



CITY OF HAMILTON
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT
Planning Division

TO:	Chair and Members Planning Committee
COMMITTEE DATE:	October 19, 2021
SUBJECT/REPORT NO:	Request for Direction to Proceed with Appeal of Committee of Adjustment Decision to Approve Minor Variance Application HM/A-21:221, for Lands Located at 44 Hughson Street South, Hamilton (PED21198) (Ward 2)
WARD AFFECTED:	Ward 2
PREPARED BY:	Joe Buordolone (905) 546-2424 Ext. 7856
SUBMITTED BY:	Steve Robichaud Director, Planning and Chief Planner Planning and Economic Development Department
SIGNATURE:	

RECOMMENDATION

That Council gives approval to the following actions, as detailed in Report PED21198, respecting Committee of Adjustment Minor Variance Application (HM/A-21:221) by UrbanSolutions Planning and Land Development Consultants Inc. c/o Matt Johnston, on behalf of Fengate Hamilton Land GP Inc. (Owner), for the lands located at 44 Hughson Street South, Hamilton, as shown on Appendix "A" attached to Report PED21198, granted 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 Land Tribunal (OLT) against the decision of the Committee of Adjustment to approve Minor Variance application HM/A-21:221;
- (b) That Council directs appropriate Legal Services and Planning staff to attend the future Ontario Land Tribunal hearing in opposition to the decision of the Committee of Adjustment to approve Minor Variance application HM/A-21:221.

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EXECUTIVE SUMMARY

The applicant submitted Minor Variance Application HM/A-21:221 to permit the construction of a 34 storey (108.0 metre) mixed use building containing 635 units and 1290.0 square metres of commercial space.

Minor Variance application HM/A-21:221 was considered by the Committee of Adjustment on August 12, 2021. Planning staff recommended the variance to permit a building height maximum of 111.0 metres, later revised to permit a maximum building height of 108.0 metres, be denied, as the proposal did not meet the four tests of a Minor Variance under Section 45(1) of the *Planning Act* (see Appendix “B” attached to Report PED21198). The Committee of Adjustment granted the application (see Appendices “C” and “E” attached to Report PED21198).

Under the *Planning Act*, appeals must be filed within 20 days of the decision. As such, Planning staff submitted an appeal letter, and the required fee to the Secretary-Treasurer of the Committee of Adjustment to initiate the appeal process on September 1, 2021, subject to Council’s approval/ratification. Staff recommend proceeding with the appeal. A hearing date has been not yet been set.

Alternatives for Consideration – See Page 11

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: Planning has submitted the required fee of \$400 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.

Staffing: One representative from Legal Services and one representative from the Planning Division would be required for preparation and attendance at the Ontario Land Tribunal (OLT) hearing.

Legal: No legal implications are expected.

HISTORICAL BACKGROUND

In December of 2002, City Council endorsed a report related to the Roles and Responsibilities of the Committee of Adjustment. The recommendations included the following:

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“That where the *Planning Act* appeal periods can be met, the Planning and Development Department be directed to report to the Committee of the Whole whenever, in the opinion of staff, a Committee of Adjustment decision has the effect of adding to the uses permitted under the Zoning By-law. In response to such a report, the City may determine its position on the Committee of Adjustment decision and instruct staff accordingly.”

The subject property is located at 44 Hughson Street South in Hamilton, at the north west corner of Hughson Street South and Jackson Street West (see Appendix “A” attached to PED21198).

Downtown Hamilton Secondary Plan and Zoning By-law No. 05-200

On May 9, 2018 Council approved the Downtown Hamilton Secondary Plan and implementing Zoning By-law No. 05-200 amendments for Downtown Hamilton. The subject lands formed part of the Council approval. Fengate Hamilton Lands GP Inc. appealed OPA No. 102 and Zoning By-law No. 18-114 as it related to the subject lands (OLT File PL180548). On April 21, 2020, the OLT issued a Notice of Oral Decision summarizing the settlement between Fengate Hamilton Lands GP Inc. and the City by changing the height category in the Downtown Hamilton Secondary Plan (Map B.6.1.-2 Maximum Building Heights) for a portion of the subject lands fronting on James Street South to High-Rise 1 and limiting the maximum building height to 94.2 metres in Figure 1 of Schedule “F” – Special Figures of Zoning By-law No. 05-200.

