Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: April 03, 2024 **CASE NO(S).:** OLT-23-001076

PROCEEDING COMMENCED UNDER subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant/Appellant:	Wilson St. Ancaster Inc.
Subject:	Site Plan
Description:	To permit development of 8-storey mixed use building and bicycle/parking spaces
Reference Number:	DA-23-011
Property Address:	392, 398, 400, 402, 406 and 412 Wilson Street East & 15 Lorne Avenue
Municipality:	Hamilton
OLT Case No.:	OLT-23-001076
OLT Lead Case No.:	OLT-23-001076
OLT Case Name:	Wilson St. Ancaster Inc. v. Hamilton (City)

Heard: January 25-26, 2024 by Video Hearing

APPEARANCES:

Parties	**Counsel**
Wilson St. Ancaster Inc.	Patrick Harrington Matthew Helfand
City of Hamilton	Patrick MacDonald

DECISION DELIVERED BY A. MASON AND ORDER OF THE TRIBUNAL

Link to Order

INTRODUCTION

[1] Wilson St. Ancaster Inc. ("Appellant") appealed the lack of a decision within the statutory timeframe by the Council of the City of Hamilton ("City") of a site plan control application ("SPA") pursuant to s. 41(12) of the *Planning Act* ("Act") with respect to the properties municipally known as 392-412 Wilson Street and 15 Lorne Avenue, Ancaster ("Subject Property"). The SPA facilitates the development of an eight-storey residential, mixed-use building ("Development Concept"). Previous applications for the Subject Property for an official plan amendment ("OPA") and zoning by-law amendment ("ZBA") to facilitate the Development Concept were appealed under ss. 22(7) and 34(11) of the Act respectively and adjudicated by the Tribunal, differently constituted, in a decision on a proposed settlement rendered on September 19, 2023 in which the OPA was dismissed at the request of the Parties and a revised ZBA was approved ("Settlement ZBA").

[2] On the eve of the two-day SPA Hearing, Counsel for the Parties advised the Tribunal that through cooperative efforts they were jointly presenting a redline of the Development Concept ("Redlined Development Concept") and a set of redline draft conditions of site plan approval ("Redline Conditions") for the Tribunal's consideration to facilitate the implementation of the Settlement ZBA. One draft condition, Special Condition H, that requires a Visual Impact Study ("VIA Study") for approval by the City and the Niagara Escarpment Commission ("VIA Condition"), was in disagreement between the Parties and to be separately considered by the Tribunal at the Hearing.

[3] Notwithstanding the stated ground of appeal, the Redline Development Concept and Redline Conditions presented on consent of the Parties, and the single disputed VIA Condition, the Tribunal's attention was overtaken by a different overarching question. To adjudicate the merits of the SPA appeal, the Tribunal had to consider the

unique and novel set of circumstances brought about through *The Planning Statute Law Amendment Act, 2023* ("Bill 150"), and the enactment of the *Official Plan Adjustments Act, 2023* ("OPAA") by the provincial government on the case at hand. The OPAA at s. 1(1) deems that modifications made by the Minister of Municipal Affairs and Housing to the Urban Hamilton Official Plan ("Ministerially Approved UHOP") were never made. Further, it retroactively enforces a new version of the Urban Hamilton Official Plan ("Legislatively Approved UHOP") as of November 4, 2022, which mirrors the earlier City Council approved Urban Hamilton Official Plan ("Council-Adopted UHOP"), subject to specific modifications, and implements the same process in eleven other municipalities ("Affected Municipalities"). The Tribunal considered the impact of s. 3(2) of the OPAA that requires that any decision of the Tribunal must conform with the official plan as approved, in this case the retroactively in force Legislatively Approved UHOP, and how that requirement is applied in an appeal of a non-decision of an approval authority on a site plan control application under s. 41(12) of the Act where the Settlement ZBA was approved under the Ministerially Approved UHOP that is now deemed to have never existed.

[4] Having reviewed and evaluated the evidentiary and detailed legal submissions of the Parties, the Tribunal finds that s. 3(2) of the OPAA imports a requirement for the Tribunal to consider conformity of the SPA to the Legislatively Approved UHOP under an appeal pursuant to s. 41(12) of the Act. While the Tribunal finds that the proposed Redline Conditions and Redline Development Concept would implement the Settlement ZBA in accordance with those requirements under s. 41(4) and s. 41(7) of the Act, and the disputed VIA Condition was found to be reasonably requested by the City, the SPA cannot overcome a lack of conformity with the retroactively in force Legislatively Approved UHOP and the directive under s. 3(2) of the OPAA that any decision of the Tribunal must conform to the official plan in effect.

[5] After considering the extensive submissions of the Parties, the Tribunal finds that the SPA is not in conformity with the Legislatively Approved UHOP with respect to

height, land use designation and general vision and urban design policies. The appeal is dismissed.

BACKGROUND AND TIMELINE

Site Context and History of Applications

[6] The Subject Property consists of five properties merged in common ownership forming a single, irregular shaped parcel at the north-east corner of Wilson Street East and Academy Street. The lands are currently developed with one single-storey heritage designated dwelling known as the Mar-Phillipo House ("Mar-Phillipo House"). A permit under the *Ontario Heritage Act* has been issued that allows the relocation of the Mar-Phillipo House from its current position on the Wilson Street East frontage of the Subject Property to the portion of the property municipally known as 15 Lorne Avenue, subject to the Appellant obtaining approval of the SPA. The surrounding area is a mix of one and two-storey single detached dwellings, with commercial buildings on Wilson Street East and Academy Street up to three storeys in height.

