010, the Committee of Adjustment approved the minor variance application subject to a restriction that the restaurant hours of operation shall not exceed 11:00p.m. The application for minor variance was appealed to the Ontario Municipal Board (OMB) by a third party.

In May, 2010, an OMB hearing was held with respect to the appeal of the Committee of Adjustment Decision to approve the proposed variances. In July, 2010, the OMB denied the proposed variances, with the exception of a variance for a 6 seat outdoor licensed patio within the north-east side yard. However, in the decision, the OMB stated that a Zoning By-law Amendment was the proper way to approach the proposal (see Appendix “D”).

Chronology:

January 11, 2011: The applicant submitted an application for rezoning in order to legally establish a 36 seat licensed outdoor patio at the rear of the subject property, along with the 6 seats within the north-east side yard that was approved by the OMB. The application for rezoning was deemed to be incomplete.

April 5, 2011: Planning Justification Report received and the application was deemed to be complete.

April 29, 2011: A notice of complete application and pre-circulation was mailed to all residents within 120m of the subject property.

June 9, 2011: City staff and the applicant attended a meeting of the Kirkendall North Neighbourhood Association to better inform the neighbourhood association on the details of the proposed patio and rezoning application.

August 19, 2011: Notice of Public Meeting was sent to all residents within 120m of the subject property.

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Details of Submitted Application

Location: 252-254 Locke Street South (Hamilton)

Owner: Cynthia Bernstein

Applicant: Stephen Bernstein

Property Description:

Frontage: 12.2m

Lot Depth: 43.5m

Area: 505.9 sq. m.

EXISTING LAND USE AND ZONING:

	<u>Existing Land Use</u>	<u>Existing Zoning</u>
<u>Subject Lands:</u>	Mixed-Use, Restaurant and Second Storey Residential Dwellings	“H” Community Shopping and Commercial District, and “D” Urban Protected Residential - 1 and 2 Family Dwellings District.
<u>Surrounding Lands:</u>		
West	Single-Detached Residential Dwellings	“D” Urban Protected Residential 1 and 2 Family Dwellings District.
North	Commercial Uses and Single-Detached Residential Dwellings	“H” Community Shopping and Commercial District, and “D” Urban Protected Residential - 1 and 2 Family Dwellings District.
East	Duplex Dwellings	“D/S-426” Urban Protected Residential - 1 and 2 Family Dwelling District, Modified.
South	Mixed-Use, Commercial Uses and Second Floor Residential Dwellings	“H” Community Shopping and Commercial District.

POLICY IMPLICATIONS

Provincial Growth Plan for the Greater Golden Horseshoe

The application has been reviewed with respect to the Provincial Growth Plan for the Greater Golden Horseshoe (Places to Grow).

The application conforms with the policies that manage growth within the built up area, as per the policies contained in Section 2.2.2 of the Places to Grow Plan.

Provincial Policy Statement

The application has been reviewed with respect to the Provincial Policy Statement (PPS) policies that contribute to the development of healthy, liveable, and safe communities, as contained in Section 1.1.1. The subject lands are considered to be within a Settlement Area, as defined by the PPS. As such, the application is consistent with Policy 1.1.3.1 with respect to focusing growth and regeneration within existing Settlement Areas. The application will facilitate the on-going restaurant use on the subject lands and, therefore, is consistent with the Provincial Policy Statement.

Hamilton-Wentworth Official Plan

The subject property is designated “Urban Area” in the Hamilton-Wentworth Official Plan. Policy C-3.1 outlines that a wide range of urban uses, determined through Area municipal Official Plans and based on full municipal services, will be concentrated in the Urban Area. Policy 3.1.1 encourages compact, mixed-use to ensure people are close to shopping and their workplace, and that growth can be accommodated within the existing Urban Area.

As the application is to establish an outdoor licensed patio for an existing restaurant, the proposal conforms to the policies of the Hamilton-Wentworth Official Plan.

City of Hamilton Official Plan

The subject property is designated “Commercial” in the City of Hamilton Official Plan, which permits establishments involved in the buying and selling of goods and services, business offices, hotels, convention, and entertainment facilities. The following policies, among others, apply:

- “A.2.2 The Plan promotes a high aesthetic quality in all Commercial areas, and endeavours to minimize their impacts on adjacent land uses, most importantly, Residential uses.

A.2.2.2 Council recognizes that the Commercial structure of the City operates within a hierarchy of categories ranging from the Central Policy Area (which, as defined by the Regional Official Plan, is intended to function as the “Regional Centre”) to local Commercial uses of a convenience type. Except for the Central Policy Area and Sub-Regional Centres, the hierarchy is not designated on Schedule “A” to this Plan. The location and distribution of such categories will be identified through Neighbourhood Plans, as set out in Sub-section D.2.

A.2.2.35 Where Commercial Uses are proposed to be developed adjacent to Residential land uses, Council will be satisfied that the following provisions are adequately met:

- i) Access drive, parking, and service areas will be screened and/or buffered such that noise, light, or undesirable visual impacts emanating from the Commercial Use are mitigated;
- ii) Light from standards or other external lighting fixtures, excluding those used for store and window display or wall illumination, will be directed downward and shielded or oriented as much as practicable away from the adjacent Residential uses; and,
- iii) Light standards will be of a height that is in scale with the facility, but will not be of a height sufficient to create a nuisance to adjacent land uses.

D.8.2 The boundaries between classes of land use designated on Schedule “A” by patterned areas, as well as any other boundaries on Schedules “B”, “B-1”, “B-2”, “C”, “F”, “G”, “H”, and “J-1”, are only intended to be general, and not to define the exact limits of any land use or policy. It is intended, therefore, that minor adjustments may be made in respect of these boundaries in the Zoning By-law without the necessity of further amending this Official Plan so long as such By-laws conform to the general intent and purpose of this Plan.”

As the proposal is to establish an outdoor licensed patio for an existing restaurant, with appropriate screening and buffering between the patio and the abutting residential properties, the proposal conforms to the policies of the City of Hamilton Official Plan.

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New Urban Hamilton Official Plan (Under Appeal)

The Urban Hamilton Official Plan received Ministerial Approval from the Ministry of Municipal Affairs and Housing on March 16, 2011, and, therefore, can no longer be modified.

The final decision on the Urban Hamilton Official Plan has been appealed.

The subject property is designated “Mixed-Use - Medium Density” in the City of Hamilton Urban Official Plan, and is intended to permit a full range of retail, service commercial, entertainment, and residential accommodation at a moderate scale. The “Mixed-Use - Medium Density” designation recognizes traditional mixed-use main streets, other large commercial areas which serve the surrounding community, or a series of neighbourhoods which are intended to evolve and intensify into mixed-use, pedestrian oriented areas. In accordance with Policy E.4.6.5 of Volume 1, the “Mixed-Use - Medium Density” designation permits the following uses:

- “a) Commercial uses such as retail stores, auto and home centres, home improvement supply stores, offices oriented to serving residents, personal services, financial establishments, live-work units, artist studios, restaurants, and gas bars.”

In addition, the following policies also apply:

- “E.4.6.1 The range of commercial uses is intended to serve the surrounding community or series of neighbourhoods, as well as provide day-to-day retail facilities and services to residents in the immediate area. These areas shall also serve as a focus for the community, creating a sense of place.
- E.4.6.2 The “Mixed-Use - Medium Density” designation shall be applied to traditional ‘main street’ commercial areas outside of the area designated “Downtown Mixed-Use”, and promote the continuation of these areas as pedestrian oriented mixed-use areas. Retail and service commercial uses are key elements in maintaining that function and ensuring the continued vibrancy of the pedestrian realm.
- F.1.2.7 Neighbourhood plans are policies adopted by Council resolution, and do not form part of the Official Plan. Any proposal for development or re-development must conform to the designations and policies in the Neighbourhood Plan.

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F.1.2.8 Any amendment to the Neighbourhood Plan must be evaluated using the provisions of Policies F.1.1.3 and F.1.1.4, and shall require a formal Council decision to enact the amendment.

F.1.1.4 When considering amendments to this Plan, including secondary plans, the City shall have regard to, among other things, the following criteria:

- a) the impact of the proposed change on the City's vision for a sustainable community, as it relates to the objectives, policies, and targets established in this Plan; and,
- b) the impact of the proposed change on the City's communities, environment and economy, and the effective administration of the public service."

Based on the neighbourhood plan being amended, the proposal conforms to the policies of the City of Hamilton Urban Official Plan.

Kirkendall North Neighbourhood Plan

The subject property is designated "Commercial" (Block 1) and "Single and Double Residential" (Block 2) in the Kirkendall North Neighbourhood Plan.

The policies of the Neighbourhood Plan state: "c) Locke and Dundurn Street Commercial Areas: In these two areas, some provision for commercial expansion has been provided for, as well as the proposed elimination of some commercial areas where it is felt that these areas will not develop commercially."

As the proposal is to convert an exiting unlicensed restaurant patio into a licensed outdoor patio for a restaurant, and as the proposed outdoor patio is located entirely within those lands designated "Commercial", the proposal conforms to the policies of the Kirkendall North Neighbourhood Plan.

RELEVANT CONSULTATION

Agencies/Departments Having no Comment or Objections

- Urban Renewal Section, Economic Development Division
- Traffic Engineering and Operations Section, Public Works Department
- Operations and Waste Management Division, Public Works Department
- Forestry and Horticulture Section, Public Works Department.
- Hamilton Municipal Parking System.

Public Consultation

In accordance with Council's Public Participation Policy, this application was pre-circulated to 269 property owners within 120 metres of the subject lands. A Public Notice Sign was also posted on the subject lands at that time. At the time of preparation of this Report, staff had received 4 letters of objection, including 1 with an objecting planning justification report with respect to the proposed rezoning (see Appendix "F"). The concerns are discussed in the Analysis/Rationale for Recommendation section of this Report.

