

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: March 09, 2022

CASE NO(S).:

PL180376

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

Applicant and Appellant: 5507 River Development Inc.
Subject: Request to amend the Official Plan – Failure of the City of Niagara Falls to adopt the requested amendment

Existing Designation: Residential and Special Policy Area
Proposed Designation: Special Policy Area
Purpose: To permit a 390 unit apartment building, with a 21 storey and a 12 storey tower and underground parking

Property Address/Description: 5471, 5491, & 5507 River Rd., 4399, 4407, 4413, & 4427 John St.

Municipality: City of Niagara Falls
Approval Authority File No.: AM-2017-011
OLT Case No.: PL180376
OLT File No.: PL180376
OLT Case Name: 5507 River Development Inc. v. Niagara Falls (City)

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

Applicant and Appellant: 5507 River Development Inc.
Subject: Application to amend Zoning By-law No. 79-200 – Refusal or neglect of City of Niagara Falls to make a decision

Existing Zoning: Residential Apartment 5E Density (R5E-840), in part, Parking (P-841), in part, and Residential Single Family and Two Family (R2-2), in part

Proposed Zoning: Residential Apartment 5F Density (site specific)
Purpose: To permit a 390 unit apartment building, with a 21 storey and a 12 storey tower and underground parking

Property Address/Description: 5471, 5491, & 5507 River Rd, 4399, 4407, 4413, & 4427 John St
 Municipality: City of Niagara Falls
 Municipality File No.: AM-2017-011
 OLT Case No.: PL180376
 OLT File No.: PL180377

Heard: October 25, 2021 by video hearing

APPEARANCES:

Parties

Counsel*/Representative

2486489 Ontario Inc.
 (formerly, 5507 River
 Development Inc.)
 (“Applicant/Appellant”)

Denise Baker*

City of Niagara Falls (“City”)

Tom Halinski*

Citizens for Responsible
 Development (Niagara Falls)

Debra Jackson-Jones

Kenneth Westhues

Self-represented

DECISION DELIVERED BY D. CHIPMAN AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This appeal hearing before the Ontario Land Tribunal (the “Tribunal”) spanned twelve (12) hearing days. It was brought by 5507 River Developments Inc. (the previous landowner) and continued under 2486489 Ontario Inc. when the property was purchased in June 2019 (the “Applicant/Appellant”). The appeal was filed due to the failure of the Council of the City of Niagara Falls (the “City”) in making a decision on the Appellant’s application for an Official Plan Amendment (“OPA”) and a Zoning By-law Amendment (“ZBA”) with respect to lands municipally known as 5471, 5491 and 5507 River Road, and 4399, 4407, 4413, 4427 and 4437 John Street and the closed part of River Lane (“Subject Property/Lands”) pursuant to s. 22(7) for the Official Plan amendment and s.34 (11) for the Zoning By-law amendment of the *Planning Act* (the

“Act”).

THE PARTIES AT THE HEARING

[2] In addition to the Appellant and the City, there were two other Parties represented at the hearing, who were opposed to the appeal.

[3] Debra Jackson-Jones representing the organization Citizens for Responsible Development Niagara Falls (“CRD”) were granted Party status in June 2019. Ms. Jackson-Jones stated they would not be calling any evidence.

[4] Kenneth Westhues who was granted Party status on Dec 14, 2018, lives in the vicinity of the subject lands.

[5] The Tribunal notes that the issues and concerns raised by both Parties are addressed through the City.

[6] In an email dated October 26, 2021, addressed to the Tribunal and copied to all parties, Mr. Westhues notified the Tribunal he was withdrawing as a Party to this matter.

[7] The Tribunal informed Ms. Jackson-Jones that she would have the opportunity to provide opening and closing statements, and the ability to cross-examine the witnesses brought forward by the Appellant and the City, in order to express CRD’s concerns.

[8] Niagara Parks Commission, who initially requested Party status, had withdrawn prior to this hearing.

[9] The Tribunal heard from the following witnesses, each of whom were qualified to provide expert opinion evidence in their respective identified areas of expertise:

[10] On behalf of the Applicant:

- Ryan Guetter – Expert qualified in land use planning
- Michael Spaziani – Expert qualified in architecture and urban design
- Mark Telesnicki – Expert qualified in geological engineering

[11] On behalf of the City:

- Andrew Bryce (City of Niagara Falls) – Expert qualified in land use planning
- Khaldoon Ahmad (Niagara Region) – Expert qualified in urban design and landscape planning

ISSUES

[12] The key issues for the Tribunal to decide therefore include whether the proposed height is appropriate for the Subject Site; whether there will be any impacts through construction, including excavation and site preparation on the integrity of the surrounding geology, including the Niagara Gorge, the structural integrity of surrounding residences and the top of the Gorge bank; whether the massing and scale is appropriate, such that it transitions to, and is compatible and contextually appropriate with, the adjacent low rise residential neighbourhood to the west.

The Subject Lands and Site Conditions

[13] The Subject Lands are located south of Phillip Street and north of John Street, on the west side of River Road, east of the Niagara Gorge which contain an area of 0.85 hectares (2.10 acres) with a frontage of 7 meters (“m”) along River Road, 39.60 m on Phillip Street and 124.12 m on John Street.

[14] It is comprised of eight (8) land parcels and include an existing laneway, River

Lane, which traverses between Philip Street and John Street.

[15] The Property is directly north of the City's primary tourist commercial area, the Clifton Hill Subdistrict, and south of the City's downtown, known as the Whirlpool Satellite District with access to public transit. John Street is the northern boundary of the Tourist Commercial District having the Tourist Commercial District on one side of the road and River Road Satellite District where the Subject property is located on the other.

[16] In 2012, Council for the City designated and zoned the lands directly to the south of the proposed development known as Michael's Inn, a four (4)-storey Travelodge hotel and associated parking (located on the block bounded by John Street., River Road., Hiram Street. and Blondin Avenue.), along with the Niagara Falls Aviary lands permitting a 60 and 61 storey hotel development providing a total of 966 suites. This project has not been started to date.

[17] The Subject Lands are situated in a neighbourhood which is known as the River Road Satellite District per Schedule E of the Official Plan and are located to the southeast of a mature and predominately residential low-density neighbourhood that is generally comprised of 2.5 storey single-detached dwellings. Interspersed within the neighbourhood are several bed and breakfast establishments.