Site Plan Control Application

Site Plan Control application (DA-19-174) was submitted on October 29, 2019 and was conditionally approved on April 16, 2020. The conditionally approved Site Plan Control Application contemplated a 91.4 metre (30 storey) building and included a special condition for one variance to allow a reduced setback to the alleyway for any portion of the building that is greater than 44 metres in height, notwithstanding the 9.5 metre requirement. A revised Site Plan was submitted to the City on April 28, 2021, which included revisions to the proposed building height, shown to be 111.0 metres, and massing.

In addition to the submitted Site Plan Control Application, Zoning By-law Amendment Application (ZAD-21-035), for the removal of Holding Provisions that are currently on the subject site, has been submitted and is currently under review. The following studies were submitted in support of the Holding Provision removal:

- Shadow Impact Study;
- Pedestrian Level Wind Study;

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- Visual Impact Assessment;
- Traffic Impact Assessment: and,
- Functional Servicing Report.

Minor Variance Application

In May of 2021, the applicant submitted a Minor Variance Application to permit construction of a 34 storey (111.0 metre) mixed use building containing 635 units and 1290.0 square metres of commercial space. While conditional approval of Site Plan Application DA-19-174 only identified one minor variance, the Minor Variance Application (HM/A-21:221) contained 12 variances, of which staff were in support of variances 1, 2, 3, 4, 6, 7, 8, and 9, with some variances being removed entirely.

The applicant revised Variance 5 from a 111.0 metre building height to 108.0 metres at the Committee of Adjustment hearing on August 12, 2021. The variance looked to permit a maximum building height of 108.0 metres, notwithstanding the maximum building height of 94.2 metres approved by the OLT.

Staff comments recommended the application be denied as the proposal did not meet the four tests of a Minor Variance under Section 45(1) of the *Planning Act* (see Appendix “B” attached to Report PED21198). The Committee of Adjustment granted Minor Variance Application HM/A-21:221 on August 12, 2021 with no conditions.

Staff are of the opinion the Committee of Adjustment’s decision should be appealed because:

- An Official Plan Amendment Application and Zoning By-law Amendment Application is the appropriate mechanism to review the impacts of increasing the maximum building height; and,
- The increase in maximum permitted building height is neither minor in nature nor desirable for the development as negative impacts, including obstructed views of the Niagara Escarpment and Lake Ontario and a built form not desirable for the subject site will arise from the additional height.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENT

Planning Act

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

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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 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 the effect of the application is to increase the maximum permitted building height which does not maintain the general intent of the Urban Hamilton Official Plan, the Downtown Hamilton Secondary Plan or Zoning By-law No. 05-200, is not desirable or appropriate for the use of the land and is not considered minor in nature. Therefore, the Minor Variance Application does not meet the four tests of a Minor Variance under the *Planning Act*.

Provincial Policy Framework

The Provincial planning policy framework is established through the *Planning Act* (Section 3) and the Provincial Policy Statement (2020) (PPS). The *Planning Act* requires that all municipal land use decisions affecting planning matters be consistent with the PPS.

The mechanism for the implementation of the Provincial plans and policies is through the Official Plan. Through the preparation, adoption and subsequent OLT approval of the City of Hamilton Official Plans, the City of Hamilton has established the local policy

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framework for the implementation of the Provincial planning policy framework. As such, matters of Provincial interest (e.g. efficiency of land use and balanced growth) are reviewed and discussed in the Official Plan analysis below.

