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File no. 02422348

City Council
City of Kingston
216 Ontario Street
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Dear Honourable Council Members:

**Re: 223 Princess Street - IN8 (The Capitol) Developments Inc.
City File No. D-14-027-2019**

We are counsel for Building Kingston's Future Inc. and the Frontenac Heritage Foundation with respect to the above noted application. This is further to our letter of September 15, 2020 that was before Planning Committee. We ask that this be added to the Council agenda for Council's upcoming meeting.

History of Proceedings

The history of this application is long and arduous, and our clients, who are grass roots community organizations, have expended extensive resources with widespread support through contributions from across the City. The Local Planning Appeal Tribunal has rejected the proposal with 16 storeys twice, firstly at an eleven-day hearing, and secondly when the Executive Chair of the Local Planning Appeal Tribunal dismissed IN8's request for a review of the first decision.

IN8 also appealed the LPAT's first decision on its 16-storey proposal to the Divisional Court. The Court has not yet made its decision. The presence of this new 12-storey application illustrates the level of faith that the applicant has in the prospects of its success on the Divisional Court appeal. While there are currently two proposals by IN8 – one for 16 storeys and one for 12/13 storeys, this letter focuses on the request currently before Council for approval of 12/13 storeys (the "Proposed Development").

The Proposed Development does not meet the Test for a Zoning By-law Amendment

The test for consideration of a site-specific zoning by-law amendment is whether the proposal is consistent with provincial policy, conforms with the Official Plan, and represents good planning, including a consideration of adverse impacts. The City has substantial direction from the LPAT as to how the prior iteration of this proposal does not meet the test for a zoning by-law amendment, which is instructive.

The Tribunal in its decision on the 16-storey proposal found that:

1. there is a need to strike a balance between policies on intensification and growth as well as the preservation of heritage;¹
2. in order for intensification to coexist with the applicable heritage policies, there must be an upper limit on the amount of intensification;²
3. the mass, scale, height, and other proposed building elements must be compatible with the neighbourhood and its heritage context,³ and
4. the existing low-profile building landscape forms an important part of the heritage character of the Lower Princess Street HCA and that heritage preservation was a central objective of the Official Plan. In this respect, the height and massing of the tower in the Proposed Development were excessive and did not conform to the policies of the Kingston Official Plan.⁴

The question for Council is – does the new 12/13 storey proposal meet the test? The evidence demonstrates that it does not.

Contrary to what is stated in the staff report, the proposal does not conform with the Official Plan and does not meet the test of good planning. It is telling that City staff do not reference heritage in their executive summary until making a passing reference in the second to last paragraph.

Specifically, the issues include:

1. **Failure to Respect Heritage Policies** - Lower Princess Street (from Barrie Street to the water) and the St. Lawrence Heritage Character Area (Queen Street and north) are protected by special policies in the City's Official Plan. Both of these policies apply to the Proposed Development. Despite the application of these policies, the City is entertaining a proposal that ignores them.

ERA's peer review notes that the area is characterized by 1 and 2 storey buildings – this is the context in which this 12/13 storey building is being proposed.

Notably, the staff report emphasizes the frontage on Princess Street; there is 9.1m of frontage on Princess Street, while in contrast there is 41.3m of frontage on Queen Street. The impacts of the Proposed Development on Queen Street are significant and understated by staff.

2. **Angular Plane Non-Compliance** – The Zoning By-law requires an angular plane of 39 degrees. An angular plane is a tool for limiting the impact of building height and massing, wherein larger sites can facilitate taller buildings. When the angular plane is adhered to, the impacts on views are lessened.

Despite ERA's suggestion that a 45 degree angular plane is appropriate (without a principled analysis), incredibly the ERA addendum states that 54 degrees is supportable. The staff report describes the increase from 45 degrees to 54 degrees as "minor piercing on the 11th and 12th

¹ Tribunal decision dated November 9, 2018, Case No. PL161069 at paras 43-47, 49-52.

² Tribunal decision at paras 75-77.

³ Tribunal decision at paras 161, 174.

⁴ Tribunal decision at para 173(k).

storeys.”⁵ This fails to acknowledge the purpose of an angular plane. When there is any piercing of the angular plane, people will see additional building height and massing. There is no justification for a 54 degree angular plane.

3. **13 Storeys** – The staff report describes the Proposed Development as 12 storeys; however, this fails to account for the mechanical penthouse, which constitutes a 13th storey according to Section 5.19(i)(i) and 5.19(i)(iv) of the City’s Downtown and Harbour Zoning By-law No. 96-259. Specifically, the proposed zoning by-law amendments show that the mechanical room is 4.7m high. This exceeds this 3.5m maximum height, and therefore constitutes an additional storey according to the City’s existing By-law. The description of this proposal as 12 storeys is inaccurate and misleading.
4. **Relying on Site Plan Elements for a Zoning Decision** – Much of the justification to address concerns about the height, mass, and scale of the proposed building relates to site plan elements – such as the proposed construction materials and design elements. Note that these elements are not before Council when it considers the proposed zoning by-law amendments. The zero setback from the lot line on Queen Street, angular plane, parking ratios, allowed density, and height are the zoning elements for Council’s vote. The design elements described in the staff report can be changed at a later date, without public input or input from Council.
5. **Adverse Impacts on Adjacent Properties** – The ERA addendum to its peer review notes that the building design includes balconies that are projecting into adjacent properties, constraining their as-of-right development potential. ERA indicated that it is deferring to the City’s building department, but in the test for good planning, Council must consider these adverse impacts on neighbouring properties. In the hundreds of pages of the staff report and applicant submissions, no analysis of the downzoning of neighbouring properties has been provided. The development rights of others cannot be diminished without a compelling public interest – this application does not address this issue.
6. **Community Benefits** - With respect to Section 37 of the *Planning Act* / Community Benefits, staff’s position is flawed because: (1) staff falsely conclude that the proposal constitutes good land use planning; (2) the staff report provides scant analysis on the calculation of the Community Benefits amount; and (3) the proposed zoning by-law amendment does not provide details of the community benefits to be received. Instead, the staff report promises staff negotiations and execution of an agreement about the substance of the proposed amount and the actual benefit required through the use of a holding symbol. This is contrary to the requirements of the *Planning Act*.

Furthermore, the staff report references Community Benefits Charges. This is misleading as the provincial legislative amendments introducing Community Benefit Charges through Bill 108 are not in force. Staff’s position is flawed.

⁵ Staff Report at p. 32.

IN8's Expectation

In a letter to Planning Committee, dated September 10, 2020, Mr. Osterhout of the law firm Soloway Wright, and IN8 President Darryl Firsten wrote:

In providing this assurance [to withdraw the 16-storey proposal], it remains IN8's expectation and understanding that, if the current zoning by-law amendment is appealed to the Local Planning Appeal Tribunal, the City would participate fully in the hearing of those appeals in defence of the by-law amendment.

It appears that IN8's expectation is that Kingston City Council vote in favour of the 12-storey proposal and thereby restrict its future discretion. It is common knowledge that Council must maintain its public interest mandate and continue to make decisions as an independent statutory decision-maker. Council cannot fetter its ability to make a decision with respect to any future appeals, should such arise. This expectation of IN8 is unreasonable and unsupportable in law.

Conclusion

The applicant's consultants previously supported 21 storeys. Even staff previously supported 16 storeys. They were both wrong – the Tribunal has confirmed this... twice. This proposal represents a piecemeal, site-specific approach to land use planning, which is not consistent with the principles of good planning and is not in the public interest.

Future City of Kingston policies could allow for more height, massing, and scale in the downtown core. A comprehensive approach would benefit the community, as well as provide greater predictability for applicants. To date, the City's policies do not support this application.

Accordingly, we ask that Council reject this application.

Sincerely,



Roberto D. Aburto

RDA

cc: *City Council*
cc: *Clients*
cc: *Philip Osterhout, Soloway Wright LLP*