

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: November 04, 2021

CASE NO(S):

PL170714

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

Applicant and Appellant:
Subject:

Homestead Land Holdings Limited
Request to amend the Official Plan - Failure of the City of Kingston to adopt the requested amendment

Existing Designation:
Proposed Designated:
Purpose:

Central Business District
Site Specific (To be determined)
To permit the development of two property blocks which will include: 1) A 21-storey residential building with 180 dwelling units and a municipal parking garage. 2) A 21-storey mixed use building with 200 dwelling units and some retail/commercial office space

Property Address/Description:

51-57 Queen Street, 18 Queen Street and 282 Ontario Street

Municipality:
Approval Authority File No.:
OLT Case No.:
OLT File No.:
OLT Case Name:

City of Kingston
D09-039-2015
PL170714
PL170714
Homestead Land Holdings Limited v. Kingston (City)

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

Applicant and Appellant:
Subject:

Homestead Land Holdings Limited
Application to amend Zoning By-law No. 96-259 - Refusal or neglect of the City of Kingston to make a decision

Existing Zoning:
Proposed Zoning:

Specific Central Business System (C1-22(H))
Site Specific (To be determined)

Purpose: To permit the development of two property blocks which will include: 1) A 21-storey residential building with 180 dwelling units and a municipal parking garage. 2) A 21-storey mixed use building with 200 dwelling units and some retail/commercial office space

Property Address/Description: 51-57 Queen Street, 18 Queen Street and 282 Ontario Street

Municipality: City of Kingston

Municipality File No.: D14-146-2015

OLT Case No.: PL170714

OLT File No.: PL170715

Heard: March 29 to April 14, 2021 by video hearing and June 9, 2021 in writing

APPEARANCES:

Parties

City of Kingston

Homestead Land Holdings Limited

Frontenac Heritage Foundation

Counsel

Tony Fleming

Eileen Costello
Phillip Osterhout
Peter Dalglish
(student-at-law at the time of the hearing)

David Donnelly
Alexandra Whyte
Morgan Fletcher

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND S. BRAUN AND ORDER OF THE TRIBUNAL

[1] This is a dispute about the height of proposed buildings that are in an area designated for intensification and near cultural heritage resources.

[2] Homestead Land Holdings Limited (“Homestead”) wishes to redevelop two sites in the City of Kingston (“City”). In support of this ambition, Homestead applied for site-specific amendments to the City’s Official Plan (“OP”) and to Zoning By-law-No. 96-259.

[3] The City failed to make a decision on the applications and Homestead appealed these matters to this Tribunal.

[4] Discussion and review resulted in modifications to the proposals in the original applications. Homestead and the City have since entered Minutes of Settlement and the City appears in support of the revised proposals now before the Tribunal.

[5] The Frontenac Heritage Foundation (“Foundation”) appears in opposition to the Homestead proposals.

[6] The Tribunal allows the appeals in part, approves the OP Amendment filed as Tab 49 of Exhibit 2 in these proceedings, and amends Zoning By-law No. 96-259 in accordance with the Zoning By-law Amendment filed as Tab 50 of Exhibit 2 in these proceedings. These are the Tribunal’s reasons.

Balancing Heritage and Intensification

A Variety of Heritage Protections

[7] The City is proud of, and sensitive to, its heritage and has taken a number of steps to protect and preserve it. Those steps have been nuanced carefully and not all identifications of heritage areas and properties have equal protection. By providing a range of protections, the City has recognized the differences between various cultural resources and responded accordingly.

[8] The City has designated individual properties under the *Ontario Heritage Act*, which receive the higher protection for individual properties, and simply listed others in the City’s heritage directory.

[9] The City has adopted heritage conservation district plans and designated heritage character areas. The heritage conservation districts (“HCD”) have the most stringent requirements and protections. The heritage character areas (“HCA”) display important heritage characteristics but do not have the more stringent protection of an HCD with its adopted HCD Plan.

Designated Development Sites

[10] The City has also been careful to identify areas of growth and intensification to respond to housing and employment needs and contribute to a vital and robust downtown.

[11] The Homestead sites, while near the heritage resources, are within a separate policy area: the North Block Special Policy Area (“North Block”). This is an area identified by the City for intensification and development. The Homestead sites within the North Block are identified in the City’s OP as Major Development Sites. The sites are known as Block 3 and Block 5 and are brownfield sites used as surface parking lots.