[7] Under the Council-Adopted UHOP and the Legislatively Approved UHOP, the majority of the Subject Property is designated Community Node with a smaller portion being designated Neighbourhoods (15 Lorne Avenue). The Community Node designation is characterized as a pedestrian orientated main street of mixed-use buildings with an animated streetscape. Wilson Street East, being the frontage of the Subject Property, is identified as a major arterial road. Academy Street and Lorne Avenue are classified as local roads.

[8] The Subject Property is also regulated under the Ancaster Wilson Street Secondary Plan ("AWSSP") where the majority is designated Mixed Use – Medium Density - Pedestrian Focus (392 to 412 Wilson Street East), with a smaller area designated as Low Density Residential 1 (15 Lorne Avenue). Further, the Subject Property is within the Village Core as set out in the AWSSP and is designated as Urban Area under the Niagara Escarpment Plan ("NEP").

[9] After initial consultation with the City, the Appellant filed applications for OPA and ZBA in December 2021 for an eight-storey mixed use building. Subsequently, the OPA and ZBA were appealed to the Tribunal for a non-decision pursuant to ss. 22(7) and 34(11) of the Act on May 7, 2022 (“OPA/ZBA Appeals”).

[10] In June 2022, shortly after the OPA/ZBA Appeals were filed by the Appellant, Amendment 167 to the Council-Adopted UHOP was adopted by City Council in By-Law 22-145.

[11] A few months later, the Minister of Municipal Affairs and Housing further altered the Council-Adopted UHOP with modifications to urban boundaries and other detailed policies establishing the Ministerially Approved UHOP as of November 4, 2022. Specifically, the Minister added new Policy E.2.3.3.12 to the Community Node designation that allowed for a maximum of six storeys in Mixed Use Medium Density Community Nodes, and upon satisfaction of certain urban design criteria, the ability to obtain a maximum total of eight storeys and an increase in density above 150 units per hectare notwithstanding any secondary plan policies to the contrary (“Height and Density Policy”). As a result of the Height and Density Policy, the Appellant’s development proposal could be satisfied under the new Community Node policy and no longer required the OPA to facilitate the eight-storey Development Concept.

[12] The Appellant filed an application for SPA for the Development Concept in December 2022 that was deemed complete by the City on January 12, 2023.

[13] During the period of time when the Ministerially Approved UHOP was the governing official plan policy document that facilitated the Development Concept up to eight storeys, subject to urban design criteria in the Mixed Use Medium Density Community Node policy, the OPA/ZBA Appeals were settled between the Appellant and

the City and set out in Minutes of Settlement dated July 26, 2023 (“MOS”). The MOS set out the following elements important to the current matter:

a. The MOS was endorsed by City Council on June 21, 2023;

b. The Redline Development Concept was agreed to and attached to the MOS showing a development proposal for an eight-storey mixed use building containing 118 residential units, 1,475 square meters of commercial space, 272 parking spaces and site-specific setbacks, height and gross floor area regulations;

c. The Settlement ZBA was agreed to and facilitated the Redline Development Concept;

d. Due to the Height and Density Policy, the Parties agreed that the site-specific OPA was no longer necessary, and the Parties agreed it could be dismissed; and

e. The SPA would be processed by the City and specific conditions could be imposed as set out in, but not limited to, the MOS.

[14] A Hearing to consider the OPA/ZBA Appeals took place by written motion on August 1 and 22, 2023 to the Tribunal, differently constituted. A Final Order dismissing the OPA and approving the Settlement ZBA was issued by the Tribunal on September 19, 2023. The Settlement ZBA permits the development of the Redline Development Concept as set out in the MOS.

[15] The Appellant filed an appeal of the SPA (“SPA Appeal”) on October 25, 2023 under s. 41(12) of the Act for a failure of the City to issue a decision within the statutory timeframe.

Bill 150 and the OPAA

[16] Subsequent to the Tribunal issuing the Final Order on the Settlement ZBA and dismissing the OPA, the Ontario government introduced Bill 150 on November 16, 2023, and it was brought into force and effect by Royal Assent on December 6, 2023. Bill 150 enacted the OPAA which relates to the Affected Municipalities, including the City and implemented the following:

a. Retroactively reverses certain provincial decisions on official plans made between November 2022 and April 2023 in the Affected Municipalities;

b. Approves previous municipally adopted official plans retroactive to the date of provincial approval in the Affected Municipalities;

c. Returns settlement boundaries to those originally adopted by municipal Councils unless otherwise modified;

d. Provides an exception to retroactive implementation of previous Council adopted official plans only where a building permit has been issued; and

e. Retains certain specified provincial modifications to the municipally adopted official plans.

[17] With respect to the City, the OPAA at s. 1(1) sets out that the Ministerially Approved UHOP is “deemed to have never been made” as of November 4, 2022, and as of that date, the earlier Council-Adopted UHOP is deemed retroactively approved as the Legislatively Approved UHOP, with the result that the Height and Density Policy no longer exists. The only modifications retained from the Ministerially Approved UHOP are set out in ss. 18, 26 and 36 and address natural heritage and Indigenous issues and are not applicable to the matter before the Tribunal.