[18] The Niagara River and Gorge along the Canada-United States border is directly to the east of the Property. This area is classified as an Environmental Conservation Area.

[19] The grading of the Subject Lands varies considerably across the site. The grade difference measured along River Road is roughly 6.25 m, along John Street the grade difference is roughly 11.64 m and along Philip Street the difference measures 4.25 m. The lowest grade is at the corner of River Road and John Street, which is 162.50 m as a geodetic elevation.

[20] The west property line is generally flat with a grade difference of approximately 1.48 m from north (established grade of 172.16 m) to south (established grade of 173.64 m). The Subject Lands include clusters of trees near the northwest and southeast portions of the River Road properties and along the side and rear lot lines of some of the John Street properties.

Road and Transit Infrastructure

[21] River Road is a scenic road that functions primarily as an arterial road, is regulated by the Niagara Parks Commission (“NPC”) and has an existing width which is variable across the River Road frontage, ranging from 16 - 18 m, not including the boulevard east of the sidewalk which is variable in width. The Niagara River Recreation Trail extends along this portion of River Road and the Regional Bicycle Network extends along River Road adjacent to the subject lands. River Road has sidewalks on both sides of the street. The travelled surface of the road, including the sidewalks, is approximately 14-15 m.

The Prior Development Proposals

[22] The current application has evolved over a number of years with various owners and proposed towers ranging from 10 to 34 storeys. All have been rejected by Niagara Falls Council. An Ontario Municipal Board Appeal resulted in the creation of Official Plan Amendment No. 86 designating the site as a “Special Policy Area 60” which holds a maximum density of 238 units per hectare (“ha”).

[23] Subsequent applications were made resulting in a positive planning staff recommendation for the approval of a 16-storey tower and eight (8) storey mid-rise development. The Planning Building and Development Committee meeting in August 2018 included support for the application based on the tower and podium being stepped back in accordance with a 45-degree angular plane measured from the west lot line. This proposal was refused by City Council.

[24] The proposal before this Tribunal has not been the subject of a current City Planning Staff report, has not been discussed by City Council nor has this iteration received public input.

The Proposed Development

[25] The site area has increased to 0.85 h or 2.1 acres, since the acquisition of River Lane, increasing the depth of the site from River Road to the first residential property to the west, to about 120 m.

[26] The built form includes three (3) components, Tower A at 26 to 29 storeys, a mid-rise Block B at seven (7) to ten (10) storeys and a one (1) to four (4) storey amenity block linking the buildings. There are two (2) distinct height experiences noted above with a range of heights. When viewed from the abutting neighbourhood to the west the building heights are lower at 26, seven (7) and one (1) storey for each component. Due to the grade drop at the southeast corner of the site, the perceived heights from River Road increase by about three (3) storeys. This perspective from the east creates a skyline silhouette at 29, four (4), and ten (10) storeys.

[27] The total unit count proposed is 360 units, which results in a density of 424 units per hectare based on the area of the Subject Lands. Building A provides a total of 284 units and Building B provides 76 units. The total Gross Construction Floor Area is proposed at 33,908 square metres ("sq m"). The unit types include one, two and three-bedroom units, both with and without a den. Both buildings provide units adjacent to and integrated with the underground parking levels. These units are at or above grade. Building A provides units on both the P1 and P2 underground levels and Building B has six (6) units on the P1 underground level.

[28] The underground parking levels provide a total of 425 parking spaces, of which 336 spaces are for Building A and 89 spaces are for Building B. The surface parking area provides 36 parking spaces, of which 28 spaces are for Building A and 8 spaces are for Building B. The proposed parking rate is 1.28 spaces per unit, inclusive of

resident and visitor space allocations.

[29] Vehicular access is provided from John Street from one all-moves access driveway. Buildings A and B both have entrances facing River Road with sidewalks extending from these entry points to the existing sidewalk along River Road. The main entrance is located interior to the site, at the ground floor level at the podium between both buildings.

[30] Three landscaped open space amenity areas/parkettes are proposed at the southwest, northeast and southeast corners of the Subject Lands with a landscaped midblock pathway linking Philip Street and John Street. The open space area at the southwest, which is intended to be an open lawn/playfield, is suggested to act as a landscaped buffer between the neighbourhood to the west and Building A.

[31] Indoor amenity spaces are provided within both Building A and Building B, along with a second-floor roof terrace on the podium. All of the units maintain either a balcony, patio or private terrace.

Planning Context

[32] The Issues List in the Procedural Order (“PO”) dated September 22, 2021 governed the presentation of the evidence and the hearing of this Appeal. The issues before the Tribunal can be broadly identified as the determination of whether the Official Plan Amendments and the amendments to Zoning By-law Amendment (the “ZBLA”) that will permit the Development: have sufficient regard to the Provincial interests listed in s. 2 of the Act; are consistent with the 2020 Provincial Policy Statement (“2020 PPS”); conform to the applicable Growth Plan for the Greater Golden Horseshoe (“Growth Plan”) as amended; conform to the Region (“ROP”) and City’s Official Plan (“OP”) and any related and applicable Model Design Guidelines (“MDG”), as addressed in the evidence; properly adhere to all relevant design guidelines; and represent good planning in the public interest.

Planning Evidence

[33] Through the Agreed Statement of Facts both Planners agreed that the subject lands are within the “Settlement Areas” as defined by the, 2020 PPS and located within the delineated “Built-up Area” as defined in the Growth Plan for the Greater Golden Horseshoe (GP).

Provincial Policy Statement, 2020

[34] The policy review included Policies 1.1, 1.1.2, 1.1.3, 1.4, 1.6 and 2.1 of the 2020 PPS. The Planners agreed that, save and accept the areas which speak to affordable housings (s 1.4) and natural features (s. 2.1.8) the proposed development is consistent with the 2020 PPS.

[35] Mr. Guetter testified the proposed development will make efficient use of underutilized and vacant land within the existing urban boundary; introduce an underrepresented housing type into one of the Region's area municipalities, diversifying the current housing stock in, and will provide a building scale that, introduces 360 new units within the built-up area.

[36] Mr. Bryce stated given that the proposed development would represent the tallest height in the surrounding area that would have a high density it does not include any affordable housing (s. 1.4).

