

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: May 19, 2021

CASE NO(S): PL171205

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Applicant and Appellant:	4005 Hickory Drive Limited
Subject:	Application to amend Zoning By-law No. 0225-2007 - Neglect of the City of Mississauga to make a decision
Existing Zoning:	O Zone (Office)
Proposed Zoning:	RM9-XX with site specific exemptions
Property Address/Description:	4005 Hickory Drive
Municipality:	City of Mississauga
Municipal File No.:	OZ 17/006
OMB Case No.:	PL171205
OMB File No.:	PL171205
OMB Case Name:	4005 Hickory Drive Limited v. Mississauga (City)

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

Applicant and Appellant:	4005 Hickory Drive Limited
Subject:	Request to amend the Official Plan - Failure of the City of Mississauga to adopt the requested amendment
Existing Designation:	Office and accessory uses
Proposed Designation:	Residential Medium Density
Property Address/Description:	4005 Hickory Drive
Municipality:	City of Mississauga
Approval Authority File No.:	OPA 17/006
OMB Case No.:	PL171205
OMB File No.:	PL171300

Heard: February 1, 2021 by video hearing

APPEARANCES:

Parties

Counsel

4005 Hickory Drive Limited

Max Laskin

City of Mississauga

Marc Kemerer

Nina Rubino

Barry Horosko (settled and withdrawn)

DECISION DELIVERED BY JATINDER BHULLAR AND INTERIM ORDER OF THE TRIBUNAL

[1] This was a hearing of the appeals by 4005 Hickory Drive Limited (“Applicant/Appellant”) under s. 22(7) of the *Planning Act* (“Act”) from the refusal of the City of Mississauga (“City”) of an application for an Official Plan Amendment (“OPA”), and under s. 34(11) of the Act for an application for a Zoning By-law Amendment (“ZBA”).

[2] The property is located at the northeast corner of Burnhamthorpe Road East and Hickory Drive in the City of Mississauga (“subject lands/Site”) and is municipally known as 4005 Hickory Drive. The subject lands are approximately 7,937.17 square metres (“sq m”) in size, with frontage of 71.86 metres (“m”) along Hickory Drive and frontage of 71.96 m along Burnhamthorpe Drive East.

BACKGROUND

[3] The subject Site is part of the Rathwood-Applewood Community Node Character Area (“RCN”) as delineated in the City of Mississauga Official Plan (“MOP”). It is part of an established area with a mix of land uses, including medium and high-density residential uses, commercial uses, some offices and community and recreational uses.

[4] The subject lands are zoned "O" pursuant to Zoning By-law No. 0225-2007, as amended. The lands zoned "O" permit office and accessory uses. The Applicant/Appellant seeks to rezone the subject lands to H-RM9 (Horizontal Multiple Dwellings with more than 6 dwellings - Exception) to permit medium density development.

[5] The Applicant/Appellant proposes to build 102 stacked and back-to-back townhouses in a cluster of five blocks around a central outdoor amenity space. Of the five blocks, two will face Burnhamthorpe Road. These will replace the existing single storey multiple-unit office space and above ground parking area.

[6] Whereas City staff recommended approval of the applications, the City planning committee recommended refusal citing that the proposal is not in keeping with the single-family detached homes; potential negative traffic impacts; and that the proposal represents overdevelopment at the site.

PRELIMINARY

[7] Counsel for party Nina Rubino informed the Tribunal at the start of the hearing that they have reached a settlement regarding all of their issues and had so informed the Tribunal and all the parties on March 13, 2020, of their intent to withdraw from the hearing.

[8] The Tribunal accepted the request of Nina Rubino and the Tribunal ordered that this party had no further standing in the proceeding.

WITNESSES

[9] The Applicant/Appellant presented Jane McFarlane, a registered professional planner and Mark Sterling, an urban designer. The Applicant/Appellant also called Marianne Cassin, a planner at the City under summons.

[10] The City presented Edward Davidson, a professional planner.

