

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



**ISSUE DATE:** March 10, 2016

**CASE NO(S):** PL150405

**PROCEEDING COMMENCED UNDER** subsection 17(40) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Hamilton Health Science Corporation  
Subject: Failure of the City of Hamilton to announce a decision respecting Proposed Official Plan Amendment No. OPA-14-017  
Municipality: City of Hamilton  
OMB Case No.: PL150405  
OMB File No.: PL150405  
OMB Case Name: Hamilton Health Science Corporation v. Hamilton (City)

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

Applicant and Appellant: Hamilton Health Science Corporation  
Subject: Application to amend Zoning By-law No. 6593 – Neglect of application by the City of Hamilton  
Existing Zoning: DE-2-'H'/S-1569 (Multiple Dwellings – Holding) District  
Proposed Zoning: Site Specific  
Purpose: To permit an expansion of the parking lot  
Property Address/Description: 201 Robert St & 166 Ferguson Ave N  
Municipality: City of Hamilton  
Municipality File No.: ZAR-14-035  
OMB Case No.: PL150405  
OMB File No.: PL150406

**Heard:** February 2016 in Hamilton, Ontario

**APPEARANCES:**

**Parties**

City of Hamilton

**Counsel**

J. Wice

Hamilton Health Sciences  
Corporation

S. Snider and A. Toumanians

### **DECISION DELIVERED BY J. V. ZUIDEMA AND ORDER OF THE BOARD**

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[1] Hamilton Health Science Corporation (“HHSC”) made site-specific applications for an Official Plan Amendment (“OPA”) and Zoning By-Law Amendment (“ZBA”) to the City of Hamilton’s (“City”) Secondary Plan, specifically the West Harbour/Setting Sail Secondary Plan (“Setting Sail”) and the City’s Zoning By-Law respectively.

[2] The purpose of the OPA was to modify the existing land use designation that permitted medium density residential uses to also include parking as a stand-alone use in order to expand the existing HHSC parking lot on Ferguson Avenue North (“the 640 lot”) to include two parcels, 201 Robert Street (“the Robert lot”) and 166 Ferguson Avenue North (“the Ferguson lot”) and collectively referenced as the “subject properties.”

[3] The purpose of the ZBA was to amend the existing zoning to achieve the same development as that described for the OPA.

[4] HHSC appealed under ss. 17(40) and ss. 34(11) of the *Planning Act* for City Council’s failure to make a decision within the statutory time periods for both the OPA and ZBA.

[5] On that point, the facts show that the City’s Planning Committee did make its decision on May 5, 2015, recommending the applications be denied. The matter was to go before City Council approximately a week later but in the interim, HHSC appealed to this Board.

[6] When the matter was before City Council, it endorsed the Planning Committee’s recommendation despite the appeals.

[7] Planning Staff for the City, through a report dated April 14, 2015, had recommended approval of the applications. Mr. Greg MacDonald, the author of the report appeared under summons by HHSC.

[8] On behalf of HHSC, I heard from the following witnesses:

- a. Ms. Brenda Flaherty, senior employee of HHSC and lay witness;
- b. Mr. MacDonald, City Planner appearing under summons, qualified and accepted as an expert witness in land use planning;
- c. Mr. Mark Conway, qualified and accepted as an expert in land use planning and as a land economist;
- d. Mr. Ed Fothergill, qualified and accepted as an expert in land use planning;
- e. Ms. Kelly Campbell, senior employee with HHSC and lay witness.

[9] On behalf of the City, I heard from:

- a. Mr. Edward (Ted) Davidson, qualified and accepted as an expert in land use planning.

[10] I heard from the following Participants, each as lay witnesses:

- a. Mr. Edgardo Moreno, a musician and abutting neighbour to the Robert lot;
- b. Mr. Rob Fieldler, a doctoral candidate in urban geography at York University and resident in the neighbourhood;
- c. Dr. John Neary, a physician with St. Joseph's Health Care and resident in the neighbourhood;

- d. Ms. Allison Chewter, a recent graduate of the University of Waterloo with a degree in Urban Planning and currently the President of the Beasley Neighbourhood Association.

