

**Ontario Municipal Board**  
Commission des affaires municipales  
de l'Ontario



**ISSUE DATE:** February 13, 2018

**CASE NO(S):** PL150274

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

Applicant and Appellant: Adi Development Group Inc.  
Subject: Request to amend the Official Plan - Failure of the City of Burlington to adopt the requested amendment  
Existing Designation: Downtown Mixed Use Centre  
Proposed Designated: Site Specific (To be determined)  
Purpose: To permit the development of a 28-storey mixed use building with 226 residential units  
Property Address/Description: 374 Martha Street  
Municipality: City of Burlington  
Approval Authority File No.: 505-02/14  
OMB Case No.: PL150274  
OMB File No.: PL150274  
OMB Case Name: Adi Development Group Inc. v. Burlington (City)

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

Applicant and Appellant: Adi Development Group Inc.  
Subject: Application to amend Zoning By-law No. 2020 - Refusal or neglect of the City of Burlington to make a decision  
Existing Zoning: Downtown Core  
Proposed Zoning: Downtown Core-Exception  
Purpose: To permit the development of a 28-storey mixed use building with 226 residential units  
Property Address/Description: 374 Martha Street  
Municipality: City of Burlington  
Municipality File No.: 520-07/14  
OMB Case No.: PL150274

OMB File No.: PL150275

**Heard:** February 22 – 24, 27, 2017, March 6, 2017 and July 17 – 21, 2017, in Burlington, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

Adi Morgan Developments  
(Lakeshore) Inc.

D. Baker  
M. Connell

City of Burlington

Q. Annibale  
M. Joblin  
C. Yi  
B. Hurley

6965083 Canada Inc.

P. Devine  
S. Lampert

2145024 Ontario Ltd.

S. Snider  
A. Toumanians

**DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER**

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**BACKGROUND**

[1] Adi Morgan Developments (Lakeshore) Inc. (“Adi”), formerly Adi Development Group Inc., owns the lands at 374 and 380 Martha Street (“Subject Site”) in the City of Burlington (“City”). These lands also have frontage on Lakeshore Road.

[2] Adi proposes a development that is predominantly residential with some commercial uses in a podium. In support of this proposal, Adi applied for a site-specific official plan amendment (“OPA”) and associated site-specific zoning by-law amendment (“ZBLA”). The City failed to make a decision on either application and Adi appealed these matters to this Board.

[3] The proposed development has been the subject of extensive discussions and negotiations.

[4] The original proposal did not include 380 Martha Street. 2145024 Ontario Ltd. (known as “Carriage Gate”) and Adi negotiated a land exchange that added 380 Martha Street to the Adi holdings for the proposal that is now before the Board.

[5] Carriage Gate’s lands are adjacent to the west to those of Adi. Carriage Gate appears in support of the Adi proposal.

[6] The Region of Halton (“Region”) had entered into Minutes of Settlement with Adi, which were filed at a pre-hearing. The Region had advised the Board at that time that these Minutes of Settlement resolved the Region’s single issue in this matter and the Region withdrew from these proceedings. As noted in City planning staff reports, the Region’s planning staff advised the City that the proposed development conformed to the Region’s growth policies in the Region Official Plan (“ROP”).

[7] The City appears in opposition to Adi’s revised proposal.

[8] 6965083 Canada Inc. is wholly owned by Sun Life Assurance Company of Canada and is referred to in this hearing and decision as “Sun Life”. Sun Life appears in general support of the City, but is not precisely aligned with the City. Sun Life appears in opposition to Adi.

### **Site, Area and the Revised Proposal**

[9] As a result of the land exchange with Carriage Gate, the Subject Site is now more regularly shaped. It is made up of a surface parking lot and the house at 380 Martha Street. The Subject Site is on the northwest corner of Martha Street and Lakeshore Road East.

[10] On the east side of Martha Street, opposite the Subject Site, is Martha’s Landing. Martha’s Landing is a five-storey retirement home catering to older residents.

[11] Northeast of the Subject Site at 395 Martha Street is Martha Terrace, a 12-storey

residential rental building that is owned by Sun Life.

[12] Adjacent to the west of the Subject Site are the Carriage Gate lands. These lands are located between the Subject Site on the east and Pearl Street on the west. The Carriage Gate lands, like the Subject Site, front on Lakeshore Road.

[13] Adjacent to the north of the Subject Site is a mixed use development that includes three-storey, townhouse-style live-work units.

[14] Southwest of the Subject Site, on the south side of Lakeshore Road is an approved and under construction 22-storey residential condominium in a development that also includes a seven-storey residential condominium and an eight-storey residential condominium and hotel.

[15] At the time of the hearing, the approval for the 22-storey building was the tallest in the nearby area, with several others in the 17 to 21- storey range. The Board was advised that applications for 23-storey proposals were under consideration by the City.

[16] The existing height permission on the Subject Site is capped at four storeys with the possibility of an increase to eight storeys under certain circumstances.

[17] The revised proposal is for a 26-storey mixed use development with commercial uses at grade and residential uses above. There are 240 residential units, more than two-thirds of which are one-bedroom units. All of the parking is below-grade with access and egress from Martha Street. The parking standard to be applied is 1.0 space/residential unit, a standard that is lower than the City's usual 1.2 spaces/residential unit but is a standard that has been accepted by the City.

[18] While the City and Adi agree on the ratio of parking spaces to residential units, some disagreement remains on other matters associated with parking. Questions of parking stall size, the slope of the underground parking garage and maneuverability with regard to stall and aisle dimensions are discussed more fully below.