EVIDENCE

[11] Mr. Davidson opined that the subject Site should be developed as mixed use and not sole residential use as proposed. He stated that the MOP recognizes Urban Growth Centres where sole residential developments for particular sites are allowed. He stated that the sites within the RCN do not have such flexibility. Ms. McFarlane opined that the RCNs are considered a character area. Ms. McFarlane added that in the RCNs, not each and every building can be expected to have all aspects of commercial, employment and residential always present. Ms. McFarlane opined that within the RCN there are many examples of residential only, commercial only as well as mixed use. Ms. McFarlane opined that the targets set for the RCN are achieved across the whole of the node and cannot be used to restrict developments as proposed. Ms. McFarlane further opined that there are many opportunities for a different mix of developments across the development as well as reimagining of the existing mall which has large amounts of surface parking.

[12] Mr. Davidson in reviewing the applicable policies in the Growth Plan for the Greater Golden Horseshoe 2019 (the "Growth Plan"), stated that whereas the subject Site is identified as a designated area for intensification, he emphasized that a mix of retail and service uses is also envisioned and the proposal does not consider this direction. Ms. McFarlane re-iterated that for RCNs, the policies are applicable across a collection of various developments and that each development is not directed or

envisioned to provide components of each and every type, vis-a-vis, commercial, employment, retail, residential, etc.

[13] Mr. Davidson opined that the proposal will cause a significant reduction in the number of jobs that could be accommodated at the subject Site. Mr. Davidson referring to policy 2.2.5.14 in the Growth Plan opined that retention of the same number of jobs is required. Mr. Davidson opined that hence the conversion from office to residential does not conform with the Growth Plan. Mr. Davidson added that any such conversion is only possible through a due Municipal Comprehensive Review (“MCR”). Mr. Davidson postulated that it could be as little as a loss of ten office jobs capacity or ten jobs. However, during cross-examination, when asked about policy 5.2.3.2 in the Growth Plan, Mr. Davidson concurred that there was no specific direction to carry-out an MCR on a site-specific basis. The Growth Plan defines an MCR as:

Municipal Comprehensive Review

A new official plan, or an official plan amendment, initiated by an upper- or single-tier municipality under section 26 of the Planning Act that comprehensively applies the policies and schedules of this Plan.

Under questioning Mr. Davidson admitted that he has not come across a situation in his decades of experience as a planner where an MCR was conducted on such site-specific applications.

[14] Ms. McFarlane opined that conversion of office or employment to residential use is not prescriptive in policy 2.2.5.14 of the Growth Plan which states:

Outside of employment areas, development criteria should be established to ensure that the redevelopment of any employment lands will retain space for a similar number of jobs to remain accommodated on site.

Ms. McFarlane opined that the MOP in response to this direction only addresses conversion of employment lands to other uses in Employment Areas. She stated that that the subject Site is not part of an employment area.

[15] Mr. Davidson stated that the subject Site is presently designated as “Office” and inherently provides employment uses. Mr. Davidson opined that policy direction requires the same number of jobs to be secured in any redevelopment of such sites. Mr. Davidson cited Section 5.3.3.5 of the MOP as follows with respect to policies in a community node:

Development applications within a Community Node proposing a change to the designated land which results in a significant reduction in the number of residents or jobs that could be accommodated on the site, will not be permitted unless considered through a municipal comprehensive review.

[16] Mr. Davidson argued that the subject Site could potentially have been developed in the form of live-work units. Mr. Davidson did agree that there is a potential for live-work in the proposed development as remote working is becoming more common. Ms. McFarlane stated the subject Site has been sitting vacant for nearly three years. She added that there is an adjacent commercial-only development already approved and many other such sites exist within the RCN with vacant space available for occupancy. Ms. McFarlane opined that the RCN is not part of the designated employment zones in the City where the protection of jobs is mandatory or otherwise strongly controlled through the MOP and associated planning framework instruments. Ms. McFarlane further added that there is no identified shortage of office space in Mississauga.

