

ISSUE DATE:

August 23, 2013



PL120529

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Lynwood Charlton Centre has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 6593 of the City of Hamilton to rezone lands respecting 121 Augusta Street from "L-mr-2/S-1345" to permit the development of a residential care facility
OMB File No. PL120529

APPEARANCES:

Parties

Counsel

Lynwood Charlton Centre

S. Snider

City of Hamilton

M. Minkowski

Ontario Human Rights
Commission

R. Dhir and
R. Arbabian (Student-at-law)

DECISION DELIVERED BY R.G.M. MAKUCH AND ORDER OF THE BOARD

[1] Prior to the hearing, the parties filed a number of motions to be heard at the commencement of the hearing as follows:

- 1) Lynwood Charlton Centre ("LCC") motion for an Order to phase the hearing into two phases with Phase I dealing with Issues 1, 2, 3, 4, 6, and 7, referred to as the typical planning issues and Phase II dealing with Issue 5 referred to as the "OHRC" Issues;
- 2) Ontario Human Rights Commission ("OHRC") motion for an Order excluding the proposed evidence of Warren Sorensen; and
- 3) City of Hamilton ("City") motion for:

- a) an Order striking the Witness Statement in whole or in part of Ian Skelton and excluding the proposed evidence of this person and;
- b) an Order striking portions of the Witness Statement of John Gladki and excluding such proposed evidence of this person.

[2] The Board heard the LCC motion first because if successful, there would be no need to hear the other motions until Phase II if, and when, it takes place.

LYNWOOD CHARLTON CENTRE MOTION

[3] The issues list contains seven issues and Counsel for LCC argues that issues 1 to 4 and issue 6 raise matters of a land use planning nature such as PPS and OP conformity that are typically reviewed in a hearing before this Board hearing. Issue 5 however, specifically raises whether refusing the application would be discriminatory and contrary to the Ontario Human Rights Code.

[4] Mr. Snider argues that in total six expert witnesses are proposed to be called by the parties and that of the six, three expressly offer no opinion with respect to the OHRC issue. None of the non-expert witnesses offer any opinion with respect to the OHRC issues. Two of the six experts confine their opinion evidence to only the OHRC issue, Dr. Ian Skelton and Warren Sorensen.

[5] Only the OHRC planner John Gladki provides opinions with respect to both the typical planning issues and the OHRC issue. None of the LCC witnesses address the OHRC issue.

[6] Mr. Snider argues that the eight days scheduled over a two week period around the Easter holidays means that there is little likelihood that the hearing would be completed within the eight days allotted.

[7] He further argues that Issue 5 framed as follows:

Would the denial of re-zoning application amount to discrimination contrary to OHRC?

becomes moot if the appeal is allowed and there is no need to consider the issue of discrimination under the OHRC.

[8] If the Board has doubts after Phase I as to whether the appeal should be granted based on the typical planning issues, then the hearing would proceed to Phase II and the motions by the City and OHRC would be heard at that time.

[9] Mr. Snider argues that Issue 5 only engages if the Board is inclined to dismiss the appeal and deny the rezoning on the basis of typical planning grounds. As such issue 5 is a sufficiently discreet one to be addressed in a separate phase of the hearing.

[10] While the OHRC believes that the discrimination issue (Issue 5) is a proper issue for the Board to consider, it nevertheless supports the Lynwood motion as it does not want to inconvenience the parties and the hearing of this matter.

[11] The City opposes the Lynwood motion on the grounds that it will increase the costs for the City and be prejudicial to it.

[12] The Board does not agree with the City's position and finds that the arguments by counsel for LCC are logical and ought to be adopted by the Board. It is evident that it is unlikely that the hearing will be completed within the eight days allotted and that phasing the hearing is the proper way to proceed.

[13] The Board will therefore allow the LCC motion and orders that the hearing be phased as proposed. The motions by the City and OHRC will be heard at the commencement of Phase II.