[12] The Market Square HCD is a primary heritage destination in the downtown. Neither Homestead site is adjacent to the Market Square HCD. Block 5 is adjacent to the Lower Princess Street HCA. Block 3 is not adjacent to either an HCD or an HCA.

[13] The St. Lawrence Ward HCA is located to the west of Block 3 and separated from it by other properties. The Old Sydenham HCD is separated from Block 5 by the Lower Princess Street HCA and the Market Square HCD. It is even further away from Block 3.

Economic Fragility of the Downtown Area

[14] On consent, the evidence of Craig Desjardins was filed as written and unchallenged.

[15] Mr. Desjardins undertook an economic analysis of the Downtown trade area in a one-kilometre radius from potential residential development in the North Block. His conclusions are that the economic conditions in the Downtown are fragile and the Homestead mixed-use proposals are an important component to support economic recovery.

[16] Mr. Desjardins's evidence was relied upon by the City's expert planning witness in support of the proposals now before the Tribunal.

[17] Having come on consent and unchallenged at the hearing, the Tribunal accepts and relies on the evidence of Mr. Desjardins for an understanding of the economic circumstances of the Downtown and the role the Homestead proposals may play.

Evolving Proposals in an Evolving North Block Area

[18] The North Block Area was, historically, filled with industrial uses. The area is currently rather mixed. It contains some designated heritage properties, an arena, a fitness facility, a grocery and several surface parking lots.

[19] The Homestead applications have been the subject of considerable study, including various public meetings and feedback both from the public and from the City. The City's feedback has been informed by a multi-disciplinary independent peer review team. Homestead revised its proposals in response. A further iteration of the proposals in mid-2018 formed the basis for settlement with the City and the version of the proposals now before the Tribunal.

[20] The proposed developments are intended to contribute to meeting the City's housing supply needs, provide a mix of employment and residential uses, and be transit supportive. In this central location, the proposed development encourages walkability and active transportation.

[21] Block 3 and Block 5 are on opposite sides of Queen Street, offset from each other.

[22] The proposal for Block 3 is for a total of 19 storeys composed of a five-storey podium and a 14-storey tower that has a reduced floorplate. On Block 5, the proposal is now for 23 storeys composed of a seven-storey podium with a 16-storey tower. The floorplate for the Block 5 tower has also been reduced.

[23] The revisions to what was sought originally also include greater building articulation and podia detailing, along with additional proposed commercial uses at grade and provision for a municipal art gallery.

[24] The Minutes of Settlement, entered into between Homestead and the City, include additional design elements addressing colour and materials for the final design.

Compatibility

[25] Communities are not static; they evolve. The conservation of cultural heritage resources brings the past into the present and helps shape the physical expression of a community. Growth and intensification respond to the community's current needs and planned function for the future; they also help shape the physical expression of a community.

[26] In planning for both heritage and for growth, the challenge is to find the right balance to achieve both elements of a community's ambition. The compatibility provisions in the OP, the applications of which have informed the proposals now before the Tribunal, are the mechanism used by the City to achieve that balance.

[27] Land use compatibility principles are set out in policy 2.7 of the OP. The OP defines compatible as capable of co-existing in harmony, not having an undue physical

or functional adverse impact on development in the area, and not posing an unacceptable risk to environmental or human health.

[28] The Tribunal distils the principal concerns about adverse impacts to the following: visual intrusion and height, shadowing and height, and environmental degradation and climate change.

Visual Intrusion and Height

Height and Design

[29] When identifying Blocks 3 and 5 for major development, the City did not impose maximum building heights. Instead, the City has relied on compatibility provisions in its OP. Those provisions specifically contemplate heights greater than 25.5 metres (“m”) for development that is able to co-exist compatibly with its surroundings. Utilizing this approach, compatibility is achieved through design and not through a blanket height limit.

[30] The reference points for compatibility are set out in s. 3.18.22, which recognizes the special status of the North Block. At s. 3.18.22 (a), the OP requires an urban design study that demonstrates compatibility with the surrounding built form context.

[31] An urban design study was undertaken, peer reviewed by the City and resulted in modifications. With the adjustments made to the original proposal, and the further detailed work contemplated by the requirements of the Minutes of Settlement, the Tribunal finds that the proposals are compatible with their respective surrounding built form and context.