[19] The commercial uses are in a three-storey podium which steps down to one storey as it moves north along Martha Street toward the live-work units. The podium wall is the principal design element that sets the context for the pedestrian experience on the sidewalks adjacent to the building on Lakeshore Road East and on Martha Street. The podium is set at the property line with extensive glazing proposed to frame and enliven both Lakeshore Road East and Martha Street.

[20] The proposed tower sits on top of the podium and is set back from the podium edge. An outdoor amenity area for the residential tower is on top of the podium adjacent to the live-work units north of the Subject Site.

### **Witnesses Called by the Parties**

[21] Adi called four experts:

1. Andrew Ferancik, a qualified land use planner
2. Tahrona Lovlin, a professional engineer qualified in pedestrian wind assessment
3. Mark Sterling, an architect qualified in architecture and in urban design
4. Stewart Elkins, a professional engineer qualified in transportation planning

[22] Carriage Gate called one witness, Mark Bales. Mr. Bales is the Manager of Development with Carriage Gate. He is also a full Member of the Canadian Institute of Planners and Registered Professional Planner in Ontario. He addressed the Board from the business perspective of Carriage Gate and did not seek qualification as an expert witness in these proceedings. He confirmed the Carriage Gate support for the Adi proposal and the Carriage Gate support for the Adi proposal that is before the Board.

[23] The City called five experts:

1. Rosa Bustamante, a qualified land use planner on staff with the City
2. Paul Lowes, a qualified land use planner retained by the City
3. Hanqing Wu, a professional engineer qualified in wind assessment
4. Robert Freedman, qualified in urban design
5. Kaylan Edgcumbe, a certified engineering technician qualified in transportation planning

[24] Sun Life called Dana Anderson, a qualified land use planner.

#### **Participants who addressed the Board**

[25] The Board also heard from five Participants. All of the Participants appeared in opposition to Adi. The Participants generally supported the City but not in all areas.

[26] Participant Tamra Belontz is the General Manager of Martha's Landing. She is concerned about the impact of shadowing and the loss of light as a result of the proposed tower. Serving residents that are predominantly 87 to 100 years old, Martha's Landing has frequent need of emergency services with appropriate access. She feels the additional traffic from the proposed development would interfere with emergency service access to Martha's Landing. She also feels that the parking is insufficient and that the overflow will also impact parking for Martha's Landing.

[27] Ms. Belontz acknowledged that a construction management plan would be needed and that such a plan would address matters such as the maintenance of necessary access. She also acknowledged that the City agrees with the parking standard proposed and that the City did not raise any traffic issues. Finally, Ms. Belontz acknowledged that she did not review any of the shadow studies prepared to assess the shadow impacts from the proposed development but was operating on the assumption

that a tall building would create negative shadow impacts for Martha's Landing.

[28] Participant Gary Scobie, who lives about 3.5 kilometres ("km") from the Subject Site, testified from a public interest perspective rather than from the perspective of a nearby neighbour impacted directly by the proposed development. He feels that the horizontal urban sprawl of the past has been overtaken by vertical urban sprawl with the number of tall buildings proposed.

[29] Mr. Scobie suggested that the City Official Plan ("OP") has already taken into account the applicable provincial policies and plans, that the City is meeting its intensification targets and that the existing four-storey limit with a possible increase to eight storeys is appropriate.

[30] Participant Joan Little is a former member of the City Council and of the Region of Halton Council. She resides northeast of the Subject Site in Martha Terrace. Ms. Little addressed the Board both as a nearby resident and from a public interest perspective.

[31] Ms. Little is concerned about shadowing and wind impacts and the large number of small units in the proposed building. Ms. Little notes that much of the surrounding area still contains single-family houses and a smaller building would fit more compatibly within the mix of heights in the neighbourhood.

[32] Ms. Little also noted the need for affordable family housing. In her view, the smaller units may be less expensive than the larger ones but they are not affordable family housing.

[33] Ms. Little agrees that the Subject Site is well served by, and is close to, transit but suggests it is really just close to what she described as a bus kiosk with loading and unloading on the street. She was unchallenged in noting that the existing bus service is on a 20 to 30 minute interval and that provincial plans for a major transit hub have no firm dates or dollars attached. It is her view that the Province may wish to shift travel

patterns from the car to transit but the transit is not really available yet and the City is, and remains, car-oriented. In that regard, Ms. Little disagrees with the City's position to reduce the amount of parking required for the proposed development.

[34] Participant Joseph Gaetan strongly supported the evidence of Ms. Little regarding the reduction in parking and the current unsuitability of a decision to rely so extensively on transit that is not as frequent or accessible as needed to support an appropriate shift from car use. Mr. Gaetan is an avid cyclist but does not see support for cycling as an appropriate justification for reducing the parking standard.

[35] Participant Deedee Davies was the last Participant to address the Board. She lives about 1 km from the Subject Site. Like Mr. Scobie, Ms. Davies addressed the Board from a public interest perspective rather than that of a nearby neighbour impacted by the proposed development. Ms. Davies is an active member of a citizens' group that focusses on the City waterfront. She echoed the concerns already voiced by others regarding the need for affordable family housing and the City's reduction in the parking required for the proposed development.

[36] Ms. Davies also added concerns that the height of the proposed development would block many views of the waterfront and would add difficult wind conditions at the sidewalk level. Ms. Davies acknowledged that there are several other tall buildings dotted around the area, including some closer to the waterfront than the Subject Site.