[17] Ms. Cassin addressed the issue of office and employment conversions raised by Mr. Davidson. She stated that such concerns have been addressed in OPA 115; albeit not yet in force and effect, which was driven by the City’s initiative for re-imagining the malls. Ms. Cassin stated that policy 13.2.7 recognizes loss of space and “does not prohibit but discourages” such scenarios and requires due and diligent consideration of overall planning and development principles prior to any changes or approval. She added that the discouraged qualifier leads for land use planning to pay attention to ensure that the proposal represents good planning and meets the overall intent of the plan and conform with it. Overall Ms. Cassin opined that the City staff recommended approval of the proposal and she concurs as to the proposal representing a reasonable

and appropriate development in the RCN; that it will not destabilize the RCN, and in fact will add to full lifecycle employment and other opportunities in the RCN while being situated on key transit bus routes.

[18] Mr. Davidson opined that the proposal does not adequately address community node policies. He stated that the requirement for between 100 residents and jobs combined per hectare (“ha”) is not achieved. He emphasized that the RCN falls far short of the employment ratio set in the MOP. He added that the direction in the MOP is for the population to employment ratio to be between 2:1 to 1:2.

[19] Ms. McFarlane, in review of the 100 residents and jobs per ha, opined that this is a target for the RCN. She added that there are large amounts of redevelopment opportunities that will all contribute towards the RCN objectives for 100 residents and jobs per ha as well as in meeting the target ratios for population to employment. Ms. McFarlane added that it simply leads to absurd considerations if every development is individually forced to have all the proper mixes of commercial, employment and residential components. Ms. McFarlane emphasized and re-iterated her opinion that such considerations are managed across the whole RCN and not site by site.

[20] Mr. Davidson stated that the proposal does not provide for appropriate transitions with respect to the adjoining properties and landscapes. Mr. Sterling provided sole expert evidence with respect to urban design issues. Mr. Sterling opined that the development represents one of the best examples of incorporating the latest design principles of good urban design. In the consideration of transitions, Mr. Sterling opined that the necessary adaptations have been done to align the proposal with adjacent properties through generous setbacks and alignment of access driveway to the Sunrise access on the opposite side of Hickory Drive.

[21] Mr. Sterling reviewed and provided further details on urban design. He cited how the proposal incorporates an open facade and visibility towards public streets, has

amenity space that enhances sense of community and facilitates social activities. Mr. Sterling added that the proposed addition of a public boulevard along Hickory Drive in front of the subject Site adds to vibrancy and public access. Mr. Sterling added that setbacks and buffer from the multiuse pedestrian trail on the north side of Burnhamthorpe Road is provided for better public realm and will also provide easy access to the trail for future residents.

[22] Beyond the differences of expert opinions and associated evidence discussed so far, there was general consensus among the experts that in all other aspects the proposal has regard for the provincial interest, is consistent with PPS 2020, conforms with the Growth Plan, conforms with the Regional Municipality of Peel Official Plan (“POP”) and MOP policies.

[23] Ms. McFarlane opined that the proposal has regard for the provincial interest as required per s. 2 of the Act. She stated that overall the introduction of horizontal multiple dwelling units to a site located within Community Node and in proximity to a Corridor has appropriate regard for matters of Provincial Interest, including matters respecting the efficient use of services, the adequate provision of a full range of housing, the appropriate location of growth and development, and the promotion of transit and pedestrian-supportive development.

[24] Ms. McFarlane opined that the proposal is consistent with the PPS 2020. She emphasized the policies which direct growth through intensification, the sustenance of healthy, liveable and safe communities. She opined that the proposal supports multiple housing types, amenity space, and various means of pedestrian, bicycle and automobile access suitably deployed. Ms. McFarlane illustrated that the Subject Site is surrounded by good public park access, library, commercial centre, recreational facilities which are already in place for easy access and use of the future residents.