Urban Hamilton Official Plan (UHOP)

The subject site is identified as Downtown Urban Growth Centre on Schedule E Urban Structure and designated Downtown Mixed Use Area on Schedule E-1 Urban Land Use Designations within the Urban Hamilton Official Plan (UHOP). The following policies, amongst others, apply to the proposal.

- “E.4.4.4 The following uses shall be permitted on lands designated Downtown Mixed Use on Schedule E-1 – Urban Land Use Designations:
- a) commercial uses such as retail stores, auto and home centres, home improvement supply stores, offices including major offices, personal services, live work units, artist studios, financial establishments, restaurants, and medical clinics (OPA 64); and,
 - e) residential uses.
- E.4.4.7 Permitted density and heights shall be set out in the secondary plan for the lands designated Downtown Mixed Use.
- E.4.4.11 Building mass shall consider the pedestrian nature of the area designated Downtown Mixed Use. Massing techniques such as stepped back or terraced floors may be required.”

The proposed mixed use building is contemplated by Policy E.4.4.4 and the proposed development incorporates stepbacks and terraces to improve the building mass (Policy E.4.4.7). However, the proposed building height does not meet the maximum building heights permitted in the Downtown Hamilton Secondary Plan. The proposal does not meet the intent of Policy E.4.4.7.

Volume 2 - Downtown Hamilton Secondary Plan

The subject site is designated as “Downtown Mixed Use” in the Downtown Hamilton Secondary Plan and the western portion is identified as Pedestrian Focused on Map B.6.1-1 of the Secondary Plan. The eastern portion of the subject site is further identified as High-Rise 1 while the western portion of the subject site is identified as High-Rise 2 on Map B.6.1-2 of the Secondary Plan. The following policies, amongst others, apply to the proposal.

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- “B.6.1.2(h) The Niagara Escarpment is an essential part of the character and appearance of the City; views to the Escarpment are important assets to protect. The Niagara Escarpment meanders through the City of Hamilton providing a natural backdrop to the Downtown, access to a unique natural environment, and a home to a diverse ecosystem of international significance – a UNESCO World Biosphere Reserve. The Downtown Hamilton Secondary Plan recognizes the importance of the relationship between topography and building height and the impacts on significant views to and of the Niagara Escarpment.
- B.6.1.4.12 Building heights are identified on Map B.6.1.2 – Downtown Hamilton Building Heights and the maximum heights for each area shall fall into the following categories:
- e) High-Rise 2 – up to 30 storeys.
- B. 6.1.4.14 Notwithstanding Policy B.6.1.4.12 and Map B.6.1-2 Building Heights, maximum building height within the Downtown Hamilton Secondary Plan area shall be no greater than the height of the top of the Escarpment as measured between Queen Street and Victoria Avenue, identified on Appendix “D” – Niagara Escarpment Heights. The maximum permitted height, in accordance with Policy B.6.1.4.14 has been determined to be 94.2 metres.
- B.6.1.4.18 The following policies shall apply to high-rise (tall) buildings (among others):
- a) a tall building is any building that is greater than 12 storeys’ in height; and,
 - b) new tall buildings shall be no greater than the height of the top of the Escarpment as measured between Queen Street and Victoria Avenue.
- B.6.1.4.23e) The following studies may be required, in addition to any other studies identified as part of the Formal Consultation required under Section F – Implementation of Volume 1, for tall building development to demonstrate that the proposal meets the applicable design criteria of the Downtown Hamilton Tall Building Guidelines:
- i) Shadow Impact Study;
 - ii) Pedestrian Wind Impact Study;

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- iii) Visual Impact Assessment;
- iv) Transportation Studies, including, but not limited to:
 - i. Transportation Impact Study;
 - ii. Cycling Route Analysis;
 - iii. Pedestrian Route and Sidewalk Analysis;
 - iv. Neighbourhood Traffic Calming Options Report;
 - v. Transit Assessment; and,
 - vi. Transportation Demand Management Options Report.
- v) Infrastructure and Servicing Study;
- vi) Cultural Heritage Impact Assessment;
- vii) Urban Design Brief; and,
- viii) Planning Justification Report.