## **ISSUES, ANALYSIS AND FINDINGS**

[37] Having heard extensive evidence in this matter over several months, the Board allows the appeal in part. These are the Board's reasons.

### **Applicable Legislation**

[38] In reaching its decision on a planning matter, the *Planning Act*, R.S.O. 1990 c. P.13 ("Act") sets out certain requirements to which the Board must adhere.



[39] The Act contemplates applications for an OPA and ZBLA, with the possibility of appeal to this Board, as in this case. Under the Act that is applicable in this case, the test in the Act is not whether the in-force official plan (“OP”) or the in-force zoning by-law (“ZBL”) meets the requirements of the Act. The test is whether the decision on the application meets the requirements of the Act.

**Section 2 of the Act: Matters of Provincial Interest:**

[40] In making a decision, the Board and the municipal council must both have regard for the matters of Provincial interest, identified in s. 2 of the Act. This section sets out, in summary form, the elements that characterize desirable growth. In this case, the Board finds that the matters of Provincial interest that are most relevant are set out in the following subsections of the Act:

1. 2(h) regarding the orderly development of safe and healthy communities
2. 2(m) regarding the co-ordination of planning activities of public bodies
3. 2(p) regarding the appropriate location of growth and development
4. 2(q) regarding the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians
5. 2(r) regarding the promotion of built form that is well-designed

[41] In each of these matters the Board finds that the proposal before the Board has had appropriate regard for and implements these matters of Provincial interest.

**Section 2.1 of the Act: Regard to the Decision of the Municipal Council:**

[42] Section 2.1 of the Act requires the Board to have regard to the decision of the municipal council and to information and material considered by the municipal council in

making its decision. While the appeal was made to the Board for non-decision, the City subsequently took two decisions. Both decisions were refusals. The first was to refuse the initial application and the second was to refuse the revised application.

[43] In each case, the City referred the Board to the applicable staff report to the City Council that dealt with the particular iteration of the proposal since City Council did not set out its reasons for either decision. Noteworthy in each of these two staff reports is the planning opinion that the particular proposal under consideration is consistent with the Provincial Policy Statement 2014 (“PPS 2014”) and conforms to the applicable provincial plans and conforms to the Region’s growth policies. The planning opinions set out in these reports then go on to state that the City is evaluating the proposal from a land use compatibility perspective.

[44] While the planning report on the first proposal was extensive and provided detailed analysis, the planning report on the revised proposal was quite short. This report had no substantive compatibility analysis on the revised proposal. The report simply asserts that the revised proposal is not compatible with the existing neighbourhood character.

[45] As a result, the Board is left with little to which regard might be had in terms of the planning reasons the staff, and perhaps the Council, considered in rejecting the revised proposal.

### **Section 3(5) of the Act: Policy Statements and Provincial Plans:**

[46] Section 3(5) of the Act also places responsibility on both the Board and the municipal council:

#### **Policy statements and provincial plans**

(5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,

- (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
- (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

[47] The provincial policy statement that is in effect is the PPS 2014. The applicable provincial plan is the Growth Plan for the Greater Golden Horseshoe 2017 (“GGH 2017”).

[48] On the analysis set out below, the Board finds that the proposal before the Board is consistent with the PPS 2014 and conforms to the GGH 2017.

#### **Provincial Policy Statement 2014**

[49] The PPS 2014 is a broad policy document that applies Province-wide. In addition to reading the PPS 2014 as a whole, it must be read and considered through the plans that are more detailed and apply to smaller and more specific geographic areas. The first layer of such plans is made up of the applicable provincial plans that cover the geographic area in which the Subject Site sits, in this case the GGH 2017.

[50] While the provincial policy regime emphasizes the importance of a municipality’s official plan, there is no suggestion in the provincial policy regime that a municipality’s official plan may undercut provincial policy.

[51] Provincial policy has imposed a steadily increasing emphasis on transit and intensification as part of its overall emphasis on complete communities, environmental sustainability, healthy lifestyles and the importance of providing a full range of diverse housing opportunities for a diverse population.

[52] In its section on the vision for the planning system, the PPS 2014 states:

Efficient development patterns optimize the use of land, resources and public investment in infrastructure and public service facilities. These land use patterns promote a mix of housing, including affordable

housing, employment, recreation, parks and open spaces, and transportation choices that increase the use of active transportation and transit before other modes of travel.

[53] Then, in policy 1.1.3.5, the PPS 2014 states:

Planning authorities shall establish and implement **minimum** targets for *intensification* and *redevelopment* within built-up areas, based on local conditions. However, where provincial targets are established through *provincial plans*, the provincial target shall represent the **minimum** target for affected areas. [Emphasis added by the Board]

[54] What the PPS 2014 does not do is set a maximum target for intensification. Implementation of the PPS 2014 logically requires that each application is to be considered on its own merits. The fact that an application may involve an official plan amendment does not mean that the proposed development is inconsistent with the PPS 2014.

### **Growth Plan for the Greater Golden Horseshoe 2017**

[55] When the hearing commenced, the Growth Plan for the Greater Golden Horseshoe 2006 (“GGH 2006”) was in effect. The GGH 2017 had not been issued and had not yet come into effect.

[56] The GGH 2017 is similar to the GGH 2006, but it is not the same.

[57] As a result of unforeseen and unavoidable circumstances regarding one of the City’s witnesses, the Board adjourned the hearing on March 6, 2017, with a resumption date of July 17, 2017. By the time of the resumption of the hearing on July 17, the GGH 2017 had been issued and had come into effect on July 1, 2017.

