TO: Chair and Members Economic Development and Planning Committee  
WARD(S) AFFECTED: WARD 4

COMMITTEE DATE: August 9, 2010

SUBJECT/REPORT NO:  
Appeal of the City of Hamilton Committee of Adjustment Decision to Approve Minor Variance Application HM/A-09:318, 1655004 Ontario Inc. (Owner), 244 Kenilworth Avenue North (Hamilton) (PED10179) (Ward 4)

SUBMITTED BY:  
Tim McCabe  
General Manager  
Planning and Economic Development Department

PREPARED BY:  
J. Matthew Blevins  
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SIGNATURE:

RECOMMENDATION

That Council agrees to the following actions, as detailed in Report PED10179, respecting the appeal of City of Hamilton Committee of Adjustment Minor Variance Application HM/A-09:318 (1655004 Ontario Inc.), 244 Kenilworth Avenue North (Hamilton), as shown on Appendix “A” to Report PED10179, approved by the Committee of Adjustment, but recommended for Denial by the Planning and Economic Development Department:

(a) That Council of the City of Hamilton proceed with the appeal to the Ontario Municipal Board (OMB) against the decision of the Committee of Adjustment to approve Application HM/A-09:318.

(b) That Council directs appropriate Legal Services and Planning staff to attend the future Ontario Municipal Board (OMB) Hearing.

Vision: To be the best place in Canada to raise a child, promote innovation, engage citizens and provide diverse economic opportunities.

Values: Honesty, Accountability, Innovation, Leadership, Respect, Excellence, Teamwork
EXECUTIVE SUMMARY

Application HM/A-09:318 was considered by the City of Hamilton Committee of Adjustment on June 24, 2010. The purpose of the application was to permit the conversion of a ground floor commercial unit to a residential unit. Comments to the Committee of Adjustment from the Planning Division did not support the application, as it was the opinion of staff that the proposal did not conform to the Residential Conversion policies, as set out in Section 19 of Hamilton Zoning By-law No. 6593, nor did the requested variances meet the four tests set out in the Planning Act. The Committee of Adjustment, at its meeting of June 24, 2010, approved the variance application, subject to a condition that only permits the residential conversion for a period of four years (see Appendix “B”). Due to the appeal period, Planning and Economic Development Department staff submitted an appeal letter and the required fee to the Secretary-Treasurer of the Committee of Adjustment to initiate the appeal process, subject to Council’s approval/ratification.

Alternatives for Consideration - See Page 6.

FINANCIAL / STAFFING / LEGAL IMPLICATIONS (for Recommendation(s) only)

Financial: Planning and Economic Development Department staff has submitted the required fee of $125.00 to the Minister of Finance to begin the appeal process. Other than this one-time fee, the costs for the Hearing are covered by the respective Departmental Work Programs/Budgets. Therefore, no additional funds would be required.

Staffing: One representative each from Development Planning and Legal Services would be required for preparation and attendance at an Ontario Municipal Board Hearing.

Legal: No legal implications are expected.

HISTORICAL BACKGROUND (Chronology of events)

Roles and Responsibilities of the Committee of Adjustment (PD02116(a))

In December 2002, City Council endorsed a staff report related to the roles and responsibilities of the Committee of Adjustment. The recommendations included the following:
“That where the Planning Act appeal periods cannot be met, the Planning and Development Department be authorized and directed to file an appeal with the Secretary Treasurer of the Committee of Adjustment, in the name of and on behalf of the City, whenever, in the opinion of staff, a Committee of Adjustment decision has the effect of adding to the uses permitted under the Zoning By-law and is deemed not to be in keeping with the intent and purpose of the By-law (emphasis added). Such an appeal shall be made subject to Council approval/ratification or withdrawal. The Planning and Development Department shall prepare a report to the Committee of the Whole. In response to such a report, the City may determine its position on the Committee of Adjustment decision and instruct staff accordingly.”

Due to the short appeal time frame regulated through the Planning Act, the prescribed fee and appeal letter were submitted to begin the appeal process, subject to confirmation of this action from Council.