[11] Further to reviewing all of the materials filed; hearing from expert and lay witnesses; hearing and receiving submissions from Counsel for the Parties and conducting site visits during standard business hours and off-peak hours, I determine that the appeals are dismissed. My reasons follow.

## **BACKGROUND**

[12] One of the themes running through the evidence provided by the residents of the area and the City was that what was occurring in this case was “piece-meal” or ad-hoc planning. There is some history to this proposal and it is useful to set out some of the background in summary form.

[13] Over a decade ago, the City initiated with extensive public consultation, the Setting Sail Secondary Plan for this area. The subject property falls within this Plan and as such, while there was an appeal of Setting Sail and some matters were and still are outstanding, despite the approval of the City’s new Urban Hamilton Official Plan (“UHOP”), it was agreed by the Planners that the operative policy for this matter was the Setting Sail Plan.

[14] Setting Sail identified a long term vision for this area. Over the years, the City had invested considerable time and money to see that vision move forward. There has been significant re-investment in this area as a result. Examples include the Wesley Urban Ministries buildings along Ferguson Avenue North and the Ferguson Bridge over the CN Rail Tracks facilitating a link from this area to the City’s waterfront. The City has also renovated the streetscape along Ferguson with interlocking brick street lay-by parking, wider boulevards and enhanced landscaping.

[15] Part of this vision was to identify the subject properties, along with another parcel, namely the 640 lot, as mixed use. The hope was that over time, commercial, retail and residential uses would be established.

[16] In 2009, an application was made by HHSC to permit the 640 lot along Ferguson to be used as a parking lot. The remaining two parcels, the Robert lot and the Ferguson lot, were to be severed but continue to be identified for medium density residential development.

[17] That earlier decision was challenged and residents in the area were concerned that this area, known as the Beasley Neighbourhood, already had too many surface parking lots – a criticism heard again at this hearing. The City, on that occasion however, supported the change but placed a holding provision to realize the completion of two eating establishments, a Tim Horton's and an A & W restaurant near the intersection of Barton and Ferguson. Those two restaurants now exist. The subject properties nonetheless were to remain as designated and identified for future residential development.

[18] The matter before me is a second attempt by HHSC to deviate from the policies of Setting Sail. On this point, I agree with the residents in this area that what in fact is occurring is an incremental "chipping away" of the broader vision identified for this stable albeit fragile neighbourhood.

[19] For this reason, I cannot support the proposed site-specific OPA and ZBA as in my estimation, this does not reflect good planning nor is it in the public interest.

### **NEED**

[20] Another theme which dominated this hearing was that the hospital needed the parking. I heard from Ms. Flaherty and Ms. Campbell, each is a senior bureaucrat but testified as laypersons on behalf of their employer.

[21] The evidence of Ms. Flaherty and Ms. Campbell can be summarized as follows:

- i. in order to attract the best employees, the hospital needs to provide adequate parking for those employees as many commute from outside the City;
- ii. the parking that HHSC currently has is deficient for its needs now and into the future. The existing parking garage located along Victoria Avenue North south of Birge St. along with other surface parking facilities are at 85% to 90% capacity;
- iii. the shuttle bus which HHSC runs to an off-site parking lot (the "Dafasco lot") approximately 3 km away is not ideal nor sustainable for the long term. It costs the hospital \$100,000 per year to run the shuttle. Lease costs for the Dafasco lot are donated back to the hospital. Employees do not pay to use the shuttle service. The shuttle adds 30 to 45 minutes to the commute and the hospital needs to consider this for the well-being of its employees.

[22] As employees of the hospital, I took their evidence as reflecting the operational needs of the hospital to continue providing high quality health care services to this community and to the broader public throughout the province.