[58] Given the timing and effective date of the GGH 2017, and the status of the hearing on resumption in July, 2017, the Board would now have to consider these matters through the lens of the GGH 2017 and not the GGH 2006.

[59] The GGH 2006 identified Urban Growth Centres as areas within the built-up area of a municipality that are intended to accommodate significant population and employment growth. An Urban Growth Centre (“UGC”) was identified for the City and is located in the downtown. The GGH 2017 continues to emphasize the importance of a UGC. The Subject Site is within the City UGC.

[60] The GGH 2017 has placed considerable additional emphasis on intensification within a compact urban form that contributes to complete communities. In the context of intensification, the GGH 2017 places even greater emphasis on transit and on transit-supportive development than did the GGH 2006.

[61] At policy 1.2.1 dealing with guiding principles, the GGH 2017 states:

...The policies of the Plan regarding how land is developed, resources are managed and protected, and public dollars are invested are based on the following principles:

...**Prioritize** *intensification* and **higher densities** to make efficient use of land and *infrastructure* and **support transit viability**. [Emphasis added by the Board]

[62] Then in chapter 5, dealing with implementation and interpretation, policy 5.1 states:

Key to the success of this Plan is its effective implementation...

Except for some minor matters, most planning decisions can affect the achievement of the policies of this Plan...

Where a municipality must decide on a planning matter before its official plan has been amended to conform with this Plan, or before other applicable planning instruments have been updated accordingly, it must still consider the impact of the decision as it relates to the policies of this Plan which require comprehensive municipal implementation...

[63] All the planning witnesses agree that the Subject Site is within a *major transit station area* [“MTSA”] as defined by the GGH 2017:

## Major Transit Station Area

The area including and around any existing or planned *higher order transit* station or stop within a *settlement area*; or the area including and around a major bus depot in an urban core. *Major transit station areas* generally are defined as the area within an approximate 500 metre radius of a transit station...

[64] Policies 2.2.4.8 and 2.2.4.9 elaborate in the following ways that are directly applicable to the matters before the Board:

2.2.4. 8. All *major transit station areas* will be planned and designed to be *transit-supportive* ...

2.2.4. 9. Within all *major transit station areas*, development will be supported, where appropriate, by...

c) providing alternative development standards, such as reduced parking standards; and

d) **prohibiting** land uses and **built form** that would adversely affect the achievement of *transit-supportive* densities. [Emphasis added by the Board]

[65] The definition of transit-supportive development emphasizes high density:

### **Transit-supportive**

Relating to development that makes transit viable and improves the quality of the experience of using transit. It often refers to compact, mixed-use development that has a high level of employment and residential densities...

[66] The Big Move is a regional transportation plan by the provincial agency known as Metrolinx. The GGH 2017 notes the importance of The Big Move to support the implementation of the GGH 2017.

[67] The Big Move was launched in 2008, after the GGH 2006, and identifies various Mobility Hubs in the Greater Toronto and Hamilton area.

[68] For the City, The Big Move identifies an Anchor Mobility Hub within the UGC.

Such hubs have strategic importance for their relationship to UGCs. A UGC is intended to be the focus for significant high-density employment and population growth. The Anchor Mobility Hub is a focus for the integrated transit investment that will facilitate the movement of those who live and work within the UGC.

[69] While the MTSA is defined as having a 500 metre (“m”) radius, the Big Move casts its net of influence even further and establishes an 800 m radius from the centre of an Anchor Mobility Hub as the area that is considered to be within the Anchor Mobility Hub. The Subject Site is 250 m from the centre of the City’s Anchor Mobility Hub, placing it well within both the MTSA and the Anchor Mobility Hub area.

[70] Just as the Province has steadily emphasized, and then required, intensification within settlement areas, the Province has now placed additional importance on supporting transit when considering proposed developments. Recognizing the importance of effective implementation of the GGH 2017, it is insufficient to refuse an OPA application on the basis that a municipality’s official plan was brought into conformity with the GGH 2006 and therefore a decision to refuse a proposed OPA on that basis is a decision that conforms to the GGH 2017.

### **Introduction of New Evidence**

[71] The hearing of the merits commenced on February 22, 2017. As noted above, the hearing had to be adjourned on March 6, 2017 with a resumption date of July 17, 2017.

[72] By the time of the adjournment in March, the Board had heard all of Adi’s case in chief, all of Carriage Gate’s case, part of the City’s case and all of the Participants.

[73] The Procedural Order set December 19, 2016 as the date for the exchange of revised witness statements in light of the revised proposal. The purpose in setting such a date in this, and in any, Procedural Order is to ensure that each party would know the case it must meet.

[74] Given the history of this matter, and the unavoidable need to adjourn the hearing partway through the evidence, the Board wished to ensure that no additional materials would be filed that had not been disclosed previously as part of implementing the requirements of the Procedural Order.

[75] The necessary exception was the filing of supplementary witness statements dealing with the GGH 2017, which could not have been dealt with in accordance with the Procedural Order prior to the start of the hearing in February.

[76] A supplementary witness statement of Mr. Ferancik, confined to an analysis of the impact of the GGH 2017, was filed by Adi.

[77] The City sought to introduce other evidence, unrelated to the introduction of the GGH 2017, in a supplementary witness statement of Mr. Lowes that the City proposed to file in response to the Board's request regarding the GGH 2017.