[25] Ms. McFarlane in conclusion of her review of the PPS 2020 opined that the proposal provides for efficient intensification of an underutilized lot. She added that efficient land use patterns as supported by the proposal is highly desired in the context of the PPS 2020.

[26] Ms. McFarlane opined that the proposal conforms with the Growth Plan. She stated that the development is situate within a settlement area. She added that the development is also located within a strategic growth area with well served transit infrastructure. She stated that the proposal will contribute towards meeting the minimum intensification targets for the City.

[27] Ms. McFarlane opined that the proposal conforms with the policies in the POP. She demonstrated the conformity through review of policies related to redevelopment in the Urban System and growth management through compact form of housing that improves the mix of housing types.

[28] In review of the MOP, Ms. McFarlane opined that the proposal being located in the RCN is identified as an intensification area. Emphasizing the planning rationale that RCN policies need to be applied holistically across the RCN area, Ms. McFarlane opined that the proposal helps towards the RCN objective of between 100 and 200 residents and jobs combined per hectare. She also opined that the proposal contributes towards the ratio of population to employment across the RCN to be 2:1 to 1:2 measured as an average across the entire RCN area.

[29] Ms. McFarlane opined that the proposal is in character with the context of other land uses in the area as is to be expected in a community node like the RCN. She added that the proposal adds to better architected housing types which provide open presence across the public realms. Depending upon the expert testimony of Mr. Sterling, Ms. McFarlane opined that the proposal design meets the good design, built form and public realm directions in the MOP.

[30] In reference to the OPA requested by the Applicant/Appellant, Ms. McFarlane stated that the subject Site is presently designated "Office". This designation restricts uses to major office, secondary office and accessory uses. She stated that the lands adjacent to this site are within the "Residential Medium Density" designation and this permits townhouse dwellings and all forms of horizontal multiple dwellings. Ms. McFarlane reviewed and presented details regarding the evaluation criteria for amendments to be allowed in the context of a MOP as per policy 9.5.1. She opined that the OPA conforms to and meets the policy directive.

[31] Ms. McFarlane in conclusion regarding the MOP opined that proposed re-designation and ZBA are appropriate and will support the intensification and complete community objectives for the RCN as directed by the MOP.

[32] In review of the ZBA, Ms. McFarlane stated that to rezone from Office – 'O' to Horizontal Multiple Dwellings with more than six Dwelling Units – 'RM9' is needed for the proposed development. Additionally, certain changes to site-specific standards are needed. She reviewed all the deviations in details and opined that these will not conflict with and maintains the intent and purpose of the Zoning By-law No. 0225-2007.

[33] Ms. McFarlane in review of the totality of evidence opined that the proposed development represents a desirable development which espouses good land use planning.

ANALYSIS

[34] For the OPA the Tribunal needs to determine the following:

- a. Does the proposal have regard for the provincial interest per s. 2 of the *Planning Act*?

- b. Is the proposal consistent with the Provincial Policy Statement 2020?
- c. Does the proposal conform with the Growth Plan for the Greater Golden Horseshoe 2019?
- d. Does the proposal conform with Regional Municipality of Peel Official Plan?
- e. Does the OPA maintain and not conflict with the general intent and purpose of the Mississauga Official Plan?
- f. Does the proposal represent good land use planning and is it desirable?

[35] The Tribunal notes having received and reviewed all the evidence that major differences of opinion between Ms. McFarlane and Mr. Davidson centre around the conversion of an “office” designation property to residential uses. Mr. Davidson referring to the PPS 2020, the Growth Plan, and the MOP declares that this is not allowed and an MCR type exercise is required for any change of such designation. Mr. Davidson also highlights the population to employment ratios as being not complied with by the proposal. Ms. McFarlane counters that MCRs are not an exercise directed towards such smaller development and site-specific amendments. She also adds that the RCN parameters need to be considered across the whole RCN and not transposed into a site application. Based on the review of appropriate policies by the two planning experts, the Tribunal finds that the assessment and interpretation of Ms. McFarlane is preferred. The application of PPS 2020, the Growth Plan, the POP and the MOP on a micro basis leads to absurd conclusions like every re-designation or change on a site-specific basis needs an expensive and multi-year MCR type analysis. Mr. Davidson’s thesis may find more appropriate application in designated “Employment Zones” but this site and the RCN are not a designated “Employment Zone”

[36] The Tribunal finds that the evidence of Ms. McFarlane, Ms. Cassin and Mr. Sterling was unshaken through cross-examination and was otherwise successfully reasoned out and sustained.