ANALYSIS / RATIONALE FOR RECOMMENDATION

(include Performance Measurement/Benchmarking Data, if applicable)

1. The proposal has merit and can be supported for the following reasons:
 - i) It is consistent with the Provincial Policy Statement and conforms to the Places to Grow Plan, the Hamilton-Wentworth Official Plan, and Hamilton Official Plan.
 - ii) It is compatible with the type and form of development in the surrounding neighbourhood.
 - iii) It is an appropriate extension of an existing commercial use that is within an existing mixed-use building.
2. The subject lands are located within the Kirkendall North Neighbourhood on the west side of Locke Street South, south-west of Downtown Hamilton. There is an existing 30 seat restaurant located on the first floor of a 2-storey building, the restaurant has an existing 6 seat licensed outdoor patio located in the north-east side yard near the front of building, and a 36 seat unlicensed patio located at the rear of the building between the building and a 5 car detached garage.

The subject property is dual zoned, with the front portion of the property zoned "H" Community Shopping and Commercial District and the rear portion of the property zoned "D" Urban Protected Residential - 1 and 2 Family Dwelling District. The existing mixed-use building, as well as the proposed licensed outdoor patio, is located entirely within the portion of the property zoned "H" District (see Appendix "A").

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The rear portion of the property is zoned “D” Urban Protected Residential - 1 and 2 Family Dwelling District. As an outdoor patio for a restaurant is not a permitted use in the “D” District, the applicant has requested to change the zoning for the property from a dual zoned “H” and “D” District to an “H” Community Shopping and Commercial, Modified, District. In order to better protect the abutting residential properties, staff is proposing to establish an “H/S-1644” Community Shopping and Commercial, Modified, District. The Modified “H/S-1644” Community Shopping and Commercial District for Block 1 will permit a 36 seat licensed outdoor patio to be located in the rear yard and a 6 seat licensed outdoor patio to be located in the north-east side yard of the subject property (see Appendix “B”).

Patio Seating Restriction (Block1)

Section 18.11.a) i) of Hamilton Zoning By-law No. 6593, as amended by By-law No. 09-210, states that no outdoor patio shall have more than 50% of the seating accommodated within the restaurant, or 50 seats, whichever is greater. Through the site plan process, the applicant proposed a total of 46 seats, which was less than the 50 the applicant would have been restricted to. Through the site plan review process, 4 seats were eliminated, bringing the total number of seats to 42, 36 in the rear yard and 6 in front of the building. In order to ensure that the seating for the patio is not increased, staff is requiring that Section 18.11.a) i) be modified to restrict the outdoor patio to a maximum of 42 seats.

Patio Located In Rear Yard (Block 1)

Section 18.11.b) i) of Hamilton Zoning By-law No. 6593, as amended by By-law No. 09-210, states that no outdoor patio shall be permitted on a lot where any lot line abuts a Residential Zone or where such lot is separated from a Residential Zone by a laneway. The rear lot line and a portion of the northerly side lot line adjoin a residential district and, therefore, the applicant has requested an exemption from Section 18.11.b) i). The proposed exemption can be supported for the following reasons:

- i) The proposed rear yard licensed outdoor patio will be restricted to a maximum of 36 seats.
- ii) The existing 5 car garage will buffer and screen the adjoining residential properties located at the rear and north side of the subject property, as well as those residential properties located to the south west of the subject property.

- iii) The existing visual barrier that surrounds the proposed patio will buffer and screen the adjoining residential properties located at the rear and north side of the subject property, as well as those residential properties located on the other side of the alleyway and commercial property located to the south of the subject property. Furthermore, the applicant is also proposing to replace the existing fencing with noise attenuation fencing to further protect adjoining residential properties.
- iv) The residential properties located to the south and south-west of the subject property are setback a significant distance, approximately 19m (62 feet), and will be separated by an alleyway and the private parking area of an existing commercial property.

Patio Located in the North-East Side Yard (Block 1)

The OMB approved a 6 seat licensed outdoor patio within the north-east side yard, as the patio is located at the front of the building and the building buffers the residential properties to the rear of the property. The By-law modification is added to ensure that the new zoning reflects through the OMB approvals.

Prohibited Uses (Block 2)

The following modifications would be applied to the “H/S-1644” Community Shopping and Commercial District for Block 2 to prohibit a licensed or unlicensed patio.

Within the “H” District, any building used wholly or partially for human habitation requires a rear yard setback of 7.5m, and in all other cases, a rear yard setback of 4.5m is required. To minimize the impacts of the proposed rear yard patio, staff is of the opinion that it is appropriate to include a site-specific restriction prohibiting a patio, whether licensed or unlicensed, to be located within 16.7m (55 feet) of the rear lot line (see Appendix “B”).

To further ensure that the abutting residences are protected from any future uses or development at the rear of the subject property, staff is of the opinion that it is appropriate to include a site-specific restriction prohibiting all uses, except a garage used for the parking of vehicles or other noise attenuation features, from being located within 16.7m of the rear lot line (Block 2). The 16.7m prohibited portion of the property is not intended to be used for a restaurant or patio or any other commercial use other than a garage for the parking of vehicles. The applicant will still be permitted to establish a restaurant and a licensed outdoor patio on the front portion of the property (Block 1 - See Appendix “B”). The restriction will maintain a buffer between the commercial uses and abutting

residential uses, as well as prevent the encroachment of commercial uses towards the abutting residential properties.

Parking Setbacks (Block 2)

Section 18A.36.1 b) requires that parking for a restaurant be setback 12m from a residential district, and Section 18A.36.2 requires that the point of ingress and egress for parking and manoeuvring for a restaurant be setback 30m from a residential district. The existing 5 car garage is located within 0m of the residential district to the west and north, and the point of ingress and egress is located 0m from the residential district to the west and southwest. In order to recognize the existing situation, staff is requiring that Section 18.A.36.1 b) be modified to require a 0m separation for the parking and manoeuvring for the parking associated with a restaurant, and that Section 18.A.36.2 be modified to require a 0m setback for a point of ingress and egress for parking associated with a restaurant.

3. The proposed outdoor patio is subject to site plan approval. The applicant has submitted a minor site plan application that staff is currently reviewing. Through the site plan approval process, staff will note that a bar, outside sound system, and outside music are prohibited from being located on the outdoor patio, which will assist in reducing the noise, as well as other impacts that the licensed outdoor patio would create on adjoining residential properties. Furthermore, By-law No. 09-210 states that a portion of a lot on which the Outdoor Patio is permitted on shall not be used for commercial entertainment or commercial recreation, including live or recorded music, or dancing facilities. In addition, site plan approval will not include any seat to be located between the garage and the northerly property line, and that a planting area be established between the garage and the northerly property line, which will provide additional buffering and screening for the residential property located at the north side of the subject property (see Appendix "E"). The principal entry and exit of patrons will be restricted to Locke Street South, which will direct patrons entering or leaving the patio towards Locke Street South and away from the abutting residential properties, which will further separate the patio from the adjoining residential properties. In addition, the existing unlicensed patio is located between the mixed-use building and detached 5 car garage. The patio is surrounded by a 1.8m (6 feet) high solid board fence, which the applicant will be replacing with noise attenuation fence. This fence will also screen the patio from view and maintain the privacy of neighbouring residents, and provide buffering between the patio and the neighbouring residents (see Appendix "E").

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4. The applicant previously applied for a minor variance application under Section 45 of the Planning Act. Staff recommended that the proposed variances be approved and the application was given approval by the Committee of Adjustment, however, the application was appealed to the OMB. The Board decision approved a 6 seat outdoor licensed patio to be located in the north-east side yard, but turned down the proposed variances for a 36 seat rear yard outdoor licensed patio. The decision stated that an application for Rezoning was a more appropriate avenue with respect to addressing the proposal. The Board decision also stated that: *“The Board does not disagree with this owner that this particular outdoor patio may be appropriate for this location, given the existing five car garage at the rear may provide sufficient separation and buffer between the patio activities and the residential dwelling. However, the issue is conformity with the By-law which dictates that the use (restaurant) must also be permitted in the residential zone when the site has dual zoning. Restaurant is not a permitted use in the residential zone.”* (See Appendix “D” - Page 5)

5. Four letters of objection were received in response to the Pre-Circulation notice, including one with an objecting Planning Justification Report (see Appendix “F”). The objecting parties are of the opinion that the proposed rear yard outdoor licensed patio will negatively impact the neighbouring residence due to increased noise, odours, garbage, unacceptable social behaviour, the value to the area, parking, and that the proposal could set a precedent. The objecting parties also had concerns with respect to the public participation process, expressing concerns with respect to clearly identifying the difference between a “patio” and an “outdoor patio”, and with the fact that the public notice sign was located in such a manner as to be less noticeable from the street. The Planning Justification Report concluded that the proposal is contrary to the Official Plan, does not address mitigation measures, and expresses the opinion that the issue of regulating rear outdoor patios should be reviewed comprehensively (on a City Wide basis) rather than be dealt with on an ad hoc (site-specific) basis.

Odours, Garbage, and Parking: The conversion of the patio from an unlicensed rear yard patio to a licensed rear yard outdoor patio will not increase the existing levels of odours, and garbage, and will not increase the parking demand of the site.

Noise: Staff is of the opinion that the existing garage, fencing, including noise attenuation fencing, setbacks, and mitigation measures required as part of the site plan approval process will ensure that the noise generated from the site will be kept to acceptable levels and will not negatively impact abutting residential properties. Furthermore, Section 18.11.e) prohibits an outdoor patio from being used for entertainment or amusement, and prohibits live or recorded music, as well as dance facilities.

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Property Value: The establishment of the proposed licensed outdoor patio will not negatively impact the value of the area due to the required mitigation measure required as part of site plan approval.