[78] The principal submission from the City in support of this additional material dealt with timing. The City asserted that it could not have alerted Adi any earlier than Friday, July 14 that it had new evidence it wished to introduce nor could the City have sought leave of the Board to bring forward additional materials, other than those dealing with the GGH 2017, at any earlier date than the resumption of the hearing on Monday, July 17.

[79] Following submissions and several questions from the Board, the Board admitted the portion of the supplementary witness statement of Mr. Lowes that dealt with the GGH 2017 but declined to admit the additional, non-GGH 2017 material.

[80] The primary requirement for the Board to admit any evidence is the relevance of the evidence to the matter before the Board.

[81] While the City's submissions in this matter were grounded primarily in the assertion that the City could not have acted any sooner, Counsel for the City advised



the Board that the additional information was that there had been a slight change to the mapping of the downtown UGC as a result of a decision on an amendment to the ROP. This was the limit of the submissions from the City on relevance. Notably, there was no suggestion in the City's submissions that this slight mapping change put the Subject Site outside of the UGC.

[82] The existence of the UGC was not at issue in this hearing nor was the fact that the Subject Site is within the UGC. If the slight mapping change placed the Subject Site outside the UGC, evidence on the mapping change would be directly relevant. That is not the case.

[83] The Subject Site is still within the UGC and no witness suggested that it was not in the UGC. There was no challenge to its distance from the centre of the Anchor Mobility Hub or that the Subject Site is well within the MTSA.

[84] The description of this additional material did not meet the test of relevance and the Board refused to admit it.

[85] If the Board had found that the additional material was relevant and should be admitted, the Board would then have to consider matters of procedural fairness to ensure that Adi would have a chance to deal with a late disclosure.

[86] While procedural fairness does not alter or modify relevance, in the event the Board were to find the additional information relevant, the Board also heard and considered the City's submissions that it could not have alerted Adi any earlier of its intention to introduce evidence not previously disclosed nor seek leave of the Board any earlier to do so.

[87] The hearing on the revised proposal was commenced on February 22, 2017.

[88] The additional information respecting the slight mapping change the City sought to introduce on July 17, 2017 as new evidence was known by the City on February 1,

2017.

[89] While the Board agrees that the additional information could not have been known by the December 2016 filing date for expert witness statements, it was known by the City three weeks before the start of the hearing on February 22, 2017. No persuasive explanation was advanced by the City to explain why the information was not disclosed at least at the outset of the hearing on February 22, 2017.

### **Region of Halton Official Plan**

[90] The question before the Board is not whether the current OP conforms to the ROP. The question before the Board is whether the proposed OPA conforms to the ROP. The Region withdrew from these proceedings once it had reached a settlement with Adi. As such, the Region called no evidence in opposition to the proposed development or the specific planning instruments before the Board. As noted in the City planning staff reports, the Region's planning staff advised the City that the proposed development conformed to the Region's growth policies.

[91] Mr. Ferancik reviewed the ROP in some detail and concluded similarly that the proposed development conforms to the ROP.

[92] The Board is persuaded by Mr. Ferancik's detailed evidence in this regard and finds that the proposed OPA conforms to the ROP.

### **City of Burlington Official Plan**

[93] Recognizing that the in-force OP has not yet been the subject of a conformity exercise with the GGH 2017, it is still important to understand and consider the requirements of the OP.

[94] In addition to being within an MTSA and Anchor Mobility Hub area, for the OP the Subject Site is within a Mixed Use Activity Area, is within a Mixed Use Centre and is

within the downtown UGC. The specific designation in the OP for the Subject Site is Downtown Core Precinct (“DC”).

[95] The DC designation specifies a maximum height of four storeys. This designation contemplates the possibility of eight storeys in height, subject to compatibility with surrounding land uses, pedestrian scale at lower levels and community benefits. The possibility of a building height greater than four storeys is discretionary and not automatic.

[96] The only properties within the DC designation at or near the Subject Site are the Subject Site and the Carriage Gate lands. Together these two holdings make up a relatively small rectangular island with the DC designation. This DC rectangle is separated from all other lands designated DC in the OP.

[97] The properties surrounding this DC designation that houses the Subject Site and the Carriage Gate lands are all in other designated precincts which contemplate greater heights than the DC designation or have no height limits at all.

[98] Part of the analysis of the appropriateness of this proposal to amend the OP is an analysis of compatibility.

[99] In considering compatibility, the Board was asked to consider the existing uses and built form that surrounds the site, particularly to the north and east. By emphasizing the existing built form, as distinct from an analysis that relies on the possible future built form in the event of redevelopment, the Board was asked to consider that once a property is developed the reasonable expectation is that it will not redevelop in the subsequent near future.

[100] In the circumstances of this case, the Board accepts this approach as a relevant consideration, particularly since the Subject Site is within the UGC, an MTSA and close to the centre of the Anchor Mobility Hub. In light of the Subject Site’s location, the Board extends this approach to the consideration of the likely life-span of the proposed

development. In implementing GGH 2017 policy 2.2.4.9(d) that is set out above, the Board must consider whether a four-storey development as of right with only a possibility of growing to eight storeys, as set out in the current City OP designation for the Subject Site, would 'adversely affect the achievement of *transit-supportive* densities'.

### **Height and a Comprehensive Municipal Official Plan Review**

[101] Mr. Lowes and Ms. Anderson provided the opinion that the existing DC designation is consistent with the PPS 2014 in that the OP was approved previously as consistent with the PPS then in effect. Further, it was their evidence that the OP identified areas other than the Subject Site for intensification. Neither Mr. Lowes nor Ms. Anderson analyzed the proposed development itself and neither expert provided the Board with their opinion on whether the proposed OPA is consistent with the PPS 2014.