[23] I heard from these witnesses that the need to locate more parking on the subject properties was a direct result of the construction and completion of the Ron Joyce Children's Health Centre ("RJCHC") formerly referred to as the McMaster Children's Health Centre.

[24] Because of the deadlines associated with funding from the Ministry of Health, the RJCHC needed to be completed within a specific timeframe or the hospital risked the loss of the funding. As such, the issue of how and where to replace the lost parking (from the RJCHC site), which parking served the entire HHSC campus not just RJCHC, would be addressed at a later time.

[25] Both hospital witnesses conceded that in looking back, this process was not

ideal. A solution could have been to construct a parking garage but that would cost 10 million dollars, money which the hospital does not have and for which the Ministry does not cover. The Ministry only funds surface parking.

[26] I asked Mr. Fothergill about alternative sites and options given that the shuttle to the Dafasco lot was not sustainable, and particularly whether any surrounding landowners with private parking had been approached to enter into a shared parking arrangement.

[27] His response was that he was “not sure of what other options were pursued” but only knew of the option to use part of the CN Rail lands north of the RJCHC but understood that they were not available. He did not provide any specific details concerning their unavailability.

[28] I also asked about details concerning the lease agreement with Mr. Hotz, the owner of the 640 lot and from whom the subject properties would be similarly leased. Mr. Fothergill had not seen the lease. This evidence arose when Mr. Fothergill was recalled as part of HHSC’s Reply case.

[29] Ms. Campbell testified following Mr. Fothergill; she was the last witness in HHSC’s Reply case. She explained that the hospital had in fact approached other landowners surrounding the subject property with a view to entering into a shared parking arrangement but the logistics did not work given the hospital’s needs.

[30] Specifically she mentioned that a neighbouring church was approached given that its parking lot remained empty on occasion but the church required its parking not only on Sundays, but on certain days during the week, so this arrangement would not be suitable.

[31] Ms. Campbell also explained that the lease agreement with Mr. Hotz provided for termination on notice with no penalty provisions whatsoever.

[32] I accept the hospital's evidence on its need for additional parking. What I did not get was how the proposed lots targeted to satisfy this need should be preferred over other parcels, options or shared parking arrangements in the vicinity. I appreciate that the parking garage option is simply too expensive and as such, not practical.

[33] The subject properties are located adjacent to existing residential neighbourhoods. What was lacking in the planning rationale from HHSC was the justification for this intrusion into the residential area in light of the Setting Sail policy which requires a sensitive and compatible approach to existing neighbourhoods.

[34] I did not receive from HHSC a comprehensive review of parking supply and availability in the area. I received evidence from Mr. Fothergill wherein he reviewed six sites including the proposal before me and of those six sites, four were located on lands within the Hamilton Hospital campus (Victoria Street parking garage, RJCHC on-site parking, 293 Wellington and 215 Barton on-site parking connected with the Wellness Health Building located at 293 Wellington) and the remaining two are those owned by Mr. Hotz (the 640 lot and the subject properties) [see Exhibit 3, Tab 1D, pg. 26].

[35] No expert review or analysis was done of available off-site parking other than that owned by Mr. Hotz. With respect, this myopic approach was not helpful.

[36] I accept Mr. Davidson's opinion that the proposal did not respect policy A.6.3.2.2 of Setting Sail which stipulated: "As changes in West Harbour continue, both on the water and in the neighbourhoods, it is important to: i) ensure new development respects and enhances the character of the neighbourhoods" and " iii) encourage compatible development on abandoned, vacant and under-utilized land .." [see Exhibit 1, Tab 20, pg. 538].

[37] To establish the need for parking is just one step. To rationalize and provide a planning justification to identify the location to fulfill the need is the next step. To simply suggest that the two parcels before me are a logical extension to the existing parking lot is not sufficient.