[37] Section. 2.1 and Section 2.1.1 of the 2020 PPS states that natural features and areas shall be protected for the long term. Section 2.1.8 of the PPS states that developments shall not be permitted on lands adjacent to natural heritage features and areas, including significant valleylands unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions.

[38] It was the City’s position that the Applicant has not satisfactorily demonstrated

that impacts on natural heritage features in the Niagara River gorge will be fully mitigated and that the submitted environmental impact statement does not satisfactorily address the shadowing on the abutting residential area; impacts on habitat of endangered or threatened species nor that the development is located outside of the setback required from a stable top of slope.

[39] Based on the Environmental Impact Study (EIS) prepared by Beacon Environmental, Messrs. Guetter and Telesnicki opined there will be no natural features or functions of the Natural Heritage System negatively affected.

Growth Plan for the Greater Golden Horseshoe, 2019, as amended

[40] Mr. Guetter testified locating residential uses on the periphery of both a residential neighbourhood and a growing tourist commercial in a delineated built-up area allows for greater accessibility, locates new residents in proximity to employment opportunities and daily needs, and serves to reduce the number and length of automobile trips in order to support a healthy and sustainable community as required in the Growth Plan.

[41] Mr. Guetter opined that although he and Mr. Bryce agreed on the current and projected intensification targets, the policy does not indicate that greater targets cannot be included or achieved instead, intensification should occur where tests have been met. Stating the proposed density of 424 units per ha will support the Region's and City's mandate of meeting GP intensification targets.

[42] Mr. Bryce testified that the proposed development is not consistent with the Growth Plan, Section 2.2.2.3 (a) and (b) which directs the City to identify strategic growth areas as key focus areas for development and to identify appropriate type and scale of development in those areas. In this matter, the subject lands he stated, are not identified as being within a strategic growth area.

[43] He emphasized that strategic growth areas are defined as nodes, corridors and

other areas that have been identified by Municipalities or Province to be the focus for accommodating intensification and higher density mixed uses in a more compact form. Despite not being located in a strategic growth area, he stated that a portion of the site is currently entitled to intensification at the density expected in urban growth areas under, what he emphasized is permissible in current zoning permissions.

[44] Mr. Bryce testified the site is not located in proximity to a higher order transit station, but rather a 1.9 kilometres distance from the nearest higher order transit station (Niagara Falls GONIA transit station). The Growth Plan defines priority areas (Major Transit Station Areas) as being within 500 to 800 m of a transit station or a ten (10)-minute walk.

[45] Mr. Bryce stated that it has not been demonstrated that there is a need for the degree of the proposed intensification of the site to meet the City's intensification goals or housing needs.

Region of Niagara Official Plan (ROP)

[46] The subject land is designated Urban Area in the Regional Official Plan ("ROP").

[47] Both Planners agreed that Regional Policy Plan, Sections 2.1 and 2.7, state the Proposed Development is located within the Region's existing urban area which is where growth is anticipated to occur through intensification.

[48] Mr. Guetter commented that although Mr. Bryce took issue with the above noted sections of the ROP, the Region had raised no issues as the proposal introduces new residential uses and housing options in close proximity to the Niagara Falls tourist commercial area. The Subject Lands are well served by existing and proposed community services, amenities and infrastructure. The Applications support an intensified form of urban development on lands that are suitable to accommodate development.

[49] He stated that the policies under Section 4.C of the ROP recognizes that intensification includes all forms of development throughout the built-up area and direct local official plans to generally encourage intensification to assist in achieving minimum intensification targets. The proposed density of 424 units per hectare he opined will support both the Region and City in meeting their minimum targets and will provide a building scale that, in his opinion is compatible with the existing and planned neighbourhood context both of the approved high-rise hotel development directly to the south and the neighbourhoods to the west and north.

[50] With regard to the Sections 7A to 7C, (natural environment) it was the City's position that the environmental impact statement submitted does not satisfactorily address the impacts on habitat of endangered or threatened species; and that impacts on the geology of Niagara River gorge will be mitigated, nor that the development is located outside of setback from a stable top of slope.

[51] Mr. Guetter indicate that relying on the opinions of Beacon Environmental, Study the Proposed Development conforms to the Natural Environment policies of the ROP as it promotes a building design that does not adversely impact the adjacent natural heritage features.

[52] It was Mr. Bryce's testimony that the Region looks to the local Municipality to develop and implement intensification through their OP strategies and policies to achieve intensification targets. (Section 4.C.4) The ROP notes it is the local municipality that will also define the designated area where intensification should occur. (Section 4.C.2.1)

[53] He supported his testimony by referring to Sections 4.A.1.1 to 4.A.1.3 (Growth Management Objectives) which directs a majority of growth to existing urban areas and directs a significant portion of future growth to built up areas designated by the local Municipality in what is outlined as Local Municipally Designated Intensification Areas. He opined that the subject lands are not located in an area that has been designated by the City as part of that Intensification Area.

[54] It was agreed by both Planners that s. 9.A, 9.E, 9.F and 11.A of the ROP involving, servicing, transportation and housing which encourages a variety of housing types within urban communities and neighbourhood to serve a variety of people as they age through the life cycle had been addressed.

City of Niagara Falls Official Plan (OP) Issue No. 4

[55] The City of Niagara Fall Official Plan ("OP"), the Subject Lands are located within the "Urban Area" and are within the City's "Built-Up Area" in accordance with Schedule A2 - Urban Structure. The subject land is designated "Residential" on Schedule "A" of the OP and represents a consolidation of eight land parcels.

[56] Special Policy Area "60" applies to 0.50 ha of land located on the west side of River Road, between Philip Street and John Street which took the site from Tourist Commercial designation to Residential on Schedule "A" of the Official Plan.

[57] In addition to the policies contained in Part 2, Section 1.7.5 and Part 4, Section 4.5, the OP states that a portion of the land between River Road and River Lane may be developed with an apartment building to a maximum building height of seven (7) storeys and 27 m, as measured from the intersection of River Road and John Street, and a maximum density of 238 units per ha. As well, the portion of the site west of River Lane shall only be used for parking and buffering.

