

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



**ISSUE DATE:** October 30, 2019

**CASE NO(S):** PL180857

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 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Waterdown Bay Ltd.
Applicant:	NHDG (Waterdown) Inc.
Subject:	Minor Variance
Variance from By-law No.:	Zoning By-Law 90-145z, as Amended by By-Law Number 14-099
Property Address/Description:	40 Mallard Trail
Municipality:	City of Hamilton
Municipal File No.:	FL/A-17:469
LPAT Case No.:	PL180857
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LPAT Case Name:	Waterdown Bay Ltd. v Hamilton (City)

**Heard:** April 23, 2019 in Hamilton, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

Waterdown Bay Ltd.

Anna Toumanians

NHDG (Waterdown) Inc.

Patrick Harrington

City of Hamilton

No one appeared

**MEMORANDUM OF ORAL DECISION DELIVERED BY JOHN DOUGLAS ON APRIL 23, 2019 AND ORDER OF THE TRIBUNAL**

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**INTRODUCTION**

[1] This was a hearing in the matter of an appeal to the Local Planning Appeal Tribunal pursuant to s. 45(12) of the *Planning Act* (the “Act”) by Waterdown Bay Ltd. (the “Appellant”) of the decision of the City of Hamilton (the “City”) Committee of Adjustment (the “Committee”) to approve an application made by NHDG (Waterdown) Inc. (the “Applicant”) for variances to the former Town of Flamborough Zoning By-law (“ZBL”) No. 90-145z. The application is intended to permit the construction of a two (2) storey commercial building as per Site Plan Control Application DA-17-101, for land known municipally as 40 Mallard Trail (the “subject property”).

[2] At the commencement of the Hearing, the Board was advised that the Applicant and the Appellant had reached an agreement. The Applicant has revised the proposal to address the concerns of the Appellant.

[3] Sarah Knoll was retained by the Applicant to provide evidence in support of the settlement. Ms. Knoll was qualified by the Tribunal to provide expert opinion evidence in land use planning in this matter.

[4] The City did not appear at the hearing.

**The Subject Property and the Proposed Development**

[5] The subject lands are zoned Urban Commercial (UC-13) in the former Town of Flamborough Zoning By-law No. 90-145z.

[6] The purpose of the original application was to permit the construction of a two (2) storey commercial building as per Site Plan Control Application DA-17-101, notwithstanding that:

1. A minimum of 952 square metres (“sq m”) of retail and service commercial gross floor area shall be permitted for this development instead of providing a minimum of 3,600 sq m of retail and service commercial gross leasable floor area for all lands within the UC-13 zone and may include day care and office uses restricted to the second storey.
2. No planting strip shall be provided between the building and both the Mallard Trail and the Riverwalk Drive street lot lines instead of the minimum three (3) metre (“m”) wide planting strip required across all lot lines adjacent to a street.
3. A parking area shall be permitted to be located in the yard abutting a street (specifically Riverwalk Drive) whereas the By-law does not permit a parking area to be located in any yard abutting the street.
4. An access driveway having a minimum width of six (6) m shall be permitted between the parking spaces instead of the minimum 6.4 m wide access driveway required.
5. A total of 17 parking spaces inclusive of one (1) parking space for disabled persons shall be provided.

[7] As previously noted, the Tribunal was informed at the hearing that an agreement had been reached between the Applicant and the Appellant. The Tribunal was advised that only the wording of the first variance has been modified slightly as a result of the agreement. Patrick Harrington requested that the Tribunal exercise its powers under s. 45(18.1.1) of the Act, to waive the requirement for the Tribunal to provide notice of the amended application. Section 45 (18.1.1) states:

**Amended application**

(18.1) On an appeal, the Tribunal may make a decision on an application which has been amended from the original application if, before issuing its order, written notice is given to the persons and public bodies who received notice of the original application under

subsection (5) and to other persons and agencies prescribed under that subsection. 1993, c. 26, s. 56; 1994, c. 23, s. 26 (7); 2017, c. 23, Sched. 5, s. 80.