Proposal

The subject property is located at 244 Kenilworth Avenue North (Hamilton) (see Appendix “A”). The application proposes to permit the conversion of a ground floor commercial unit to a residential unit, notwithstanding the requirement of Section 19 of Hamilton Zoning By-law No. 6593 to maintain a minimum 180m radial separation distance from another converted building. The adjacent property at 246 Kenilworth Avenue North was converted with approval through Committee of Adjustment Application HM/A-09:105 (see Appendix “C”).

The application was reviewed against applicable planning policy documents, which included the Hamilton-Wentworth Official Plan, the former City of Hamilton Official Plan, and former City of Hamilton Zoning By-law No. 6593. Planning Division staff recommended denial of the application on the basis of non-conformity with the above-noted policy documents. The application is not consistent with the Residential Housing and Environment Policies of Subsection C.7 of the City of Hamilton Official Plan. More specifically, Policy C.7.3 iv) sets out that “Council will encourage a RESIDENTIAL ENVIRONMENT of an adequate physical condition that… contains a variety of housing forms that will meet the needs of present and future residents. Accordingly, Council will support RESIDENTIAL conversions of underutilized commercial space to residential which does not undermine the primary commercial use/function of the neighbourhood, subject to the provisions of Subsection A.2.2; (O.P.A. No. 128)”. As the Hamilton-Wentworth Official Plan defers to the Local Official Plans to identify intensification areas, and to determine the appropriate policies to govern those areas, staff recommended denial of the application as it does not maintain the intent and purpose of the intensification policies in Section C.7 of the City of Hamilton Official Plan and, as such, is not consistent with the policies of the Hamilton-Wentworth Regional Official Plan.
The Committee of Adjustment, at its meeting of June 24, 2010, approved the minor variance application (see Appendix “B”).

**POLICY IMPLICATIONS**

**Hamilton-Wentworth Official Plan**

The subject property is designated as “Urban Area” in the Hamilton-Wentworth Official Plan. Staff notes that Policy C-3.1 outlines that a wide range of urban uses, defined through Area Municipal Official Plans and based on full municipal services, will be concentrated in the Urban Areas.

The Hamilton-Wentworth Official Plan defers to the former Local Official Plans to define the ranges of urban uses and development that are appropriate for the lands that they apply to. The proposed development does not conform with the policies set out in the former City of Hamilton Official Plan.

Based on the foregoing, staff is satisfied that the proposed variances conform to the Hamilton-Wentworth Official Plan.

**City of Hamilton Official Plan**

The lands are designated as “Commercial” on Schedule “A” - Land Use Concept Plan in the Hamilton Official Plan, and are identified as “Commercial and Apartments” in the Homeside Neighbourhood Plan.

As the subject application deals with the residential conversion of an existing commercial building, the policies of Subsection C.7 - Residential Environment and Housing Policy dealing with residential conversion of underutilized commercial space must be considered.

“C.7.3.iv) Council will encourage a RESIDENTIAL ENVIRONMENT of an adequate physical condition that contains a variety of housing forms that will meet the needs of present and future residents. Accordingly, Council will:

Support RESIDENTIAL conversions of underutilized commercial space to residential which does not undermine the primary commercial use/function of the neighbourhood, subject to the provisions of Subsection A.2.2; (O.P.A. No. 128).”

The proposed variance is not consistent with the Residential Environment and Housing Policies of the Hamilton Official Plan, as there are currently four converted units within 180m of the subject property (see Appendix “D”), and granting a further conversion...
would undermine the primary commercial use/function of the neighbourhood. Accordingly, the variance does not conform with the City of Hamilton Official Plan.

**Former City of Hamilton Zoning By-law No. 6593**

The lands are zoned “H/S-837” (Community Shopping and Commercial) District, Modified, in Hamilton Zoning By-law No. 6593. Section 19 of By-law No. 6593 provides options for conversion of commercial buildings.

“19(3)(iii) (1) Every building converted in accordance with Clause (i) shall… be situated on a lot having a minimum radial separation distance of 180.0 metres from the lot line to the lot line of any other lot occupied or as may be occupied by a building converted in accordance with Clause (i); or,

(2) Maintain the ground floor for commercial uses and provide parking in accordance with the provisions of Section 18A.”