[102] Simply stating that the OP was approved at some time in the past is not the end of the story.

[103] The City's intensification strategy was set out in OPA 55, before the GGH 2017 came into force.

[104] The Board heard evidence from Messrs. Ferancik and Lowes and from Ms. Bustamante regarding the ability of the intensification strategy, as implemented, to achieve the minimum targets of population and jobs required by the GGH 2006 and the GGH 2017. The upshot of the examination and cross-examination of these witnesses appears to be that the City may not quite meet the minimum required target for intensification.

[105] This evidence was not helpful to the Board in the context of these proceedings.

[106] The required target for intensification is a minimum target. Additionally, there is no test of 'need' in either the PPS 2014 or the GGH 2017 against which the Board is

expected to consider a development proposal contemplated through an OPA and a ZBLA. Whether the overall minimum intensification target is being met is not relevant to the question of whether the proposed development is consistent with the PPS 2014 and conforms to the GGH 2017.

[107] The far more compelling evidence is that **all** of the land use planners and **both** urban designers testified that the Subject Site is not only suitable for development at heights that exceed the as of right four-storey height but is also suitable for development at heights that exceed the discretionary eight-storey height. In other words, all of these experts agreed that the Subject Site is suitable for development that is more transit-supportive than the four-storey, as-of-right OP designation.

[108] While height and density are different, they are related. The Subject Site is a relatively small site. There is some maneuverability to deal with tower separation and stepbacks to reflect adjustments to the design for purposes of compatibility with existing adjacent uses but not a great deal of maneuverability regardless of height. Under these circumstances, the Board finds that a reasonable inference for purposes of this analysis is that a greater height likely results in greater density.

[109] For the City and for Sun Life, the acceptable heights seemed to range from the 11 storeys advanced by Ms. Bustamante to the 16 storeys suggested by Ms. Anderson. Mr. Lowes did not provide a specific number.

[110] Mr. Lowes and Ms. Anderson explicitly, and Ms. Bustamante through her adoption of the evidence of Mr. Lowes, relied instead on the suggestion that a height greater than the 16 storeys suggested by Ms. Anderson should only be approved following a comprehensive municipal review of the OP. Mr. Lowes and Ms. Anderson emphasized what they described as the need for the public to have certainty about development and that such certainty is derived from the in-force OP.

[111] The Board finds that there is no evidentiary foundation to suggest that an official plan amendment for an increased height to somewhere between 11 storeys and up to

16 storeys is acceptable without a comprehensive municipal official plan review but that any height taller than 16 storeys should only be undertaken within a comprehensive municipal official plan review.

[112] The Board finds that there is nothing in the PPS 2014 or the GGH 2017 that draws such a distinction on when a comprehensive municipal official plan review is required that is based on the scale of the proposed development.

[113] The Board recognizes that an application for an official plan amendment that is intended to convert employment lands to non-employment uses may only be permitted through a comprehensive municipal review of the official plan. The OPA application before the Board is not an application to convert employment lands to non-employment uses.

[114] None of the possible heights advanced by Mr. Lowes in general terms, Ms. Bustamante at 11 storeys and Ms. Anderson at 16 storeys are grounded in a detailed compatibility analysis with surrounding land uses. Although the Board had clear evidence that the Subject Site is suitable for development in excess of the current OP designation, the Board had no expert planning evidence to assess the differential, if any, in the relative compatibility with and impacts on surrounding land uses between the proposed development and any of these alternate heights.

[115] Taken together, the evidence suggests to the Board that the current OP designation is no longer appropriate for the Subject Site and a proposal that is taller and more transit-supportive is both preferable and better implements the transit-oriented and intensification policies of the PPS 2014 and the GGH 2017.

### **Compatibility**

[116] Intensification and transit-supportive development do not, and should not, occur in a vacuum. Proposals need to be considered in their surrounding context, and that is the compatibility analysis.

[117] Mr. Lowes and Ms. Bustamante referred the Board to Part III, policy 2.5.2 of the OP as setting out the criteria for assessing compatibility. The difficulty with relying on this policy arises from the fact that the City itself, on recommendation from the City planning staff in a report that went to Council on July 18, 2016, recognized that the City's definition of intensification in its OP required updating. The proposed update would capture more proposals as intensification and would fit with a proposal to update the criteria for evaluation of compatibility.

[118] The proposal to update the criteria for evaluation of proposals for intensification was grounded in the concern that the City's current criteria, as found in Part III, policy 2.5.2, are oriented to low-rise proposals like townhouses and do not address adequately mid-rise or high-rise proposals or those that are not entirely residential.

[119] Council adopted the staff recommendation at its July 18, 2016 meeting.

[120] It is the evaluation criteria that form the core of the compatibility analysis.

[121] Since Mr. Lowes did not undertake any compatibility analysis, the Board attaches no weight to his reference to Part III, policy 2.5.2.

[122] Ms. Bustamante undertook the compatibility analysis for the revised proposal, as indicated in the report to Council on the revised proposal. This report was dated October 12, 2016. The Board discusses the difficulties in this report in the earlier section dealing with the requirements of 2.1 of the Act.

[123] In addition during cross-examination, but not otherwise disclosed, Ms. Bustamante acknowledged that she knew of the July 18, 2016 position of Council but that she continued to use the criteria in Part III, policy 2.5.2 anyway. She was unable to explain to the Board whether and how she made appropriate adjustments to these evaluation criteria to recognize the inappropriateness of simply applying them to the revised proposal.