B.6.1.4.37 Downtown Hamilton contains a number of primary gathering spaces where civic life occurs. The quality, image, and amenity of these spaces strongly affect how people perceive the Downtown. Notwithstanding Policy B.6.1.4.35 and Policy B.6.1.4.36, development shall not cast any net new shadow between 10:00 a.m. and 4:00 p.m. as measured from March 21 to September 21 on the following parks, squares, plazas and open spaces areas that serve as Downtown’s key civic gathering spaces:

- b) Prince’s Square (50 Main Street East).”

The intent of the UHOP is to limit building height to the top of the Niagara Escarpment. As per policy B.6.1.2(h) of the Downtown Hamilton Secondary Plan, the Niagara Escarpment is an essential part of the character and the appearance of the City of Hamilton, and views to the Niagara Escarpment are important assets to protect to ensure the intent of the Official Plan is being maintained.

Volume 1, Policy E.4.4.7 states that permitted density and heights shall be set out in the Secondary Plan for the lands designated Downtown Mixed Use. Policies B.6.1.4.12 and B.6.1.4.14 of the Downtown Hamilton Secondary Plan state that the portion of land that is subject to the proposed 108 metre (34 storey) tower is identified as High-Rise 2 and limited to “up to 30 storeys”. The policy further states that notwithstanding height permissions, the maximum building height within the Downtown Hamilton Secondary Plan area shall be no greater than the height of the top of the Niagara Escarpment as measured between Queen Street and Victoria Avenue as identified on Appendix “D” – Niagara Escarpment Heights attached to Report PED21198. The maximum permitted height for the subject lands in accordance with this Policy is 94.2 metres.

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The proposal to permit a maximum building height of 108.0 metres does not meet the general intent and purpose of the UHOP as the height is not permitted by the existing policy framework. An Official Plan Amendment is required to facilitate the proposed maximum building height.

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

The subject lands are zoned Downtown Mixed Use – Pedestrian Focus (D2, H17, H19, H20) Zone and Downtown Central Business District (D1, H17, H20) Zone. The applicant requested a variance, in addition to other variances, to permit a maximum building height of 108.0 metres, for the portion of the lands fronting on James Street North (see Appendix “A” attached to Report PED21198) notwithstanding that a maximum building height of 94.2 metres is permitted on Figure 1 of Schedule “F” – Special Figures of Zoning By-law No. 05-200.

Holding Provision 17 requires the submission of several studies including a Shadow Impact Study, Visual Impact Study (VIA), Pedestrian Level Wind Study, Traffic Impact Study and Functional Servicing Report to demonstrate that the proposed development meets the intent of the Downtown Hamilton Secondary Plan policies. These studies have been submitted in support of an application to remove the Holding Provisions and were used to assess the impact of the proposed building height minor variance. Additionally, the Holding Provision requires that the applicant demonstrate that the proposed building height does not exceed the height of the Niagara Escarpment.

Policies B.6.1.4.23, B.6.1.4.37, B.6.1.4.38 and B.6.1.4.39 of the UHOP require the submission of a Shadow Impact Study and Pedestrian Level Wind Study to demonstrate that the proposed development has been sited, massed and designed to reduce and mitigate wind impacts and shadow impacts on the surrounding public realm, including the civic gathering space at 50 Main Street East (Prince’s Square).

The Shadow Impact Study, by Graziani + Corazza Architects Inc. dated August 5, 2021, submitted in support of Zoning By-law Amendment application ZAD-21- 035 (Holding Provision removal) was not completed in accordance with the Terms of Reference for Shadow Impact Studies and did not include a written assessment of the shadow map to clarify findings. Based on the mapping included in the Study, the shadows from the new development are starting to edge the Prince’s Square at 3:18 p.m. and the 4:18 p.m. shadows indicate encroachment of the new development shadows into the square, beyond the outline of the former 30-storey concept shadow, as approved through a previous OLT appeal. The encroachment indicates the creation of new net shadows on a Downtown civic gathering space which does not comply with Policy B.6.1.4.37 of the Downtown Hamilton Secondary Plan.