The general intent and purpose of the By-law is to ensure adequate separation between converted dwellings within a commercial district to ensure that the commercial character of the area is maintained. A minimum radial separation distance of 180m was established to permit the conversion of underutilized commercial space without impacting the commercial character.

Based on the forgoing, the relief requested for the proposed development is not considered to be minor in nature, nor desirable for the appropriate development of the property, and does not maintain the general intent and purpose of the Official Plan or Zoning By-law.

**City of Hamilton Urban Official Plan (For Information Purposes Only)**

The City of Hamilton Urban Official Plan was adopted by Council on June 29, 2009. The Plan has been forwarded to the Minster of Municipal Affairs and Housing for approval, and is not yet in effect.

The subject lands are designated “Mixed Use - Medium Density” on Schedule “E-1” - Urban Land Use Designations. Table E.4.3.1: Pedestrian Predominant Streets identifies the portion of Kenilworth Avenue North between Barton Street and Main Street East to be a Pedestrian Predominant Street. Policy E.4.3.4.e) specifically sets out that “Residential uses shall not be permitted on the ground floor of a building facing onto a pedestrian predominant street.”
Based on the foregoing, as the new Urban Hamilton Official Plan does not have legal status at this time, the minor variance application remains guided by the policies of the current Hamilton Official Plan but is not, in principle, in conformity with the policies of the new Urban Hamilton Official Plan.

**RELEVANT CONSULTATION**

- Legal Services Division.

**ANALYSIS / RATIONALE FOR RECOMMENDATION**

(include Performance Measurement/Benchmarking Data, if applicable)

The proposed variance would result in the conversion of a commercial building which does not meet the minimum requirements or general intent and purpose of City of Hamilton Zoning By-law No. 6593. The proposal also does not conform to the policies of the City of Hamilton Official Plan in that the proposed conversion would not be in keeping with the character of the existing commercial area.

Based on the foregoing, staff feels that it is appropriate to proceed with an appeal to the Ontario Municipal Board in opposition of the approval from the Committee of Adjustment.

**ALTERNATIVES FOR CONSIDERATION**

(include Financial, Staffing, Legal and Policy Implications and pros and cons for each alternative)

**Option 1**

Council could proceed with the appeal and direct appropriate Legal Services and Planning staff to attend the Ontario Municipal Board Hearing in opposition to the approved severance and variance applications, as recommended in this Report.

**Option 2**

Council may direct staff to withdraw the appeal letter, which was filed by staff against the decisions of the Committee of Adjustment, to the Ontario Municipal Board (OMB).
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CORPORATE STRATEGIC PLAN (Linkage to Desired End Results)


Healthy Community

- Plan and manage the built environment.

APPENDICES / SCHEDULES

- Appendix “A”: Location Map
- Appendix “B”: HM/A-09:318 Committee of Adjustment Decision
- Appendix “C”: HM/A-09:105 Variance Decision
- Appendix “D”: Converted Properties Within 180m of Subject Lands

:JMB
Attachs. (4)
APPLICATION NO. HM/A-09:318
SUBMISSION NO. A-318/09


AND IN THE MATTER OF the Premises known as Municipal number 244 Kenilworth Avenue North, in the City of Hamilton and in an "H3-837" (Community Shopping and Commercial, etc., as amended by By-law 83-228) district.

AND IN THE MATTER OF AN APPLICATION by the agent DeFilippis Design on behalf of the owner 1665004 Ontario Inc., for relief from the provisions of the Zoning By-Law No. 6593, under Section 45 of The Planning Act, R.S.O. 1990, c. P. 13, so as to permit the existing building to be converted in its entirety to contain a total of two (2) dwelling units (one dwelling unit on the main floor and one dwelling unit on the second floor) notwithstanding that the lot containing the building to be converted is 0.0m from the closest lot which was previously approved by the Committee of Adjustment (File No. HM/A-09:105 respecting 246 Kenilworth Ave N) to be converted under the requirements of Section 19 of Hamilton Zoning By-law 6593.