[58] In the testimony of Mr. Guetter the proposed 29-storey building height is compatible with the adjacent Tourist Commercial and Residential land use designations as the majority of this building is on the River Road properties and maintains a small building floorplate of 788 sq m which represents low lot coverage. The technical reports prepared, which he relied on, supported the efficient use of existing services and identify no impacts on the transportation system or natural environment.

[59] In the opinion of Mr. Bryce, with regard to Part 4 Section 2.6 it has not been demonstrated that it is desirable to develop the land at the density and intensification

proposed. He stated other lands in the City are designated and available for intensification to this extent that support higher order transit and commercial areas. As an example, the downtown area, which includes facilities to serve residents and high order transit. Further, the parking lot proposed off John Street is not compatible with the established streetscape of the rest of John Street.

[60] Mr. Guetter stated the OP recognizes that prescribed height regulations can be exceeded in specific situations to allow for appropriate and well-designed buildings, which, in his opinion, provides support, in part, for considering higher building heights in areas outside of the OP's identified intensification areas based on good planning and urban design principles. This promotes a better utilization of these properties, thereby achieving a larger-scale residential development that allows for a more efficient use of urban land and available municipal infrastructure.

[61] He opined, the six (6) and seven (7)-storey maximum height permissions are not the appropriate heights for the Subject Lands given the current and future context of this area. He emphasized that intensification is focused in greater measures in order to optimize the use of land and existing infrastructure within the built-up area.

[62] He stated that the as-of-right permitted density of 238 units/hectare, which exceeds any density permissions allowed in the OP for residential buildings in intensification nodes or anywhere else in the City predated the Growth Plan 2020 and the 2020 PPS with Subject Lands maintaining a Tourist Commercial designation prior to 2009 that supports the highest building heights in the City. The principle of high-density development for a portion of the Subject Lands in his opinion had been established.

[63] In his opinion, the location on the edge of a residential neighbourhood, fronting on to River Road and adjacent to Tourist Commercial designated lands to the south, along with its historic designation, establishes a basis for the site's appropriateness to support greater building heights and densities from those permitted by the municipal policy framework.

[64] Mr. Bryce gave testimony that, the City's OP has numerous policies requiring compatibility between existing and proposed development. He referenced the policy specific to the applicable land use designations for the Subject Site (Schedule A-2). Policy 1.15.1 of the OP includes a long list of criteria to be considered when evaluating proposals for intensification within "the Built-up Area". He noted:

the character of the existing neighbourhoods within the Built-up Area shall be retained. Accordingly, residential development, intensification and infilling shall blend into the lot fabric, streetscape and built form of a neighbourhood.

[65] It was his opinion the proposal neither blends with the lot fabric or streetscape nor does it retain the built form of the adjacent residential neighbourhood. It does not adequately provide for an appropriate form and transition in terms of height and massing as outlined in Part 2, Section 1.15.5. Adverse impacts, in terms of shadowing and overlook, as well as visual impacts due to a lack of the reduction of the perception of height through effective use of a stepped back form, has not been achieved.

[66] Mr. Bryce opined that the contrast between 29 storeys and the two (2)-storey residential abutting is simply too drastic and out of character with the surrounding neighbourhood. The setbacks equivalent to building height are not achieved from adjacent low-rise development to the west of the subject lands through the use of the 45-degree angular plane. A transition or gradation in building height to abutting lands is therefore not provided, as expected for lands designated for intensification at this level and expected for buildings that are taller than the six (6)-storey building height generally contemplated in the Residential designation. Further, he testified the proposal is not considered an accepted gradation in height and intensity from the proposed hotel development to the south to the adjacent residential development.

[67] Part 1, Section 3 of the OP provides policies on intensification and identifies various areas that have been designated for intensification, including intensification nodes and corridors specifically, (b) and (c):

(b) Intensification within these areas are to comply with the policies

of Part 2, Section 1.15.5; and

- (c) Building heights for designated intensification nodes are provided in Schedules A.

2 (a) to A.2 (d) of the Official Plan. Although building heights differ due to the different goals of these nodes, these schedules generally identify lower building heights to transition to adjacent areas of low rise, low density residential development.

[68] Mr. Bryce stated the proposed site is not situated within a planned intensification node and is not situated at the intersection of major streets. The scale and height of the development is not appropriate for this site and to this block. The OP, he opined, envisions the degree of intensification planned for sites within neighbourhoods and along arterial roads to not exceed six (6) storeys and should be designed to complement and blend with surround forms and streetscapes. The lands are currently zoned to permit the development, of a seven (7)-storey building which is a scale that reflects the intention of the OP and provides for an appropriate transition to the surrounding area.

[69] Section 2.6.6 speaks to the availability of adequate municipal services and facilities for the proposed use and its impact on the transportation system, community facilities and natural environment. Through the technical reports prepared, of which Mr. Guetter stated he relied on, the proposal supports the efficient use of existing services and identify no impacts on the transportation system or natural environment. On the contrary, Mr. Bryce maintained the impacts to the natural environment is still in question with further study required.

Zoning By-law – Issue No. 5

[70] The River Road properties at 5471, 5491 and 5507 are zoned "R5E - Residential Five (R5) Zone", and the property located on the west side of River Lane, between John and Phillip Street, which is municipally known as 5491 and 5507 is zoned "P - Parking Lot (P) Zone". The John Street properties at 4399, 4407, 4413, 4427 and 4437 are zoned "R2 - Residential Two (R2) Zone."

[71] The properties are subject to Zoning By-law No. 2008-17 Exception 840 which permits the construction of a seven (7)-storey, 27 m apartment structure with a maximum of 119 units. Exception 841 permits the construction of a parking structure to satisfy a portion of the required parking for the apartment structure, for a maximum of 12 required parking spaces. No building or structures are permitted on this portion of the land.

[72] The R2 zone permits detached dwellings, duplex dwellings and semi-detached dwellings. Rezoning the Subject Lands to a new Residential Apartment SF (R5F) Density zone with site-specific provisions, including, but not limited to density, height, yard setbacks, landscaped open space, lot coverage, building projections and parking will bring the zoning into conformity with the OP.

[73] Both Parties agreed that the change in zoning of the property to Residential Apartment 5F Density Zone (R5F) is the appropriate zone category under City of Niagara Falls Zoning By-law No. 79-200.

[74] Notwithstanding the appropriateness of the zone category, the experts did not agree as to the site-specific regulations for the proposed development.

