

AIRD BERLIS

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March 25, 2019

Our File No.: 137843

BY EMAIL

Mayor Fred Eisenberger and Members of Council

and

Janet Pilon
Acting Clerk, City of Hamilton

Hamilton City Hall
71 Main Street West
Hamilton, ON L8P 4Y5

Dear Mayor Eisenberger, Ms. Pilon and Members of Council:

**Re: Local Planning Appeal Tribunal Appeal No. PL170981
3033, 3047, 3055, 3063 Binbrook Road (PED19031/LS19003) (Glanbrook)
(Ward 11)**

Aird & Berlis LLP represents Binbrook Heritage Developments (the “Applicant”), registered owner of the property municipally known as 3033, 3047, 3055 and 3063 Binbrook Road, in the former Township of Glanbrook (City of Hamilton) (the “Subject Lands”).

Planning Committee - Report and Recommendations

On March 19, 2019, I was granted the opportunity to speak to the Planning Committee (the “Committee”) regarding our client’s appeals. I submitted a letter to the Committee in support of my delegation (attached), and I refer you to that correspondence for the relevant background and context of this matter.

I indicated to the Committee my surprise and disappointment in discovering that this matter had been added to its agenda as an *in camera* item, without the courtesy of any notice to me or my client, without any comment on the invited submission we had made to staff, and without any indication of the status of our proposal.

As the Committee discussed this matter *in camera*, and as staff have provided no insight into the resubmission, I have no idea what the current report before this Council says or what recommendations you are being asked to adopt today. If, as would be our preference, the recommendation to Council is to support our client’s proposal and direct staff to enter into Minutes of Settlement to resolve the appeals, then I encourage Council to do so.

If, as I suspect, Council is being asked to not support my client’s proposal, then I respectfully request that Council direct staff to meet and negotiate with my client in an effort to resolve the outstanding appeals in advance of this summer’s hearing. At the very least, such negotiations would likely serve to narrow or scope the City’s issues with the proposal to simplify and shorten

the hearing process. It is doubtless in everyone's interest to avoid the exorbitant costs and the countless hours of staff time and resources needed to prepare for an LPAT hearing if a mutually beneficial alternative remains on the table.

Planning Committee - Disputed Facts and Misconceptions

Following my five-minute delegation to the Committee, the City's in-house and outside legal counsel were given an opportunity to address my comments and offer a rebuttal to my submissions. In the nearly twenty minutes of rebuttal, the City's counsel vociferously denied any impropriety or irregularity in dealing with me and my client and suggested my submissions were inappropriate. Unfortunately, lost in the raised voices and adamant denials of the morning was the key message that we brought to the Committee: that the proponent is eager to continue its dialogue with the City to work towards a positive proposal that will benefit the Binbrook community.

I was not given an opportunity to reply to the City's legal counsel, but would like to offer the following clarifications to ensure that Council is aware of the efforts and intentions of my client to maintain a dialogue with the City:

- In his comments, Mr. Kovacevic stated that my client's revised proposal had been discussed on a without prejudice basis with Planning staff, and that staff had advised that the proposal was not acceptable to them. This is untrue. The revised proposal was only developed and provided to staff as part of the January 18, 2019 with prejudice resubmission. Neither myself nor my client has ever received a comment from City staff on this proposal;
- On January 18, 2019 my associate provided the City's outside legal counsel, Mr. Biggart, with the requested resubmission, including an updated Concept Plan, detailed Floor Plans; and a 3D rendering of the proposed development. In this email, we thanked him for his cooperation and stated that we look forward to hearing back from him once staff has had an opportunity to review. We received no response to this email, not even an acknowledgment of receipt;
- On January 23, 2019 I emailed Mr. Biggart to ask if he had everything he needed to consider the revised proposal. Again, no response was received.
- On February 26, 2019 my associate again emailed Mr. Biggart and asked for a phone call to discuss the resubmission and whether there were any preliminary comments that could be provided. No response was given.
- On March 2, 2019 my client emailed the Director of Planning for the City, Mr. Robichaud, asking if he could provide any comments on the resubmission. Mr. Robichaud advised that he had asked Mr. Biggart to reply. No response was provided by Mr. Biggart.
- On March 12, 2019, my client again email Mr. Robichaud asking for comments. Again, Mr. Robichaud followed up with the City's legal counsel and requested that they respond. Again, no response was provided.

