



CITY OF HAMILTON
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT
Planning Division

TO:	Chair and Members Planning Committee
COMMITTEE DATE:	October 6, 2015
SUBJECT/REPORT NO:	Appeal of the City of Hamilton Committee of Adjustment Decision to Approve Minor Variance Application HM/A-11:22, Gary Ceppetelli (Owner), for lands located at 175 Young Street (Hamilton) (PED15155) (Ward 2)
WARD(S) AFFECTED:	Ward 2
PREPARED BY:	Daniel Barnett Planner II (905) 546-2424 Ext. 4445 Steve Robichaud Director of Planning and Chief Planner
SUBMITTED BY:	Jason Thorne General Manager Planning and Economic Development Department
SIGNATURE:	

RECOMMENDATION

That Council agrees to the following actions, as detailed in Report PED15155, respecting the appeal of City of Hamilton Committee of Adjustment Minor Variance Application HM/A-11:22, Gary Ceppetelli (Owner), 175 Young Street (Hamilton), as shown on Appendix "A" to Report PED15155, approved by the Committee of Adjustment but recommended for Denial by the Planning and Economic Development Department;

- (a) That Council of the City of Hamilton proceed with the appeal to the Ontario Municipal Board (OMB) against the decision of the Committee of Adjustment to approve Minor Variance Application HM/A-11:22; and,
- (b) That Council directs appropriate Legal Services and Planning staff to attend the future OMB Hearing in opposition to the decision of the Committee of Adjustment to approve Minor Variance Application HM/A-11:22.

EXECUTIVE SUMMARY

Minor Variance Application HM/A-11:22, to permit approval for the establishment of a 40-seat outdoor patio for an existing restaurant at 175 Young Street, was considered by the City of Hamilton Committee of Adjustment on July 9, 2015. Comments to the Committee of Adjustment from the Planning Division recommended that approval to permit the outdoor patio be denied, as the proposal did not meet the tests of a Minor Variance contained in Section 45(1) of the *Planning Act* (see Appendix “B”). The Committee of Adjustment approved the Minor Variance Application for the reasons set out in the decision of the Committee of Adjustment (see Appendix “C”).

Due to the appeal period, Planning and Economic Development Department staff submitted an appeal letter and the required fee to the Secretary-Treasurer of the Committee of Adjustment to initiate the appeal process, subject to Council’s approval / ratification.

A second variance to permit a parking space size of 2.6 m by 5.5 m was also included in Minor Variance Application HM/A-11:222. Staff noted that this variance was not required for the proposed outdoor patio but for the existing restaurant and comments to the Committee of Adjustment recommended that approval be given to the variance to permit a parking space size of 2.6 m by 5.5 m, as the proposal met the test of a Minor Variance contained in Section 45(1) of the *Planning Act* (see Appendix “B”). The Committee of Adjustment approved the Minor Variance for the reasons set out in the decision of the Committee of Adjustment (see Appendix “C”).

The appeal submitted by the Planning and Economic Development Department was filed with respect to the variance to permit an outdoor patio for a restaurant that abuts a residential district, and was not filed with respect to the reduction in parking space size.

Alternatives for Consideration – See Page 8

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: Planning and Economic Development Department staff have submitted the required fee of \$125.00 to the Minister of Finance to begin the appeal process. Other than this one-time fee, the costs for the Hearing are covered by the respective Departmental Work Programs / Budgets. The Hearing would likely take one day.

Staffing: One representative each from Planning and Legal Services would be required for preparation and attendance at an OMB Hearing. One member of Planning staff would attend as an expert witness at the

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Hearing, should Council support Option 1 as outlined on page 8 of this Report.

Legal: No legal implications are expected.

HISTORICAL BACKGROUND

The subject property is located at 175 Young Street, Hamilton, at the corner of Young Street and Ferguson Avenue South (see Appendix "A").