BUILT FORM – Issue 7 and 8

[75] The Region's Urban Design Guidelines ("MUDG") as outlined in the City's OP is one of reference. The test under the ROP is set out in policy 4.J.2 which states:

The Region promotes adoption of its Model Urban Design Guidelines or similar community design guidelines by the local municipalities to support the development of a strong sense of place and an overall approach to development which considers design at a broader neighbourhood and/or community scale. The City may prepare urban design plans or neighbourhood plans to implement the Urban Design Policies on specific areas. In the absence of such plans, reference should be made to Niagara Region's Model Urban Design Guidelines.

[76] The City of Niagara Falls has not adopted specific design guidelines for the Subject Lands in this location. As a result, the design of the proposal has been reviewed

under the Regional Municipality of Niagara MUDG, prepared by Brook McIlroy Planning and Urban Design, dated April 2006.

[77] Section 4.a6 of the Design Guidelines provides guidance on the design of tall buildings to respond to potential negative overshadowing, overlook and wind tunnel impacts on adjacent properties, by noting that height transition should be incorporated into the design of tall buildings when situated next to low density - low rise areas, and that upper floor step backs should be designed according to the appropriate visual angular plane analysis.

[78] Part 2, Section 1.15.5(iii), clause 3, of the City's Official Plan has policies addressing the appropriate set back of tall buildings abutting low rise residential development, stating that new development should have a rear yard equivalent to building height, in keeping with the incorporation of a 45 degree angular plane when viewed from the property line of the abutting low rise development.

[79] Chapter 4 Section 4d.4 Height, Massing, Transitions of the MUDG provides further guidance on form and placement of tall buildings in relation to adjacent development and streetscapes through the following guidance

- (a) The design of high-rise buildings should respect potential negative impacts on adjacent properties, including overshadowing, overlooking and wind tunnel effects. Therefore, building height and mass should be appropriate to the type and nature of adjoining development.
- (b) Nodes and major intersections are the appropriate locations for the tallest / highest buildings.
- (c) Wherever possible, high rise buildings greater than 5 storeys should extend vertically with small footprints and include a base height of 3 to 5 storeys.
- (d) The base height should generally be no greater than 2 storeys above adjacent property height.

- (e) New developments should be designed to provide a height transition to lower scale developments and public spaces to minimize impacts of taller buildings, including shadowing and wind acceleration.
- (f) Step backs of upper storeys should be provided so that building bulk is minimally perceived from the vantage of a pedestrian on the street. Step backs should be considered for buildings above 3 storeys.
- (g) A step back of the building wall should occur above the building base. The step back distance should be a minimum of 2.0m.
- (h) Visual Angular Plane Analysis should be used to determine appropriate building envelopes. A visual angle is typically measured from pedestrian areas located opposite the proposed development or from the boundary of an adjacent property.

Applicant's Position:

[80] Mr. Spaziani opined, Part 2, Section 1.15.5, includes a policy about rear yards to control building heights and ensure compatibility with the surrounding area, it was his opinion that the Proposed Development conforms with this policy. Based on the City's Zoning By-law provisions (Section 2) and based on the street and block pattern under the lot consolidation, John Street and Phillip Street are in his opinion, both considered frontages and the west lot line and River Road are considered flankages. However, the original underlying lot composition identified the River Road parcels as fronting onto River Road.

[81] Notwithstanding these considerations, it was his opinion, that John Street is the prominent frontage from a built-form presence, site access and building entrance perspective. Based on his interpretation and the lack of specific guidance in the Official Plan, he opined the proposed Building A and Building B are situated generally within a 45-degree angular plane as measured from Phillip Street and from the west lot line.

[82] The angular plane was taken at a height of 2 m above ground level was explained as being reasonably within compliance with the Principle of the Angular Plane

and geodetic surveys. It was further advanced as being in line with possible fencing, variance in grade and/or the presence of where the average eye views from (2 m off the ground). He explained that a visual angular plane analysis was used to determine the appropriate building envelope and scale compatibility with the adjacent low-rise residential area. The angular planes are measured from the boundary of adjoining residential properties to the west and north across Philip Street at 2 m above grade. Building A, proposed at 29-storeys, generally conforms to the MUDG.

[83] Consideration has been given to the current and planned context of the surrounding area in proposing a height for Building A which he stated is modest in comparison to the adjacent 60 and 61 storey hotel development permissions and in proposing a height for Building B, which represents a suitable and appropriate transition in scale to the west and north of the Subject Lands.

[84] Mr. Spaziani contended the building design follows the principles of respecting the human scale through the design of the podium that counterbalances the scale and height of the 26- storey tower adjacent to Tourist Commercial. He stated the siting of the development is on the periphery of the Residential land use designation as the majority of the building is on the River Road properties, provides for a 45-degree angular plane and maintains a small building floorplate of 788 sq m which represents low lot coverage and minimal shadow impacts.

[85] It was his opinion that when viewed from the west, within the existing low-rise area, the upper four floors of Tower A step back 2 m per step, conforms to a 45-degree angular plane drawn from the western lot boundaries at a height of 2 m. In the case of Building B, the two upper floors step back to reduce its perceived height and conform to a similar 45-degree angular plane drawn from the linear extension of the dominant property line from the south.

[86] The Proposed Development includes architectural treatments such as a four (4)-storey podium for Building A which, in his opinion, will limit any wind impacts and provides for a pedestrian scaled build form condition, lessening the impact of this taller

building and engaging the street frontage.

[87] The landscape design includes three landscaped open space areas at the northeast, southwest and northwest corners of the Subject Lands which he stated, supports the public realm along River Road.

[88] A separation distance between Buildings A and B has been set at 24 to 26 m, an appropriate separation. This he stated, creates increased sky view and reduces the perception of a wall of built form. Tower A has a setback to the west lot line of about 64 m which ensures that overlook and privacy impacts on existing residents are minimized. The shadow impacts are minimal compared to the shadow impacts of the neighbouring hotel development. It was Mr. Spaziani's opinion that the 60-61 storey hotel facility will have the greatest impact in terms of shadowing.

[89] A parkette has been provided along the western site boundary fronting on John Street. The parkette has a width of 18.4 m (60') creating a major landscape buffer visually separating the development from the residential lands to the west.