[124] Mr. Ferancik, called by Adi, did the most extensive and complete detailed analysis of land use compatibility of the proposal that is now before the Board. Recognizing the limitations of Part III, policy 2.5.2, he explained in full those parts he felt would apply and those parts that either required some modification or which really did not apply to an analysis of an intensification proposal such as the one now before the Board. His analysis withstood rigorous cross-examination and was not undercut by the evidence of any other land use planner.

[125] For compatibility with existing land uses, the Board found that wind, sun and shadow, and physical form with setbacks, stepbacks and potential tower separation to be principal matters for review.

**Wind:**

[126] The proposed development is quite near Lake Ontario. Winds at Lake Ontario are strong, especially in winter or otherwise in stormy weather. There is no dispute that the Subject Site, and the surrounding area, experiences windy conditions. For compatibility, the concern regarding wind focusses on the impact on the pedestrian realm.

[127] Ms. Lovlin undertook the wind study for Adi. The City did a peer review but did not do a separate wind study.

[128] There are four matters of particular note regarding the pedestrian wind assessment.

[129] First, Ms. Lovlin conducted a wind tunnel analysis which is more commonly done at the site plan stage. This analysis, at the OPA and ZBLA stage, allowed for a more nuanced consideration of pedestrian wind conditions as part of a compatibility analysis.

[130] Second, Ms. Lovlin used standard safety criteria and the methodology she used has been accepted by the City in the past. Her conclusions are that no safety failures



were found as a result of pedestrian wind conditions in all test locations in the public realm.

[131] Third, Ms. Lovlin's analysis found that pedestrian wind conditions are generally comfortable for walking with one notable exception at the transit stop at the northeast corner of Lakeshore Road and Martha Street. Ms. Lovlin recommended that a transit shelter be built at this location to mitigate the pedestrian wind condition.

[132] Finally, an updated pedestrian wind assessment is appropriate prior to obtaining site plan approval. Both wind experts agree that if the updated pedestrian wind assessment identifies a problem, there are a number of well-established tools that may be employed to mitigate undesirable or inappropriate impacts. With the inclusion of a condition related to an updated pedestrian wind assessment, the Board finds that any concerns in this regard are met.

#### **Sun and Shadow:**

[133] Neither the City nor Sun Life took any issue with the sunlight and shadow assessment of the proposed development. Since the Subject Site is now a surface parking lot with a house in the northeast corner, any development will result in some shadowing. The Board finds that there would still be ample sun and that shadows will move quickly.

#### **Setbacks, Stepbacks and Tower separation:**

[134] The analysis in these areas engages matters of urban design.

[135] Mr. Freedman, for the City, has expressed concern with the setback of the podium on the Lakeshore Road frontage. Specifically, he expressed the concern that a wider and more gracious sidewalk would be an appropriate addition to the pedestrian realm along this frontage.

[136] The value of this suggestion was directly undercut by the City's own apparent intentions for this area of Lakeshore Road.

[137] Mr. Freedman acknowledged, under cross-examination but not otherwise, that the existing sidewalk along this frontage is 4 m wide before any road widening of Lakeshore Road. He agreed that a 4 m wide sidewalk is a generous and gracious sidewalk.

[138] The City intends to widen Lakeshore Road by 4 m. The resulting width of the sidewalk along this frontage, and the resulting impact on the pedestrian realm at this location, is a function of the City's detailed design of the road widening.

[139] The stepback deals with the tower setback from the edge of the podium.

[140] The tower is set 3 m back from the podium wall on the west, south and east sides of the site.

[141] Carriage Gate is content with this limited tower setback on the west side, taking the position that the Carriage Gate site is large enough to accommodate any additional tower setbacks on its site.

[142] Mr. Freedman suggests a greater tower setback is appropriate for the west side of the Subject Site. His analysis, however, confirms that the Carriage Gate site is large enough to absorb a tower setback appropriate for tower separation that would place the majority of the tower separation setback on the Carriage Gate lands.

[143] The 3 m setback from the podium wall on the south side provides ample distance from any developments south of Lakeshore Road. Similarly, the 3 m tower setback on the east side adds to the separation from Martha's Terrace, which is across the street from the Subject Site.

[144] The real question on the Lakeshore Road and Martha Street frontages is the

pedestrian realm.

[145] At the street level, the design feature most likely to be experienced and to shape the pedestrian realm is the podium. It is the design of the podium that will enliven the street and frame it. Pedestrians walking in front of the proposed development will generally look either straight ahead, slightly down or turn to look at what is presented by the podium face. There is no dispute between the expert witnesses that pedestrians are very unlikely to be walking along the street adjacent to the podium looking up at the tower that is stepped back from the edge of the podium.

[146] The last area of stepback is from the north side. Here the stepback is very generous, designed as it is to provide an amenity area for the development's residents on top of the podium. In doing so, the proposed development provides more distance from the tower to the live/work units on the property to the north of the Subject Site.

[147] The podium at this point has been designed to meet the height of the live/work units. For this portion, the tower stepback from the north side is nearly 19 m. On the west portion of the tower that is not immediately adjacent to the live/work units, the stepback from the north is 11.5 m.

[148] The proposed development is within an area that is very much an urban condition. There will always be some potential overlook from a taller structure to one that is lower. For the live/work units to the north, that would occur whether the redevelopment of this site, that is largely a surface parking lot now, occurs at a height of four storeys, eight storeys, 11 storeys, 16 storeys or 26 storeys.