In 2007 an application for Minor Variance (HM/A-07:130) to establish a 60-seat outdoor patio was brought before the Committee of Adjustment to permit the outdoor patio for a restaurant that abuts a residential district. On June 20, 2007 the Minor Variance Application was denied by the Committee of Adjustment on the basis that the patio would negatively impact the surrounding residential area, was not minor in nature or desirable and appropriate, and did not meet the general intent and purpose of the Official Plan and Zoning By-law (see Appendix "D"). The decision of the Committee of Adjustment was appealed to the OMB. On December 13, 2007 the OMB dismissed the appeal on the basis that no planning evidence in support of the Minor Variance was presented and that the variance to permit an outdoor patio on lands abutting a residential district did not satisfy the four tests of a Minor Variance under Section 45(1) of the *Planning Act* (see Appendix "E").

In 2011 Minor Variance Application HM/A-11:22 was submitted to establish a 50-seat outdoor patio to permit an outdoor patio that abuts a residential district. Staff comments to the Committee of Adjustment noted the previous OMB decision which denied Minor Variance Approval for the establishment of a 60-seat outdoor patio. Staff also noted that insufficient justification was provided to support the proposed variance, and staff recommended that the applicant consider tabling the application to provide proper justification. In the absence of proper justification, staff recommended that the application be denied. At the March 10, 2011 Committee of Adjustment meeting the applicant requested that the application for Minor Variance be tabled until further notice.

In 2015 Minor Variance Application HM/A-11:22 was brought back before the Committee of Adjustment. The application has been amended by the applicant to reduce the capacity of the outdoor patio from 50 seats to 40 seats. No justification was provided to demonstrate that the proposed patio would not negatively impact the surrounding residential area and meet the four tests of a Minor Variance. Staff again noted the previous OMB decision which denied approval for the establishment of a 60-seat outdoor patio. Staff also noted that insufficient justification had been provided to support the proposed variance. Staff maintained their previous position that the applicant consider tabling the application to provide proper justification or in the absence of this justification staff would recommended that the application be denied.

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Staff note that there was a typographical error on page 2 of the staff comments to the Committee of Adjustment where it was identified that the number of seats proposed for the patio was 44 seats rather than the intended total of 40 seats. The correct number of seats (i.e. 40) was mentioned throughout the balance of the report and the assessment and staff position was based on the outdoor patio having a total of 40 seats.

A second variance was included in Minor Variance Application HM/A-11:22 to permit a parking space size of 2.6 m by 5.5 m. Parking for the restaurant is only required for the seating inside the restaurant and not for the outdoor patio. Therefore the variance for parking space size has no relation to the proposed outdoor patio. The proposed parking space size complies with the new parking space size standard outlined in the City of Hamilton Zoning By-law 05-200. The opinion of staff is that the variance for reduced parking space size satisfies the four test of a minor variance under the *Planning Act* and staff recommended to the Committee of Adjustment that the variance for reduced parking space size be approved.

At the July 9, 2015 Committee of Adjustment meeting, the Committee of Adjustment approved the application for Minor Variance to establish a 40-seat outdoor patio (see Appendix "C").

On July 22, 2015 Planning staff filed an appeal to the OMB objecting to the decision of the Committee of Adjustment to approve Minor Variance Application HM/A-11:22 on the basis that the decision is contrary to the previous OMB decision PL070565, the variance does not conform to the policies of the Urban Hamilton Official Plan (UHOP), and does not meet the four tests of a Minor Variance under Section 45(1) of the *Planning Act*.

The appeal of staff pertains only to the variance to permit an outdoor patio for a restaurant that abuts a residential district.

On July 28, 2015 a member of the public filed an appeal with the Secretary-Treasurer of the Committee of Adjustment.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

Planning Act

The application has been reviewed with respect to the criteria of the *Planning Act*.

Powers of Committee

"44(1) If a municipality has passed a by-law under section 34 or a predecessor of such section, the council of the municipality may by by-law constitute and appoint a committee of adjustment for the municipality composed of such persons, not

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fewer than three, as the council considers advisable R.S.O. 1990, c. P.13, s. 44 (1).