**Exception**

(18.1.1) The Tribunal is not required to give notice under subsection (18.1) if, in its opinion, the amendment to the original application is minor. 2017, c. 23, Sched. 5, s. 98 (5).

[8] The Tribunal finds that the amendment to the original application is minor and no notice is required.

[9] The wording for the first variance has been amended as follows:

1. Notwithstanding s. 17.3.13(l) of the Flamborough ZBL 90-145z, which requires a minimum of 3,600 square metres of retail and service commercial gross leasable floor area for lands within the UC-13 zone, a minimum of 952 square metres of retail and service commercial gross floor area shall be permitted on 40 Mallard Trail. This minimum 952 square metres of retail and service commercial gross floor area may include day care and office uses in satisfaction of the required minimum floor area.

## ISSUES

[10] Section 45(1) of the Act allows the Tribunal to authorize variances to a zoning by-law where the variance is minor; is desirable for the appropriate development or use of the land, building or structure; maintains the general intent and purpose of the Official Plan (“OP”); and maintains the general intent and purpose of the Zoning By-law. The Tribunal must be satisfied that all four tests are met in order to authorize the requested variances.

[11] The Tribunal must also determine whether the minor variances are consistent with the Provincial Policy Statement, 2014 (the “PPS”) and conform to the Growth Plan for the Greater Golden Horseshoe (the “Growth Plan”).

[12] Since this matter was heard, the Growth Plan for the Greater Golden Horseshoe 2017 (the “Growth Plan”) has been replaced by the Growth Plan for the Greater Golden Horseshoe 2019. Ontario Regulation (“O.Reg”) 311/06 addresses Transitional Matters with respect to the Growth Plan. Section 2.1(2) of the O.Reg 311/06 states:

S. 2.1(2) Where section 3 requires a matter to be continued and disposed of in accordance with the Plan and the matter was commended before May 16, 2019, the requirement shall be read as a requirement that the matter be continued and disposed of in accordance with the 2017 Growth Plan as it read before its revocation if, on May 16, 2019, the Local Planning Appeal Tribunal or a joint board has completed its hearing of the matter but reserved its final decision.

[13] Having been heard April 23, 2019, the Growth Plan 2017 applies in this matter.

[14] The Tribunal accepts Ms. Knoll’s uncontested evidence that the application is consistent with the PPS and that it conforms to the Growth Plan 2017 and raises no concerns regarding provincial policy.

[15] It is worth noting that a report prepared by the City’s Planning and Economic Development Department, dated September 20, 2018 stated that the application has been reviewed with respect to the PPS, policies 1.1.4 and 1.1.5 in particular, and staff were of the opinion that the application is consistent with the policies that manage growth and regeneration within settlement areas.

## **ANALYSIS AND FINDINGS**

### **Maintains the general intent and purpose of the OP**

[16] The subject property is designated Neighbourhoods on Schedule ‘E’ – Urban Structure and designated Neighbourhoods on Schedule ‘E-1’ Urban Land Use Designations in the Urban Hamilton Official Plan (“UHOP”). The subject property is also designated Mixed Use – Medium Density in the Waterdown South Secondary Plan. Ms.

Knoll testified that this designation permits a stand-alone commercial building allowing for commercial uses such as retail stores and offices oriented to providing personal services to meet the needs of the community.

*Variance 1*

[17] As testified to by Ms. Knoll and addressed in the City's Planning and Economic Development Department Report, dated September 20, 2018, the Waterdown South Secondary Plan requires that the implementing ZBL include a provision for a minimum Gross Leasable Floor Area of 3,600 sq m for the four corners at the intersection of Mallard Trail and Riverwalk Drive. The 952 sq m of Gross Leasable Floor Area proposed by this application will facilitate the implementation of the Waterdown South Secondary Plan and as such the proposal conforms to the intent of the UHOP.

*Variance 2*

[18] Variance 2 requests that no planting strip shall be provided between the building and both the Mallard Trail and the Riverwalk Drive street lot lines. To implement the intent of the UHOP and the vision of the Waterdown South Secondary Plan, the Applicant has proposed the building be located 0.78 m from the north and east property lines. Due to the location of the building it is not possible to provide a planting strip of three (3) m.