[18] Importantly, s. 3(2) of the OPAA sets out that:

> any decision of a municipality or the Ontario Land Tribunal made under the [Act], as well as any by-law passed or public work undertaken by a municipality, on or after the date on which the approval of an official plan or an amendment to an official plan is deemed to have been given under subsection 1(3) must conform with the official plan, as approved or amended, while that approval is in effect. [emphasis added]

[19] The Parties were canvassed regarding Bill 150 and its impacts on the SPA Appeal under s. 41(12). Those submissions are discussed later in this Decision.

WHAT MUST BE CONSIDERED IN AN APPEAL UNDER S. 41(12)?

Specific Requirements Under s. 41 and General Tests Under the Act

[20] Where there is an appeal of a non-decision of an approval authority with respect to a site plan control application under s. 41(12) of the Act, the Tribunal has the responsibility to hear the matter in issue, determine the details of the plans or drawings and determine the requirements, including the provisions of any agreements required. In reviewing the reasonableness of a site plan control application, the Tribunal is to consider whether the drawings and plans show the items listed in s. 41(4) of the Act and if the site plan conditions are permitted under s. 41(7)(a)-(d) of the Act.

[21] When considering an appeal under s. 41(12) of the Act, the Tribunal shall also consider broader considerations required to evaluate whether a decision under the Act constitutes good planning, including:

a. Having regard for matters of provincial interest pursuant to s. 2 of the Act,

b. Having regard for any information and material that the municipal council or approval authority received in relation to the matter, in accordance with s. 2.1(2) of the Act;

c. Ensuring its decision is consistent with the Provincial Policy Statement, 2020 (“PPS”), as set out in s. 3(5) of the Act; and

d. Ensuring its decision conforms, or does not conflict, with any provincial plans that are in effect on the date of the decision, and in this case the A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2019, as amended (“Growth Plan”).

[22] Matt Johnston, a registered Professional Planner, was presented by the Appellant and qualified by the Tribunal to provide opinion evidence in the area of land use planning. Mr. Johnson provided background on his involvement in the applications for the Development Concept, as well as the history of the OPA/ZBA Appeals dealt with by the Tribunal previously.

[23] Mr. Johnston opined that the Settlement ZBA is the determinative planning instrument respecting the Development Concept and reflects the MOS. Mr. Johnston opined that the Redline Development Concept drawings and the Redline Conditions appropriately show the items and matters in s. 41(4) and 41(7) of the Act, are reasonable and can implement the drawings as part of the clearance of conditions and finalization of drawings for building permit application. Further, Mr. Johnston opined that the Redline Conditions appropriately ensure the implementation of the jointly agreed Redline Development Concept, the MOS, the Settlement ZBA, and constitute good planning of the Subject Property.

[24] Mr. Johnston testified that the implementation of the Development Concept through the Settlement ZBA accords with the MOS and the objectives of good site-specific planning as set out in Policy 1.7.1 of the Legislatively Approved UHOP that provides direction regarding site plan control applications in the City (“Site Plan Implementation Policy”). The Site Plan Implementation Policy directs that site plan control shall be used to achieve specific planning objectives, including promoting pedestrian scale development and land use compatibility, as well as preserving and

enhancing community character by integrating heritage features and important views in site design, among others. Mr. Johnston opined that the full scope and impact of the Development Concept on those matters set out in the Site Plan Implementation Policy had been assessed through the planning process, ultimately crystalizing in the Settlement ZBA endorsed by the Tribunal previously.

[25] Mr. Johnston did not provide evidence specifically on those matters in ss. 2 and 3(5) of the Act at the Hearing. It was Mr. Johnston's evidence that such matters had been considered in the previous Tribunal hearing event to consider the Settlement ZBA and its dismissal of the OPA, and that opinion affidavit and oral evidence had been provided at that time. While not providing specific evidence on the matter, Mr. Johnston did testify that that the SPA, as evidenced in the Redline Concept Plan and Redline Conditions, has regard for the matters identified in s. 2 of the Act, is consistent with the PPS and conforms to the Growth Plan, and implements the in force Settlement ZBA. It was Mr. Johnston's conclusion that the Settlement ZBA is deemed to comply with the Legislatively Approved UHOP by operation of s. 24(4) of the Act, and that as such, approval of the SPA instruments by the Tribunal would constitute good land use planning.

[26] The City presented Mr. Sean Kenney, a Registered Professional Planner and Manager of Site Plans for the City, to provide opinion evidence in the area of land use planning. He was qualified for same by the Tribunal. Mr. Kenney generally agreed with the history, context and background presented by Mr. Johnston. Mr. Kenney also agreed that the Redline Development Concept and Redline Conditions were capable of implementing the Settlement ZBA and those elements prescribed in s. 41.

[27] Mr. Kenney informed the Tribunal that he had reviewed the SPA, the Redline Development Concept and Redline Conditions against the PPS, Growth Plan and the NEP. Mr. Kenney opined that the SPA generally complies with the PPS and the Growth Plan. With respect to the NEP, Mr. Kenney provided evidence the Subject Property is

designated Urban Area under the NEP and is not subject to development control thereunder.

[28] In considering the written evidence and oral testimony presented, the Tribunal accepts the uncontested evidence presented by Mr. Kenney and Mr. Johnson that the Redline Development Concept and the Redline Conditions are reasonable and capable of implementing the Settlement ZBA and satisfy the criteria in ss. 41(4) and 41(7) of the Act, subject to the discussion and findings regarding the VIA Condition set out below. The Tribunal also accepts the uncontested opinion of Mr. Kenney and Mr. Johnston that the Redline Development Concept and the Redline Conditions satisfy those broader requirements under ss. 2 and 3(5) of the Act.