[149] Having considered the specific location of the Subject Site, and the foregoing analysis of stepbacks, the Board finds that the proposed tower stepbacks on all sides are appropriate.

## Parking

[150] There are two matters related to parking.

[151] The first of these matters deals with the concerns of the Participants regarding the reduction in the parking that is required. While the Board understands the apprehension of the Participants, the Board is satisfied that the City decision to reduce the requisite parking standard for parking spaces per unit is reasonable and fully in keeping with the direction from the PPS 2014 and the GGH 2017 for development that emphasizes transit use and is transit-supportive.

[152] The second of these matters deals with the proposed internal layout of the parking garage, particularly with the proposed size of the parking stalls, ramp slopes, aisle widths and the circulation of vehicles maneuvering in the underground garage.

[153] The proposed parking stalls are smaller than required by the zoning by-law. Mr. Elkins, for Adi, suggested that the parking stall standard used by the City is overly generous. He pointed to several other municipalities that use a standard which results in smaller parking stalls. It was his professional opinion that the parking stalls would operate appropriately at the smaller size.

[154] The Board is not persuaded that the fact of smaller stalls being permitted in other municipalities is a sufficient reason to alter the City's standard in this matter. On the evidence presented, the Board does not agree that the proposed development should have smaller parking stalls and that the proposed ZBLA should reduce the parking stall size that is now required as the City's standard.

[155] Ramp slopes and aisle widths for the safe maneuverability of vehicles in the underground garage, particularly for those using accessible parking stalls, are not matters before the Board in the context of the proposed zoning by-law amendment. Ms. Edgcumbe, for the City, acknowledged that these matters are normally considered at the site plan stage but was raising them at this point to flag the concern. The Board

notes the concern but makes no finding on these matters since the issues raised are not matters addressed in the proposed zoning by-law amendment.

### **Proposed Conditions**

[156] Adi and the City agree that the City, through private legislation, may attach conditions to zoning by-law amendments. Both Adi and the City have proposed conditions in the event that the Board allows the appeal. The Board notes, and appreciates the fact, that the City's conditions are offered in the alternative to the City's request that the Board dismiss Adi's appeal.

[157] Adi suggests that an updated wind study and an updated noise study be required prior to obtaining site plan approval, and the Board agrees.

[158] Adi also suggests a condition that a transit shelter should be built at the northeast corner Lakeshore Road East and Martha Street. The Board understood from the evidence of Ms. Lovlin that the purpose of constructing a transit shelter is to mitigate the problem of adverse wind conditions at this location, particularly in the winter. The Board agrees with the suggestion of a transit shelter at the transit stop to mitigate the problem of adverse wind conditions at this location.

[159] Finally, Adi proposes the condition sought by the Region in its settlement with Adi that a Record of Site Condition, subject to certain requirements, is to be provided to the Region prior to obtaining site plan approval.

[160] The City suggests that a holding provision, or H, be placed in the ZBLA that would be removed on the delivery of an executed s. 37 Agreement, to the satisfaction of the City, which outlines the community benefits to be secured in return for any additional height and density.

[161] In order for an H to be removed, there must clear and achievable criteria that a proponent must meet.

[162] The City did not call any evidence on the community benefits it would seek or the criteria by which these s. 37 benefits would be identified. Ms. Bustamante testified that it is the City's practice to do so only once a determination is made that a proposed development should be approved. In the circumstances of this case, with the City opposed to the proposed development, the Board was advised that no discussion has taken place between the City and Adi regarding s. 37 benefits and there is no agreement at this time on the language appropriate in the ZBLA regarding s. 37 benefits.

## **CONCLUSION**

[163] The Board finds that the revised proposal, as generally set out in the proposed official plan amendment filed as Exhibit 6 and as generally set out in the proposed zoning by-law amendment as filed in Exhibit 7, is consistent with the Provincial Policy Statement 2014, conforms to the Growth Plan for the Greater Golden Horseshoe 2017 and conforms to the official plan of the Region of Halton.

[164] The Board finds that s. 37 benefits are appropriate in this case and the finalization of the language regarding the s. 37 contribution is a necessary addition to the proposed zoning by-law amendment.

[165] The Board finds that the following conditions for the amendment of By-law No. 2020, being the zoning by-law, are appropriate:

1. The submission of an updated pedestrian wind assessment study, prior to obtaining site plan approval under s. 41(4) of the Act;
2. The submission of an updated noise study, prior to obtaining site plan approval under s. 41(4) of the Act;
3. The construction of a transit shelter at the transit stop at the intersection of Martha Street and Lakeshore Road, the details of which are to be finalized

through the site plan approval process;

4. The provision to the Region of Halton of an Ontario Ministry of the Environment and Climate Change acknowledged Record of Site Condition, certified by a Qualified Person as defined in Ontario Regulation 153/04, to the satisfaction of the Region of Halton, prior to obtaining site plan approval under s. 41(4) of the Act.

[166] The appeal by Adi Development Group Inc., now Adi Morgan Developments (Lakeshore) Inc., is allowed in part.

[167] The Board withholds its Order for 45 days from the date of this decision to permit the finalization of the proposed official plan amendment and the proposed zoning by-law amendment.

[168] If difficulties arise, the Board may be spoken to.

*“Susan de Avellar Schiller”*

SUSAN de AVELLAR SCHILLER  
VICE-CHAIR

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please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

**Ontario Municipal Board**

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