Height and Views

[32] There are three areas of concern regarding height and views that were advanced by the Foundation. One concern is whether the towers may be seen from within the Market Square HCD, negatively impacting this HCD. A second concern is whether the towers disturb pedestrian enjoyment along the street. A third concern is whether the buildings interfere with OP protected views of the water.

The Market Square HCD

[33] The Market Square HCD is a broad, open, largely paved area edged with the historic City Hall and generally low-rise buildings. It includes some surface street parking and supports various seasonal activities. Standing in the middle of the Market Square HCD, and depending on the direction in which one looks, a pedestrian will likely see some existing taller buildings in the distance.

[34] The Homestead development sites are about two blocks away from the Market Square HCD. The Tribunal agrees that the proposed towers will be seen, again depending on the viewing direction and line of sight, but disagrees that they are either close enough or tall enough to have a negative impact on this HCD.

Pedestrian Enjoyment

[35] The pedestrian experience along the streets that edge Block 3 and Block 5 responds to the podium on which each tower sits. The podia are to be designed to enhance visual interest and contribute to the animation of the street. This is done primarily through the City requirement that ground floor uses should be commercial and not residential. A municipal art gallery is comparable to a commercial use, in that it also enlivens and animates the street.

[36] Even viewing the towers over the height of the podia would require the pedestrian to crane her neck to look up, a posture not conducive to enjoying the streetscape. The towers might be able to be seen more easily at a distance, depending on view direction and line of sight.

[37] The Tribunal is not persuaded that there is a negative disturbance of the pedestrian experience, whether the pedestrian is viewing the towers from within the North Block or from within an HCD or HCA.

[38] Simply being able to see something, or simply knowing that it is there, does not constitute an adverse impact that warrants further modifications or mitigation.

Protected Views

[39] Finally, there is the matter of protected views of the water. The City has identified the views to be protected and has included them in its OP. The protected views are mapped on Schedule 9 of the OP. They follow several streets that provide what are essentially corridor views along the streets to the Kingston Harbour. Neither Block 3 nor Block 5 cross or impede any of these protected views.

[40] The Kingston Harbour remains an important attraction that can be viewed and enjoyed.

Shadowing and Height

[41] Shadowing is partly a function of height but is also partly a function of floorplate size. In the vernacular, the choices are often squash and spread or squeeze and soar.

[42] A shadow study was submitted with the original proposal. The City also reviewed the updated shadow modeling as part of the settlement proposal.

[43] Shadows cast by the podia are comparable to the shadows that would be cast by the existing as-of-right development permissions. Shadows from the tower elements have been reduced through tower placement and the reduced floorplate size.

[44] Block 5 is to the north of the Lower Princess Street HCA. With shadows thrown primarily to the north, the Tribunal finds no adverse impacts from shadowing on this HCA.

[45] Block 3 is located to the west of Block 5, on the north side of the street, and east of the St. Lawrence Ward HCA. The location of the tower on Block 3 and the reduced floorplate reduces shadowing on the neighbourhood to the west. The Tribunal finds no adverse impacts from shadowing on this HCA that would require further mitigation.

Environmental Concerns

[46] The Homestead proposals will remediate and redevelop two brownfield sites. A Record of Site Condition is required prior to the issuance of any building permit and there are no natural features on the sites or on adjacent lands.

[47] Parking on site for the developments is intended to serve both the residential and commercial uses in the two mixed use buildings. The amount of parking meets the City's parking standard and no increase is being sought. These Downtown sites have transit readily available and support active transportation in a walkable area.

An Alternative Proposal

[48] The Tribunal had before it an alternative proposal, the main point of which is that the possible building shown was shorter. The witness presenting this alternative admitted that the proposal was not fully refined, not subject to application review by the City, not prepared in conformity with the OP requirement that commercial and not residential should be at grade, and not intended to be equivalent to the detailed work

necessary for an application for either official plan or zoning by-law amendment. Rather, the Tribunal was advised that the alternative concept was prepared with the thought that it would be used in negotiation and possible settlement discussions with the City and Homestead.