Is the Disputed VIA Condition Reasonable and Should it be Enforced?

[29] Mr. Johnston explained that, in advance of the Hearing, the Parties had worked cooperatively and agreed on the totality of the Redline Conditions presented to the Tribunal, save and except for Special Condition H proposed by the City, which requires that:

> [Phase 2 – Prior to the submission for building permit]… [the] Owner/Applicant submit and receive approval of a Visual Impact Assessment to the satisfaction of the Niagara Escarpment Commission and the City's Manager, Site Planning.

[30] Mr. Johnston explained that the Niagara Escarpment Commission's ("NEC") technical criteria establishes that the purpose of a VIA Study is to evaluate the impacts of a development proposal on changes in the landscape. In Mr. Johnston's opinion, the VIA Condition is not appropriate since it would require the Appellant to submit and receive approval for a study, the purpose of which is to review location, massing and height of a proposed building to determine whether it will have significant impact on

important views and vistas, and that these matters are expressly excluded from consideration in a site plan control application, specifically:

a. Section 41(6) of the Act states that matters of height and density are not to be controlled by site plan approval; therefore, any conclusions from a VIA Study are prohibited from being implemented;

b. Section 41(4.1) of the Act states that matters pertaining to a building's exterior design are excluded from site plan approval; therefore, any conclusions from VIA Study are prohibited from being implemented;

c. The Site Plan Implementation Policy that provides direction on the planning objectives of the site plan control applications filed with the City were assessed, regulated and approved through the Settlement ZBA and should not be reevaluated through the SPA;

d. The VIA Condition is a collateral attack by the City to ignore the applicable Settlement ZBA and instead import zoning controls into the SPA;

e. The VIA Condition is inappropriate due it is subjective wording that requires both the City and the NEC to be "satisfied";

f. Urban design criteria are addressed under specific urban design conditions in the Redline Conditions and it is inappropriate to duplicate them through a VIA Study; and

g. The NEC did not participate in the ZBA process for the Subject Property when the recommendations from a VIA Study could have been appropriately considered and implemented.

[31] With respect to the VIA Condition, Mr. Kenney agreed that a VIA Study typically provided guidance on matters such as building massing, height, and landscape

treatment. Mr. Kenney confirmed that the NEC did not participate in the ZBA process; however, in his experience as Manager of Site Plans, he asserted that it is typical to see a condition for a VIA Study during the site plan control application process. Furthermore, Mr. Kenney confirmed he understood that under s. 41(6) of the Act, any findings in a VIA Study could not modify the height or density of the proposed development, nor those items listed under s. 41(4.1), such as the exterior building treatment. Nevertheless, Mr. Kenney opined that the objectives and recommendations of a VIA Study extend beyond those realms and touch on urban design and landscape matters that can be legitimately reviewed and incorporated at the site plan approval stage. Mr. Kenney acknowledged that there are other urban design criteria set out in the Redline Conditions but opined that a VIA Study may result in different recommendations such as landscaping recommendations in line with NEC technical criteria.

[32] The Tribunal favors the evidence provided by Mr. Kenney on the matter of the reasonableness of the VIA Condition. The Tribunal finds that there are reasonable and important recommendations that may come out of a VIA Study that are not excluded from a site plan control application under ss. 41(6) and 41(4.1), such as landscape measures that conform to NEC technical criteria. The Tribunal is satisfied that the City is not attempting to circumvent ss. 41(6) or 41(4.1) and attack matters of height, density or exterior building treatment through the VIA Condition. Those things legislatively prohibited from site plan control in ss. 41(6) or 41(4.1) cannot be overridden by the imposition of conditions or changes to the Redline Development Concept or the Redline Conditions. The Tribunal is content that a VIA Study can be appropriately scoped to respect the prohibitions in ss. 41(6) and 41(4.1) of the Act and that findings can be applied consistently with, and only seek to consider, those things that are within NEC technical criteria and which not excluded from a site plan control application under s. 41 of the Act.

IS THERE A REQUIREMENT TO CONSIDER CONFORMITY WITH THE OFFICIAL PLAN UNDER S. 41 OF THE ACT?

[33] Having arrived at the position that the Redline Development Concept and Redline Conditions, including the VIA Condition, are appropriate and reasonable under s. 41 of the Act, and the general considerations under ss. 2. and 3(5) of the Act have been satisfied, the Tribunal turns to consider the City's assertion that the SPA is not in conformity with the Legislatively Approved UHOP. Section 41 of the Act is silent on whether an approval authority must specifically consider conformity with an official plan when evaluating a site plan control application. In the absence of legislative direction, the Tribunal considered the legal submissions of the Parties and the corresponding expert evidence following from their positions on this legal question.