Precedent for Similar Applications: Every application is evaluated on its own merits, and the situation for the subject property is unique. The subject property is a deep lot, whereas the majority of properties along Locke Street South are shallow lots. Also, the subject property has a large detached garage at the rear of the property that provides buffering and screening for abutting residents, and the existing setback of approximately 19 metres between the existing residents and the proposed licensed outdoor patio that other properties would not have. Therefore, Planning staff is not of the opinion that the issue of how to regulate rear outdoor licensed patios should not be reviewed strictly on a comprehensive (City Wide) basis, as such an approach does not take into consideration the unique situation that exists for the subject property.

As each application is evaluated on its own merits it is not recommended that that the regulation of rear outdoor licensed patio be conducted through a comprehensive City Wide approach, as most prop

Participation Process: The original location of the Public Meeting notice sign was not satisfactory to Planning Staff in that it was no prominently located. In discussions with the applicant, a second sign was placed on-site giving notice to the public of a Public Meeting, what the application was for, the date, time, and location of the Public Meeting, and directing interested parties who want further details to consult the original sign, which is legible from a public highway and a place to which the public has access, but is not clearly visible such that most pedestrians and motorists would easily see the original sign (see Appendix "G").

In response to comments received from the public, staff required that the applicant include the phrase "outdoor licensed patio" on the second sign. The Public Meeting Notice was updated to include the phrase "outdoor licensed patio" to better inform neighbouring residents and property owners of the exact nature of the proposed rezoning application.

Official Plan Conformity:

As was mentioned in the policy Implication section of this Report, the subject property is designated "Commercial" in the City of Hamilton Official Plan, and the proposal complies with the City of Hamilton Official Plan.

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ALTERNATIVES FOR CONSIDERATION:

(include Financial, Staffing, Legal and Policy Implications and pros and cons for each alternative)

If the proposed rezoning application is not approved, the applicant would still be permitted to operate a licensed restaurant within the existing building, and a licensed patio at the front of the restaurant on the north-east side yard.

CORPORATE STRATEGIC PLAN (Linkage to Desired End Results)

Focus Areas: 1. Skilled, Innovative and Respectful Organization, 2. Financial Sustainability, 3. Intergovernmental Relationships, 4. Growing Our Economy, 5. Social Development, 6. Environmental Stewardship, 7. Healthy Community

Social Development

- ◆ Hamilton residents are optimally employed earning a living wage.

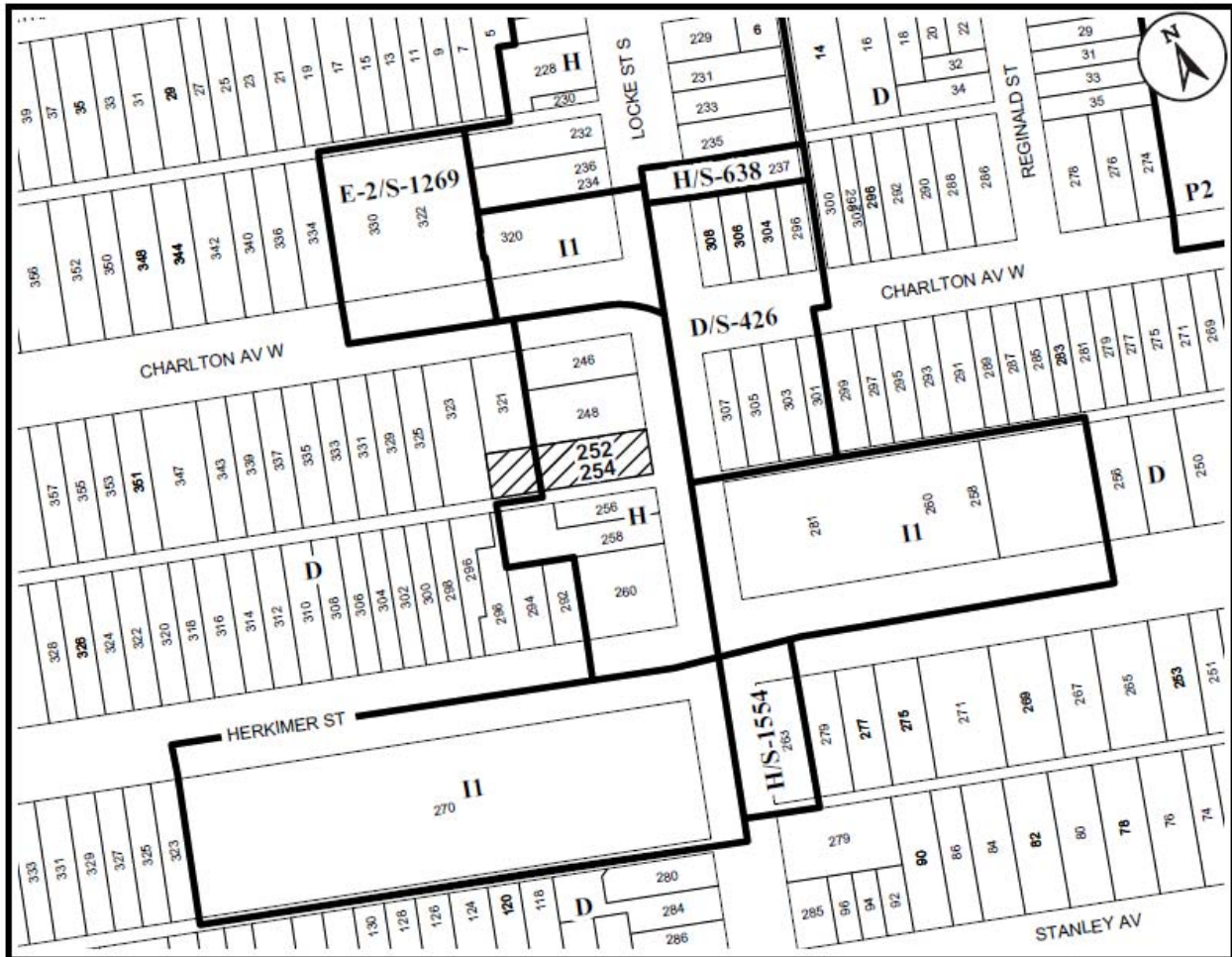
Healthy Community

- ◆ Adequate access to food, water, shelter and income, safety, work, recreation and support for all (Human Services).

APPENDICES / SCHEDULES

- Appendix "A": Location Map
- Appendix "B": Draft By-law and Schedule A Map
- Appendix "C": Survey Plan
- Appendix "D": OMB Decision
- Appendix "E": Site Plan
- Appendix "F": Letters of Objection
- Appendix "G": Sign Postings

:DB
Attachs. (7)



● Subject Property



Ward 1 Key Map

N.T.S.

Location Map



Hamilton

PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT

File Name/Number:
ZAR-11-003

Date:
April 21, 2011

Appendix "A"

Scale:
N.T.S.

Planner/Technician:
DB/MS

Subject Property

252-254 Locke Street South



Change in Zoning from the Community Shopping and Commercial "H" and Urban Protected Residential - One and Two Family Dwelling "D" District to the Community Shopping and Commercial "H/S-1644" District, Modified.

Authority: Item: [REDACTED]
Planning Committee
Report: [REDACTED] (PED11147)
CM: [REDACTED]
Bill No. [REDACTED]

CITY OF HAMILTON

BY-LAW NO. [REDACTED]

**To Amend Zoning By-law No. 6593 (Hamilton), as Amended,
Respecting Lands Located at 252-254 Locke Street South (Hamilton)**

WHEREAS the City of Hamilton Act, 1999, Statutes of Ontario, 1999 Chap.14, Sch. 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 to 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 and Official Plans of the former area municipalities and the Official Plan of the former regional municipality 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. 6593 (Hamilton) was enacted on the 25th day of July 1950, which By-law was approved by the Ontario Municipal Board by Order dated the 7th day of December 1951, (File No. P.F.C. 3821);

AND WHEREAS the Council of the City of Hamilton, in adopting Item [REDACTED] of Report 11-[REDACTED] of the Planning Committee, at its meeting held on the [REDACTED] day of [REDACTED], 2011, recommended that Zoning By-law No. 6593 (Hamilton) be amended as hereinafter provided;

AND WHEREAS this By-law will be in conformity with the Official Plan of the City of Hamilton (the Official Plan of the former City of Hamilton);

NOW THEREFORE the Council of the City of Hamilton enacts as follows:

1. That Sheet No. W-13 of the District Maps, appended to and forming part of Zoning By-law No. 6593 (Hamilton), as amended, is hereby further amended as follows:
 - (a) That Block 1 be rezoned from the "H" (Community Shopping and Commercial) to the "H/S-1644" (Community Shopping and Commercial, etc.) District, Modified; and,
 - (b) That Block 2 be rezoned from the "H" (Community Shopping and Commercial, etc.) District and "D" (Urban Protected Residential - 1 and 2 Family Dwelling) District, to the "H/S-1644" (Community Shopping and Commercial, etc.) District, Modified,

on the lands the extent and boundaries of which are more particularly shown on Schedule "A" annexed hereto and forming part of this By-law.

2. That the "H" (Community Shopping and Commercial, etc.) District regulations, as contained in Section 14 of Zoning By-law No. 6593, applicable for Blocks 1 be modified to include the following special requirements:

Block 1

- a) Notwithstanding Section 18(11) a) and b) of By-law No. 6593, an outdoor patio located in the rear yard with a maximum seating accommodation of 36 persons and an outdoor patio in the northeast side yard with a maximum seating accommodation of 6 persons is permitted.
3. That the "H" (Community Shopping and Commercial, etc.) District regulations, as contained in Section 14 of Zoning By-law No. 6593, applicable for Block 2, be modified to include the following special requirements:

Block 2

- a) Notwithstanding range of uses permitted in Section 14.1 of By-law 6593, only a garage and associated manoeuvring area for the parking of vehicles is permitted.

