

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



16-265-OLT-01

ISSUE DATE: June 24, 2022

CASE NO(S): OLT-22-002489
(Formerly PL161168)

PROCEEDING COMMENCED UNDER subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Choice Properties Real Estate Investment Trust
Subject: Proposed Official Plan Amendment No. 65
Municipality: City of Hamilton
OLT Case No.: OLT-22-002489
Legacy Case No.: PL161168
OLT Lead Case No.: OLT-22-002489
Legacy Lead Case No.: PL161168
OLT Case Name: Choice Properties Real Estate Investment Trust v. Hamilton (City)

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Choice Properties Real Estate Investment Trust
Subject: By-law No. ZBL 16-265
Municipality: City of Hamilton
OLT Case No.: OLT-22-002495
Legacy Case No.: PL161169
OLT Lead Case No.: OLT-22-002489
Legacy Lead Case No.: PL161168

Heard: May 11, 2022 by Video Hearing

APPEARANCES:**Parties****Counsel**

Choice Properties Real Estate
Investment Trust and Loblaw
Properties Limited ("Choice" or
the "Appellant")

J. Pappas

City of Hamilton (the "City")

P. MacDonald

**DECISION DELIVERED BY M. RUSSO AND S. MANN AND ORDER OF THE
TRIBUNAL**

INTRODUCTION

[1] The matter before the Ontario Land Tribunal (the "Tribunal") is an appeal under the *Planning Act* (the "Act"), s. 17(24), arising from the City's adoption of Official Plan Amendment (the "OPA") No. 65 and the Appellant's appeal within the statutory timeframes prescribed under the Act.

[2] Additionally, before the Tribunal is an appeal arising from the City passing Zoning By-law ("ZBL") No. 16-265 and the Appellant's appeal within the statutory timeframes prescribed under the Act.

Chronology and Background

[3] On November 8, 2017, City Council adopted OPA No. 69 and passed ZBL No. 17-240.

[4] A number of Parties appealed the adoption of the OPA No. 69 and ZBL No. 17-240, including Canadian Tire Real Estate Limited ("CTREL") and Choice by appeal letters dated December 6, 2017, and December 7, 2017, respectively referred to by the Parties as the Commercial and Mixed Use Appeals (the "CMU Appeals").

[5] The CMU Appeals were filed with the former Ontario Municipal Board, which has since been continued as the Local Planning Appeal Tribunal as of April 3, 2018, and the Ontario Land Tribunal as of June 1, 2021, and all bodies are hereinafter referred to as the "Tribunal".

[6] The Tribunal issued an order dated November 16, 2018, bringing into force certain sections of the ZBL No. 17-240 that were not under appeal as well as the entirety of OPA No. 69, to save several properties which remained under site-specific appeal.

[7] On January 7, 2021, the Tribunal issued an order amending ZBL No. 17-240 in part with respect to a settlement between the City and the West End Homebuilders Association.

[8] On June 25, 2021, the Tribunal issued an order whereby the appeals of OPA No. 69 and ZBL No. 17-240 would be addressed in two phases: City-wide appeals; and Site-specific appeals. CTREL and Choice maintained appeals of ZBL No. 17-240 on a City-wide basis.

[9] On June 25, 2021, the Tribunal issued a procedural order and issues list for the City-wide appeals and scheduled the hearing of the City-wide appeals between the City, CTREL, and Choice for 25 days starting February 14, 2022.

[10] Concurrently to the paragraphs above, on October 12, 2016, City Council passed ZBL No. 16-265 and Urban Hamilton OPA No. 65.

[11] Choice subsequently appealed the passage of ZBL No. 16-265 and OPA No. 65, referred to by the Parties as the Transit Oriented Corridor Appeal, (the "TOC Appeal").

[12] On May 1, 2017, the Tribunal issued an order bringing ZBL No. 16-265 into force as of October 12, 2016, save and except for three properties that remained under appeal on a site-specific basis by Choice.

[13] The City, CTREL, and Choice (collectively, the "Parties") for this Matter have reached an agreement to settle the CMU Appeals. These appeals are not before this Panel.

[14] The City and Choice have also reached an agreement to settle the TOC Appeal based on modifications to the ZBL No. 16-265 and the withdrawal of Choice's appeal of OPA No. 65 (these appeals are before this Panel).