[34] Counsel for the City took the position that, beyond considering whether the SPA meets the tests under the specific provision in s. 41 and the general principles in ss. 2 and 3(5) of the Act, the Tribunal must also evaluate the impact of s. 3(2) of the OPAA and the obligation imposed therein for all decisions under the Act to conform to the official plan in force and effect at the time of the decision. Mr. Kenney, on behalf of the City, opined that the SPA did not conform with the Legislatively Approved UHOP and policies engaged within the AWSSP as follows:

a. The eight-storey Development Concept does not comply with the Mixed Use Medium Density designation in the AWSSP that restrict height to a maximum of 2.5 and 3 storeys (Policy 2.8.8.4 and Policy 2.8.8.5);

b. Part of the Subject Property addressed as 15 Lorne Avenue, where the Mar-Phillipo House is proposed to be relocated, is designated Low Density Residential 1 in the AWSSP and only permits single detached and semi-detached dwelling; whereas, to facilitate its use as amenity area in the Development Concept, the Mixed Use – Medium Density – Pedestrian

designation is required (Policy 2.8.7.3 Low Density Residential Designations); and

c. The eight-storey Mixed Use Medium Density built form of the Development Concept does not comply with the visioning and urban design policies of the AWSSP that seek to maintain and enhance the overall historic character of Ancaster (Policy 2.8.1, 2.8.2, and 2.8.3).

[35] Counsel for the City presented two cases to demonstrate instances where the Tribunal has evaluated official plan conformity when considering site plan control approval: (1) *31 Huron Street Inc. v Collingwood (Town)*, 2022 CarswellOnt 5071 (OLT); and (2) *CSG Limited Partnership v Brant (County)*, 2023 CarswellOnt 13310 (OLT). Both were appeals of a zoning by-law and site plan control application where the Tribunal noted conformity with the official plan in rendering its decision. In considering these cases, the Tribunal notes that evaluation of the zoning by-law amendment and the site plan control application were wrapped together in the appeals and that neither case turned on the specific question of site plan conformity with the official plan. However, these cases are instructive to demonstrate that in the normal course, the Tribunal has considered site plan control application conformity to the official plan in the context of an appeal of a zoning by-law and a site plan control application together.

[36] In reviewing the history of the OPA for the Subject Property, Mr. Johnston acknowledged that when the Appellant first consulted with the City in early 2022 regarding the Development Concept, an OPA along with ZBA and the SPA were required by the City to facilitate the Development Concept. Subsequently, it was through enactment of the Ministerially Approved UHOP and the Height and Density Policy therein that the OPA was no longer necessary, and as such, subsequently dismissed by the Tribunal. Mr. Johnston also agreed that an OPA would be required to facilitate the Development Concept at all times except during the window of time when the Ministerially Approved UHOP was in place from November 4, 2022 to December 6, 2023.

[37] Counsel for the Appellant set out the position that there is no statutory requirement in s. 41 that a site plan must demonstrably conform with the municipal official plan and that the Tribunal must not read a new requirement into the Act, as the City is advocating. Counsel asserted that, where the Act intends for an instrument to be assessed for conformity with a municipal official plan, such as that found in s. 51(24) with respect to plans of subdivision, a test for such is expressly set out. Counsel also took the position that that evaluation of a site plan control application is not an opportunity to re-evaluate whether a zoning by-law is in conformity with the policy context of an official plan; rather, it is only the implementation stage of a development proposal focused on determining the plans, drawings and conditions between the municipality and the landowner.

[38] Counsel for the Appellant provided the Tribunal with cases it asserts stand for the proposition that the Tribunal has recognized the lack of a specific official plan conformity test in s. 41 of the Act. *1341665 Ontario Ltd. v Toronto (City)*, 2004 CarswellOnt 3529 (O.M.B.) ("*1341665 Ontario Ltd.*") was a decision on a motion for party status by an adjacent landowner on a site plan control application. *1341665 Ontario Ltd.* was held out by Appellant Counsel to demonstrate the premise that the authority given to an approval authority or the Tribunal under s. 41 is to consider "micro-management of the site" and is not the time to consider "matters of a nature arising from the first principles of land use or considerations implying a larger concern beyond the immediate environment of the site." Counsel took the position that, to look to those things settled in an official plan or zoning amendment when considering a site plan control application, there would be the risk that the Tribunal inappropriately "slip unto a greasy slope" toward re-litigation of those same policy matters at the site plan approval stage.

[39] Having reviewed *1341665 Ontario Ltd.*, the Tribunal distinguishes it from the case at hand. The decision in *1341665 Ontario Ltd.* was a motion for party status and not a decision of the Tribunal on a site plan appeal under s. 41. The commentary relied upon by Appellant Counsel is obiter as the case did not turn on a question of site plan control application conformity with the official plan**.** Furthermore, the commentary

highlighted by Counsel for the Appellant that “the plans, drawings or the requirements thereof [in a site plan] are matters of micro-management of site whose land use and performance standards are in most cases determined and set”, is not directly applicable to the fact scenario at hand due to operation of s. 3(2) of the OPAA. The Tribunal finds that the fact scenario created by the provincial government through s. 3(2) of the OPAA retroactively revoking the Ministerially Approved UHOP, deeming same to have “never existed” and reinstating the Legislatively Approved UHOP to November 4, 2022, means that arguably the performance standards were effectively no longer “determined and set” at the time the Settlement ZBA was enacted. Given the retroactivity of the Legislatively Approved UHOP in place of the Ministerially Approved UHOP, the Tribunal does not find that the matters in the consideration of the official plan are truly “settled” at the point where it is now considering the SPA.

[40] Counsel also relied on the disposition letter by then Associate-Chair Hubbard granting a review of the decision in *Avila Investments Ltd. v Waterloo (City)*, 2019 CarswellOnt 16246 (L.P.A.T) (“*Avila*”). In *Avila*, the appeal concerned the design of a 16-storey building where in the original decision the Member denied the site plan on the basis that it was not sufficient for the applicant to demonstrate zoning compliance. That decision was found to be an error by Associate-Chair Hubbard for not providing more specific directions or methods to resolve the differences between the Parties. The commentary in *Avila* was presented by Counsel for the Appellant as evidencing that the Tribunal has taken the position that site plan control only “serves to implement the approved zoning on a site by ensuring that the proposed development is well designed, functional and a good fit with the existing land uses”.

[41] The Tribunal distinguishes the letter granting review of *Avila* and ultimately rescinding dismissal of that site plan from the current case. While the commentary from Associate-Chair Hubbard is instructive on how a site plan typically delivers site-specific details in a development project, that does not limit the Tribunal from considering the blunt overarching legal question imposed by s. 3(2) of the OPAA that all decisions must conform to the official plan in force at the time of the decision.

[42] Upon considering the legal submissions of the Parties, the Tribunal finds that s.41 of the Act is silent on the whether there is a specific requirement for an approval authority to consider official plan conformity when evaluating a site plan control application. The cases presented by both Counsel for the Appellant and the City demonstrated instances where official plan conformity had been equally considered by the Tribunal and also not considered in deciding on a site plan control application.

[43] In the normal operation of a development application similar to the Appellant's, where a development proposal requires an official plan amendment, zoning by-law amendment and a subsequent site plan control application to implement the development project, official plan conformity would naturally be considered through the antecedent public process of the official plan amendment and zoning by-law amendment applications by municipal planning staff and Council, and not necessarily need to be considered again at the site plan control application stage. However, there are other instances where a site plan control application is all that is necessary to bring forward a development proposal on a parcel of land because the project is in alignment with existing official plan policies and the relevant municipal zoning. In such a case, the sole requirement for a site plan control application speaks to the fact that municipal planning staff would have conducted some background review to determine the development proposal was in conformity with official plan policies and applicable zoning, and thereby, would not require an antecedent official plan application. The Tribunal finds that the absence of a specific official plan conformity test being articulated in s. 41 does not mean that an approval authority is barred from consideration of same, as Appellant Counsel contends. In fact, the Tribunal finds that consideration of official plan conformity is imbedded in the building blocks of the planning process and is demonstrated to have been met at some point in time in an approval of a standalone SPA.

Does s. 3(2) of the OPAA Import a New Requirement of Official Plan Conformity?

[44] In the Merit Hearing, Counsel for both the Appellant and for the City agreed that the effect of s. 3(2) of the OPAA is to revoke and deem the Ministerially Approved UHOP to have never existed and reinstate the Legislatively Approved UHOP as of November 4, 2022. Counsel for both Parties agreed that this has the result of removing the Height and Density Policy that facilitated the Development Concept and was the basis for dismissing the OPA appeal.

[45] Counsel for the Appellant took the position that the purpose of the OPAA was not to alter the manner in which planning applications are normally considered under the Act, nor was it the objective of the provincial government in enacting the OPAA that a two-tier planning system would arise for site plan control applications in which official plan conformity was required for a site plan control application in Affected Municipalities, but not required in all other municipalities. Appellant Counsel argued that the importation of a new “test” of official plan conformity, as the City asserts, would lead to all planning decision in municipalities affected by the OPAA to have to satisfy an independent official plan conformity test that trumps any deemed conformity under s. 24(4) of the Act. In contrast, other municipalities outside the scope of the OPAA would not need to perform an independent official plan conformity test and the deemed conformity between a zoning by-law and underlying official plan could be relied upon by landowners due to the operation of s. 24(4) of the Act.

[46] In opposition, Counsel for the City drew on Hansard transcripts of the Provincial Legislature from December 5, 2023 (the date of the third and final reading of Bill 150) to provide insight into the provincial government objectives behind the OPAA. Mr. Rob Flack, Associate Minister of Municipal Affairs and Housing, on behalf of Minister Calandra, clarified that “applications already in progress seeking planning permissions…would need to conform to the municipalities’ official plan, approved under

the [OPAA]."[1] Counsel for the City also drew the Tribunal's attention to Mr. Flack's comments that past decisions of the previous Minister were made in a way that did not maintain or reinforce public trust and that "the [OPAA] is about working effectively with our municipal partners…it is about rebuilding trust so we can continue to focus on building more homes right across Ontario."[2] Counsel for the City relied on these comments to make the point that, to allow applications under the Act, such as the SPA in this case, to proceed where they clearly do not conform to the Legislatively Approved UHOP would be going against both the wording and the spirit of the legislation.

[47] While the Hansard transcripts are not binding, the Tribunal finds they are instructive and provide helpful insight into the mind of the provincial government and the objectives behind the OPAA that can assist the Tribunal in wielding the blunt instrument of the legislation. It is clear that the provincial government found that certain decisions of the previous Minister with respect to official plans in the Affected Municipalities did not build or maintain public trust. The OPAA is the tool deployed to both rewind the decision making through the retroactivity provision in s. 1(1), and catch planning applications as they wind their way forward through the labyrinth of municipal approvals through s. 3(2) and the imposed official plan conformity test for all decisions under the Act.

[48] Having considered the submissions of the Parties, the Tribunal finds that s. 3(2) of the OPAA creates a new official plan conformity test in Affected Municipalities on an appeal of a site plan control application under s. 41(12) of the Act. The language of s. 3(2) of the OPAA is conclusive that <u>any</u> decision of a municipality or the Tribunal made under the Act must conform with the official plan as approved or amended. The provincial government did not carve out that only certain decisions had to conform, it specified that <u>all</u> decisions in Affected Municipalities were to conform, in this case, to the Legislatively Approved UHOP.

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[1] Ontario, Legislative Assembly, "Planning Statute Law Amendment Act, 2023, Bill 150, Mr. Calandra", *Official Report of Debates (Hansard)*, No 120A (05 December 2023) at 7015.
[2] *Ibid* at 7017.

[49] The lack of a specific existing official plan conformity test in s. 41 does not impart that site plan control applications are exempt from the scrutiny set out in the OPAA. If the Act contained a more specific test for site plans respecting official plans, as is the case for minor variances being required to maintain the general intent and purpose of an official plan, it would be possible for the more specific provision to prevail over the general. However, the language of the OPAA is conclusive and explicitly directs that all decisions must be in conformity with the in force official plan, and nothing in the Act allows the Tribunal to conclude that an exception should be made for site plan control application appeals.

[50] Appellant Counsel contended that the City's position that an official plan conformity test is required under the OPAA amounts to a collateral attack on the Settlement ZBA and the Development Concept by asking the Tribunal to depart from the "fine tuning" of the Settlement ZBA at the SPA stage, and instead asking it to wade into areas of policy conformity dealt with previously through the OPA/ZBA Appeal. The Tribunal disagrees and finds the City's position is a genuine attempt to apply new, blunt legislation (without transition provisions) part way through a planning process without precedent. The City is merely applying the new legislative scheme at the next milestone in the planning approval of the Development Concept, which happens to be approval of the SPA under s. 41 of the Act. The Tribunal finds that the test under the OPAA must be applied on an appeal of a site plan control application under s. 41(12) of the Act.

Deemed Conformity and s. 24(4) of the Act

[51] Having found that the OPAA imports a requirement of official plan conformity when considering an appeal of the non-decision of an approval authority on a site plan control application under s. 41(12) of the Act, the Tribunal then turned its mind to whether the deemed conformity provision in s. 24(4) of the Act could overcome a lack of conformity through the retroactive operation of the OPAA. The deemed conformity provision set out in s. 24(4) of the Act establishes that where a by-law is passed when

an official plan is in effect and no appeal occurs, the by-law can be conclusively deemed to be in conformity with the official plan.

[52] Both Mr. Johnston and Mr. Kenney provided evidence that the Settlement ZBA that came into force through the Tribunal decision issued on September 19, 2023, constitutes the in force zoning for the Subject Property. From this, Counsel for the Appellant set out the position that the Settlement ZBA is a “definitive conclusion on the issue of official plan conformity” pursuant to s. 24(4) of the Act that directs that an in-force by-law is conclusively deemed to be in conformity with the official plan.

[53] Counsel for the Appellant took the position that the use of the word “conclusively” in s. 24(4) of the Act removes any rebuttable presumption regarding conformity with an in force zoning by-law. Counsel for the Appellant submitted that there is no temporal limitation in s. 24(4) of the Act, such that, even if the official plan changes retroactively, the conclusive deemed conformity of the by-law to the official plan continues to apply.

[54] Cases presented to support the Appellant’s position that s. 24(4) of the Act deems conformity between the Settlement ZBA and the retroactively in force Legislatively Approved UHOP were provided. *Albert Bloom Ltd. v Bentinck (Township) (Chief Building Official)*, 1996 CanLII 522 (ONCA) (“*Albert Bloom*”) was a challenge to the release of a Holding provision in which the Ontario Court of Appeal (“ONCA”) set out that “the respondents were entitled to rely on the by-laws which were conclusively deemed to be in compliance with the O.P. and proceed accordingly”. In that case, challenging the lifting of the Holding provision was held by the ONCA as an inappropriate way to contest the validity of a by-law where an earlier opportunity to challenge the decision in the planning process by way of appeal was passed up. Appellant Counsel relied on *Albert Bloom* to demonstrate the efficacy of s. 24(4) of the Act in deeming that conformity between a by-law and the underlying official plan and that it has been recognized by the Ontario Courts and the Tribunal is bound to follow.

[55] The Tribunal distinguishes the fact scenario in *Albert Bloom* from the current case and does not agree that it stands for a universal proposition that s. 24(4) of the Act deems conformity of a by-law to the official plan in the face of s. 3(2) of the OPAA. By operation of enactment of the OPAA and the retroactive enforcement of the Legislatively Approved UHOP, the Tribunal finds there has been no opportunity for a challenge to the in force Settlement ZBA, as was the case in *Albert Bloom*. Therefore, it cannot be said that the City is challenging a planning process at a later stage, being the approval of the SPA, than it had the opportunity to do so in the normal course.

[56] Counsel for the Appellant also provided *Aon Inc. v Peterborough (City)*, 1999 CarswellOnt 924 (Ont. Gen. Div.) ("*Aon Inc.*") to explain "deemed conformity" in s. 24(4) of the Act. In that case, a contextual explanation of deemed conformity was offered in a scenario where a decision of a chief building official was under review. Council for the Appellant held this case out for the proposition that official plan policy is translated in a zoning by-law, which is then applicable law governing a building permit. Counsel for the Appellant relied on the passage that:

> [it is] a zoning by-law which must implement or convert the Official Plan into a body of law regulating the use of the land and it does so only to the extent that it actually sets forth in its provisions, interpreted in their ordinary sense in light of the policy framework of the official plan and the context of the by-law as a whole (*Aon Inc.* at para 18).

[57] Appellant Counsel took the position that *Aon Inc.* and *Albert Bloom* stand for the proposition that: (1) landowners are entitled to rely on zoning by-laws that are conclusively deemed to be in conformity with the official plan and to proceed accordingly; and (2) it is the zoning by-laws that convert official plan policies into applicable law that regulates the type of construction, spacing and use of buildings on the land and this constitutes applicable law whether a building permit can issue. Counsel submitted that in following these cases, and by operation of s. 24(4) of the Act, the Settlement ZBA is deemed to conform with every policy in the Legislatively Approved UHOP and the Appellant is entitled to rely on it. Since both Mr. Johnston and Mr. Kenney opined that the Redline Development Concept and Redline Conditions

reasonably implement the Settlement ZBA, Counsel for the Appellant asserted that s. 24(4) bridges the gap and deems conformity of the SPA with the Legislatively Approved UHOP.

[58] The Tribunal agrees that *Aon Inc.* and *Albert Bloom* demonstrate that in the normal operation of the Act, a site plan control application implements the policies and framework in an official plan translated through a zoning by-law and delivers the detailed elements of the land use, buildings, and structures. The Tribunal also agrees that in the normal course, s. 24(4) of the Act deems conformity between the by-law and the official plan where the official plan changed subsequent to a point in time when those instruments were in alignment and that such is an equitable outcome to provide reliance and stability to landowners in the planning process. However, the foundation stone in the building blocks between official plan policy implemented through a zoning by-law and delivered at the micro-level though a site plan control application is explicitly demolished by OPAA s. 3(2) where it states the approval of the Ministerially Approved UHOP is deemed to have “never been made”.

[59] The Tribunal does not accept the Appellant’s interpretation of s. 24(4) of the Act as being applicable to the fact scenario at hand. Deemed conformity in s. 24(4) of the Act contemplates an underlying official plan that has changed prospectively; whereas the OPAA at s. 3(2) specially sets out that the Ministerially Approved UHOP is deemed to have never existed. In other words, retroactive insertion of the Legislatively Approved UHOP means there was never a foundational moment of conformity between the Settlement ZBA and the Legislatively Approved UHOP that can be relied on to “deem conformity” between the instruments today. Additionally, the language in the OPAA that the Ministerially Approved UHOP was deemed to have never been made leads the Tribunal to conclude that neither the City, nor the public, had the opportunity to challenge the conformity of official plan policies as enacted through the Settlement ZBA that the Appellant is now relying on as the basis for approving the SPA. Public engagement is at the heart of the planning process under the Act and cannot be said to have run its course where the Ministerially Approved UHOP, on which the Settlement

ZBA is based, is deemed never to have existed. Rather, the Settlement ZBA has become an orphaned instrument that s. 24(4) of the Act cannot cure of its lineage since there is now no retroactive point in time where the Settlement ZBA accorded with the in force Legislatively Approved UHOP.

[60] The Tribunal is a creature of statue and must follow the direction in s. 3(2) of the OPAA to test for official plan conformity in all planning decisions of Affected Municipalities, in this case at the site plan approval stage. Presumably the provincial government recognized that by deeming the Ministerially Approved UHOP to have never existed, it would leave orphaned planning instruments, such as the Settlement ZBA, that no longer manifested the underlying policies of the official plan. It is reasonable to assume that the provincial government inserted the requirement for official plan conformity in s. 3(2) of the OPAA in order to flush out such planning instruments now without lineage at the next milestone in the planning process. The Tribunal can presume that the intention of the provincial government was to address the lack of public confidence in decisions made by the Minister and “walk back” such Minister modifications through the language in the OPAA. If the Tribunal were not to consider official plan conformity in the current case, the entire objective of the OPAA would be undermined since planning decisions facilitated by the Ministers modifications in the Affected Municipalities are exactly what the provincial government targeted with the OPAA and the official plan conformity test therein; it is a wide net to catch planning instruments made by the Minister without public confidence.

SUMMARY OF FINDINGS

[61] Having reviewed the evidence and legal argument presented by the Parties as set out and detailed above, the Tribunal summarizes its findings below:

a. The proposed Redline Development Concept and Redline Conditions are reasonable and capable of implementing the Settlement ZBA and set out

those items required under s. 41(4) of the Act and allowed under s. 41(7) of the Act;

b. The proposed Redline Development Concept and Redline Conditions meet the general tests set out in ss. 2 and 3(5) of the Act;

c. The VIA Condition is reasonably requested by the City under s. 41(3.4) of the Act;

d. Any recommendations that may come about through the VIA Condition shall not prevail over those items prohibited from site plan control under ss. 41(6) and 41(4.1) of the Act;

e. The Tribunal finds that s. 3(2) of the OPAA imports an official plan conformity test in Affected Municipalities on an appeal of a site plan control application under s. 41(12) of the Act.

f. The SPA, as facilitated by the Redline Development Concept and Redline Conditions, does not conform to height, land use designation and general visioning and urban design policies in the Legislatively Approved UHOP.

g. Section 24(4) of the Act does not overcome the lack of conformity between the Legislatively Approved UHOP and the SPA where the earlier, underlying Ministerially Approved UHOP is deemed to have never been made under s. 1(1) of the OPAA.

ORDER

[62] **THE TRIBUNAL ORDERS** that the appeal is dismissed for the reasons set out above.

"A. Mason"

A. MASON
MEMBER