- 45(1) The Committee of Adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained R.S.O. 1990, c. P.13, s. 45 (1); 2006, c. 23, s. 18 (1); 2009, c. 33, Sched. 21, s. 10 (11).
- 45(3) A council that has constituted committee of adjustment may by by-law empower the committee of adjustment to grant minor variances from the provisions of any by-law of the municipality that implements an official plan, or from such by-laws of the municipality as are specified and that implement an official plan, and when a committee of adjustment is so empowered subsection (1) applies with necessary modifications R.S.O. 1990, c. P.13, s. 45 (3)."

Staff are of the opinion that the variance to permit an outdoor patio for a property abutting a residential district does not meet the general intent of the UHOP and Zoning By-law No. 6593; is not desirable and appropriate for the use of the land; and, is not considered minor in nature.

Provincial Policy Statement (2014)

The application has been reviewed with respect to the Provincial Policy Statement (PPS).

"1.1.1 Healthy, liveable and safe communities are sustained by:

- a) promoting efficient development and land use patterns which sustain the financial well-being of the Province and municipalities over the long term."

Policy 1.1.1 speaks to healthy, liveable and safe communities. The application is generally consistent with the policies of the PPS.

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).

“2.2.2 Managing Growth

1. Population and employment growth will be accommodated by-
 - a. directing a significant portion of new growth to the built-up areas of the community through intensification.”

The proposed outdoor patio for an existing restaurant directs growth into the built-up area. Therefore, the application conforms with the policies of the Provincial Growth Plan for the Greater Golden Horseshoe.

Urban Hamilton Official Plan

The subject property is identified as “Neighbourhoods” on Schedule “E” – Urban Structure and designated “Neighbourhoods” on Schedule “E-1” – Urban Land Use Designations. The following policies, amongst others, are applicable to the review of the Minor Variance Application.

“E.3.2.3 The following uses shall be permitted on lands designated Neighbourhoods on Schedule “E-1” – Urban Land Use Designations:

- d) local commercial uses.

E.3.8.1 Local Commercial uses that primarily cater to the weekly and daily needs of residents within the surrounding neighbourhood may be permitted within the Neighbourhood Designation.”

As the proposal is to add an outdoor patio to an existing restaurant, the proposed use is permitted.

- “E.3.8.9 Development and redevelopment of local commercial uses shall:
- a) Front and have access to a major arterial, minor arterial or collector road;
 - b) Provide safe and convenient access for pedestrian and cyclists; and,
 - c) Be compatible with the surrounding area in terms of design, massing, height, setbacks, on-site parking, noise impact, landscaping, and lighting.”

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The subject property is not located on an arterial road or collector road whereas development and redevelopment of local commercial uses shall front and have access to a major arterial, minor arterial or collector road.

Local commercial uses are required to be compatible with the surrounding area in respect to noise impacts among other potential impacts. The proposed 40-seat outdoor patio is located in a residential area and therefore noise impacts are of a concern. Adequate justification has not been provided in order to demonstrate that the proposed outdoor patio will not have an adverse impact and therefore be compatible with the surrounding residential area.

On this basis, the proposed variance to permit an outdoor patio to be located on a lot that is not fronting onto an arterial road or collector road and is abutting a residential district does not comply with the policies of the Urban Hamilton Official Plan.

City of Hamilton Zoning By-law No. 6593

The subject property is zoned “H” (Community Shopping and Commercial) District and “G-3” (Public Parking Lots) District in the City of Hamilton Zoning By-law, to which the proposed use of a restaurant is permitted in the “H” District.

RELEVANT CONSULTATION

- Legal Services Division.

ANALYSIS AND RATIONALE FOR RECOMMENDATION

The proposed variance permits the existing restaurant to establish a 40-seat outdoor patio (see Appendix “F”).

The Minor Variance approval included a total of two variances.

