Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: January 03, 2023 **CASE NO(S).:** OLT-22-003866

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

Applicant/Appellant:	Burlington 2020 Lakeshore Inc.
Subject:	Request to amend the Official Plan – Refusal of request
Description:	The applications propose to demolish the existing hotel and restaurant and construct a new mixed-use building in a 2-tower format atop a 5-6 storey podium, with tower heights ranging from 30-35 storeys, and associated underground parking.
Reference Number:	505-04/19
Property Address:	2020 Lakeshore Road
OLT Case No.:	OLT-22-003866
OLT Lead Case No.:	OLT-22-003866
OLT Case Name:	Burlington 2020 Lakeshore Inc. v. Burlington (City)

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

Applicant/Appellant:	Burlington 2020 Lakeshore Inc.
Subject:	Application to amend the Zoning By-law – Refusal of application
Description:	The applications propose to demolish the existing hotel and restaurant and construct a new mixed-use building in a 2-tower format atop a 5-6 storey podium, with tower heights ranging from 30-35 storeys, and associated underground parking.
Reference Number:	521-11/21
Property Address:	2020 Lakeshore Road
OLT Case No.:	OLT-22-003867
OLT Lead Case No.:	OLT-22-003866

Heard: by video hearing November 1, 2022

APPEARANCES:

Parties	**Counsel**
Burlington 2020 Lakeshore Inc. ("Applicant/Appellant")	M. Lakatos-Hayward
City of Burlington ("City")	C. Barnett
Regional Municipality of Halton ("Region")	B. Maione
Bridgewater Hospitality Inc. and The Pearle Hotel & Spa Inc.	I. Kagan

DECISION DELIVERED BY D. CHIPMAN AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This Decision deals with the matters brought before the Tribunal under a Notice of Motion dated October 7, 2022 ("Motion") brought by the City.

[2] The Tribunal received a Response to the Notice of Motion from the Region of Halton in support of the City's position.

[3] The Tribunal notes that Bridgewater Hospitality Inc. and The Pearle Hotel & Spa Inc. filed a Response to the Motion in support of the City's position.

THE MOTION IS FOR:

[4] An Order of the Tribunal confirming that the Official Plan Amendment and Zoning By-law Amendment applications (the "Applications") filed with the City by Burlington 2020 Lakeshore Inc. (the "Applicant") with respect to its lands at 2020 Lakeshore Road (the "Subject Property") were "made" after the decision of the Minister of Municipal Affairs and Housing (the "Minister") approving and modifying Official Plan Amendment No. 48 ("ROPA 48") to the Region of Halton ("Halton") Official Plan ("Halton OP").

GROUNDS FOR THE MOTION

[5] Through the motion, the City seeks a ruling by the Tribunal that an application "made" under the *Planning Act* is only "made" once all materials required to be filed with the City pursuant to Section 22(4), 22(5), 22(6), 34(10.1) and 34(10.2) of the *Planning Act* and the Burlington Official Plan ("Burlington OP") are filed.

[6] The date the Applications are "made" will determine whether the Urban Growth Centre ("UGC") policies of the Halton OP apply to these Applications.

[7] The motion is made in the context of the decision of the Minister to approve ROPA 48 with modifications, pursuant to his authority under Subsection 17(34) of the *Planning Act* (the "Minister's Decision"). ROPA 48 moves the UGC in the Halton OP from Downtown Burlington (including the Subject Property) to an area centred around the Burlington GO Station (which does not include the Subject Property).

[8] The Minister's Decision includes a transition provision, which deems the UGC policies in Sections 80 to 80.2 of the Halton OP continue to apply to applications "made" by an applicant on or before the date of the Minister's Decision (i.e., November 10, 2021), if the lands that are the subject of the application were within an UGC prior to the date of the Minister's decision.

BACKGROUND AND CHRONOLOGY

[9] The Region is currently undergoing a municipal comprehensive review ("MCR") of the Regional Official Plan ("ROP") in accordance with s. 26 of the Planning Act. ROPA 48 is the first amendment as part of the MCR to bring the ROP into conformity with the current provincial plans and policies.