Applicable Legislation and Policies

[15] Land use planning in Ontario is a policy-led system implemented in hierarchical fashion. This system is deliberately crafted to recognize that there cannot be a one-size fits all approach to implementing policy framework, given the diversity of Ontario's local communities. As such, the broader Provincial policies and objectives are to be implemented by each municipality through their Official Plan ("OP"), Zoning By-laws, issue-specific guidelines, etc.

[16] Although the Parties have settled their issues, the Tribunal must still determine if the proposal meets the provincial interests and municipal policy framework. In adjudicating the appeal, the Tribunal must have regard to matters of provincial interest enumerated in s. 2 of the Act. The Tribunal must be satisfied that the proposal is consistent with the Provincial Policy Statement, 2020 (the "PPS") and pursuant to s. 3(5) of the Act. Further, the Tribunal must also find that the proposal conforms with policies of the provincial plan, A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2020 (the "Growth Plan"). Lastly, the Tribunal must be satisfied with the proposal's conformity with the City OP, and that it represents good land-use planning in the public interest.

THE HEARING AND THE PLANNING WITNESS

[17] Mr. MacDonald provided brief opening submissions that summarized the Settlement reached. Before doing so, the Tribunal marked three items that were put forward and are relevant to these proceedings.

- Exhibit 1 - Affidavit of Service
- Exhibit 2 - Affidavit of Ms. Shannon McKie
- Exhibit 3 - Minutes of Settlement

[18] Jointly, the Parties agreed to call Ms. McKie, a Registered Professional Planner with over eighteen years of professional experience, in the Province of Ontario. Further, Ms. McKie is employed with the City and holds the position of Manager, Zoning and Committee of Adjustment with the City and is responsible for the development of the Citywide ZBL including Urban Hamilton OPA No. 65 and ZBL No. 16-265 both of which are the subject of the appeals before the Tribunal (as indicated). The Tribunal was asked that she be qualified to give *viva voce* evidence on the proposed Settlement.

[19] Provided in Exhibit 2 was Ms. McKie's affidavit and written evidence on the matter. Also included in Exhibit 2 were her Curriculum Vitae ("CV") and Acknowledgement of Expert's Duty form for the Tribunal's consideration.

[20] Upon review of Ms. McKie's CV and Acknowledgement of Expert's Duty form, the Tribunal duly qualified and affirmed Ms. McKie to provide expert opinion evidence pertaining to Land-Use Planning for this Hearing.

Appeals to OPA No. 65 and Zoning By-law No. 16-265 (Transit Oriented Corridor Zones)

[21] Ms. McKie adopted her evidence provided in Exhibit 2 and her affidavit.

[22] She reiterated that on October 12, 2016, the City passed ZBL No. 16-265, an amendment to City ZBL No. 05-200, for the creation of new Transit Oriented Corridor Zones. Council also passed at that time, Urban Hamilton OPA No. 65, which allowed for the implementation of certain parts of ZBL No. 16-265.

[23] Expanding on Paragraphs [10] to [12] of this Decision, Ms. McKie highlighted that on November 9, 2016, Choice filed an appeal against ZBL No. 16-265 and OPA No. 65.

[24] Ms. McKie further highlighted, that the Choice appeals of both OPA No. 65 and ZBL No. 16-265 were restricted to its properties known municipally in the City as:

- a. 50 Dundurn Street South;
- b. 435-447 Main Street East; and,
- c. 1124 Main Street East.

Planning Support for the Settlement

[25] Ms. McKie provided her written and *viva voce* opinion that the proposed Settlement has regard to the Act, is consistent with the PPS and conforms to the Growth Plan.

[26] She also opined that the Settlement conforms to the Urban Hamilton Official Plan ("UHOP").

Urban Hamilton Official Plan ("UHOP")

[27] Ms. McKie provided evidence that the UHOP contains policies with respect to Mixed Use Designations that are typically located along corridors and arterial roads, which have been implemented through the Transit Oriented Corridor Mixed Use Medium Density (TOC1) Zones.

[28] She further expanded her evidence to highlight that UHOP, s. E.4.6.21 notes that buildings shall be located close to the street with no parking, drive-throughs, or stacking lanes between the building and the street. She opined that the policy does provide flexibility on allowing larger buildings to be located farther from the street with smaller buildings closer to the street.

[29] Ms. McKie put forward and opined that s. F.1.12.9 permits the expansion or enlargement of a legal non-complying use provided they maintain the intent and purpose of the UHOP and the ZBL.

Settlement Proposal

[30] The following table summarizes the nature of the Appeal and what has been negotiated and settled by the Parties and before the Tribunal, for its consideration. Further the Table highlights the proposed amendments necessary to facilitate settled aspects of the Appeal.