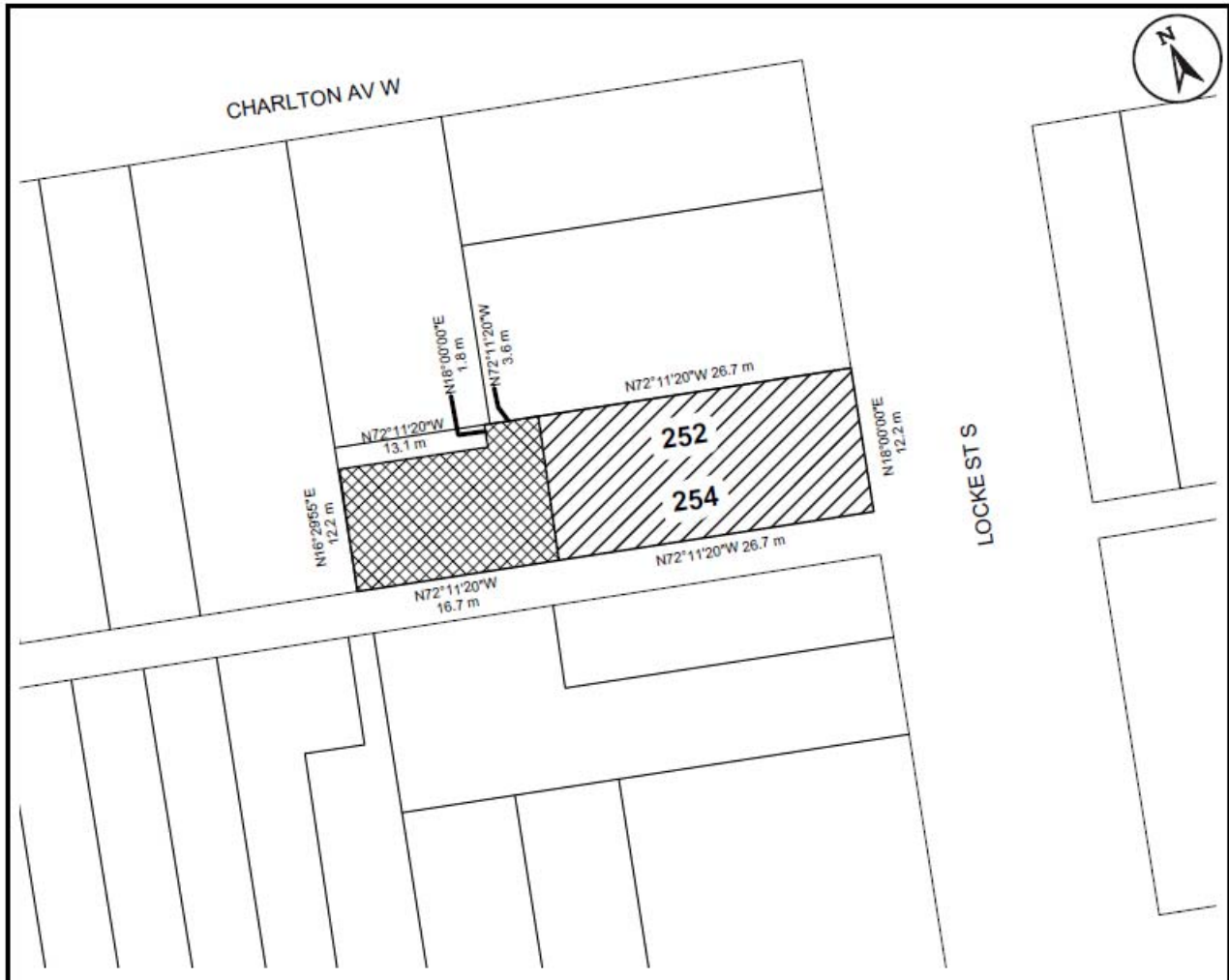
- b) Notwithstanding Section 18A(36) 1 b) of By-law No. 6593, a distance of not less than 0 metres between a residential district and the driveway, parking area, and manoeuvring area used in conjunction with a restaurant.
 - c) Section 18A(36) 2 of By-law No. 6593 shall not apply
4. That By-law No. 6593 (City of Hamilton) is amended by adding this By-law to Section 19B as Schedules S-1644.
 5. That Sheet W-13 of the District maps is amended by making the lands referred to in Section 1 of this By-law as Schedules S-1644.
 6. That no building or structure shall be erected, altered, extended, or enlarged, nor shall any building or structure or part thereof be used, nor shall any land be used, except in accordance with the "H" district provisions, subject to the special requirements in Section 2 of this By-law.
 7. That the Clerk is hereby authorized and directed to proceed with the giving of notice of the passing of this By-law, in accordance with the Planning Act.

PASSED and ENACTED this [REDACTED] day of [REDACTED], 2011.

R. Bratina
Mayor

Rose Caterini
Clerk

ZAC-11-003




This is Schedule "A" to By-Law No. 11-
 Passed the day of, 2011


 Clerk

 Mayor

Schedule "A"
 Map Forming Part of
 By-Law No. 11-_____
 to Amend By-law No. 6593

Subject Property
 252 - 254 Locke Street South

 Block 1 - Change in Zoning from the Community Shopping and Commercial "H" District to the Community Shopping and Commercial "H/S-1644" District, Modified.

 Block 2 - Change in Zoning from the Community Shopping and Commercial "H" and Urban Protected Residential - One and Two Family Dwling "D" District to the Community Shopping and Commerical "H/S-1644" District, Modified.

Scale: N.T.S.	File Name/Number: ZAR-11-003
Date: June 9, 2011	Planner/Technician: DB/KA
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT	



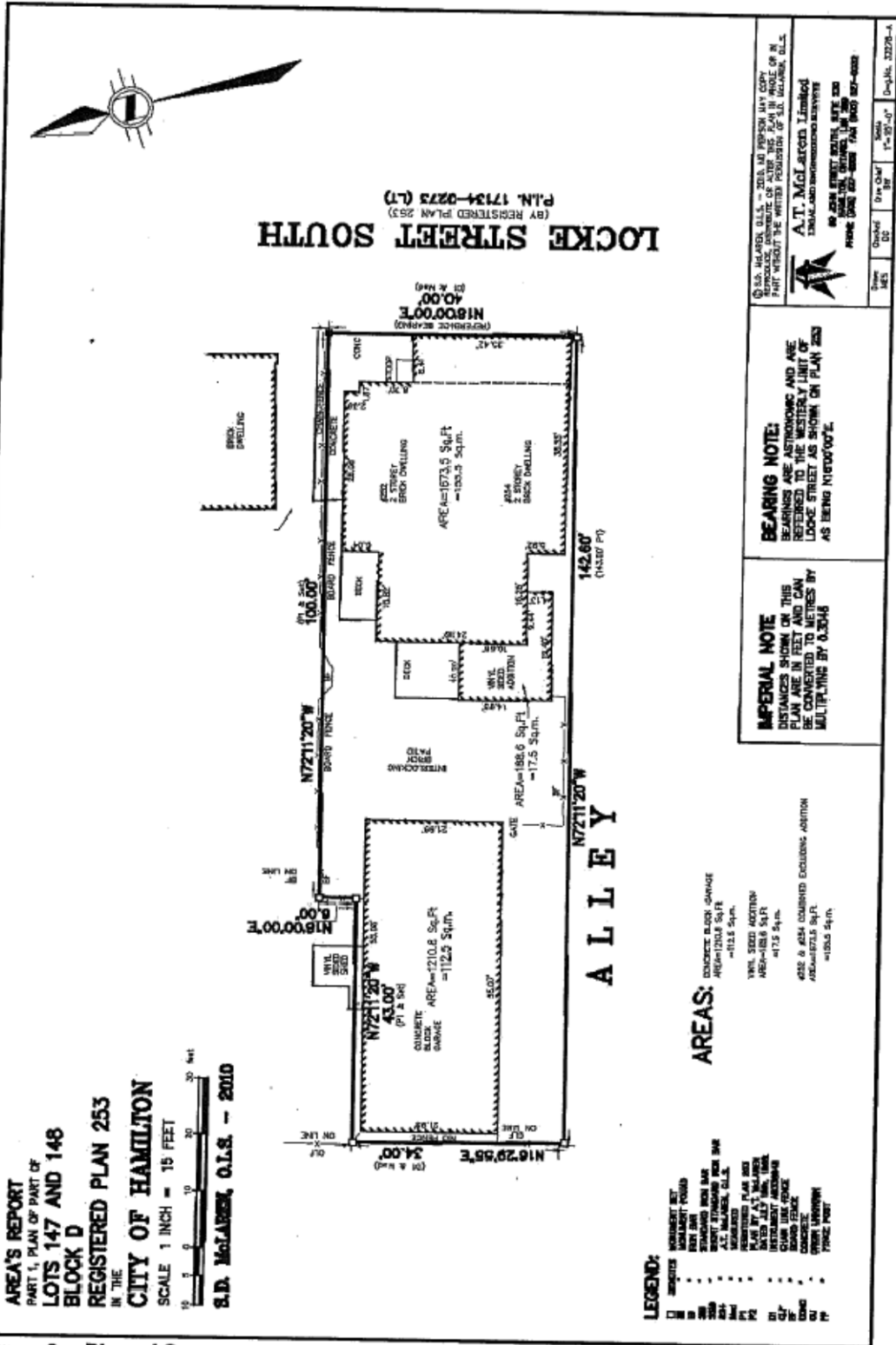


Figure 3 - Plan of Survey

ISSUE DATE:

July 5, 2010



Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL100221

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Mark Milne
Applicant:	Willowpond Enterprises Inc.
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	252-254 Locke Street South, Hamilton
Municipality:	City of Hamilton
OMB Case No.:	PL100221
OMB File No.:	PL100221
Municipal No.:	A-295/09

APPEARANCES:

Parties

Mark Milne

Willowpond Enterprises Inc.

Counsel*/Agent

K. Dickson

S. Bernstein*

DECISION DELIVERED BY A. CHRISTOU AND ORDER OF THE BOARD

This was an interesting case involving an existing and sympathetic family-type restaurant, The Courtyard, occupying the ground floor of two former semi-detached dwellings on Locke Street, which is a commercial thoroughfare within a low density residential area. Two smaller restaurants were approved, enlarged and combined into The Courtyard, through a series of successive variances to the Zoning By-law over the past few years. Required parking for the restaurant use was also eliminated by the previous variances.