[49] These gaps in the alternative proposal are not pivotal to the Tribunal's consideration in attaching no weight to this alternative proposal. What is pivotal is what is before the Tribunal to decide. There may well be other ways to implement an applicant's program or a municipality's ambition for its community. The Tribunal is not charged with deciding on the merits of alternative proposals. The Tribunal must consider and analyze the applicant's proposal to determine if it meets the appropriate criteria, requirements and tests.

[50] While the Tribunal supports and encourages settlement discussions, the hearing room is not the forum for settlement discussions. A proposal specifically intended for settlement discussions did not assist the Tribunal in deciding this matter.

Case Law Considered

[51] The Foundation put two cases before the Tribunal: *Burfoot v. Kingston (City)*, 2018 CanLII 107780 ("*Burfoot*") and *Aurora (Town) v. Sikura*, [2011] O.J. No. 6007, 2011 ONSC 7642 ("*Aurora*").

Burfoot v. Kingston (City)

[52] The Tribunal distinguishes *Burfoot* as being inapplicable and of no assistance to the Tribunal in this case.

[53] *Burfoot* dealt with a zoning by-law amendment for a proposed development at 223 Princess Street. The City adopted the requested zoning by-law amendment, which was appealed to this Tribunal. Unlike the case at hand, the City did not appear at the

hearing of the merits. The Tribunal allowed the appeal and repealed the amendment to the zoning by-law.

[54] 223 Princess Street is not within the North Block and was not designated as a Major Development Site. Moreover, 223 Princess Street is a through block and is within two HCAs: the Lower Princess Street HCA and the St. Lawrence Ward HCA.

[55] The zoning by-law amendment was not accompanied by an OP amendment, as is now before the Tribunal.

Aurora (Town) v. Sikura

[56] This was an application by the Town for leave to appeal the Tribunal's decision regarding an appeal of an OP amendment adopted by the Town. The Tribunal allowed the appeal of the OP amendment. The Court dismissed the Town's application for leave.

[57] Section 2.1 of the *Planning Act* ("Act") sets out the requirement that the Tribunal have regard to the decision of City Council and the materials and information considered by Council in making its decision. Part of the Town's reasons in support of its application for leave was the suggestion that the Tribunal did not have proper regard to the decision of the Town in adopting the OP amendment.

[58] In dismissing the application for leave, the Court followed *Ottawa (City) v. Minto Communities Inc.*, [2009] O.J. No. 4913 in its analysis and conclusions regarding interpretation of this section of the Act.

[59] The Homestead appeals are appeals of the non-decision of City Council. The settlement, papered in the Minutes of Settlement, is a subsequent decision of City Council. In considering s. 2.1 and the non-decision followed by the later settlement, the

Foundation asks the Tribunal to provide “minimal deference” to the settlement decision and to have regard to the fact of the non-decision.

[60] While the Court in *Aurora* used the phrase “minimal deference”, the Tribunal prefers a different descriptor. The Tribunal understands the requirement of s. 2.1 to be to review and consider carefully the decision of Council and consider the information and materials before it when its decision was reached.

[61] The only thing that can be said about a non-decision is that Council took no decision initially. The only decision of the City Council available to the Tribunal to have regard to is the decision of the City Council which settled its dispute with Homestead.

[62] The Foundation expressed the concern that the settlement decision was reached in a closed session. Since litigation, in the form of Homestead having filed its appeal was already underway, the Tribunal wonders how else the City Council would have been able reasonably to consider a settlement proposal and debate it.

[63] Three other aspects to the settlement decision are important here. First, it is the only decision and, therefore, the only decision to which the Tribunal may have regard. Second, a full case was called at this hearing, with evidence on which the Tribunal relies. Third, the Joint Book of Documents of Homestead and the City, filed as Exhibit 2 in these proceedings, contains extensive materials regarding the Homestead applications and its evolution that resulted in the final Minutes of Settlement with the City.

[64] The Tribunal finds that the fact of a settlement decision being taken in closed session in the context of ongoing litigation is of no relevance to this decision, based as it is on the extensive materials and evidence filed in these proceedings.