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- Finally, on March 16, 2019, my associate again emailed Mr. Biggart after discovering that this matter had been placed on the Committee's agenda, asking for an update and noting that we had not received any comments or updates on this matter since filing the resubmission. No response was provided.

Both Mr. Biggart and Mr. Kovacevic stated to the Committee that they are under no obligation to provide any comments or responses to me or my client. This is most certainly not the typical procedure and should not be the bar that the City of Hamilton aspires to. It is certainly inconsistent with the dialogue that had taken place between the parties prior to the January resubmission.

While this experience has been frustrating for myself and my clients, who are well known and respected developers in the City of Hamilton, we remain optimistic that the parties can find a resolution to this matter that does not involve expensive and expansive litigation. We are, as before, committed to working with the City to ultimately develop the Subject Lands in a manner that represents good planning in the public interest.

Should you have any questions, please feel free to contact the undersigned or David Neligan (416-697-8923; dneligan@airdberlis.com).

Yours truly,

AIRD & BERLIS LLP



Steven A. Zakem

SAZ/DPN

Encl.

- c. Nicole Auty, City Solicitor, City of Hamilton
Steve Robichaud, MCIP RPP, Director of Planning and Chief Planner, City of Hamilton
Anita Fabac, Manager of Development Planning, Heritage and Design, City of Hamilton
Andrew Biggart, Ritchie Ketcheson Hart & Biggart LLP
Brenda Khes, MCIP RPP, GSP Group
Sergio Manchia and David Horwood, Binbrook Heritage Developments

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AIRD BERLIS

March 18, 2019

Our File No.: 137843

BY EMAIL

Councillor Maria Pearson
Chair, Planning Committee

and

Ms. Lisa Chamberlain
Legislative Coordinator, Planning Committee

City of Hamilton
71 Main Street West
Hamilton, ON L8P 4Y5

Dear Madam Chair and Members of the Planning Committee:

**Re: Local Planning Appeal Tribunal Appeal No. PL170981
3033, 3047, 3055, 3063 Binbrook Road (PED19031/LS19003) (Glanbrook)
(Ward 11)**

Aird & Berlis LLP represents Binbrook Heritage Developments (the “Applicant”), registered owner of the property municipally known as 3033, 3047, 3055 and 3063 Binbrook Road, in the former Township of Glanbrook (City of Hamilton) (the “Subject Lands”).

We were surprised to see that our client’s appeal of its Official Plan Amendment application and Zoning By-law Amendment application (the “Applications”) are scheduled to be discussed by the Planning Committee (“Committee”) in closed session on March 19, 2019. Having recently provided City staff and its outside counsel with a resubmission of the Applications in an effort to resolve this matter without the need for a contested hearing, we were hopeful that our dialogue would continue before the Committee and Council were asked to take a position and provide instructions with respect to the LPAT hearing, currently scheduled for August, 2019. Accordingly, we write to provide the Committee with important background to inform its discussion, and to make submissions in favour of the continued negotiation of a mutually beneficial resolution that would avoid the need for a costly hearing.

Background

More than two and a half years ago, on July 29, 2016, our client submitted an application for an Urban Hamilton Official Plan Amendment (“UHOPA”) and Zoning By-law amendment (“ZBA”) to permit the construction of a 10-storey mixed use building on the Subject Lands.

In support of its application, our client provided technical reports and a planning justification highlighting that this carefully designed mixed-use project would: (i) provide the opportunity for residential intensification and the provision of rental housing alternatives within the Binbrook community; (ii) increase the supply of both professional and service commercial jobs in the

community; (iii) promote the efficient use of land and infrastructure, and support active transportation; and (iv) retain and repurpose identifiable heritage sites important to the area.

Importantly, the proposed development provides an opportunity for an aging in place facility for seniors who wish to remain in the Binbrook-Glanbrook area, as well as providing rental housing opportunities for all ages in the community.