INTRODUCTION

[14] Lynwood Hall Child and Family Centre and Charlton Hall Child and Family Centre were both publicly funded, non-profit charitable organizations and accredited children's mental health centres, which operated as separate organizations providing children's mental health services to the Hamilton community for many years. They merged to become Lynwood Charlton Centre ("LCC") in October 2011 and continue to offer the programs previously offered by the separate entities, which includes a spectrum of services to children, youth, families and the community including residential programs for children, young male and young female teens; day treatment programs

servicing both the residential programs and children unable to function effectively in the school system due to behavioural/learning difficulties; and a variety of community-based programs. LCC is licensed by the Ministry for Children and Youth Services under the *Child and Family Services Act*.

[15] Charlton Hall Child and Family Centre operated a residential facility for adolescent girls with mental health challenges at 52-56 Charlton Avenue West in the Durand Neighbourhood in what is generally described as Hamilton's City "core". The facility is known as "Charlton Hall". LCC now operates Charlton Hall and it is home to eight girls who require the specialized care and treatment of the staff of LCC.

[16] While Charlton Hall is operated by LCC, the property and residence are owned by the City of Hamilton. Over the years, Charlton Hall has fallen into disrepair. It is no longer considered a suitable physical environment for the girls who live there for many reasons. A City-initiated facility condition assessment report determined that approximately \$1.5 million of substantial repairs are required. The City and LCC are not prepared to make that investment and as a consequence, the City is considering declaring the property surplus so that it can be sold. The services currently offered at Charlton Hall will eventually have to be moved elsewhere.

[17] LCC recently purchased the subject property, which has a long history of industrial use at 121 Augusta Street approximately eight blocks to the east of Charlton Hall. It is located within the Corktown neighbourhood, also a neighbourhood within the City's core.

[18] More recently, the site has been used for a variety of office uses including a supervised access centre, which provides integrated treatment and educational service for approximately 16 students between the ages of 13 and 17 years. The services are specifically designed for youth whose histories of serious psychiatric and/or emotional challenges have significantly interfered with their ability to function within main stream educational settings.

[19] LCC wishes to relocate the residential use currently housed at Charlton Hall to the second floor of the building at 121 Augusta Street believing it to be far superior to the existing Charlton Hall in providing a safe, home-like, and accessible living space for the girls.

[20] In order to do so, it needs the subject property to be re-zoned from L-mr 2/S-1345 which is described as “Planned Development – Multiple Residential District Modified”. It is a rather convoluted “holding” by-law that essentially permits existing uses until a rezoning is approved. The zone contemplates that the rezoning will be one of the City’s “E” zones which permit multiple dwellings. However, via a site specific Official Plan amendment (in 1995) and a corresponding site specific zoning by-law amendment (in 1997), the lands were re-designated and rezoned to also permit “general offices, only within the existing building”. This paved the way for a variety of office uses noted above including the current COMPASS Day Program operated by LCC.

[21] LCC made application for a re-zoning to permit a residential care facility but was refused by City Council, which relied on a report from its Planning Department recommending refusal of the application on the grounds that the proposed re-zoning would further aggravate the existing over-intensification of residential care facilities within the Central City resulting in this appeal. The re-zoning was required as a result of a restriction in Zoning By-law No. 6593, which limits the location of “residential care facilities” to within a radius of 300 meters of each other. The Planning Department report to Council notes that the subject property is located within 160 metres of another existing Residential Care Facility.

[22] Zoning By-law 6593 defines “Residential Care Facility” (“RCF”) as follows:

Residential Care Facility means a group living arrangement, within a fully detached residential building occupied wholly by a minimum of four supervised residents and a maximum number of supervised residents, as permitted by the district, exclusive of staff, residing on the premises because of social, emotional, mental or physical handicaps, or problems or personal distress and that is developed for the well-being of its residents through the provision of self-help, guidance, professional care, and supervision not available in the resident's own family, or in an independent living situation or if:

The resident was referred to the facility by hospital, court, or government agency; or,

- i. The facility is licensed, funded, approved, or has a contract or agreement with the federal, provincial, or municipal governments.
- ii. A residential care facility is not considered as an emergency shelter, lodging house, corrections facility, or retirement home.