The essence of this hearing was whether or not the Board should approve the two variances requested and legalize the existing (unlicensed) rear yard patio, to permit an *outdoor patio* (licensed under the LLBO) with seating capacity of 42, as an accessory to the existing 30 seat restaurant. The variances are as follows:

1. To permit an *outdoor patio* within the "D" (Urban Protected Residential) District; whereas the By-law does not permit *outdoor patios*; and
2. To permit an *outdoor patio* in a rear yard and north-east side yard, notwithstanding that an *outdoor patio* is only permitted within the front yard where only the rear lot line adjoins a residential district.

By-law 6593 prohibits *outdoor patios* in the rear yard. An *outdoor patio* is permitted only within the front yard when the rear lot line abuts a residential district. Part of the property where the restaurant and rear patio exist, is zoned commercial, and the rear one third is zoned residential and contains a five-car garage used for storage, which is to remain. The evidence was that when you have split zoning, the (primary) use must be permitted in both zones. The residential zone does not permit restaurants. Oddly enough, the By-law does not regulate or even define unlicensed "patios" such as the one at the rear of this restaurant, which operates without known problems.

Mark Milne, who lives south of the laneway separating the restaurant from his property, has appealed the decision of the City of Hamilton Committee of Adjustment (Committee) that approved a variance to permit an *outdoor patio* in the rear yard of this existing restaurant. The appellant alleges that the variance does not meet the criteria set out in s. 45 of the *Planning Act*, it is not minor; and it will set a precedent in the area. The proposal represents a change of use and should be subject to Official Plan and Zoning amendments, as the City has no policy for *outdoor patios* in the rear yards of restaurants abutting residential. Also, no parking is proposed to be provided for the patrons of the restaurant and the patio; there will be noise nuisance; and garbage from the restaurant is not being managed properly at the present. He is amenable to the liquor licence for the restaurant, but not for the patio.

The Evidence

The Board heard expert planning evidence from the Appellants' planner, Allan Ramsey and from David Barnet, planner of the Committee, who appeared under subpoena by the Applicant. Also, two residents, Norman Reintamm and Donald Cameron, appeared in support of the variance. The City did not appear.

Mr. Ramsey testified that the front portion of the property is designated Commercial, while the rear portion is designated Residential in the Hamilton Official Plan (OP). Although restaurants and *outdoor patios* are permitted in the commercial areas, the proponent should demonstrate that adverse impacts on adjacent residential uses are minimized. He opined that the proposed *outdoor patio* is incompatible with the adjoining residential uses and does not address the potential adverse impacts of noise to nearby residents.

According to Mr. Ramsey, the front portion of the property is zoned "H" Community Shopping and Commercial District, which permits a wide range of retail and commercial uses, including restaurants and *outdoor patios*. The rear portion of the site is zoned "D" Urban Protected Residential. Restaurants and *outdoor patios* are not permitted in this zone, nor are they permitted where a lot line adjoins a residential district. Both the rear lot line and the north side lot line adjoin a residential district. In lots with dual zoning, the (restaurant) use must be permitted in each of the Districts. In his opinion, the variances do not maintain the general intent and purpose of the Zoning By-law. The variances are not minor, because the patio would add 42 seats to the 30 seats permitted by variance within the restaurant, for a total of 72 seats. The *outdoor patio* in the rear yard, if licensed under the LLBO, will increase the potential for nuisance, loss of privacy and will create land use incompatibilities with abutting residential uses; it is not desirable for the development of the area as there are no other rear yard *outdoor patios* in the immediate area or anywhere else in the City; and it does not represent good planning. He concluded that the proposal should be considered in the context of OP and Zoning Amendment applications, where the potential impacts to allow a prohibited use can be comprehensively evaluated.

Daniel Barnet testified that planning staff support the variances because there is a board fence and buffering is provided between the outdoor patio and the abutting residential by the garage and by the lane. The Applicant has revised the Site Plan to the City's satisfaction, by removing some of the proposed seating and reducing the seats from 46 to 42; no outdoor bar and no music or sound system is to be permitted on the patio. He is not concerned that parking is not provided for the restaurant and the proposed outdoor patio, because it is located in a commercial area. He recommends approval of the variances.

Discussion

This was a change in use by variance, to introduce a licensed *outdoor patio* use in the rear yard as an accessory to an existing restaurant. A patio not licensed under the LLBO seems to be permitted, although such use is not defined in the By-law. An *outdoor patio* on the other hand is defined in the By-law and it can be licensed if it is accessory to a restaurant. An *outdoor patio* is limited to the front of a restaurant where the more noisy activity is tolerated. It is not, however, permitted in the rear, and particularly where the restaurant property abuts residential. The reason in the Appellant's uncontradicted planning evidence appears to suggest that loud conversations and noise from restaurant patrons could interfere with the quiet enjoyment of the abutting residential occupants, which represents nuisance. The City has no policy on rear *outdoor patios* and no evidence was adduced that any such patios exist elsewhere. The City therefore needs to review, as a public policy, on how to deal with rear yard licensed patios and to clarify in its By-law the difference between "patio" and "*outdoor patio*" which is tied in with LLBO. I find that a Zoning By-law Amendment is the proper way to approach this matter.

It would appear that the City accepted an incomplete variance application, without a legal survey and it approved a Site Plan that does not include all of the property. There was also some confusion as to whether the variances shown in the Notice and in the Decision were consistent. Not having complete and accurate information can lead to confusion and misunderstanding by the public and may lead to questioning the accuracy of the Committee's decisions.

The Board does not disagree with this owner that this particular *outdoor patio* may be appropriate for this location, given the existing five car garage at the rear may provide sufficient separation and buffer between the patio activity and the residential dwellings. However, the issue is conformity with the By-law which dictates that the use (restaurant) must also be permitted in the residential zone when the site has dual zoning. Restaurant is not a permitted use in the residential zone. The applicant did not advance any compelling planning evidence to support his variances. Need or desire for a rear yard licensed patio is not one of the tests in the Planning Act. Therefore, the variances for an *outdoor patio* in the rear yard fail the Zoning conformity criteria in the Planning Act. When one or more criteria are not met, the Board can not authorise the variance. However, the Board will authorize the variance to permit an outdoor patio in the north-east side yard, as it would have no impact on the residential uses at the rear.

THE BOARD ORDERS that the appeal is allowed in part and the variances to By-law 6593 of the City of Hamilton are authorised as follows:

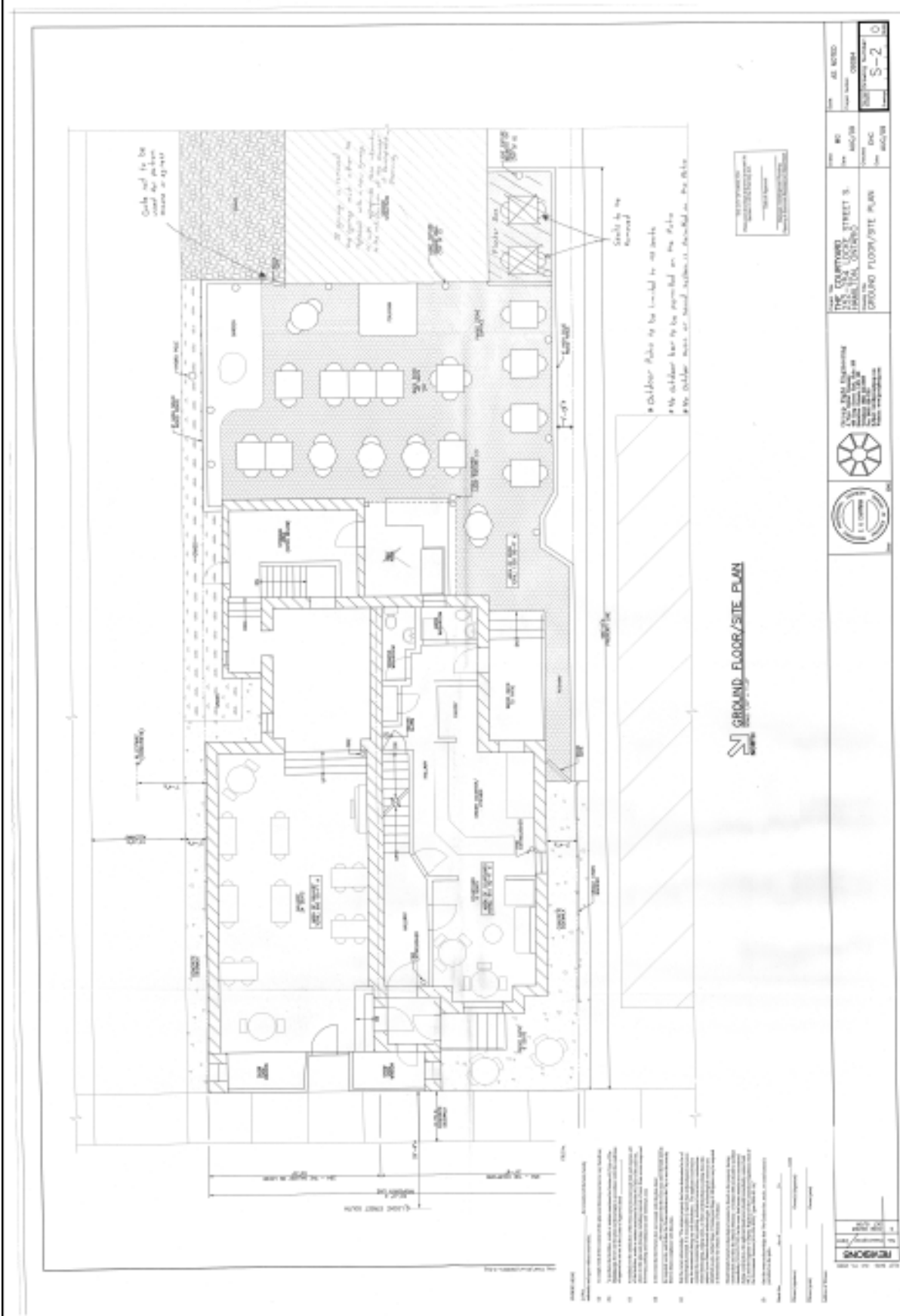
1. Variances 1 and 2 are not authorized.
2. The following variance is authorized:

To permit an outdoor patio in the north-east side yard, notwithstanding that an outdoor patio is only permitted within the front yard where only the rear lot line adjoins a residential district.