[10] The purpose of ROPA 48 is to define and provide direction on a regional urban structure and identify its components, including strategic growth areas, such as Urban Growth Centres ("UGC"), Major Transit Station Areas ("MTSA") and Regional Nodes.

ROPA 48 identifies a hierarchy of strategic growth areas in the ROP to help accommodate population and job growth to 2051 to conform with “A Place To Grow: Growth Plan for the Greater Golden Horseshoe, 2019”, as amended and effective on August 28, 2020 (the “Growth Plan”).

[11] In August 2020, the City requested that the Region adjust the boundary of the Downtown Burlington UGC to generally align with the lands in proximity to the Burlington GO Station.

[12] The Applicant is the owner of property municipally known as 2020 Lakeshore Road, Burlington (“Subject Property”) in the City’s Downtown area. Prior to the Minister’s approval of ROPA 48, the Subject Property was within the Downtown Burlington UGC.

[13] The Subject Lands are a 0.76-hectare parcel on the south side of Lakeshore Road between Brant Street and Elizabeth Street which currently contain a six-storey hotel with restaurant and associated surface parking lot.

[14] The Applications propose to demolish the existing hotel and restaurant and construct a new two-tower mixed-use building with maximum tower heights of 35 and 30 storeys and a six- storey podium (the “Proposal”) through amendments to the City’s OP and Zoning By-law 2020.

[15] The chronology of events relating to the Applications are as follows:

a. February 2021 - Region released ROPA 48 for public review. The draft instrument under consideration at that time proposed to shift the Downtown UGC north and remove the Downtown MTSA with no transition provision for existing applications being proposed.

b. April 28, 2021 - the City attended a pre-consultation meeting with the Applicant to determine the requirements for complete Applications to facilitate the Applicant's proposed development on the Subject Property.

c. May 5, 2021 - a pre-consultation package that was provided to the Applicant which identified materials required to file for the Applications to be deemed complete.

d. June 9, 2021, and June 16, 2021 - public consultation meetings were held.

e. July 7, 2021 - Halton Council adopted ROPA 48, which introduces 96 amendments to the Halton OP including Strategic Growth Areas, such as UGCs, Major Transit Station Areas ("MTSA"), Regional Nodes and Employment Areas.

f. October 22, 2021, which included the 29 materials, reports, and studies required in the PAC checklist. These materials included a Planning and Urban Design Rationale Report, dated October 2021.

g. October 26, 2021, the Applicant submitted the fees required to be paid to the City in connection with the Applications.

h. November 10, 2021, the Minister approved ROPA 48 with eight (8) modifications including the relocation of the UGC from Downtown Burlington to the area centred around the Burlington GO Station. Resulting in Downtown Burlington, including the Subject Property, would no longer be within an UGC or a MTSA.

i. November 23, 2021 - Burlington staff delivered Report No. PL-59-21 to Council. Report No. PL-59-21 recommended that Council deem the Applications incomplete, since certain required information and materials identified in the pre-consultation package had not been provided to the City

by the Applicant. These included: (i) a Phase Two Environmental Site Assessment; (ii) a Park Concept Plan; and (iii) an Angular Plane Study.

j. November 23, 2021- the City notified the Applicant in writing that the Applications had been deemed incomplete on the basis that not all of the information and materials required by the *Planning Act* and the Burlington OP had been submitted.

k. December 17, 2021 – The Applicant files the additional information and materials.

l. December 22, 2021 - Applicant filed a motion with the Tribunal seeking a determination by the Tribunal that the Applications, as filed on October 26, 2021, were made as of that date.

m. January 18, 2022 - Burlington Council at its meeting of January 18, 2022, deemed the Applications complete as of December 17, 2021, in accordance with ss. 22.1, 22(5) and 34(10.2) of the *Planning Act*.

TRANSITIONAL REGIME

[16] On November 10, 2021, the Minister approved ROPA 48 with eight modifications. Pursuant to subsections 17(34) and (36.5) of the *Planning Act,* the Minister's Decision is final and not subject to appeal.