[23] It is noted that By-law 6593 had been amended by By-law 01-143 to increase the minimum separation distance from 180 metres to 300 metres and that the by-law was

also amended by By-law 07-107 to remove the minimum separation distance requirement for retirement homes.

LYNWOOD CHARLTON CENTRE POSITION (LCC)

[24] LCC asserts that some four months following the filing of the hearing appeal and a full eight months after the initial planning report relied on by Council to deny the application, the Planning Department forwarded a further Staff Report to Council, which purported to oppose the application on completely different grounds unrelated to the issue of residential care facilities within the Central City. The Planning Department was now asserting that:

The proposal, as intended, would entrench an undesirable institutional use in an area of Hamilton intended for residential development and as such, the proposal does not conform to the Hamilton Official Plan and Urban Hamilton Official Plan, and does not represent good planning.

[25] This new position was endorsed by City Council on September 26, 2012.

[26] Mr. Snider on behalf of LCC argues that this subsequent resolution is clearly not a “decision” within the meaning of Section 2.1 of the *Planning Act*, and is not “supporting information and material” that Council considered in making its decision although the City adduced evidence at the hearing to support this new position.

[27] LCC maintains that City Council’s decision to refuse this application was based on the negative reaction from the community. Council received letters and petitions alleging that allowing such a use to occur on the subject site would result in increased mischief/damage/graffiti around the community and the destruction of efforts to beautify the local parks and surroundings. There is no evidence before this Board to support any of the concerns expressed to City Council. The only evidence before the Board is that Charlton Hall is an excellent neighbor and there is no history of conflict, damage or disruption connected with the use. It is noted that a number of residents had registered as Participants for this hearing but did not file witness statements or appear at the hearing to express their concerns.

[28] There are already two other residential care facilities within 300 metres of 121 Augusta Street: a small 4-6 bed facility for severely challenged children on Forest

Avenue (also operated by LCC), and a small six bed facility for adults on Catharine Street South. There is no evidence of any community impact arising from those facilities within the Corktown Neighbourhood. Mr. Hardy, who was retained by the City to carry out a social impact assessment respecting this proposal, carried out a survey of individuals in the area including respondents on Catharine Street South and none of the respondents even mentioned the residential care facilities, let alone concerns with those facilities. Ms. Munn one of the current residents at Charlton Hall, who testified, indicated that despite living in the Corktown Neighbourhood for many years, she was unaware that there was a residential care facility on Forest Avenue. LCC alleges that these facilities are essentially “invisible” within the Corktown Neighbourhood.

[29] LCC relies on the evidence of Ed Fothergill, a qualified professional planner with extensive experience in the City of Hamilton. Mr. Fothergill completed the Planning Justification Report that was presented to Council. Among other things, Mr. Fothergill concluded that the intent of the Radial Separation Distance (“RSD”) to disperse residential care facilities throughout the City would be furthered by the subject application. He noted that while the proposal did not meet the 300 metre RSD for 121 Augusta Street, Charlton Hall would be relocated from a “moratorium area” to a community with a lower density of residential care facilities. As a result, the number of residential care facilities within Hamilton’s downtown area would not increase and this existing facility would be relocated from a moratorium area with an alleged over-intensification of RCFs to the Corktown Neighbourhood which is outside of any moratorium area.

[30] Mr. Fothergill described the RSD restriction as a “blunt planning instrument” for the following reasons:

- (i) It does not distinguish between the size and function of a facility;
- (ii) The distance separation does not vary for different sizes or functions of facilities;
- (iii) The distance separation is not directly related to perceived or measurable impacts on the community; and
- (iv) The by-law provisions do not distinguish between the number of persons being accommodated in one building versus the number of people being located in more than one building within 300 metres of one another.

[31] He further noted that the “E” zone regulations which apply to 121 Augusta Street would permit up to 20 beds within a single RCF. The proposal before the Board would restrict the number of beds for 121 Augusta Street to eight. As a result, there would be approximately 20 beds within the 300 metre radius if the application were approved: eight at 121 Augusta Street, six at 106 Catharine Street South and four to six at 135 Forest Avenue.