This is the Order of the Board.

"A: Christou"

A. CHRISTOU
MEMBER



Message

Barnett, Daniel

From: Suzanne Ross
Sent: Friday, May 06, 2011 5:15 PM
To: McHattie, Brian; 'Mark Milne'
Cc: Barnett, Daniel; Thompson, Jason; Brown, Dale
Subject: RE: Courtyard application to amend zoning bylaw

Hi Brian,

Some of this information is new to me and is impressive. I have been fortunate to live in this neighborhood. It has blossomed over the past years and I know you have played an important part in that. I hope you continue your efforts and I know they will be supported by many people in the community.

All the best as you and the community navigate the Courtyard's application. To me the issue of precedence and long term vision for Locke Street and the community is critical here. There needs to be clear conditions on serving alcohol and there especially needs to be close limits on multiple venues. If giving the Courtyard a license to serve alcohol outside (even with whatever restrictions might be placed on it) means that it would be difficult to deny other applications because a precedent has been set, then as a resident I would be against it. I would want to know this bigger picture planning context before supporting or considering the Courtyard application. This is what I mean when I say that it doesn't seem to be proper that applicants host the community meetings. They can't provide this larger context and they don't have an incentive to do so.

But in this case I will no longer be part of the decision making! I am moving to an acre of land in a little community called Two Mile in northern interior BC. It is near where my daughter and her family live. It will be a very different lifestyle and I am excited about my new ventures. At the same time as my departure becomes more and more imminent, I am very aware how fortunate I have been to live in this community and how hard it will be to say good bye to many people who have been a part of my life here.

My very best wishes,
Suzanne

Barnett, Daniel

From: Mark and Marie Misener
Sent: Monday, June 06, 2011 8:50 AM
To: Barnett, Daniel
Subject: Re: Zoning By-law Amendment Application File No. ZAR-11-003

Hello Daniel,

I wish to submit my opposition to the amendment to zoning by-law Application File No. ZAR-11-003 submitted by owners of the "The Courtyard" at 250 Locke Street, Hamilton. The existing by-law was put into place to protect residents on adjoining, and near-by properties from exactly these kinds of intrusive business activities.

If such an amendment were to be allowed, residents in the immediate area would be subjected to increased noise, smells and unacceptable social behaviour by their clientele that are typical of bars that serve alcohol to large numbers of people.

I don't want to see the problems seen at Hess Village repeated here in the Locke Street area, especially in such close proximity to residents who have enjoyed many years of peaceful living.

Sincerely,

Mark Misener
294 Herkimer St.
Hamilton, Ontario
L8P 2J1

6/6/2011

Barnett, Daniel

From: Jean Milne
Sent: Sunday, June 05, 2011 3:00 PM
To: Barnett, Daniel
Subject: rezoning

Application file #ZAR-11-003--I oppose the rezoning .The by law needs looked at. I live right at the intersection and feel there is no room for a 42 seating patio in our backyard.

Concerned Resident

Barnett, Daniel

From: Mark Milne
Sent: Sunday, June 05, 2011 7:02 PM
To: Barnett, Daniel
Cc: Thompson, Jason
Subject: Re: 252-254 Locke Street South - Rezoning Application



IMG_0503.jpeg (82 KB)



ZAR-11-003 letter.pdf (65 KB)



IMG_0499.jpeg (95 KB)

Hi Daniel,

Please find attached a note and two photos regarding the rezoning application at 252-254 Locke Street South for inclusion in your report on this matter.

Thank-you,
Mark Milne
296 Herkimer Street

- Photos attached:
1. Note on front window of The Courtyard.
 2. Actual notice on side of building.

Friday June 3, 2011

To Whom It May Concern,

I am writing in response to the Zoning By-law Amendment Application that has been received for lands located at 252-254 Locke Street South, Hamilton (**File No. ZAR-11-003**). I would like to voice my opposition to amending the current by-law to permit the establishment of a forty-two seat commercial outdoor patio in the rear yard of this establishment.

Past Findings:

Last year the Ontario Municipal Board rendered a decision regarding several minor variances applied for by the property at 252-254 Locke Street South currently operating as "The Courtyard" – I say currently as it has changed business names/models several times during its history of applications for minor variances. In that decision, the Chair noted several things including the following:

Hamilton By-law 6593 "does not regulate or even define unlicensed 'patios'..."

"...The City has no policy for *outdoor patios* in the rear yards of restaurants abutting residential."

"The City has no policy on rear outdoor patios and no evidence was adduced that any such patios exist elsewhere. The City therefore need to review, as a public policy, on how to deal with rear yard licensed patios and clarify in its By-law the difference between "patio" and "outdoor patio" which is tied in with LLBO."

"It would appear that the City accepted an incomplete variance application, without a legal survey and it approved a Site Plan that does not include all of the property. There was also some confusion as to whether the variances shown in the Notice and

in the Decision were consistent. Not having complete and accurate information can lead to confusion and misunderstanding by the public and may lead to questioning the accuracy of the Committee's decisions."

It appears clear that "outdoor patios" are an issue that the City needs to review in a comprehensive way and not on a case-by-case basis. By-law 6593, a long established by-law, is clearly written with the best interests of the City's residents and businesses in mind and it clearly alludes to the fact that an "outdoor patio" is not to exist where it borders residences even when separated by a lane-way. This portion of the by-law seems to be very clear in its aim – it keeps the business on the streets zoned for such activity while allowing it to co-exist next to residents but with a buffer (i.e. the building that resides on the property as well as a rear yard if any). To my knowledge nothing has changed that would render this notion outdated or no longer applicable.

The Process:

The process to date has been flawed in this case for several reasons.

1. There have been three successive minor variance applications and now an application to amend a zoning by-law that reference the term "**outdoor patio**". This term on its own does not imply that such a patio entails the serving of alcohol and I would argue that the average Hamiltonian does not understand the true meaning of the term when it is presented to them unless they are well versed in Hamilton City planning. A circular that notes this term does not truly reveal what is being applied for, as there is a considerable difference between and an "outdoor patio" that does not serve alcohol over one which does. This terminology needs to be revised so the public can be aware of what exactly is being proposed when this term is used. At the very least, the City could define the term in all documents issued to the public.

2. In addition, the Notice of Complete Application and Preliminary Circulation to amend the Zoning By-law that was sent to our house, dated April 29, 2011, mentions that a zoning by-law amendment is being applied for, but nowhere in this letter does it mention which by-law may be amended or what the content of that by-law is.

3. Finally, a limited number of nearby residents received a copy of this preliminary circulation. The property itself posted a sign alerting nearby residents to the application for by-law amendment, but posted it on the side of the building facing the building next to it so it is not visible to passers-by. This seems to be contrary to the spirit of disclosure and the requirements set out by the City for notification for an application for such a zoning change (sign should..."provide maximum exposure".) The current placement might imply that the applicant does not want the public to be aware of the application. At some point after the sign was posted the applicant added an 8.5" X 11" sheet of paper to the front window noting that an application has been made and that details are on the side of the building. Again, this is not a satisfactory way to make the general public aware of the applicant's application or intentions. Photos are attached and I encourage City staff to investigate this placement for themselves. If I recall correctly, back when the liquor license was applied for it too was in a side window until the owner was instructed to move it to a location where the public could actually see it from the front of the building.

The three successive minor variance applications approved by the City with regard to this property amount to what some planners would call "piecemeal planning". On their own they may appear minor, but taken in context together they are no longer minor and introduce significant changes into the neighbourhood. The OMB decision seems to echo this sentiment in that this is not the proper way to plan an area as it is haphazard, dangerous and the kind of

thing that may have helped transform Hess Village into what it is today from what it was 25 years ago. As noted above, variances were approved without legal surveys and incomplete site plans.

Previous History:

In the past, the applicant noted that the licensed patio would be required to run his business. I would argue that there are several long standing and successful licensed establishments on the same street that appear to be profitable and well trafficked, including the extremely successful "Bread Bar", the West Town and Bar on Locke. All of these restaurants seem to be doing quite well without the addition of a rear patio. The OMB Chair noted, "Need or desire for a rear yard licensed patio is not one of the tests in the Planning Act". Locke Street is only now seeing its first patios - no doubt if one is allowed in a rear yard other businesses will surely want the same competitive advantage.

I am concerned, in part, that while the owner emphasized at the OMB hearing the upscale clientele of this establishment, once precedent has been set a new, more alcohol friendly business model may be applied at any time to increase profitability. Already, the same owner has attempted several business models over the last few years, (art gallery, coffee shop, crepe shop etc.). The history goes back to 2008 when the owners applied to expand a 6-seat restaurant to a 24-seat restaurant. During that process an inspection found that the restaurant already had seating in excess of the seating being applied for, and in addition already had a patio in place that was not part of the application or plan.