[37] Hence the Tribunal finds that the requested OPA (Exhibit 14) is appropriate as it meets all the aforementioned statutory policy tests and represents good land use planning which is desirable and in public interest.

[38] For the ZBA to be approved, the Tribunal additionally needs to determine that the ZBA does not conflict with and maintains the general intent and purpose of the MOP and the ZBL.

[39] Ms. McFarlane's evidence and analysis was complete and unshaken. Mr. Davidson's assessment was centered around the concern that it was too permissive. On balance the Tribunal prefers the wholesome evidence of Ms. McFarlane and finds that the proposed ZBA (Exhibit 15) is appropriate and maintains the intent and purpose of the ZBL.

COMMUNITY BENEFITS

[40] The City requested unspecified benefits in consideration of s. 37 provisions of the Act. Whereas the counsel for the City discussed the framework for calculating such benefits and the staff report recommending that such be sought did not provide any meaningful quantification or detail as to:

- a. what the requested amount of benefits was;
- b. what particular parts of the OPA and ZBA these benefits will be attributable to; or,

c. where the benefits will be beneficially deployed.

[41] Mr. Davidson was asked for his assessment. In a rather casual manner, he alluded that perhaps there could be more benches deployed at the Burnhamthorpe Road/Dixie Road area. There was no quantification or elaboration thereafter.

[42] While not determinative, the Tribunal finds persuasion from a previous decision *Sunny Hill Gardens Inc. v. Toronto (City)*, 2006 CarswellOnt 3251, [2006] O.M.B.D. No. 595 at paragraph (33):

The s.37 benefits sought by the City in the list now before the Board are not identified in the official plan and are not part of a comprehensive area wide assessment. They amount to a wish list prepared on an ad hoc basis as a result of an application filed for a rezoning. They do not meet the principles outlined above as being fair, clear, transparent, predictable requirements that are not arbitrary in their application. The Board therefore rejects the City's request to impose these benefit costs on the applicant.

Whereas Member Schiller, et al were provided with a general list of quantified amounts, this Tribunal Member was provided with no substance or detail. This Tribunal Member was simply requested to award some undefined amount, calculated with unknown assumptions about which changes could be attributable to what and how the whole exercise will be carried out post the decision made in this matter.

[43] The Tribunal finds that there is nothing before it that is palpable for award of any s. 37 benefits.

COSTS

[44] The matter of costs was raised by the Applicant/Appellant In their closing submission.

[45] Concerning the possible request for costs subsequent to the issuance of this decision, written submissions may be made in accordance with the Tribunal's *Rules of Practice and Procedure* ("Rules"); however, the Tribunal reminds the parties that costs are not awarded in accordance with traditional court standards but only in very limited circumstances as set out in the Rules.

ORDER

[46] The Tribunal allows the appeals in part and approves the proposed official plan amendment and zoning by-law amendment in principle.

[47] The Tribunal withholds its final order on the proposed official plan amendment and zoning by-law amendment until the Tribunal is advised and provided with the instruments in final form satisfactory to the Applicant/Appellant and the City but no later than 60 days after the date of this decision.

[48] The Tribunal denies the City's request for benefits contribution made under s. 37 of the *Planning Act*.

[49] This Member is seized and may be contacted should any difficulties arise in the implementation of this order.

"Jatinder Bhullar"

JATINDER BHULLAR
MEMBER

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Local Planning Appeal Tribunal

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