[32] Mr. Fothergill examined five criteria: the public interest, appropriateness of location, neighbourhood fit (both in terms of function and in form) potential impacts, and distance separation considerations and concluded that the proposal represented good planning. His planning opinion remained steadfast throughout the planning process and his opinion was not shaken under cross examination.

ONTARIO HUMAN RIGHTS COMMISSION POSITION (OHRC)

[33] The OHRC in Phase I of this hearing supports the position taken by the Appellant LCC. It takes the position that Hamilton City Council’s refusal in this case is inconsistent with and in fact contrary to the policies set out in the Provincial Policy Statement 2005 (“PPS”), specifically Paragraph 1.1.1(f) of the PPS, which states as follows:

“Healthy, liveable and safe communities are sustained by:

...

f) Improving accessibility for persons with disabilities and the elderly by removing and/or preventing land use barriers which restrict their full participation in society;”

[34] Furthermore, section 1.4.3 of the PPS also directs municipalities to permit and facilitate “all forms of housing to meet the social, health and well-being requirements of current and future residents, including special needs requirements.” The legislation places a positive obligation on municipalities to facilitate housing for people with special needs.

[35] The PPS defines “special needs housing” as any housing including dedicated facilities, in whole or in part, that is used by people who have specific needs beyond economic needs including but not limited to needs such as mobility requirements or support functions required for daily living. Examples of special needs housing may

include, but are not limited to, housing for persons with disabilities such as physical, sensory or mental health disabilities and the housing for the elderly. Whether or not the proposed facility at 121 Augusta meets the definition of “residential care facility”, it is nonetheless “special needs housing” and the responsibilities of the municipality under the PPS to facilitate such housing are engaged.

[36] The City’s after-the-fact attempt to characterize LCC’s proposal as an “institutional use in an area of Hamilton intended for residential development” is premised on the fact that LCC’s proposal does not meet the technical definition of a “residential care facility” in Hamilton Zoning By-law 6593. This definition requires that the residential care facility be located within a “fully detached residential building occupied wholly by staff and residents”. Since the proposed location at 121 Augusta is not “fully detached” and will not be “wholly occupied by staff and residents”, the City seeks to characterize it as an institutional use.

[37] LCC’s proposal involves moving the eight residents from 52-56 Charlton to the second floor of 121 Augusta. The use proposed for the second floor would be a residential use within a mixed-use building. The ground floor use within the building would remain unchanged. The physical form of the building would also remain unchanged. The only change would be the addition of a residential component to the second floor.

[38] Edward John’s evidence was that LCC’s proposal amounted to an institutional use because:

The proposed use will provide *social services to the broader community, provide overnight accommodation and employ a number of professional staff*. As a consequence, it has been determined that impacts of the proposed use extend far beyond the typical considerations given to the assessment of a site for a residential care facility; particularly as governed through a By-law and definition that, in order to facilitate their successful neighbourhood integration, actively mitigates impacts in terms of scale, intensity of use, built form and location [Emphasis added].

[39] Counsel argues that Mr. John’s assertions evoke images of a large hospital-like setting bulging with professional staff engaged in the treatment of people with disabilities who are required to stay there overnight. Ms. Deirdre Finlay testified that the stereotypical suggestion that LCC’s proposal would re-institutionalize the residents

“shows the profound lack of understanding of the merits of the two facilities, of the experience, skills and intent of the staff at LCC”.

[40] It also fails to appreciate that LCC is a home for its residents. The best illustration of how LCC provides “a place to live” for its residents came from Clara Munn, a 17 year old who currently resides in Charlton Hall. Ms. Munn testified that she lives with social anxiety and requires support at times to “ride the bus” or “[be] at the mall”. She stated that a typical day for her comprised of breakfast with the residents and the staff, attending school (if she had any anxiety she would call the staff at Charlton Hall), coming home from school and having dinner and talking about her day with residents and staff, doing chores and participating in activities such as skating, “pamper night”, board games or movies.