*Variance 3*

[19] The Applicant is requesting that a parking lot be permitted abutting a street whereas the ZBL does not permit it. However, in placing the building in such a manner as to screen parking from the public street, the general intent of the Waterdown South Secondary Plan is implemented. Ms. Knoll opined that the variances as agreed to with respect to the location of the parking on the lot and the access and manoeuvring to parking spaces meet the general intent and purpose of the UHOP.

*Variance 4*

[20] Variance 4 requests that an access driveway having a minimum width of six (6) m shall be permitted between the parking spaces. The variance does not conflict with any policies of the UHOP.

*Variance 5*

[21] A total of 17 parking spaces inclusive of one (1) parking space for disabled persons shall be provided. The evidence presented to the Tribunal indicates that the intent of the UHOP is maintained as the reduction in parking spaces can be supported given the wide range of alternative transportation measures being proposed and the overall pedestrian focus of the Waterdown South Secondary Plan.

[22] Ms. Knoll testified that in her opinion, the variances requested and amended through the agreement maintain the general intent and purpose of the UHOP.

**Maintains the general intent and purpose of the ZBL**

[23] The subject property is zoned Urban Commercial (UC-13) in Flamborough ZBL 95-145z. Ms. Knoll testified that this zoning permits a stand-alone commercial building allowing for commercial uses such as retail stores and offices oriented to providing personal services to meet the needs of the community.

*Variance 1*

[24] As noted previously, Flamborough ZBL 90-145z requires a minimum of 3,600 sq m of retail and service commercial gross leasable floor area for lands within the UC-13 zone. However, the Applicant has requested a minimum of 952 sq m of retail and service commercial gross floor area to be permitted on 40 Mallard Trail. Ms. Knoll

testified that the subject property is located south of Dundas Street East and is one of four corner properties at the intersection of Mallard Trail and Riverwalk Drive/Valley Trail place. Ms. Knoll testified that the minimum of 3,600 sq m of retail and service commercial gross leasable floor area applies collectively to the four properties located at this intersection.

[25] The report prepared by the City's Planning and Economic Development Department, dated September 20, 2018, supports the opinion of Ms. Knoll. The report notes that the applicant is requesting that the proposed building will have a minimum Gross Leasable Floor Area of 952 sq m while the ZBL requires a minimum Gross Leasable Floor Area of 2,600 sq m. Staff note that the Urban Commercial (UC-13) zone spans the properties located at the four corners of Mallard Trail and Riverwalk Drive, where it is the intent of the ZBL to establish a total of 3,600 sq m of commercial Gross Floor Area over the four corners. They conclude by stating that the intent of the ZBL is maintained and the variance is minor in nature.

#### *Variance 2*

[26] Variance 2 requests that no planting strip shall be provided between the building and both the Mallard Trail and the Riverwalk Drive street lot lines. To implement the intent of the UHOP and the vision of the Waterdown South Secondary Plan, the Applicant has proposed the building be located 0.78 m from the north and east property lines. Dues to the location of the building it is not possible to provide a planting strip of three (3) m. however, by providing a compact mixed-use form and adequate landscaping on site in lieu of the planting strip, the general intent and purpose of the ZBL is maintained.

#### *Variance 3*

[27] The Applicant is requesting that a parking lot be permitted abutting a street whereas the ZBL does not permit it. Despite its proposed location on the site, the



parking is partially screened by tree and shrub plantings. The plantings and screening of the parking along with the placement of the building facilitates the site's contributions to a main street commercial design. This variance meets the general intent and purpose of the ZBL.

#### *Variance 4*

[28] Variance 4 requests that an access driveway having a minimum width of six (6) m shall be permitted between the parking spaces. The proposed driveway width allows for the adequate sizing of the parking spaces within the site and the reduction in access will not impede the manoeuvrability of vehicles using the site. The proposal, with this variance, meets the general intent and purpose of the ZBL.