NOTE:

1) There are other lots within 180m of this lot which have either been converted, have been approved to be converted or are seeking approval to be converted. The lots containing buildings which have been converted under the requirements of Section 19 are 1362 Barton Street East (166.0m from this lot) and 256 Kenilworth Avenue North (44.0m from this lot). The Committee of Adjustment granted a variance (File No. HM/A-08:105) to permit 246 Kenilworth Ave N to be converted under the requirements of Section 19 to contain two dwelling units (0.0m from this lot). Additionally, an application for minor variance (File No. HM/A-09:314) has been made to permit the building located at 274 Kenilworth Ave North to be converted in its entirety to contain a total of three (3) dwelling units.

THE DECISION OF THE COMMITTEE IS:

That the variances, as set out in paragraph three above, are GRANTED for the following reasons:

1. The Committee, having regard to the evidence, is of the opinion that the relief granted is of a minor nature due to the fact that the zoning on the property is not changing and therefore the building can easily be converted back to commercial when the district becomes commercially viable again.

2. The relief granted is desirable for the appropriate development of the land and building and is not inconsistent with the general intent and purpose of the By-law and the Official Plan as referred to in Section 45 of The Planning Act, 1990.

3. The Committee having regard to the evidence is satisfied that there will be no adverse impact on any of the neighbouring lands.

That the said application IS GRANTED subject to the following condition:

1. The approval is valid for a four (4) year time limit and shall expire on June 24th, 2014.

DATED AT HAMILTON this 24th day of June, 2010

M. Dudzic (Chairman) C. Lewis

D. Smith V. Abraham

NOTE: THE LAST DATE ON WHICH AN APPEAL TO THE ONTARIO MUNICIPAL BOARD MAY BE FILED IS July 14th, 2010.

This decision is not final and binding unless otherwise noted.
NOTE:

1. Staff advise that the following noise warning clause should be included in any future purchase and sale and/or lease/rental agreements for the subject lands:

"Purchasers/tenants are advised that sound levels due to increasing road traffic may occasionally interfere with some activities of the dwelling occupants as the sound levels may exceed the Municipality’s and the Ministry of the Environment’s noise criteria."
APPLICATION NO. HM/A-09:105
SUBMISSION NO. A-105/09


AND IN THE MATTER OF the Premises known as Municipal number 246 Kenilworth Avenue North, in the City of Hamilton and in an "H/S-837" (Community Shopping and Commercial, etc.) district;

AND IN THE MATTER OF AN APPLICATION by the agent DeFilippis Design on behalf of the owner Anil Syal, for relief from the provisions of the Zoning By-Law No. 6593, under Section 45 of The Planning Act, R.S.O. 1990, c. P. 13, so as to permit an existing two storey building to be converted to contain a total of two (2) dwelling units notwithstanding that the lot containing the building to be converted is within 35m of the closest lot of three lots which have been converted under the requirements of Section 19 of Hamilton Zoning By-law 6593.

Note: The lots containing buildings which have been converted under the requirements of Section 19 are 258 Kenilworth Avenue North, 226 Kenilworth Avenue North and 1362 Barton Street East.

THE DECISION OF THE COMMITTEE IS:

That the variance, as set out in paragraph three above, is GRANTED for the following reasons:

1. The Committee, having regard to the evidence, is of the opinion that the relief granted is of a minor nature due to the fact that the zoning on the property is not changing and therefore the main floor can easily be converted back to commercial when the district becomes commercially viable again.

2. The relief granted is desirable for the appropriate development of the land and building and is not inconsistent with the general intent and purpose of the By-law and the Official Plan as referred to in Section 45 of The Planning Act, 1990.

3. The Committee having regard to the evidence is satisfied that there will be no adverse impact on any of the neighbouring lands.

DATED AT HAMILTON this 14th day of May, 2009

M. Dudzic (Chairman) D. Drury
NOTE: THE LAST DATE ON WHICH AN APPEAL TO THE ONTARIO MUNICIPAL BOARD MAY BE FILED IS June 3rd, 2009.

This decision is not final and binding unless otherwise noted.

NOTE:

1. Staff advise that the following noise warning clause should be included in any future purchase and sale and/or lease/rental agreements for the subject lands:

   “Purchasers/tenants are advised that sound levels due to increasing road traffic may occasionally interfere with some activities of the dwelling occupants as the sound levels may exceed the Municipality’s and the Ministry of the Environment’s noise criteria.”