[41] The assistance of staff with certain aspects of daily living for persons with mental disabilities does not detract from the use of the property as residential. In *Aurora (Town) v. Anglican Houses [1990] O.J. No. 451*, the Ontario High Court of Justice (now Superior Court of Justice) held that a group home for up to eight adults with mental health disabilities where residents lived voluntarily and participated in housekeeping, meal preparation and decision-making was “clearly residential” and could not be categorized as an institutional use. The Court further held that the staff in the home enhanced the use of the property as a residence by assisting the residents to integrate into home life and the neighbourhood; and did not detract from the residential quality of the neighbourhood.

[42] Similarly, in *City of Barrie v. Brown Camps Residential and Day Schools*, the Ontario Court of Appeal held that the defendant’s home for emotionally disturbed children, which included trained child care workers who would supervise the children, clean the house and do the laundry, was being “used for the care and upbringing of these children in the same manner as if they were being used by parents with special expertise to deal with their children who had similar emotional problems”.

[43] The City’s denial of LCC’s proposal runs contrary to the PPS, the Hamilton Official Plan and the new Urban Hamilton Official Plan, which actively encourage planning authorities to improve accessibility for persons with disabilities by removing and/or preventing land use barriers, and permitting the proposed use.

[44] As noted above, section 1.1.1(f) of the PPS requires municipalities to improve accessibility for persons with disabilities by removing and/or preventing land use barriers, which restrict their full participation in society. Section 1.4.3 of the PPS places a positive obligation on municipalities to permit and facilitate housing for people with special needs.

[45] The Hamilton Official Plan supports positive actions to develop a variety of housing styles, types and densities including encouraging “non-profit and co-operative housing organizations” to provide a range of socially- assisted dwelling units for a variety of client types in all areas of the City. The new Urban Official Plan states that one of the Urban Housing Goals for Hamilton is to “increase Hamilton’s stock of housing for those whose needs are inadequately met by existing housing forms or tenure, affordability or support options”.

[46] It argues that the LCC application is ultimately an attempt to remove land use barriers to improve accessibility to appropriate and necessary housing for persons with disabilities. These land use barriers are embedded in Hamilton Zoning By-law 6583 whether through minimum separation distance requirements or through an after-the-fact application of a technical definition of residential care facilities.

[47] The City’s denial of LCC’s proposal by the application of minimum separation distance requirements is contrary to the requirements in sections 1.1.1(f) of the PPS. The application of minimum separation distance requirements creates land use barriers to housing for people with disabilities and limits the available housing options as evidenced by the unsuccessful joint City and LCC search for an alternative location to 121 Augusta St. The City’s denial of LCC’s proposal is also contrary to the City’s obligation to permit and facilitate “all forms of housing to meet the social, health and well-being requirements of current and future residents, including special needs requirements”. Finally, the City’s denial is inconsistent with the Hamilton Official Plan and new Urban Hamilton Official Plan, which promote housing for persons with special needs.

[48] The City’s denial of LCC’s application to permit a residence with eight beds providing mental health services and supports in a supervised setting for adolescent females at 121 Augusta St. does not represent good planning because it is contrary to

the considerations in the PPS, Hamilton Official Plan and new Urban Hamilton Official Plan, which City Council must consider in reviewing and assessing applications for a zoning amendment such as this one.

CITY OF HAMILTON POSITION

[49] The City takes the position that the issue before the Board in this appeal is whether the subject property 121 Augusta Street (formerly used for industrial purposes) should be rezoned to permit the subject property to be used as an institutional facility. The property was the subject of an official plan amendment and re-zoning in 1997 to permit office uses with the introduction of Special Policy 69 to the Official Plan which reads as follows:

In addition to the permitted uses set out in Subsection A.2.1 – Residential Uses, for those lands shown on Schedule “B-1” as SPECIAL POLICY AREA 69, and located at 121 August Street, general office uses only within the existing building will be permitted.