[90] In response to the immediate neighbour's concerns, he stated the setback for Building B has been significantly increased from 3 m to 13.5 m from the nearest lot line and about 20 m from the existing Bed and Breakfast side wall at 4434 Philip Street. In his opinion, this setback greatly improves the scale relationship between the two (2) districts.

[91] Policies for the River Road Satellite District, the underlying designation on the western part of the subject lands, are silent on the matter of specific shadow duration and limits. The OP generally refers to site specific studies on a case-by-case basis to evaluate any adverse impacts from development.

[92] Given that there is little specific shadow guidance within the River Road Satellite District, Mr. Spaziani looked to other sections of the OP, for other planning districts, which have been reviewed to inform this question of shadow impact. The Official Plan

provides guidance on the acceptable level of shadow in Part 5 Secondary Plans, Section 2, regarding shadow duration impacts on “abutting open spaces” in the Transit Station Secondary Plan policies.

3.13.9.1 Where buildings are adjacent to open spaces (i.e. Transit Plaza), apply shadow testing on a case-by-case basis to ensure a minimum of five hours of sunlight per day from spring to fall.

[93] OP Part 2-Land Use Policies, Section 4, Tourist Commercial, 4.4 HIGH-QUALITY PRIVATE DEVELOPMENT, states:

4.4.5 . By virtue of allowing high-rise buildings, design controls need to be established to ensure that they do not create adverse impacts, such as extensive shadowing on residential areas, public streets and open spaces, encroachment on the views of other landowners and the creation of severe wind impacts at the street level. Council will be guided by studies submitted in support of new development applications to ensure that high quality building designs are achieved with minimal environmental impacts.

[94] This clause introduces the goal, “*do not create adverse impacts, such as extensive shadowing on residential areas, public streets and open spaces*”. As proposed, he opined, the quickly fleeting shadows are not considered extensive and comply with this policy direction.

[95] Mr. Spaziani’s views as expressed in his Written Statement, Reply Written Statement and in oral testimony before the Tribunal were that new net shadows do not result in unacceptable shadows within an urban environment and have minor impacts on the residential neighbourhood to the west.

[96] The Shadow Study Analysis (June 29, 2017) determined that the Proposed Development's shadows on the gorge will occur at the same time as the natural shadows of the gorge on itself, resulting in no overall impact.

[97] His urban design analysis concluded the currently proposed development will be an appropriate approach for rejuvenating River Road and downtown Niagara as well as

accommodating residential intensification and drawing tourist attraction.

[98] In his opinion, the Proposed Development is in a strategic location at the interface of a neighbourhood area and the City's main tourist area facing the Niagara Gorge along River Road and will reinforce the prominence of this location and contribute to the City's skyline.

City's Position

[99] Mr. Ahmad informed that the City's principal objection is the proposed height of the development and the lack of transition towards the residential neighbourhood to the west.

[100] He opined the building design does not have the appropriate building form setbacks and setbacks from public sidewalks to minimize shadowing as well as overlook and other massing impacts, it is not consistent with current urban design best practices that promote urban design approaches that mitigate impacts of taller buildings on adjacent lower building forms.

[101] It was his opinion that neither tower conforms to a 45 degree angular plane as measured from ground level (0 m) at the property line of the nearest adjacent residential property line, nor have setbacks or transitional building forms been effectively utilized to mitigate the impacts of this height; there is insufficient transition, in building height from the both towers to low density residential uses; the buildings appear to be too tall for the property and the area, and effective methods to mitigate impacts and integrate the development in the neighbourhood do not appear to be possible.

[102] He stated as a result, the development will have negative impacts, in terms of overshadow and overlook, on the adjacent low-rise development, and as such the development will diminish the quality, usability and enjoyment of adjacent low-rise areas and does not adequately provide for an appropriate form and transition in terms of height and massing, in accordance with Section 4a.6 of the Region of MUDG.

[103] He informed that the minimal setbacks that are shown on the South Elevation of the 29-storey tower are located above the angular plane, making these setbacks ineffective. Equally, the setbacks applied to the ten (10)-storey tower is also ineffective as these are located above the angular plane. The proposed 29 storey tower is about 72.0 m in height (from the established grade on the west elevation) and is located 50.0 m to the nearest abutting residential lot line. The ten (10)-storey tower is located 17.5 m from the nearest abutting lot line. As the proposed buildings exceed 50.0 m and 17.5 m in building height respectively, he opined these buildings fail to meet the angular plane.

[104] He furthered that the angular plane analysis is not applied correctly and consistently in accordance with Section 4d.4 of the MUDG. He was confident that if correctly applied the angular plane analysis will demonstrate that the proposed towers of 29 and 10 storeys are too tall. Correct application of the angular plane to the 29 storey tower results in the angular plane intersecting with the building above the 21st storey, and for the ten (10)-storeys tower an intersection of the angular plane with the building above the 4th storey. He noted that the MUDG clearly stated the measurement of the 45-degree angle is to be taken at ground level. Counsel for the City noted that ground level had been earlier used in each of the submissions and staff reports.

[105] Mr. Ahmad stated the Proposal does not provide appropriate step backs of upper storeys that are typically applied to diminish the visual bulk of tall buildings and add architectural variation. Stepping back the upper floors of tall buildings serves many functions including, addressing wind impacts, allowing greater penetration of sunlight on to outdoor spaces and the public realm offering greater sky-view, and finally visually sculpting building towers to diminish the bulk of towers by making these appear to recede visually.

[106] The MUDG states that a minimum setback of 2.0 m between the building base and the building wall is to be applied. The proposed 29 storey tower does meet this minimum along the River Road frontage but not along the John Street frontage. The ten (10) Storey Tower does not meet this minimum between the 6th and 7th floors.

[107] With respect to the 29 Storey tower he stated, the stepback applied by the proposal between the podium and the tower is not sufficient to diminish the visual bulk of the tower and address negative impacts of overview and shadowing. The proposal applies additional stepbacks at the top floors of the building; however, these penetrate above the angular plane and are ineffective in addressing the negative impacts of overview and shadowing.

[108] He opined the building placement along John Street is too close to the property line and is not appropriately setback from the public sidewalk to create a harmonious streetscape consistent with the existing detached housing. Further, the proposal does not include public spaces that play an important role in providing separation and landscaping that could lessen the impacts of the proposed tall buildings.