From Staff documents:

"By way of a site inspection it has come to staff's attention that the application does not reflect the existing seating situation. The gallery currently provides approximately twenty-eight (28) seats though the application is requesting an expansion of twenty-four (24) seats. Additionally, the existing restaurant provides eight (8) seats and not the six (6) seats that were applied for through Minor Variance

application HM/A-7:314. Of further note, there are approximately fifty (50) seats provided in the rear yard patio with two (2) provided in the boulevard in front of the existing restaurant that are not shown in the application submitted"

My Objection:

When I moved to the area I hoped one day to raise a family in the area. I truly enjoy living and working downtown and I have done so for close to two decades. I enjoy the mix of commercial and residential in the Locke Street area. I feel, however, that when the Locke Street commercial activity moves through the building and into the rear yards adjacent to the area's residents, a line is being crossed and that concerns me. That line, if crossed, makes the homes abutting Locke Street properties less desirable due to increased noise, garbage and parking issues. These issues already exist in our area and a certain amount is tolerated – no one is denying that the area is mixed use, however, boundaries must be set and adhered to such that both residents and business can coincide together long term while keeping the area vibrant and desirable. This application is not in the spirit of such coexistence and could pave the way for a very different Locke Street area, and even a different "off-Locke Street" area.

I love where I live and have a young family. A licensed patio may open up next to my back yard - my place to relax and enjoy time with my family. Is that desirable? Does that add value to the residents, or just to a business? I urge to you to put the interests of the residents of the area ahead of, or at least on equal footing to, those of a single business seeking changes that give them an unfair advantage over similar establishments in the area.







Ramsay Planning Inc.

June 10, 2011

Daniel Barnett
Planner
City of Hamilton
5th floor, 71 Main Street West
Hamilton, Ontario L8P 4Y5

Dear Mr. Barnett:

Re: Rezoning Application
252-254 Locke Street South, Hamilton, ON

We are planning consultants for Mark Milne. Mr. Milne resides on Herkimer Street in the City Hamilton. We have been retained to provide our professional planning opinion on the suitability of the rezoning application submitted by Willowpond Enterprises Inc. to rezone lands at 252-254 Locke South Street (the "subject lands") from "D" (Urban Protected Residential) and "H" (Community Shopping and Commercial District) to "D-Modified" (Urban Protected Residential) and to further permit, amongst other things, an outdoor patio in the rear yard. Mr. Milne's property is located immediately adjacent on the south side of the subject lands.

Background:

Our firm was retained in 2010 by the Mr. Milne to provide expert testimony at a hearing of the Ontario Municipal Board dealing with the appeal of Willowpond Enterprises' minor variance application to permit an "outdoor patio" in the rear yard of the subject lands. In its decision dated July 5, 2010 the Board did not authorize the variance for the rear yard "outdoor patio". A copy of the Board's decision is attached as Appendix 1.

The primary intent of the rezoning application is to obtain a zoning amendment to permit an outdoor patio in the rear yard.

Official Plan Policies:

During his testimony Mr. Ramsay advised the Ontario Municipal Board that the proposal to establish an "outdoor patio" in the rear yard of the subject lands did not conform to the Official Plan.



Ramsay Planning Inc.

Page 2

Under the City of Hamilton's existing Official Plan the front portion of the subject lands are designated on Schedule 'A' as "Commercial", while the rear portion is designated as "Residential Uses".

Within the Commercial designation the Plan provides for establishments involved in the buying and selling of goods and services; business offices; and hotels, convention and entertainment facilities. The Commercial policies in the Plan promote a hierarchy of commercial categories to best serve the residents of the City, and to recognize and accommodate the locational, trade area or special requirements of businesses of varying size and function. As noted in Subsection 2.2.2, the full hierarchy is not designated on Schedule "A" to the Official Plan. The location and distribution of such categories are identified through Neighbourhood Plans.

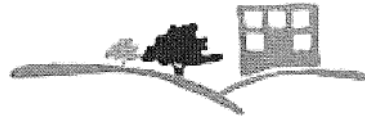
The subject lands are subject to the Extended Commercial policies in the Plan. This category applies to existing stretches of individually managed commercial establishments located along Arterial Roads serving both pedestrian and automobile borne trade.

The Official Plan requires compatibility between land uses and requires commercial uses to develop in an orderly fashion. In Subsection A.2.2 the Plan "... promotes a high aesthetic quality in all commercial areas and endeavours to minimize their impacts on adjacent land uses, most importantly, Residential uses."

Restaurants and restaurants with outdoor patios are uses that are found in Extended Commercial areas such as the Locke Street commercial corridor. However, the Official Plan only permits such uses where it can be demonstrated that adverse impacts on adjacent residential uses are minimized and where these additional commercial uses are compatible with adjacent residential uses.

The rear portion of the subject lands are designated "Residential Uses". The primary uses permitted in this designation are dwellings (Section 2.1.1.). Land use compatible with dwellings are also permitted (Section 2.1.3). Section 2.1.6 requires:

- 2.1.6 "Where compatible uses are permitted, to preserve the amenities of and support RESIDENTIAL USES in the area, new development will, subject to the Zoning By-law:
- i) screening, buffering or other such measures as determined by Council;
 - and,



Ramsay Planning Inc.

Page 3

- ii) not provide outside storage or engage in any use of land in a manner having a detrimental impact on the adjacent RESIDENTIAL USES."

The proposed rezoning application is not in keeping with the purpose and intent of the Official Plan for the following reasons:

- (a) the proposed outdoor patio is incompatible with the adjoining residential uses immediately adjoining and in close proximity to the subject lands; and
- (b) the proposal does not adequately address the potential adverse impacts of the outdoor patio on adjoining and adjacent residential uses as required by Section A.2.2.2 of the Official Plan.

Zoning By-law

The subject lands are zoned under two separate zoning categories. The front portion of the site falls within the "H" (Community Shopping and Commercial District) within Zoning By-law 6593, as amended. The "H" District permits a wide range of retail, personal service, service commercial uses including restaurants and outdoor patios. The rear portion of the site is zoned "D" (Urban Protected Residential – 1 & 2 Family Dwelling District). Within a "D" District permitted uses include single and two family dwellings.

Section 18(11) of the Zoning By-law sets out the following special requirements for outdoor patios:

"SPECIAL REQUIREMENTS FOR OUTDOOR PATIOS

- (11) Notwithstanding any of the provisions of the By-Law, every outdoor patio shall comply with the following, (86-223)
 - (a) Seating Capacity Requirements:
 - 1. No outdoor patio shall provide for,
 - A. more than 50% of the seating accommodation permitted under The Liquor Licence Act to the restaurant or tavern with which the outdoor patio is associated, or
 - B. seating accommodation for more than 50 persons, whichever is the greater;
 - (b) Location Requirements:
 - 1. Except as provided in paragraph 2, **no outdoor patio shall be located where any lot line adjoins a residential district** or is separated from a residential district by a lane or alley.



Ramsay Planning Inc.

Page 4

2. Where only the rear lot line adjoins a residential district or is separated from the residential district by a lane or alley, an outdoor patio shall not be prohibited in the front yard.
 3. Where a lot adjoins a residential district or is separated from the residential district by a lane or alley, no outdoor patio shall be located above the elevation of the floor of the first storey of the principal building.
- (c) Lighting Requirement:
1. All lighting for an outdoor patio shall be directed only towards and onto the area occupied by the outdoor patio and away from adjoining land, buildings and streets;
- (d) Parking Requirement:
1. Notwithstanding Section 18A, no parking spaces or loading spaces shall be required for an outdoor patio;
- (e) Land Use Requirement:
1. No part of the land on which the outdoor patio is situate shall be used as a place of entertainment for the purpose of providing entertainment or amusement including live or recorded music or dance facilities. (**Emphasis added**)

Under the City's By-law an outdoor patio is prohibited from locating where any lot line adjoins a residential district. This prohibition is based on the inherent incompatibilities between outdoor patios and residential uses. In the case of the subject lands, both the northerly side lot line and the rear lot line adjoin a residential district, while the southerly lot line is separated from the residential district by a lane or alley. Consequently, the Zoning By-law prohibits outdoor patios on the subject lands.

The proposed rezoning application seeks to permit an use that is expressly prohibited by the zoning by-law on lands adjoining a residential district. The applicant has not provided sufficient evidence to indicate that potential nuisances (see below) can be adequately mitigated.

Compatibility Issues and Potential Nuisances:

During his testimony at the Ontario Municipal Board hearing it was Mr. Ramsay's opinion that an *outdoor patio* in the rear yard, will increase the potential for nuisance, loss of privacy and will create land use incompatibilities with abutting residential uses. The Ontario Municipal Board decision indicates:



Ramsay Planning Inc.

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"An outdoor patio is limited to the front of a restaurant where the more noisy activity is tolerated. It is not, however, permitted in the rear, and particularly where the restaurant property abuts residential. The reason in the appellant's uncontradicted planning evidence appears to suggest that loud conversations and noise from restaurant patrons could interfere with the quiet enjoyment of the abutting residential occupants, which represents nuisance. (Emphasis added)

The supporting documentation submitted with the current application does not provide any analysis of these potential nuisances and land use incompatibilities nor does it adequately address potential mitigation measures.

Need for City Review of Rear Yard Outdoor Patio Policy:

The Ontario Municipal Board decision indicated:

"The City has no policy on rear outdoor patios and no evidence was adduced that any such patios exist elsewhere. The City therefore needs to review, as a public policy, on how to deal with rear yard licensed patios and to clarify in its By-law the difference between "patio" and "outdoor patio" which is tied in with LLBO." (Emphasis added)

It is our opinion that the issue of how to regulate "rear outdoor patios" should be reviewed comprehensively (on a City wide basis) rather than dealt with on an ad hoc basis (site specific). A City wide review should be undertaken prior to consideration of site specific applications.

Form of the By-law Amendment:

The proposed by-law amendment contained in Appendix C of the applicant's Planning Justification Report erroneously rezones the front portion of the subject lands to "D-Modified" (Urban Protected Residential).

Summary:

It is our opinion that the rezoning application at 252-254 Locke Street South should not be approved as it does not represent good planning. The application does not conform to the Official Plan. The supporting documentation submitted with the application does not include any analysis of the potential nuisances and land use incompatibilities nor does it adequately address potential mitigation measures.



Ramsay Planning Inc.