[17] Sections 80 to 80.2 of the ROP, as amended by ROPA 48, provides the objectives and policies that apply to UGCs. The Minister's Decision also approved the adjustments to the UGC boundaries in Halton as shown on Map 1H and in greater detail on Map 6B (Downtown Burlington UGC / Burlington GO MTSA) as it relates to the City.

[18] Regional Official Plan Map 1H, as amended by ROPA 48, identifies that the

Subject Property is located within a Secondary Regional Node and not within a MTSA or UGC.

[19] In the decision to approve ROPA 48, the Minister added a new Section 80.3 to the ROP. This section provides a new transition provision for the adjusted UGC boundaries in Halton, as follows:

> Sections 80 to 80.2 continue to apply to applications for Official Plan Amendments, Zoning By-law amendments and draft plans of subdivision or condominium approvals **made prior to the approval by the Minister of Municipal Affairs and Housing of Amendment 48 to this Plan** if the lands that are the subject of the application are within an *Urban Growth Centre* prior to the Minister's approval of Amendment 48.

CITY'S POSITION

[20] Counsel for the City stated that the Applications did not meet the requirements as set out under Section 22.1 of the *Planning Act*, prior to the Minister's approval of Amendment 48 (November 10, 2021). The City stated its position that the Applications, as required by the *Planning Act* and the Burlington OP were only "made" once all materials been submitted pursuant to Sections 22(4), 22(5), 22.1, 34(10.1) and 34(10.2) of the *Planning Act*.

The Tribunal heard that Policy 15(1) of the Halton OP provides the same application in the process for amending the Halton OP as being in accordance with the *Planning Act* and deems that an application is only "made" once it is complete:

> *a.* 15(1) An application is ***made*** to Regional Council that is deemed to be complete with the necessary supporting information for the amendment.

[21] Counsel brought the Tribunal to the City of Burlington OP, Part VI, Sections 1.3 (f) and (h) which provides that, the information and material established at a pre-consultation meeting must be provided to the City by the applicant before the City considers applications for an Official Plan Amendment and/or a Zoning By-law Amendment to be complete under the Planning Act.

[22] Counsel outlined that this information and material can include, without limitation, the reports, studies and other documents listed in Part VI, Section 1.3 (f) of the Burlington OP. Counsel stated this constitutes "…other information or material that the council … considers it may need" as set out in Sections 22(5) and 34(10.2) of the *Planning Act*.

[23] With regard to the Zoning By-law Amendment, the City stated that while it is acknowledged that Section 34 of the *Planning Act* does not contain an equivalent provision to Section 22.1, it is of no consequence, since the Applicant's Zoning By-law Amendment will be required to conform to any Official Plan Amendment policies that may or may not be approved by the Tribunal.

[24] The City submitted that "received" and "made" are different words and that it is impossible for an application to be "made" before it is "received" by a Municipality. The City stated an applicant cannot "make" an application until the Municipality "receives" the materials in support of the application.

[25] It was the City's position that the Minister's Decision, including the modification the Minister made to ROPA 48 by inserting Section 80.3, must be interpreted in a manner that is harmonious with the provisions of the *Planning Act*. This includes Section 22.1 of the *Planning Act*, which expressly provides that an Official Plan Amendment application is not "received" until all of the information and materials required to be provided to the Municipality are, provided.

[26] Counsel emphasized that the additional information and materials outstanding were provided to Burlington Council through a Planning Report at its meeting of January 18, 2022, and which time the Applications were deemed complete as per the date when all the outstanding materials had been received, December 17, 2021, in accordance with Section 22.1, 22(5) and 34(10.2) of the *Planning Act*.