The Statutory Requirements

Matters of Provincial Interest

[65] Section 2 of the Act sets out the matters of Provincial interest to which the Tribunal must have regard. The Tribunal has done so and finds that the matters before the Tribunal meet the relevant matters set out in s. 2. The Tribunal notes particularly s. 2(d) on the conservation of features of significant cultural and historical value, s. 2(h) on the orderly development of safe and healthy communities, s. 2(j) on the provision of a full range of housing, s. 2(k) on the provision of employment opportunities, s. 2(l) on the protection of the financial well-being of the municipality, s. 2 (p) on the appropriate location for growth and development, s. 2(q) on development that is designed to support public transit and be oriented to pedestrians, s. 2(r) on the promotion of built form that is well-designed and s. 2 (s) on the adaptation to a changing climate.

Regard to the Decision of the City Council

[66] The Tribunal has discussed its application of the requirement to have regard to the decision of the City Council that is set out in s. 2.1, above. The Tribunal has had regard to the decision of the City Council and considered it carefully and fully in making its findings in these matters.

Provincial Policy Statement

[67] Section 3(5) of the Act requires the Tribunal to make a decision that is consistent with the Provincial Policy Statement (“PPS”) in effect at the time of the decision. The PPS 2020 is now in effect.

[68] The PPS calls for development in settlement areas. In policies 1.1.3.2 and 1.1.3.3, the PPS is clear that municipalities should establish land use patterns that identify areas for intensification. The Tribunal finds that the City has done so with its

identification of the North Block and the designation of Block 3 and Block 5 as Major Development Sites.

[69] While the Tribunal finds that these two sections of the PPS focus on land use patterns rather than built form compatibility, the Tribunal also finds that questions of built form compatibility in this case have been carefully considered by the City and set out appropriately in the OP.

[70] Policy 1.8.1 deals with energy conservation and the impacts of climate change. It emphasizes active transportation and transit-supportive development. Foundation witnesses expressed the opinion that the parking to be provided was not consistent with the thrust of the PPS. The Tribunal has already noted above that the parking to be provided is for both the residential and the commercial uses on the sites and conforms entirely to the City's parking standard. No relief to pierce the standard is being sought.

[71] The Tribunal finds that the instruments before it in these proceedings are consistent with the PPS 2020.

Official Plan Requirements

[72] When reviewing proposed amendments to the City's OP, there are two important policies to be considered. They are policy 9.1.3 and policy 9.3.2 and are in addition to the compatibility criteria discussed above.

Policy 9.1.3 Comprehensive Review

[73] This policy is intended to set the framework for review of proposals involving OP Amendments. Central to the policy is the integrity of Section 2, the Strategic Policy Direction of the OP. If Section 2 is to be amended, then the OP Amendment is to be considered only in the context of a comprehensive review of the OP. No such amendment is before the Tribunal in these proceedings.

[74] The Foundation's planning witness held the opinion that an amendment to Section 2 is required because, in his opinion, the compatibility criteria in s. 2.7.3 could not be met.

[75] The Tribunal has already analyzed the proposals in terms of the compatibility requirements and found these proposals meet those requirements. As such, the Tribunal further finds that no amendment to Section 2 is required. With no requirement for an amendment to Section 2, there is no need to hold consideration of this OP Amendment until there is a comprehensive review.

Policy 9.3.2 Criteria for all Official Plan Amendments

[76] In this policy, the OP sets out general criteria to be met by all proposed OP Amendments.

[77] Located within the North Block, and designated as Major Development Sites, the Tribunal finds that the lands are available and suitable for the proposed use.

[78] On the earlier analysis, the Tribunal finds that the proposal meets the criteria for compatibility.

[79] The Tribunal finds that the proposal supports and enhances the City's efforts to protect the economic viability of the Downtown, meets the City's interest regarding financial implications of costs and revenues, and will not lead to instability.

[80] The Tribunal finds that the proposal will support and enhance existing and planned infrastructure.

[81] The Tribunal finds that the proposal is reasonable and appropriate and does not constitute an undesirable precedent.

[82] On the foregoing analysis and findings, the Tribunal finds that the proposed OP Amendment conforms to the general intent and philosophy of the City's OP.

ORDER

[83] The Tribunal orders that the appeals by Homestead Land Holdings Limited are allowed in part and:

1. The City of Kingston Official Plan is modified by the Official Plan Amendment found in Tab 49 of Exhibit 2, and as so modified is approved.
2. By-law No. 96-259 is amended in accordance with the Zoning By-law Amendment found in Tab 50 of Exhibit 2.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
VICE-CHAIR

"S. Braun"

S. BRAUN
MEMBER

Ontario Land Tribunal

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