[38] Mr. Davidson raised these concerns in his evidence and opined that the hospital's operational needs should not surpass the policy direction with respect to the interface between the proposed parking lot and the adjacent residential uses. I accept and prefer Mr. Davidson's opinions in this regard.

### **COMPATIBILITY**

[39] This takes me to the third theme of this hearing and that is that the proposed redevelopment is not compatible with the surrounding residential uses.

[40] The first ground of incompatibility is the physical difference in grade elevation from the proposed parking on the Robert lot to the existing homes along Cathcart and Robert.

[41] The uncontroverted evidence was that a 1.8 metres ("m") retaining wall with a 1.8 m fence currently exists along the edge of the 640 lot where it meets with Cathcart and the Robert lot. Cars parking in the 640 lot adjacent to the retaining wall and fence at this location are significantly elevated from Cathcart at the intersection of Robert.

[42] Impacts of noise, pollution and headlights would presumably be mitigated by the same measures used for the 640 lot, namely a narrow landscape strip and privacy mesh woven into the chain-link fence above the retaining wall. This, in my estimation, is not acceptable nor does not carry forward the intent of the Setting Sail policy which directs new development to "enhance" the character of the neighbourhood.

[43] I heard from Mr. Davidson that the area is one of transition and while in the past, undesirable industrial uses may have existed in this area, it is changing and changing for the better. This was confirmed by my own site visits.

[44] I accept Mr. Conway's characterization of this neighbourhood that there may be a stigma associated with it. As he put it, the purchase of a house is typically the largest investment one makes and this area is just not at the point where one would make such a large purchase, at least not for another 20 years or so.

[45] However, Mr. Conway could not explain why a new residential apartment-style building was being constructed at 220 Cannon Street. This construction is approximately one block to the south of the Robert lot and a half-block to the south-east of the Ferguson lot.

[46] Hence I accept Mr. Conway's description of the area but I do not accept his prognosis that the area will not experience a demand for residential development for approximately 20 years. The development at 220 Cannon Street is a concrete example of the demand which currently exist in this area.

### **STERILIZATION OF PARCELS**

[47] Mr. Davidson suggested that by permitting the parking lot use to be established, the parcels would become sterilized for their intended use in future. Perhaps the term "sterilize" is too extreme but certainly, by establishing a parking lot in these two locations means that in the future, should these parcels redevelop for residential uses, a potential developer will bear the added expense of removing all, most or some of the infrastructure associated with the parking lot.

[48] While this may not "sterilize" the parcels, it does potentially pose another obstacle before the intended use, as identified in Setting Sail, is realized. On this point, I cannot agree that the proposed development serves the broader public interest.

### **USE OF VACANT OR UNDERUTILIZED PARCELS**

[49] There was no dispute that the 2014 Provincial Policy Statement ("PPS") encourages the use of vacant or under-utilized parcels, particularly when they are located in urban areas and have existing infrastructure, specifically municipal services.

[50] I heard from Mr. Fothergill that this redevelopment was consistent with the PPS because it sought to do exactly what is directed by provincial policy. Mr. Davidson, however, agreed with the thrust of the policy but explained that there must be a

sensitive and critical analysis done.

[51] In other words, while the proposal does make use of existing vacant and underutilized parcels, it cannot do so at the expense of the incompatibility which it creates. I agree. A balance must be achieved and in this case, the intrusion into the surrounding residential neighbourhood with an incompatible use does not strike an appropriate equilibrium.

[52] While I agree that the hospital provides a necessary public service, ensuring its employees have adequate parking in order to provide that service is an operational issue which the hospital is obligated to address. The shuttling of employees is not ideal but remedying this unfortunate circumstance should not come at the expense of the surrounding neighbourhood.

### **ORDER**

[53] For these reasons, the Board orders that the appeals are dismissed.

*“J. V. Zuidema”*

J. V. ZUIDEMA  
VICE-CHAIR

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