[109] Mr. Bryce proffered that no shadow modelling had been provided or reviewed in terms of the proposal before the Tribunal. However, modelling completed for the third proposal, for March 21 and September 21, illustrated that areas of the residential area immediately west of the development were expected to remain in partial shadowing for a portion of the day. He further stated that the application of shadow guidelines as used by Mr. Spaziani, the Transit Station Secondary Plan (shadows on open space) and Tourist Commercial designation, is an inappropriate consideration for the study of shadowing from a Residential designation impacting the surrounding low-rise residential neighbourhood to the west.

INFRASTRUCTRE – Issue 9

[110] With respect to Issue No. 9 of the City's Issues List concerning transportation matters, the Tribunal agreed to strike this issue from the Issues List as the City and Appellant consented with the understanding that the approval of the proposed driveway alignment would be dealt with at the time of Site Plan.

GEOLOGICAL – Issue 10

[111] Mr. Telesnicki directed the Tribunal to Section 6.0 of the Geotechnical Report stating that the expected vibrations from the blasting, during the bedrock excavation, are not anticipated to have any significant impact on the larger overhangs or the overall stability of the rock slopes along the gorge near the site.

[112] He noted that a visual assessment was carried out on foot from the sidewalk along River Road as well an unmanned aerial vehicle (UAV or “drone”) survey which has been completed to examine, in detail the exposed rock faces in the Niagara River gorge. A UAV survey provided high resolution photographs of the rock faces in the gorge and a detailed three (3)-dimensional digital model of the gorge slopes which were created using digital photogrammetric methods.

[113] With regard to concerns regarding blasting as a method of excavating the bedrock at the site to facilitate construction of the building, he added, if blasting is used, vibration criteria would be included in the construction contract documents for the excavation contractor to follow. In addition, pre-blast as well as a post blast surveys of surrounding residences would be undertaken as requirement of the construction contract.

[114] Mr. Telesnicki opined that the blasting for the excavation of the bedrock at the site will result in ground vibrations in the rock which will attenuate with increasing distance from the excavation. The impact of these vibrations on the rock faces in the gorge will not have an impact on the overall stability of the rock slopes in the gorge. Any impact would be limited to potentially disturbing some very loose pieces of rock on the gorge walls which could cause some of these small blocks to fall; however, these pieces would likely fall in time due to ongoing natural weathering processes.

[115] Mr. Bryce stated the Report does not adequately demonstrate that the excavation for and construction of the proposed building will not impact on the integrity of the surrounding geology and that a further analysis and a pre-construction survey

would be needed to ensure construction and excavation methods do not impact the surrounding geology and the integrity of surrounding residences.

[116] It appeared that only a visual analysis of the Niagara Gorge face was undertaken and that additional information on the impacts on The Niagara Gorge, River Road and surrounding neighbourhood from excavation form blasting is required; and no conclusions on the location of the stable top of bank, nor the appropriate setback from the stable top of bank, were provided.

[117] He expressed that a thorough analysis that will fully demonstrate the excavation for and construction of the proposed building will not negatively impact on the surrounding geology and will determine the stable top of bank and setback thereto, and such report be peer reviewed by an independent third-party expert.

ENVIRONMENT – Issues 11

Mr. Guetter addressed the Beacon Environmental Impact Study which concluded that there are no important natural heritage features or functions on the subject lands. A number of design and construction mitigation measures have been identified and incorporated into the proposed plan. The recommended mitigation measures will limit impacts to the local natural features associated with the adjacent lands, specifically the Niagara Gorge.

[118] Mr. Bryce stated that an adequate analysis of species at risk animals, specifically bats has not been adequately completed in accordance with Ministry of Natural Resources and Forestry guidelines as of the submission of the revised proposal. He stated that a further analysis should be undertaken to demonstrate the proposed building will not impact on species at risk and natural heritage features of the site, in accordance with Ministry of Natural Resources and Forestry guidelines.

ANALYSIS AND FINDINGS

[119] From a policy context, the issues before the Tribunal require the general determinations of whether the proposed OPA and ZBLA have sufficient regard to the provincial interests listed in s. 2 of the *Planning Act*, is consistent with the 2020 PPS, conforms to the Growth Plan for the Greater Golden Horseshoe, conforms to the ROP and to the City's OP, in general represents good planning and is in the public interest.

[120] In determining this matter, the Tribunal, in summary, accepts the evidence and expert opinions provided by Messrs. Bryce and Ahmad. The Tribunal is persuaded by the evidence that the proposal promotes an over development in height and massing of Subject Lands and does not provide appropriate transition to the adjacent low-rise residential.

[121] At a higher policy level, there is dispute as to matters of conformity of the proposal with the Growth Plan ("GP") as the subject Site, while being recognized as within the "Built-up Area" is not acknowledged as being within a "Strategic Growth Area" as defined by the City's OP.

[122] The Tribunal has considered this evidence and concludes that the proposed Development is consistent with the 2020 PPS but where the Applicant falls short is the direction of the GP (clause 3 of Section 2.2.2) outlining that municipalities will identify strategic growth areas as key focus for development and identify appropriate types and scales of development in those areas.

[123] While the 2020 PPS and GP tests are important and necessary considerations in their own right, of importance here is their application in determining whether the OP and its implementing instruments of zoning by-laws, and use of design guidelines which properly reflect the current planned context as guided by these provincial planning documents.

[124] The Applicant contends that a higher building with more units and designed with

reference to regional guidelines better satisfies the requirements of these higher order planning documents over the restrictions of the OP.

[125] The Tribunal accepts the evidence set out in oral testimony of the City Planner, Andrew Bryce, who opined that:

a proposed development may achieve consistency with the PPS and conform to the higher order intensification, optimization and development policies in the GP, but fail to conform to the local planning policies which more specifically deal with the site specific development and design issues that are addressed in the OP.

[126] The Tribunal recognizes that municipalities are provided the tools to determine the amount of intensity based on the context of the site. In this matter, the Subject Lands are not targeted by the City to provide the amount of intensification, height and massing being requested in areas identified as Residential in the City's OP.

[127] In fact, the proposed height of the development does not provide the type of height and massing transitions that could avoid impacts on neighbouring uses.