Street Address	Nature of Appeal	Proposed Amendment to By-law No. 16-265
50 Dundurn Street South	Request to permit the same permissions under the Section 4.12f)ii) - Vacuum Clause for CMU Zones, allowing for minor (10%) additions to existing development.	A new Special Exception permitting minor additions of up to 10% of the total GFA to existing development, identical to Section 4.12f)ii) - Vacuum Clause for CMU Zones shall be created. The amendment allows for small additions such as adding a kitchen space, or retail space.

<p>435-447 Main Street East</p>	<p>Proposed new building within an existing commercial development. However, no planning application have been submitted to facilitate the proposed development. However, the following amendments to the TOC1 Zone have been requested.</p> <ul style="list-style-type: none"> •Section 11.1.3(d)(i) for minimum height from 11.0 metres reduced to 7.9 metres; •Section 11.1.3(g) for minimum building façade length, that interim intensification of the property through the addition of new buildings or the minor expansion of existing buildings shall be permitted. <p>Note: the above requests may change subject to any planning approvals.</p>	<p>A new Special Exception for modifications shall be created to give effect to the proposed changes.</p> <p>Application would remain subject to site plan approval, appellant would bear the risk if seeking to implement any changes through site plan not captured by this special exception.</p>
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[31] The above Table highlights that the Settlement Proposal focuses primarily on settled issues dealing with properties at 50 Dundurn Street South and 435-447 Main Street East.

[32] If the Tribunal is supportive of the Appeal, The Parties are seeking that the amendments put forward to ZBL No. 16-265 come into force as of the date of the Tribunal's subsequent Order.

[33] Further, the Settlement Proposal being pursuant to s. 34(30) of the Act, acknowledges that in all other respects not stipulated in the proposed amendment, ZBL No. 16-265 is deemed to come into force for the lands under appeal (as indicated in the Tribunal's order dated May 1, 2017), as of the date the ZBL No. 16-265 was passed, being October 12, 2016, such lands being:

- i. 50 Dundurn Street South;
- ii. 435-447 Main Street East; and,
- iii. 1124 Main Street East.

[34] Expanding on the Table above, Ms. Mckie explained that the changes to Schedule "C" - Special Exceptions to add Special Exception 766 and Special Exception 769 are appropriate as the modifications allow for additions and alterations to the existing buildings in advance of any full-scale redevelopment of the site to ensure continued viability of the commercial plazas. In her opinion, these modifications conform to the UHOP for the reasons described in the paragraphs above.

[35] Ms. Mckie provided her professional opinion that amendments before this Tribunal conform to the relevant policies and the general intent and purpose of the UHOP.

Concluding and Summary Opinion

[36] Ms. McKie's professional opinion was that the proposed modifications to ZBL No. 16-265 represent good planning and are in the public interest.

[37] She further opined that those portions of ZBL No. 16-265 that are no longer under appeal or modified due to the proposed Settlement represent good planning and are in the public interest.

[38] Ms. McKie concluded that it is her professional opinion, bringing OPA No. 65 into force on the properties under appeal, represents good planning and is in the public interest.

Disposition and Findings

[39] The Tribunal, having reviewed all the evidence provided in Exhibits 1-3, and having heard *viva voce* evidence, the opinions of Ms. McKie, accepts the uncontroverted expert land-use planning evidence provided by the witness. The Tribunal finds that the proposed planning instruments, have appropriate regard for the matters of Provincial Interest and s. 2 of the Act. The Tribunal also finds that the proposed Settlement is consistent with the PPS, conforms to the Growth Plan and City OP, represents good land-use planning, and is in the public interest.

[40] With Choice's withdrawal of its appeal of the adoption of OPA No. 65, and pursuant to s. 17(30) of the Act, OPA No. 65 shall come into effect on the date of this order for the lands known municipally as:

- i. 435-447 Main Street East; and
- ii. 1124 Main Street East.