#### *Variance 5*

[29] A total of 17 parking spaces inclusive of one (1) parking space for disabled persons shall be provided. A reduction in parking spaces can be supported given the wide range of alternative transportation measures being proposed and the overall pedestrian focus of the Waterdown South Secondary Plan. Additionally, there are two on-street parking spaces available for the development within the right-of-way. The proposal with Variance 5 maintains the general intent and purpose of the ZBL.

### **Is minor and desirable for the appropriate development and use of the land**

[30] The evidence before the Tribunal indicates that Variances 1, 2, 3, 4 and 5 will allow for the approval of a development on a vacant parcel of land within a recently registered subdivision. The proposed development is an efficient use of land that does not negatively impact compatibility with the community or the streetscape. No adverse impacts will result from approval of these variances. Therefore, the development for which the variances are required is minor and appropriate for the development and use of the subject lands.

## **Findings**

[31] Ms. Knoll testified that in her opinion Variances 1, 2, 3,4 and 5, with Variance 1 being the only variance amended through the agreement between the Applicant and the Appellant, individually and collectively, maintains the general intent and purpose of the UHOP, maintains the general intent and purpose of the ZBL, is minor in nature and desirable for the appropriate development and use of the subject lands.

[32] Ms. Knoll's opinion is supported by the recommendation made in the report prepared by the City's Planning and Economic Development Department, dated September 20, 2018, stating: "... the requested variances maintain the general intent and purpose of the UHOP, the former Town of Flamborough ZBL 90-145z. The variances are considered to be minor in nature and desirable for the appropriate use of the property. In conclusion, Staff recommends that the application be approved.

[33] Based on the evidence before the Tribunal and the uncontested expert land use planning opinion of Ms. Knoll, the Tribunal finds that Variances 1, 2, 3, 4 and 5, individually and collectively, maintain the general intent and purpose of the UHOP, maintain the general intent and purpose of the ZBL, are minor in nature and are desirable for the appropriate development and use of the subject property.

## **CONCLUSION**

[34] Upon the findings made, Ms. Knoll unchallenged planning evidence, and the whole of the evidence inclusive of the documentary record, the Tribunal finds that with respect to the four tests provided for in s. 45(1) of the Act, the proposed variances maintain the general intent and purpose of the UHOP, maintain the general intent and purpose of the ZBL, are minor in nature, desirable for the appropriate development and use of the subject property, is consistent with the PPS, conforms with the Growth Plan and any matters of provincial interest identified in the Act, and represents good planning

in the public interest. For these reasons, the Tribunal will allow the appeal and authorizes the variances as amended and presented at the hearing.

## **ORDER**

[35] The appeal is allowed in part. Pursuant to ss. 45(1) and 45(18) of the Act, the Tribunal hereby authorizes the following minor variances for the subject property:

1. Notwithstanding s. 17.3.13(l), which requires a minimum of 3,600 sq m of retail and service commercial gross leasable floor area for lands within the UC-13 zone, a minimum of 952 sq m of retail and service commercial gross floor area shall be permitted on 40 Mallard Trail. This minimum 952 sq m of retail and service commercial gross floor area may include day care and office uses in satisfaction of the required minimum floor area.
2. No planting strip shall be provided between the building and both the Mallard Trail and the Riverwalk Drive street lot lines instead of the minimum three (3) m wide planting strip required along all lot lines adjacent to a street.
3. Parking area shall be permitted to be located in the yard abutting a street (specifically Riverwalk Drive) whereas the By-law does not permit a parking area to be located in any yard abutting a street.
4. An access driveway having a minimum width of six (6) m. shall be permitted between the parking spaces instead of the minimum 6.4 m wide access driveway required.
5. A total of 17 parking spaces inclusive of one (1) parking space for disabled persons shall be permitted for this property for any permitted use instead of the minimum parking required pursuant to s. 5.21.1 and s. 5.21.3 of the Flamborough ZBL No. 90-145zZ.

[36] The Tribunal orders as directed above.

*“John Douglas”*

JOHN DOUGLAS  
MEMBER

If there is an attachment referred to in this document,  
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**Local Planning Appeal Tribunal**

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