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The Pedestrian Level Wind Study by RWDI, dated December 4, 2020, identified unsafe wind conditions generated by the proposed development. The unsafe conditions are shown to appear at the north west corner of the building, the north west corner of the James Street South and Jackson Street East intersection and on the building's 31-storey terrace. Given the results of the Study, the proposed development does not comply with Policy B.6.1.4.39 as unsafe wind levels are created as a result of the proposed development and the additional height proposed through the Minor Variance Application.

Policies B.6.1.4.23 and B.6.1.10.6 also require that a VIA be completed to evaluate the impact of development on significant views and views to the Niagara Escarpment. Policies B.6.1.10.3 and B.6.1.10.4 support the significance of the Niagara Escarpment as a visual feature that separates upper and lower Hamilton and as a striking landscape terminating many views from Downtown Hamilton and recognizes the need to protect significant views to the Niagara Escarpment.

The applicant submitted a VIA by MBTW dated June of 2021, which demonstrated that views from the urban area to this site, to the Niagara Escarpment and the harbour are not impacted in a negative way by the new development, which fits into the street wall established along James Street. However, the VIA did identify that views from the Niagara Escarpment, near Sam Lawrence Park, will obscure views to the opposite side of the Niagara Escarpment and lake by the proposed development as a result of the increased height. Staff are of the opinion that the proposed development does not comply with Policies B.6.1.10.4 and B.6.1.10.8.

Furthermore, staff note that the subject site is subject to an OLT appeal (Case No. PL180548), which through the Minutes of Settlement, stated that the proposal cannot exceed 94.2 metres in height.

The variance to permit a maximum building height of 108.0 metres does not meet the general intent and purpose of the Zoning By-law as the effect of the decision allows for a building height that leads to an inappropriate built form and massing and is a height that exceeds the height of the Niagara Escarpment. A Zoning By-law Amendment Application is required to assess the impacts of the proposed height.

RELEVANT CONSULTATION

- Corporate Services Department, Legal Services Division.

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ANALYSIS AND RATIONALE FOR RECOMMENDATION

The proposed variance to permit a maximum building height of 108.0 metres does not meet the four tests of a Minor Variance as stipulated in Section 45(1) of the *Planning Act* on the basis that it does not meet the general intent and purpose of the UHOP and Downtown Hamilton Secondary Plan and Zoning By-law No. 05-200, is not minor in nature, nor is it desirable for the development of the subject lands. Therefore, it is appropriate for the City to appeal the Minor Variance to the OLT.

ALTERNATIVES FOR CONSIDERATION

Council may direct staff to withdraw the appeal letter, which was filed by staff against the decision of the Committee of Adjustment to the OLT. Provided that no further appeals are filed this option would allow the Committee of Adjustment's decision to permit a maximum building height of 108.0 metres on the subject site.

ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Community Engagement and Participation

Hamilton has an open, transparent and accessible approach to City government that engages with and empowers all citizens to be involved in their community.

Economic Prosperity and Growth

Hamilton has a prosperous and diverse local economy where people have opportunities to grow and develop.

Built Environment and Infrastructure

Hamilton is supported by state of the art infrastructure, transportation options, buildings and public spaces that create a dynamic City.

Our People and Performance

Hamiltonians have a high level of trust and confidence in their City government.

APPENDICES AND SCHEDULES ATTACHED

Appendix "A" to Report PED21198 – Location Map

Appendix "B" to Report PED21198 – Staff Comments for HM/A-21:221

Appendix "C" to Report PED21198 – HM/A-21:221 Committee of Adjustment Decision

Appendix "D" to Report PED21198 – HM/A-21:221 Committee of Adjustment Application

Appendix "E" to Report PED21198 – Minutes of Public Meeting

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