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Furthermore, it is our opinion that the issue of how to regulate "rear outdoor patios" should be reviewed comprehensively (on a City wide basis) rather than dealt with on an ad hoc basis (site specific).

Yours truly,

A handwritten signature in black ink that reads "Allan Ramsay". The signature is written in a cursive style.

Allan Ramsay, MCIP, RPP
Principal,
Allan Ramsay Planning Associates Inc.

Encl.

cc. Mr. Milne



Ramsay Planning Inc.

Appendix 1

**Ontario Municipal Board Decision
PL100221**

ISSUE DATE:

July 5, 2010



PL100221

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Mark Milne
Applicant	Willowpond Enterprises Inc.
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	252-254 Locke Street South, Hamilton
Municipality:	City of Hamilton
OMB Case No.:	PL100221
OMB File No.:	PL100221
Municipal No.	A-295/09

APPEARANCES:

Parties

Mark Milne
Willowpond Enterprises Inc.

Counsel*/Agent

K. Dickson
S. Bernstein*

DECISION DELIVERED BY A. CHRISTOU AND ORDER OF THE BOARD

This was an interesting case involving an existing and sympathetic family-type restaurant, The Courtyard, occupying the ground floor of two former semi-detached dwellings on Locke Street, which is a commercial thoroughfare within a low density residential area. Two smaller restaurants were approved, enlarged and combined into The Courtyard, through a series of successive variances to the Zoning By-law over the past few years. Required parking for the restaurant use was also eliminated by the previous variances.

The essence of this hearing was whether or not the Board should approve the two variances requested and legalize the existing (unlicensed) rear yard patio, to permit an *outdoor patio* (licensed under the LLBO) with seating capacity of 42, as an accessory to the existing 30 seat restaurant. The variances are as follows:

1. To permit an *outdoor patio* within the "D" (Urban Protected Residential) District; whereas the By-law does not permit *outdoor patios*; and
2. To permit an *outdoor patio* in a rear yard and north-east side yard, notwithstanding that an *outdoor patio* is only permitted within the front yard where only the rear lot line adjoins a residential district.

By-law 6593 prohibits *outdoor patios* in the rear yard. An *outdoor patio* is permitted only within the front yard when the rear lot line abuts a residential district. Part of the property where the restaurant and rear patio exist, is zoned commercial, and the rear one third is zoned residential and contains a five-car garage used for storage, which is to remain. The evidence was that when you have split zoning, the (primary) use must be permitted in both zones. The residential zone does not permit restaurants. Oddly enough, the By-law does not regulate or even define unlicensed "patios" such as the one at the rear of this restaurant, which operates without known problems.

Mark Milne, who lives south of the laneway separating the restaurant from his property, has appealed the decision of the City of Hamilton Committee of Adjustment (Committee) that approved a variance to permit an *outdoor patio* in the rear yard of this existing restaurant. The appellant alleges that the variance does not meet the criteria set out in s. 45 of the *Planning Act*; it is not minor; and it will set a precedent in the area. The proposal represents a change of use and should be subject to Official Plan and Zoning amendments, as the City has no policy for *outdoor patios* in the rear yards of restaurants abutting residential. Also, no parking is proposed to be provided for the patrons of the restaurant and the patio; there will be noise nuisance; and garbage from the restaurant is not being managed properly at the present. He is amenable to the liquor licence for the restaurant, but not for the patio.

The Evidence

The Board heard expert planning evidence from the Appellants' planner, Allan Ramsey and from David Barnet, planner of the Committee, who appeared under subpoena by the Applicant. Also, two residents, Norman Reintamm and Donald Cameron, appeared in support of the variance. The City did not appear.

Mr. Ramsey testified that the front portion of the property is designated Commercial, while the rear portion is designated Residential in the Hamilton Official Plan (OP). Although restaurants and *outdoor patios* are permitted in the commercial areas, the proponent should demonstrate that adverse impacts on adjacent residential uses are minimized. He opined that the proposed *outdoor patio* is incompatible with the adjoining residential uses and does not address the potential adverse impacts of noise to nearby residents.

According to Mr. Ramsey, the front portion of the property is zoned "H" Community Shopping and Commercial District, which permits a wide range of retail and commercial uses, including restaurants and *outdoor patios*. The rear portion of the site is zoned "D" Urban Protected Residential. Restaurants and *outdoor patios* are not permitted in this zone, nor are they permitted where a lot line adjoins a residential district. Both the rear lot line and the north side lot line adjoin a residential district. In lots with dual zoning, the (restaurant) use must be permitted in each of the Districts. In his opinion, the variances do not maintain the general intent and purpose of the Zoning By-law. The variances are not minor, because the patio would add 42 seats to the 30 seats permitted by variance within the restaurant, for a total of 72 seats. The *outdoor patio* in the rear yard, if licensed under the LLBO, will increase the potential for nuisance, loss of privacy and will create land use incompatibilities with abutting residential uses; it is not desirable for the development of the area as there are no other rear yard *outdoor patios* in the immediate area or anywhere else in the City; and it does not represent good planning. He concluded that the proposal should be considered in the context of OP and Zoning Amendment applications, where the potential impacts to allow a prohibited use can be comprehensively evaluated.

Daniel Barnet testified that planning staff support the variances because there is a board fence and buffering is provided between the outdoor patio and the abutting residential by the garage and by the lane. The Applicant has revised the Site Plan to the City's satisfaction, by removing some of the proposed seating and reducing the seats from 46 to 42; no outdoor bar and no music or sound system is to be permitted on the patio. He is not concerned that parking is not provided for the restaurant and the proposed outdoor patio, because it is located in a commercial area. He recommends approval of the variances.

Discussion

This was a change in use by variance, to introduce a licensed *outdoor patio* use in the rear yard as an accessory to an existing restaurant. A patio not licensed under the LLBO seems to be permitted, although such use is not defined in the By-law. An *outdoor patio* on the other hand is defined in the By-law and it can be licensed if it is accessory to a restaurant. An *outdoor patio* is limited to the front of a restaurant where the more noisy activity is tolerated. It is not, however, permitted in the rear, and particularly where the restaurant property abuts residential. The reason in the Appellant's uncontradicted planning evidence appears to suggest that loud conversations and noise from restaurant patrons could interfere with the quiet enjoyment of the abutting residential occupants, which represents nuisance. The City has no policy on rear *outdoor patios* and no evidence was adduced that any such patios exist elsewhere. The City therefore needs to review, as a public policy, on how to deal with rear yard licensed patios and to clarify in its By-law the difference between "patio" and "*outdoor patio*" which is tied in with LLBO. I find that a Zoning By-law Amendment is the proper way to approach this matter.

It would appear that the City accepted an incomplete variance application, without a legal survey and it approved a Site Plan that does not include all of the property. There was also some confusion as to whether the variances shown in the Notice and in the Decision were consistent. Not having complete and accurate information can lead to confusion and misunderstanding by the public and may lead to questioning the accuracy of the Committee's decisions.

The Board does not disagree with this owner that this particular *outdoor patio* may be appropriate for this location, given the existing five car garage at the rear may provide sufficient separation and buffer between the patio activity and the residential dwellings. However, the issue is conformity with the By-law which dictates that the use (restaurant) must also be permitted in the residential zone when the site has dual zoning. Restaurant is not a permitted use in the residential zone. The applicant did not advance any compelling planning evidence to support his variances. Need or desire for a rear yard licensed patio is not one of the tests in the Planning Act. Therefore, the variances for an *outdoor patio* in the rear yard fail the Zoning conformity criteria in the Planning Act. When one or more criteria are not met, the Board can not authorise the variance. However, the Board will authorize the variance to permit an outdoor patio in the north-east side yard, as it would have no impact on the residential uses at the rear.

THE BOARD ORDERS that the appeal is allowed in part and the variances to By-law 6593 of the City of Hamilton are authorised as follows:

1. Variances 1 and 2 are not authorized.
2. The following variance is authorized:

To permit an outdoor patio in the north-east side yard, notwithstanding that an outdoor patio is only permitted within the front yard where only the rear lot line adjoins a residential district.

This is the Order of the Board.

"A. Christou"

A. CHRISTOU
MEMBER



PUBLIC MEETING NOTICE

Date: TO BE DETERMINED

Time: 9:30 a.m.

Location: Council Chambers, 2nd Floor,
City Hall, 71 Main Street West,
Hamilton

City of Hamilton Zoning By-law
Amendment application submitted.
For a 36 seat rear outdoor licensed
patio. Please refer to north side
wall for further details.

CITY OF HAMILTON
PUBLIC NOTICE OF COMPLETE APPLICATIONS FOR ZONING BY-LAW AMENDMENT AND PUBLIC MEETING OF THE PLANNING COMMITTEE

OWNER: Cynthia Bernstein
APPLICANT: Stephen E. Bernstein
SUBJECT LANDS: 252-254 Locke Street South, Hamilton
PURPOSE AND EFFECT OF THE PROPOSED ZONING BY-LAW AMENDMENT:

To permit the establishment of a thirty-six (36) seat commercial outdoor patio in the rear yard and north-east side yard to be accessory to the existing thirty (30) seat restaurant.

Inquiries Refer to File No. ZAR-11-003

PUBLIC MEETING

Date: TO BE ANNOUNCED
Time: 9:30 a.m.
Location: Council Chambers, 2nd Floor, City Hall, 71 Main Street West, Hamilton

For more information a copy of the additional information and material about the proposed By-law is posted in the Zoning By-law with an agenda for public inspection, or for a copy of the Notice of Complete Applications which was mailed to all land owners within 100 metres of the subject lands, please contact Daniel Barrett of the Planning and Zoning Development Department at 905-340-3424, ext. 3445 or by e-mail at Daniel.Barrett@hamilton.ca

Hamilton City Council
Planning and Zoning Development Department
252-254 Locke Street South, Hamilton, Ontario L8N 2E5
Tel: 905-340-3424, ext. 3445
Fax: 905-340-3424, ext. 3446
www.hamilton.ca