[128] Through Mr. Bryce's testimony the Tribunal heard that other lands in the City are designated and available for intensification and have been specifically designated to support higher order transit, other transit nodes or commercial areas, including the downtown area, which includes facilities to serve residents that are not available to the subject lands.

[129] The City's aspirations are clear, to create intensity in the preferred focus area surrounding the Niagara major transit station. This focus includes important policy requirements, identified in various ways in the OP, that any new development fit within the existing and/or planned context of the neighbourhood and the City, and promote and achieve the overall objectives by allowing a level of intensification which is appropriate for the area.

[130] Typically, planning policies and design guidelines address the form, placement,

and articulation of tall buildings such that developments can offer the needed densities and housing variety yet remain sensitive to adjacent land uses. In this matter this is simply not the case. Contrast with existing built form in the area is simply too obtrusive to blend with the residential area to the west.

[131] This application also falls short on conforming to the local planning policies which more specifically deal with the site-specific development that are addressed in the OP. The scale and height of the project is incompatible with the established, low rise, low density built form of the surrounding community and adverse impacts, in terms of overlook, as well as visual impacts due to a lack of the reduction of the perception of height through effective use of a stepped back form, are expected.

[132] The Tribunal accepts the final argument of the City that the policies and objectives to limit building height and density on these Residential designated lands are clear and very specific in order to override the clear provincial direction to optimize intensification as described by Mr. Guetter.

[133] The Tribunal relies on Part 2, Section 1.15.1 which states that residential development, intensification and infilling shall blend into the lot fabric, streetscape and built form of a neighbourhood. This is simply not the case with the proposed development. Notwithstanding the Tourist Commercial approved 60 and 61 storey proposed hotel to the south, this development is situated in a neighbourhood where, at the very maximum, four (4) to six (6) storey low-rise apartments are the tallest form of development.

[134] Part 2, Section 1.15.2 states that a gradation of building heights and densities will be encouraged together with sufficient horizontal separation distances between taller buildings and low-rise dwellings in order to ensure a complementary arrangement of residential uses.

[135] There has been no perceptible transition in scale and height as this Development represents a mass that is not unsubstantial in comparison with the residential dwellings

adjacent to it. As such, it is not compatible with, and does not represent a harmonious fit with, the physical character of the residential area to its west.

[136] Privacy and overlook impacts are generally dealt with through a combination of spatial separation, orientation and mitigating measures between buildings and sites. Such impacts, in the Tribunal's view will be unacceptable in this case with the proposed building setbacks and the separation distance of the proposed building from the neighbouring site to the west.

[137] With respect to urban design, the Official Plan policies provide for guidelines to be developed for areas to ensure that development respects the context of such areas and fits with such things as the existing streets, step backs, building heights, streetscape and the characteristics of nearby development.

[138] The Tribunal finds that these policy guidelines have not been met. Sufficient setbacks and transition in scale, through the use of angular planes and step-downs in height to adequately limit privacy impacts and that transition has not been carefully managed for the sake of its surroundings. In this case, compatibility with surrounding low rise, low density to ensure a harmonious fit is lacking within the existing planned context and therefore the transition or gradation in building height to abutting lands which is expected for lands designated for intensification at this level, has not been achieved.

[139] The Applicant requests the land be rezoned to site specific Residential Apartment 5F Density (R5F) to permit the housing type and the height and density of the proposed development. While the R5F zone is intended to accommodate apartment buildings of the highest density and building height allowed by the City, it has not been demonstrated to the Tribunal's satisfaction that it is desirable to develop the land at such a density and intensification.

[140] The revised proposal leaves many questions as to whether there will be any negative impacts on the geological integrity or adverse impacts to the natural heritage

features within the Niagara Gorge and on the surrounding residences.

[141] The Tribunal heard from Mr. Telesnicki who provided evidence based on findings for a previous version of development, that during construction, a sufficient degree of foundation inspections, subgrade inspections, and an adequate number of in-situ density tests and materials testing should be carried out to confirm that the conditions exposed are consistent with those encountered in preliminary tests. This leaves the Tribunal with inconclusive evidence that there will be no negative impacts on the Niagara Gorge and that effects on the existing residential neighbourhood remain at question.

[142] Finally, Mr. Spaziani spoke to the Subject Lands being a part of the skyline by virtue of their position on River Road located between the 60 and 61 storey hotel tower permissions to the south and the residential neighbourhood to the north, thus part of the OP's objective of providing for an internationally recognizable skyline.

[143] While this may be true, the Tribunal also recognizes by contrast Tourist Commercial designated lands are expected to be developed at a greater intensity than developments in Residential designated lands. To this extent, the policies and design guidelines for tourist areas support greater building height and intensity and allow building setbacks that do not provide a 45-degree plane to abutting properties and streets.

[144] Through the evidence presented it was made clear to the Tribunal the City is not opposed to development on the Site, but there are a number of urban design and built form concerns including the proposed overall height and the manner in which it will rise above the adjacent residential neighbourhood to the west that need to be addressed.

[145] CRD through Ms. Jackson-Jones, provided comments on concerns with the overall height, the use of blasting as a means of accomplishing underground parking and the effects on the surrounding residential properties and privacy/overlook and shadowing. The Tribunal through this analysis has provided its position on these

factors and has weighed the comments and participation of the CRD accordingly.

[146] As such, the Tribunal finds that the OPA and ZBLA, as they would permit the proposed Development, in its current form, does not conform with the built form and development policies identified in the OP.

[147] Accordingly, upon all of the evidence, for the reasons given, as a result of the Built form and massing of the proposed development and most importantly the height requested, the proposal fails to achieve the required transition in scale, and is incompatible and does not fit harmoniously with the low rise residential character of the neighbourhood area to the west.

[148] The Tribunal finds the proposed development does not conform with all relevant and applicable provisions of the City of Niagara Falls Official Plan and is not in accordance with principles of good planning.

[149] Based on the evidence, discussions, findings and reasons summarized, and after due consideration for all of the arguments set forth in the opening statements and oral submissions of counsel for the City and 2486489 Ontario Inc., the Tribunal dismisses the appeals.

ORDER

[150] **THE TRIBUNAL ORDERS** that the appeals are dismissed.

“D. Chipman”

D. CHIPMAN
MEMBER

Ontario Land Tribunal

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