[27] The City illustrated to the Tribunal examples of case law to confirm that Section 22.1 of the *Planning Act* which defines a request for an Official Plan Amendment is

deemed to be complete when the information and materials prescribed (and the prescribed fee) are received by a Municipality:

[28] The Tribunal explained the legislative history of the complete application provisions in the case of 1535 Plains Road West Inc. v. Halton (Region), 2015 CarswellOnt 16047 (“1535 Plains Road”) at paragraph 41:

> “Bill 51 amended the [Planning] Act in 2006 to assist municipalities and the public so as to provide for clearer requirements that would establish when an application is "complete". **The intent was to provide for greater clarity and certainty to both parties**, and to provide for a level of discretion to the Municipality to request additional studies, as long as those studies are already identified in their official plan.”

[29] The City emphasized the fundamental importance of the complete application requirements outlined by the Tribunal predecessor, the Ontario Municipal Board, in the case of Top of the Tree Developments Inc., Re 2007 CarswellOnt 7921, [2007] O.M.B.D. No. 1116, 58 O.M.B.R. 113 at paragraph 4:

> “Whether the matter is considered to be complete is therefore of importance in this new planning regime. **If an application for an Official Plan Amendment is considered to be incomplete, it would not be considered further by the Municipality.** More importantly, unlike the situation prior to Bill 51, the statutory appeal period to the Board will not even commence to run.”

APPLICANT/APPELLANT POSITION

[30] The Respondent submits that:

a. The Applications were made on October 22, 2021, the date on which the balance of the Applications were filed with the City, and

b. The other Parties’ interpretation is incorrect and inappropriate.

[31] The Respondent maintains the other Parties have failed to properly interpret

Policy 80.3 added to ROPA 48 by the Minister's Decision. Instead, the other Parties have applied the principles of statutory interpretation to Section 22.1 of the *Planning Act* and argue that these principles warrant a restrictive reading of Policy 80.3.

[32] The Respondent elaborated that the official plans are not statutes and ought not to be interpreted as such. While the interpretation of an official plan is "not dissimilar" to the principles of statutory interpretation, the approaches are distinct from each other; official plans are to be afforded "a broad liberal interpretation with a view to furthering its policy objectives". Official plan policies are intended to be "flexible" rather than "prescriptive in their application".

[33] The Respondent submitted that when the ROP is properly interpreted, the Applications are subject to Policy 80.3. Policy 80.3 if an application is "made" prior to the Minister's decision, then Policies 80 to 80.2 continue to apply to the application. The emphasis in Policy 80.3 is on the date the application is "made".

[34] The Respondent stated that the policy language chosen by a decision-maker in an official plan is important, particularly where it provides a clear direction. The Minister did not specify that Policy 80.3 applies only to complete applications or to applications received prior to November 10, 2021; the Minister left the policy as unqualified.

[35] The Respondent maintains that if the Minister sought to limit Policy 80.3 to complete applications, then Policy 80.3 could have stated "…applications made…that is deemed to be complete"; the Minister did not limit the policy in such a manner.

[36] The Respondent acknowledged that some certainty may be sacrificed for this approach, adopting "a one-size fits all" solution to Policy 80.3 which would diminish the principles of "fairness" and the equitable nature inherent to a transition policy.

[37] It was the Respondent's submission that the purpose of Policy 80.3 as a transition policy is to recognize "persons who have been 'in the mill'" and protect them from the unfairness of changing rules "out of a sense of equity". The Respondent stated

that Policy 80.3 must accordingly be interpreted as a policy that could potentially restrict or remove potential rights if not applicable.

[38] He further submitted as a transitional policy, Policy 80.3 must address “stability, predictability, consistency, and fairness” concerns that arise both from the changing policy regime and the transition policy itself. He opined, this guidance requires balance as the purpose of Policy 80.3, is to equitably protect existing applications from the unfairness of removing lands from a UGC against the goals and objectives of the Urban Structure policies. The Urban Structure policies primarily being to manage growth by identifying the Regional Urban Structure, establishing population and employment forecasts, and establishing a framework for local municipalities to implement those forecasts.

[39] To balance these principles, the Respondent submitted is to recognize the date on which an application is made.