ORDER

[41] **THIS MATTER** having come before the Tribunal on May 11, 2022, and having heard submissions of the Parties, **THE TRIBUNAL ORDERS AS FOLLOWS:**

1. The appeal filed on behalf of Choice Properties Real Estate Investment Trust and Loblaw Properties Ltd. ("Choice") in OLT Case No. OLT-22-002489 (formerly Case No. PL161168) is allowed, in part, in accordance with s. 34(26) of the *Planning Act*.
 - a. City of Hamilton Zoning By-Law No. 16-265 is amended in accordance with the Zoning By-Law Amendment attached as Exhibit "C" to the affidavit of Shannon McKie, sworn May 4, 2022, and attached as **Attachment 1** to this Decision.
 - b. The amendments to Zoning By-law No. 16-265 shall come into force as of the date of this Order for those properties indicated in Exhibit "C" to the affidavit of Shannon McKie, sworn May 4, 2022, and attached as **Attachment 1** to this Decision:
 - i. 50 Dundurn Street South; and
 - ii. 435-447 Main Street East.
2. Pursuant to s. 34(30) of the *Planning Act*, in all other respects Zoning By-law No. 16-265 is deemed to come into force for the lands under appeal (as indicated in the Tribunal's order dated May 1, 2017), as of the date Zoning By-law No. 16-265 was passed, being October 12, 2016, such lands being:
 - i. 50 Dundurn Street South;
 - ii. 435-447 Main Street East; and,
 - iii. 1124 Main Street East.
3. Pursuant to s. 17(27) of the *Planning Act*, Urban Hamilton Official Plan Amendment No. 65 ("OPA 65") came into force across the City of Hamilton on the day after the last day for filing an appeal, being November 11, 2016,

save and except for the following properties of Choice, for which Official Plan Amendment No. 65 shall come into force and effect as of the date of this Order, pursuant to subsection 17(50) of the *Planning Act*:

- i. 435-447 Main Street East; and,
- ii. 1124 Main Street East.

“M. Russo”

M. RUSSO
MEMBER

“S. Mann”

S. MANN
MEMBER

Ontario Land Tribunal

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The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal (“Tribunal”). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.

ATTACHMENT 1

CITY OF HAMILTON

BY-LAW NO. 16-265-OLT-01

**To amend Zoning By-law No. 05-200
Respecting Lands Located at 50 Dundurn Street South,
435 – 447 Main Street East**

WHEREAS this By-law conforms with the Urban Hamilton Official Plan;

NOW THEREFORE pursuant to subsection 34(26) of the *Planning Act* the Ontario Land Tribunal orders as follows:

1. That Maps 908 and 909 of Schedule “A” – Zoning Maps of Zoning By-law No. 05-200 are amended by changing the zoning from Transit Oriented Corridor Mixed Use Medium Density (TOC1) Zone to the Transit Oriented Corridor Mixed Use Medium Density (TOC1, 766) Zone.
2. That Map 996 of Schedule “A” – Zoning Maps of Zoning By-law No. 05-200 is amended by changing the zoning from the Transit Oriented Corridor Mixed Use Medium Density (TOC1) Zone to the Transit Oriented Corridor Mixed Use Medium Density (TOC1,766, 769) Zone.
3. That Schedule “C” – Special Exceptions is amended by adding Special Exception No. 766:

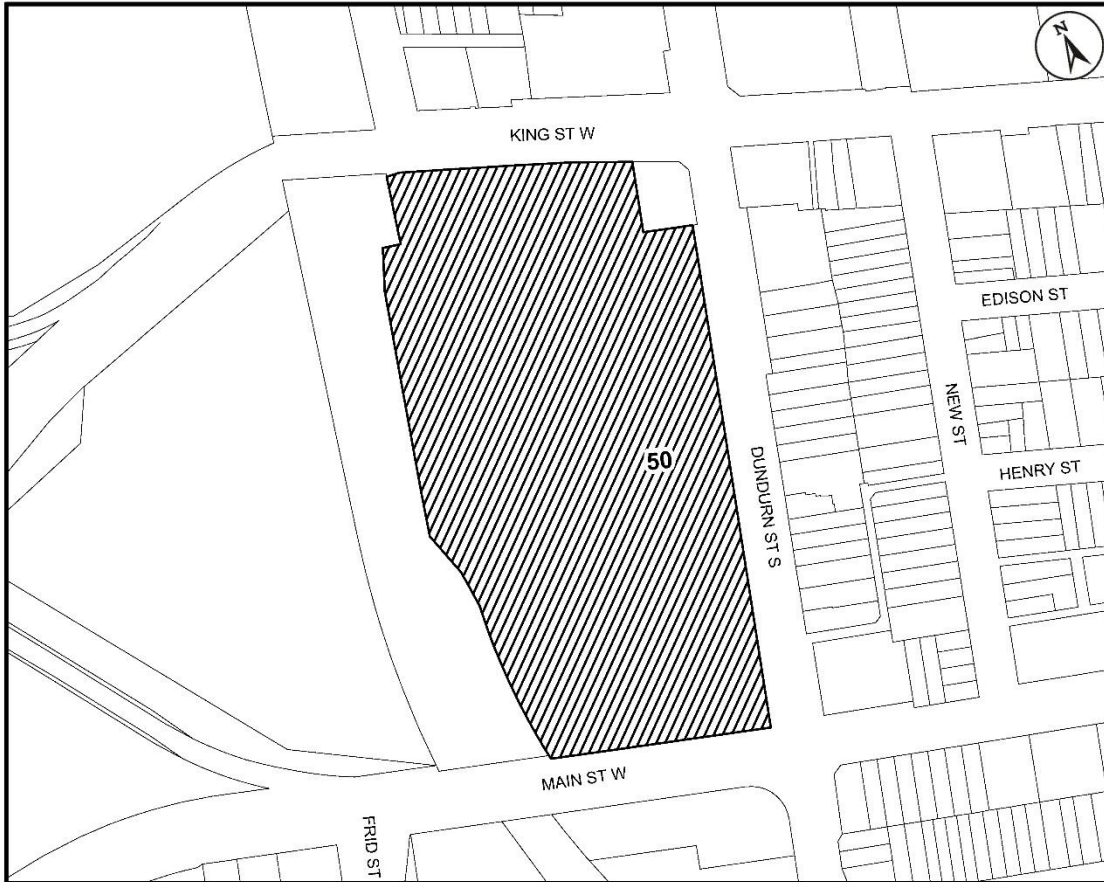
“766. Within the lands zoned Transit Oriented Corridor Mixed Use Medium Density (TOC1) Zone, identified on Maps 908, 909 and 996 of Schedule “A” – Zoning Maps, and described as:

Property Address	Map Number
50 Dundurn Street South	908, 909
435 – 447 Main Street East	996

The following special provisions shall also apply:

- a) Notwithstanding Subsections 11.1.3(d)(i) and in addition to 11.1.3(g) the following regulation shall apply:

- i) An addition or alteration to a legally existing commercial building, to a maximum of 10% of the existing Gross Floor Area existing on the date of the passing of the By-law, shall be permitted.”
- 4. That Schedule “C” – Special Exceptions is amended by adding Special Exception No. 769:
 - “769. Within the lands zoned Transit Oriented Corridor Mixed Use Medium Density (TOC1) Zone, identified on Map 996 of Schedule “A” – Zoning Maps and described as 435 – 447 Main Street East, the following special provisions shall also apply:
 - a) Notwithstanding Subsections 11.1.3(d)(i) and in addition to 11.1.3(g), the following regulations shall apply:
 - i) The minimum building height shall be 7.9 metres.
 - ii) New buildings, or expansion of existing buildings to a maximum of 10% of the existing Gross Floor Area existing on the date of the passing of this By-law, shall be permitted.”



This is Schedule "A" to By-law No. 22- Passed the day of, 2022	----- <p style="text-align: center;">Mayor</p> ----- <p style="text-align: center;">Clerk</p>
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<h2 style="margin: 0;">Schedule "A"</h2> <p style="margin: 5px 0 0 0;">Map forming Part of By-law No. 22-_____</p> <p style="margin: 5px 0 0 0;">to Amend By-law No. 05-200 Map 908, 909</p>	<p>Subject Property</p> <p>50 Dundurn Street South, Hamilton</p> <p> Change in Zoning from Mixed Use (TOC1) Zone to Mixed Use (TOC1, 766) Zone</p>
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Scale: N.T.S	File Name/Number: TOC	
Date: January 4, 2022	Planner/Technician: TL/NB	
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT		



This is Schedule "A" to By-law No. 22- Passed the day of, 2022	----- <p style="text-align: center;">Mayor</p> ----- <p style="text-align: center;">Clerk</p>
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<h2>Schedule "A"</h2> <p>Map forming Part of By-law No. 22-_____</p> <p>to Amend By-law No. 05-200 Map 996</p>	<p>Subject Property</p> <p>435 – 447 Main Street East, Hamilton</p> <p> Change in zoning from the Transit Oriented Corridor Mixed Use Medium Density (TOC1) Zone to the Transit Oriented Corridor Mixed Use Medium Density (TOC1, 766, 769) Zone</p>
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Scale: N.T.S	File Name/Number: TOC	
Date: May 13, 2022	Planner/Technician: TL/NB	
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT		