

October 28, 2020

City Council  
City of Kingston  
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File no. 02422348

Dear Sir or Madam:

**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 Frontenac Heritage Foundation with respect to the above noted application. Our clients are community organizations dedicated to preserving the heritage and character of the City of Kingston. Samantha King, President, Building Kingston's Future Inc., and Shirley Bailey, President, Frontenac Heritage Foundation, spoke at the public meeting of Planning Committee on September 17, 2020.

On October 9, 2020, the City of Kingston (the "**City**") issued Notice of the passing of By-law No. 2020-150 (the "**By-law**"). The By-law amends various site-specific zoning requirements for the property located at 223 Princess Street (the "**Subject Property**").

This letter appeals the passage of the By-law on October 6, 2020 to the Local Planning Appeal Tribunal.

Note that a Divisional Court decision on an appeal by IN8 (The Capitol) Developments was issued on October 14, 2020. Council did not have the benefit of this decision, which upheld the Tribunal decision, PL 161069, of November 9, 2018, rejecting a 16-storey proposal for the Subject Property.

## **Background**

The By-law is necessary to permit the construction of a new condominium project at 223 Princess Street. The proposal includes the development of a 12/13 storey building with a mix of residential and commercial uses (the "**Proposed Development**").

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.

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

- there is a need to strike a balance between policies on intensification and growth **as well as the preservation of heritage**;<sup>1</sup>
- in order for intensification to coexist with the applicable heritage policies, there must be an upper limit on the amount of intensification;<sup>2</sup>
- the mass, scale, height, and other proposed building elements must be compatible with the neighbourhood and its heritage context,<sup>3</sup> and
- the existing low-profile building landscape forms an important part of the heritage character of the Lower Princess Street Heritage Character Area 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.<sup>4</sup>

IN8 also appealed the LPAT's first decision on its 16-storey proposal to the Divisional Court. The Divisional Court, in its October 14, 2020 decision, found no error in the Tribunal's decision. The By-law is inconsistent with findings made by the Tribunal which were endorsed by the Divisional Court.

### **Grounds for Appeal**

To that end, our Client's grounds for appeal of the By-law include but are not limited to the following:

#### **1. The By-law is not Consistent with the PPS**

The Provincial Policy Statement requires that cultural heritage landscapes be conserved. The By-law, by permitting a high rise development in a downtown cultural heritage landscape, is inconsistent with these policies in the PPS.

The PPS also speaks to the importance of providing affordable housing and addressing climate change. This Proposed Development does neither.

#### **2. The By-law does not conform with the Official Plan**

The Subject Property for the 12/13 storey building is currently zoned as Central Business System (C1) Zone, and specifically as Heritage Commercial C1-3 within By-law No. 96-259 Downtown and Harbour Zoning By-Law of the Corporation of the City of Kingston (the "**ZBL**"). The Official Plan describes the Downtown and Harbour Area of Kingston as:

the oldest, most diverse area of the City where the Market Square Heritage Conservation District features prominently. Its cultural heritage value continues to be a defining element of its character and is intrinsically linked to its continued form and function as a mixed use, commercial node with retail, office and tourist focus, resident population, and civic prominence. To support the heritage, commercial and civic function of the Downtown and Harbour Area by providing for a full, accessible, and integrated range of commercial, hospitality, civic, and community uses as

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

<sup>2</sup> Tribunal decision at paras 75-77.

<sup>3</sup> Tribunal decision at paras 161, 174.

<sup>4</sup> Tribunal decision at para 173(k).

well as open space, and higher density residential uses that are compatible in scale and type to the historic core.<sup>5</sup>

Section 10A.1.1 of the Official Plan envisions a broad range of uses in the downtown core with stated constraints.

A broad mix of uses will be encouraged in the Downtown Area and in much of the Harbour Area (shown on Schedule DH-1), including the widest range of commercial use, as well as civic, institutional, open space, recreation, cultural and higher density residential use **provided that such uses are supportive of its vitality, human scale, pedestrian activity, historic fabric and function.** [emphasis added]

Section 10A.1.6. of the Official Plan states that:

Cultural heritage resources are a valued legacy of the City and contribute to the atmosphere and heritage character of the Downtown and Harbour Area that are intended to be conserved. New development must conserve, enhance, support or adaptively re-use these resources. [...]

Section 10A.4.6. of the Official Plan sets out guiding principles that are to be applied in the consideration of new development. The By-law does not conform with these guiding principles.

Additionally, Official Plan section 9.5.9 gives direction to Planning Committee and Council when voting on a Zoning By-law Amendment including considering compatibility with cultural heritage resources, suitability of the site for the proposal, and precedent. Council failed to consider the directives in this section.

It is clear from these policies that conserving the heritage character, including low-scale development of the Central Business District is of particular import to Council. The Proposed Development will have a detrimental impact on these central heritage conservation considerations called for by the Official Plan.

### **A) The Angular Plane Does Not Comply with the Zoning By-law Requirements**

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.

The ZBL requires an angular plane of 39 degrees<sup>6</sup>. Section 7.2.2. of the ZBL sets the commencement height of the angular plane at 17 metres or (55 feet) in C1 zones.

The staff report describes the increase from 39 degrees to 54 degrees as resulting in “minor piercing on the 11<sup>th</sup> and 12<sup>th</sup> storeys.”<sup>7</sup> 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.

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<sup>5</sup> Kingston Official Plan, 10A. Downtown & Harbour Specific Policy Area, at p. 452.

<sup>6</sup> City of Kingston Downtown & Harbour Zoning By-Law No. 96-259, p. 10.

<sup>7</sup> Staff Report at p. 32.

## **B) The Proposed Development Exceeds Height Requirements**

Section 10A.5 of the Official Plan provides guidelines for development in the area of the Subject Property. It is clear from the wording of these guidelines that new development is intended to contribute to the cohesive cultural heritage character of the buildings in this area.

**10A.6.2.** Zoning within the Downtown and Harbour Area will continue to reflect built form provisions as found in the Downtown and Harbour Zoning By-law, to ensure that the form of new development is compatible with the built heritage fabric and street-oriented pedestrian function of the Downtown and Harbour Area.

The Subject Property is zoned as C1-3 (Heritage Commercial Zone on the Princess Street side) and C1 (Queen Street side) under the ZBL. Height in the C1-3 zone is specifically restricted to 17 m (per section 7.3.3), and in the C-1 zone height is limited to 25.5 m (per section 7.2.2.1). The height of the proposed building is 42.2m.

The staff report describes the Proposed Development as 12 storeys and 37.5m; however, this fails to account for the mechanical penthouse, which constitutes a 13<sup>th</sup> storey according to Section 5.19(i)(i) and 5.19(i)(iv) of the ZBL. 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.

The height of the proposed building greatly exceeds the zoning requirements and does not conform to the goals of and the policies in the Official Plan.

## **3. The City's Reference to Community Benefits Charges is Flawed**

With respect to Section 37 of the *Planning Act*/ Community Benefits, staff's position is unsound because:

- (1) staff falsely concluded that the proposal constitutes good land use planning; and
- (2) the staff report provided scant analysis on the calculation of the Community Benefits amount.

Furthermore, the By-law does not set out the details of the community benefits to be received as required by Section 37 of the *Planning Act*. Instead, the staff report promised 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*.

This also does not conform to the Official Plan, which requires consideration of numerous factors including s. 37 when additional density is being added.

As well, the staff report referenced 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.

#### **4. The By-law Does Not Represent Principles of Good Planning**

##### **A) Failure to Respect Heritage Policies and the Heritage Context of This Site**

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 has approved a proposal that ignores them.

The peer reviewer notes that the area is characterized by 1, 2 and 3 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, have been understated by staff and incompletely assessed by Council.

Overall, the heritage character of the downtown area, as characterized in the Official Plan and Zoning By-law, was not properly considered.

##### **B) The City Has Not Considered Site Plan Elements for the Zoning Decision**

While section 10A.4.7 of the Official Plan offers the opportunity for greater height when an urban design study demonstrates compatibility, the construction materials and design elements were not before City Council when it considered 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 voted on by City Council. The design elements are not part of the By-law.

##### **C) Adverse Impacts on Adjacent Properties Have Not Been Considered**

The addendum to the City's peer review noted that the building design includes balconies that are projecting into adjacent properties, constraining their as-of-right development potential. It further indicated that it is deferring to the City's building department, but in the test for good planning, Council was required to 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 was provided. The development rights of others cannot be diminished without a compelling public interest – this application does not address this issue.

S. 2.7.3 of the Official Plan also sets out a number of adverse effects which should be addressed in the approval of a development application, and these twelve subsections have not been adequately assessed by Council in its decision.

##### **D) The City is Relying on Policy Ideas That Have Not Gone Through an Approval Process**

Over the last few years, the city has begun discussions on a number of policy changes to the Official Plan and related zoning by-laws that have not gone further than information reports and some public meetings. Nevertheless, the staff report references these preliminary policy directions as justifications

for approval for this site-specific application. Incomplete policy development matters include the Density by Design information report and discussions on tower floor plate size, tower separation, height limits in some areas, parking ratios, and community benefit calculations. It is not good planning to rely on not-yet-approved ideas. Further, it is inconsistent with the Clergy Principle.

### **Conclusion**

The applicant's consultants previously supported 21 storeys. Even staff previously supported 16 storeys. They were both wrong – the Tribunal has confirmed this on two occasions as well as the Divisional Court most recently. 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.

This appeal is based on the above noted reasons, and any further reasons advised by counsel and permitted by the Tribunal. Please direct any notices regarding these appeals to the undersigned

Sincerely,



Roberto D. Aburto

RDA