[40] The Tribunal heard clarity is imperative in the context of Section 22(6) and 22.1 of the *Planning Act*, which were both introduced by the legislature to address the historical uncertainty with respect to when an application is “received” under Section 22 of the *Planning Act*.

[41] The Tribunal was taken to an interpretation of the words “received” and “made” as being harmonious and also consistent with the modern approach to statutory interpretation, which provides that:

> “…the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the schedule of the Act, the object of the Act, and the intention of [the Legislature].”

[42] The Respondent took the Tribunal to the provisions which are enumerated through O. Reg 543/06 and O. Reg 545/06, requiring an applicant to provide various details regarding the application. This includes information about the property, the date of the application(s), and the purpose and nature of the requested amendments

(including consistency and conformity with higher-order policies).

[43] The Respondent stated these materials were provided as part of the 29 studies and reports submitted on October 22, 2021. The materials were prepared by Qualified Persons retained by the Respondent in accordance with Part VI, Policy 1.3(g) of the City OP which demonstrated the seriousness of the Applicant's intent as a formal request to the City, also meeting the definition of *development application* in the City OP.

[44] The Respondent argued that it would be a fair and reasonable interpretation to determine that Section 22.1 does not strike a submission period, and that the materials filed inclusive of the fees but without the benefit of the three reports required, could be argued to have fulfilled the requirement of the *Act*.

[45] The Tribunal heard submissions from both parties and reserved its decision.

ANALYSIS AND FINDINGS

[46] Having been provided a very thorough chronology of the submissions by both the Applicant and the City, the Tribunal prefers the position of the City and in doing so, grants the Motion.

[47] The issue is whether an incomplete OPA request would constitute an "application made" per Section 80.3 in ROPA. The further issue is how this interacts with Section 22.1 of the Planning Act, which provides that a request is "received" on the day the council receives all materials required per Section 22(4) and Section 22(5).

[48] The Section 22.1 of the *Planning Act*, introduced through the Smart Growth for Our Communities Act, 2015 (Bill 73) by the Legislature in 2015, clarifies that a reference in any Act or regulation to the day on which a request for an Official Plan Amendment is received shall refer to the day a complete application is filed and any applicable fees are paid.

[49] The purpose of the complete application requirements of the *Planning Act* supports the City's position that an application must be complete in order for it to have been "made" under Section 80.3 of ROPA 48. The purpose of Section 80.3 is to ensure that complete applications made prior to the Minister's decision to approve ROPA 48 would be processed in accordance with the provisions for UGCs.

[50] The Tribunal concurs with the City's interpretation of the complete application requirements in the *Planning Act* which underscores the critical nature of the moment in time that a complete application is received. The Tribunal agrees that until an application is complete the Municipality will not have sufficient information to make an informed decision. Before that moment, the application is neither complete, made, nor received.

[51] The Tribunal notes that the Minister's Decision, which is made under the *Planning Act*, cannot be separate from, and must be interpreted consistently with, the other policies of the *Planning Act*, including Section 22.1 which refers to the day on which a request for an Official Plan Amendment is received shall be read as a reference to the day on which the council or planning board receives the information and material required under subsections 22 (4) and (5), if any, and any fee under Section 69.

[52] The Tribunal's previous jurisprudence supports that, per Section 22.1, the request date of an OPA is the date complete materials are received by the Municipality. This is supported by the Tribunal's decision in *Paletta international Corp. vs. Burlington (City), 2020 CanLII 32071 (ON LPAT)* by Member Ng. It was the finding of the Tribunal, under Section 22.1, that the Request Date is clearly identified as the date that the Section 22(4) and (5) information and material, and the Section 69 fee, are received by the City.

[53] The Tribunal agrees with Member Ng's findings and concludes that Section 22.1 of the Act is quite pertinent to the issue at hand. It is this section that references and defines the 'made' in this case for an Official Plan Amendment which directly informs the transitional provisions that must be applied.

[54] In the Tribunal's view, Sections 22(4) and (5) are directed squarely to the matter now before the Tribunal, addressing specifically the question of whether or not a request for an OPA, without supporting technical reports, can acquire transitioned status. This is answered in the negative. Under Section 22 provisions, the City requested other information and material under Section 22(5) from the Applicant which were not provided until after the date the transition was applied.

[55] The Tribunal recognizes the Minister's Decision must be interpreted in the context of the Halton OP, which it amends through the introduction of Section 80.3. The Appellant made note of the applicability to apply the OPA and ZBA as not being an amendment of the ROP. While this is true, the wording of the ROP as a planning instrument and the definition of a complete application renders it important to establish consistency to that of the OP.

[56] Section 15(1) of the Halton OP provides that an application is only "made" when all of the required information is provided, and the application is deemed to be complete. Therefore, when interpreted in the context of the Halton OP, the Minister's choice of the word "made" in Section 80.3 is consistent with the policy that an application is only made when it is complete.

[57] In 2014, in the case of *Her Majesty the Queen in Right of Ontario v. Miller et al., 2014 ONSC 6131 (CanLII),* the Divisional Court agreed with the Tribunal that an incomplete application meets the term "request" in a transitional regulation. The Court also noted that Section 22(6) - by virtue of the Municipality having power to request for further information - supports a less restrictive reading of the word "request" to mean an application has to be complete. A couple months following that decision, the legislature added Section 22.1 to the *Planning Act*, which suggests that "receive" means a complete application. This could be seen as the legislature's response to the Miller case. The Tribunal made this observation (that Section 22.1 is a response to the Miller decision) not only in the Paletta decision above but also in *1535 Plains Road West Inc. v. Halton (Region), 2015 CanLII 66921 (ON LPAT),* which provides:

> "The Board is not often asked to delve into the to and fro between an Applicant and a Municipality in regard to the completeness of an application. Bill 51 amended the Act in 2006 to assist municipalities and the public to provide for clearer requirements that would establish when an application is "complete". The intent was to provide for greater clarity and certainty to both parties, and to provide for a level of discretion to the Municipality to request additional studies, as long as those studies are already identified in their Official Plan."

[58] Notably, these decisions were made in the context of an appeal involving both an Official Plan Amendment and a Zoning By-law Amendment and the Tribunal nonetheless determined that Section 22.1 of the *Planning Act* was determinative in the circumstances.

[59] As reflected in City Council's November 23, 2021 decision, the City reviewed the materials submitted by the Applicant and deemed the Application's incomplete. The City also returned the Applicant's application fee.

[60] This was the City's statutory right under subsection 22(6) of the *Planning Act* and its obligation under Part VI, Section 1.3(h) of the City OP, which provides that an application is not complete until all the prescribed materials have been provided.

[61] On December 17, 2021, the Applicant provided the City with the information and materials that had been identified as missing from the Applicant's October 22, 2021, submission, therefore, by operation of Section 22.1 of the *Planning Act*, the Applicant's request for an Official Plan Amendment was only received on December 17, 2021.

[62] The Tribunal is of the view that any finding otherwise would be inconsistent with the clear legislative intent of Sections 22(4), 22(5), 22(6), 22.1, 34(10.1), 34(10.2) and 34(10.3) of the *Planning Act* which are intended to provide clarity with respect to when an application is "received" and, therefore, "made" by the Applicant, while ensuring that a municipality has the quality and detail of information that it needs to allow for informed decisions to be made.

[63] On the evidence, the Tribunal finds that this date is, as the City submits, December 17, 2021, when the required further material and reports were finally

received by the City. Therefore, the Tribunal grants the Motion brought by the City.

ORDER

[64] **THE TRIBUNAL ORDERS** that the Official Plan Amendment and Zoning By-law Amendment applications filed with the City of Burlington by the Applicant Burlington 2020 Lakeshore Inc. with respect to its lands at 2020 Lakeshore Road are hereby deemed to have been made on December 17, 2021, subsequent to the decision dated November 10, 2021, of the Minister of Municipal Affairs and Housing approving and modifying Official Plan Amendment No. 48 to the Region of Halton Official Plan.

D. Chipman

D.CHIPMAN
MEMBER