Variance one is for a reduction in parking space size from 2.7 m by 6 m to 2.6 m by 5.5 m, as this variance is required regardless of whether an outdoor patio is established, and as this variance meets the four tests of a Minor Variance, staff are supportive of this variance.

The second variance is to permit an outdoor patio for a restaurant which abuts a residential district. A previous variance application for the subject property to establish an outdoor patio for a restaurant which abuts a residential district, was denied by the OMB on the basis that no planning evidence in support of the Minor Variance was provided and the variance to permit an outdoor patio for a restaurant abutting a residential district did not satisfy the four tests of a Minor Variance. The most recent

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variance application sought to establish an outdoor patio for a restaurant abutting a residential district. No planning evidence has been submitted to demonstrate that the current variance application meets the tests of a Minor Variance. The application remains in the opinion of staff as relatively similar to the previous application that was denied by the OMB.

The proposed variance fails the four tests on the basis of the incompatibility of the proposed use in the context of the residential fabric. Given the nature of the area and the potential negative noise impact that the proposed 40-seat outdoor patio will have on the residential neighbourhood, staff are not in support of the variance. Adequate justification and supporting data have not been provided to adequately demonstrate that the proposed outdoor patio will not negatively impact the surrounding residential neighbourhood. Finally, the existing restaurant is located on a local road whereas the policies of the UHOP outline that development and redevelopment of local commercial uses shall front and have access to major arterial, minor arterial, or collector roads.

It is the opinion of staff that the four tests of a Minor Variance have not been satisfied, therefore the appeal against the proposed variance for the patio should be brought before the OMB.

Additional Appeal

A second appeal was filed by a member of the public, appealing the decision of the Committee of Adjustment to approve Minor Variance Application HM/A-11:22. The third party appeal raised, among other concerns, that the approval was contrary to a similar application that was refused by the OMB; that business reasons were presented rather than planning evidence to support the application; the variances pose a risk to safety of persons and property; the variances sought do not represent good planning; and the variances do not meet the four tests of a Minor Variance under the *Planning Act*.

ALTERNATIVES FOR CONSIDERATION

Option 1:

Council could proceed with the appeal and direct appropriate Legal Services and Planning staff to attend the OMB Hearing in opposition to the approved variance application, as recommended in this Report.

Option 2:

Council may direct staff to withdraw the appeal letter, which was filed by staff against the decision of the Committee of Adjustment, to the OMB. This option would not affect the appeal filed by the interested third party and the variance application would remain

under appeal and therefore would not be brought into force and effect by the withdrawal of the appeal filed by staff. The Minor Variance Application would not be brought into force and effect until the additional appeal has been resolved.

ALIGNMENT TO THE 2012 – 2015 STRATEGIC PLAN

Strategic Priority #1

A Prosperous & Healthy Community

WE enhance our image, economy and well-being by demonstrating that Hamilton is a great place to live, work, play and learn.

Strategic Objective

- 1.5 Support the development and implementation of neighbourhood and City wide strategies that will improve the health and well-being of residents.
- 1.6 Enhance Overall Sustainability (financial, economic, social and environmental).

Strategic Priority #2

Valued & Sustainable Services

WE deliver high quality services that meet citizen needs and expectations, in a cost effective and responsible manner.

Strategic Objective

- 2.2 Improve the City's approach to engaging and informing citizens and stakeholders.

Strategic Priority #3

Leadership & Governance

WE work together to ensure we are a government that is respectful towards each other and that the community has confidence and trust in.

Strategic Objective

- 3.4 Enhance opportunities for administrative and operational efficiencies.

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APPENDICES AND SCHEDULES ATTACHED

- Appendix "A": Location Map
- Appendix "B": Staff Comments for HM/A-11:22
- Appendix "C": HM/A-11:22 Committee of Adjustment Decision
- Appendix "D": HM/A-07:130 Committee of Adjustment Decision
- Appendix "E": Ontario Municipal Board Decision PL070565
- Appendix "F": Concept Plan

:DB/