More than a year later, in August of 2017, we appealed the Applications to the Ontario Municipal Board (now the Local Planning Appeal Tribunal (“LPAT”)) on behalf of our client for Council’s failure to make a decision. Since that time, two pre-hearing conferences have been held, and a hearing before LPAT has been scheduled for the second week of August, 2019.

In the time since the appeal was filed, our client and City staff have been actively engaged in discussions with respect to the Applications. This has included numerous meetings between our client and planning staff, and discussions between legal counsel, both in-house and with the City’s outside counsel. During these conversations, staff identified concerns with the proposed development, in particular the planned density and 10-storey height. These concerns have also been vocalized by the local community, many of whom have attended the pre-hearing conferences at LPAT.

In response to this feedback from the City and the local residents of Binbrook, our client made significant changes to the proposed development. On January 18, 2019, we provided the City’s outside legal counsel with a *with prejudice* resubmission of the plans for the proposed development that, among other things, reduced the proposed height to 6 residential floors atop a first floor commercial base.

Our client has been awaiting comments from City staff and its legal counsel since its resubmission two months ago. It was our understanding that, following review of the revised plans, the City would be seeking instructions from this Committee and Council in April, 2019 on a potential settlement of the appeals or, at the very least, seeking a scoped issues list to address those concerns that remain unresolved at the upcoming LPAT hearing. Further, it was our hope that, in advance of seeking instructions from this Committee, the City would provide our client with comments on the revised plans, and to provide an opportunity to continue dialogue between the parties in order to facilitate a resolution. From our review of the Committee’s agenda for March 19, 2019, it appears that this is not the case.

The LPAT Hearing

LPAT has scheduled a hearing for 5 days beginning on August 12, 2019. Although the City has yet to provide its issues list for the hearing, it is anticipated that multiple expert witnesses, including experts in land use planning, urban design, and transportation, will be required to provide testimony. Such a contested hearing will undoubtedly cost both parties tens of thousands of dollars, and will require countless hours of staff time and resources to prepare. It is in nobody’s interest to litigate this matter if the option of settlement remains a possibility. If a negotiated settlement were reached, the five-day hearing could easily be converted to a one day settlement hearing requiring testimony only from the Applicant’s witnesses.

This Committee is likely aware of two recent LPAT decisions in Hamilton approving mid-rise development applications representing significant intensification. The first decision, *Lawson v. Hamilton (City)* was issued in January, 2019 approving a nine-storey apartment building in Dundas. A more recent decision, *Sonoma Homes v. Hamilton (City)*, issued in February, 2019, approved a nine-storey condominium in Ancaster. In that decision, the LPAT member stated:

“... I find that the City has not fully come to grips with the policies contained in this policy document [Growth Plan] and how these policies affect the application of the policy contained in the UHOP and the Secondary Plan.” (emphasis added)

These decisions seem to signal increasing support from LPAT for mid-rise intensification in the boroughs of Hamilton, and reflect a recognition that the in-force secondary-plan policies in the communities surrounding the City centre are no longer consistent with the provincial objectives of growth and intensification mandated by the Provincial Policy Statement, 2014 and the Growth Plan for the Greater Golden Horseshoe, 2017. Both of these decisions are appended to this letter for the Committee’s review.

Our client is confident that its proposed development in Binbrook (either as originally proposed, or as revised in its recent resubmission) would similarly be found by LPAT to represent good planning in the public interest. However, and as previously stated, it has no interest in proceeding to a contested hearing if a resolution remains available through a negotiated settlement.

Recommendation

In light of the above, and in recognition of the ongoing efforts by both our client and City staff to reach a resolution, we recommend that this Committee direct the City’s outside legal counsel to provide us with City staff comments on the recent resubmission and to convene a meeting between the parties to facilitate a settlement. Should it be apparent following these discussions that a negotiated resolution supported by staff is not possible, then the City’s outside counsel should return to the next meeting of this Committee on April 2, 2019 to seek instructions on the hearing scheduled for August.

We thank you for your time and consideration of our submissions on this issue. Despite our surprise and disappointment that this matter has come before this Committee without any notice to us or our client, we remain optimistic that the parties can still find a mutually beneficial solution without the need for a contested hearing later this summer.

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Should you have any questions, please contact the undersigned or David Neligan (416-697-8923; dneligan@airdberlis.com).

Yours truly,

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