[50] The City takes the position that the intent of this amendment was to permit office uses as an interim or temporary use, as indicated by the express qualification that the uses would be allowed “...only within the existing building...”

[51] The City relies on the planning report, which accompanied the official plan amendment and rezoning application in 1995 evidenced the intent that the office use was to be short term only:

The subject lands are designated “Medium Density Apartments” in the approved Corktown Neighbourhood Plan. The proposal does not comply with the approved plan. The long term intent is for this area to be developed for medium density apartments and as such a redesignation is not recommended as the proposed general office use is considered to be an interim use.

[52] The City also takes the position that the subject building is not appropriate for the proposed use in that there is no substantial on-site green space, and that the streetscape of the subject property is that of a converted, repurposed former industrial building. The implementation of the rezoning proposal for the subject property will include renovations to the interior of the building, some improvements to the exterior features, but no site alterations.

[53] The Property is designated “Residential” in the (former) City of Hamilton Official Plan (the “OP”), and it is designated “Medium Density Apartments” in the Corktown Neighbourhood Plan. The OP includes a number of key policies including incorporation of the policies adopted in the various Neighbourhood Plans, which form an integral part of the Hamilton policy framework which must be respected when evaluating a development application. Mr. Minkowski relies on previous Board decisions, which have expressly recognized and relied upon Neighbourhood Plans in the City of Hamilton in adjudicating upon the merits of development applications. He argues that the new Urban Hamilton Official Plan (still under appeal before the OMB) carries the same, consistent policy approach to neighbourhood plans.

[54] The subject property is designated for medium density apartments under the Corktown Neighbourhood Plan. It states that an increase in the residential population in the central area brings a higher level of services to the downtown and that this benefits the Region, the City and Corktown. The City argues that allowing the subject property to be used as proposed will not contribute to the stated goals of increasing the population of Corktown. It must be noted that the Corktown Neighbourhood Plan is not a statutory plan, which has undergone the public scrutiny process under the *Planning Act* and is not an official plan for *Planning Act* purposes.

[55] All three expert planning witnesses (Fothergill, Gladki and John) expressed the opinion that the designation of the Property for medium density apartment under the Neighbourhood Plan is consistent with the PPS, conforms to the Growth Plan, conforms to the Hamilton Official Plan and represents good planning.

[56] The City takes the position that allowing this re-zoning to occur will displace the planned function for the property because LCC will be making a substantial investment in it and intends to operate it for an indefinite period of time. This will result in a permanent change to an institutional use.

[57] In addition, it argues that there was no dispute that the Property is located within a 500 metres radius (approximately 380 m) from a Major Transit Station Area within the meaning and intent of the Growth Plan. Major Transit Station Areas are identified by the Growth Plan as locations for intensification. The Neighbourhood Plan is consistent with the intent of the Growth Plan and was recently reviewed and confirmed as part of

the City's conformity exercise in preparing the new Urban Hamilton Official Plan (currently under appeal before the Board).

[58] In support of its position that the proposed use constitutes an institutional use, the City argues that the nature of the activities currently occurring at Charlton Hall and which are proposed to be transferred to the subject property have all the hallmarks of an institutional use based on the evidence before the Board. It is argued that an "RCF" does not function as a residence in the conventional or typical sense. It is rather a particular type of social service or mental health service treatment activity which is housed within a detached dwelling in furtherance of public policy objectives to place these services within a residential setting, integrated in residential neighbourhoods. It is to be noted that the title for this use is not "residential", but qualified as "residential care facility".

[59] The City further argues that the proposal does not meet three key elements or conditions of the definition for an RCF:

- a) The proposal will not be located within a detached dwelling.
- b) The Property will not be wholly occupied solely by the eight adolescent girls receiving treatment.
- c) There will be non-resident clients who will be attending at the Property on a daily basis to receive mental health services from professional staff.

[60] Edward John, the City's land use planner opined that there was a specific legislative intent which underscored why the definition of RCF includes a specific requirement that the use be located within a detached residential building, and why the use of the facility was intended to be restricted only to occupants. The intent of this provision was to de-institutionalize these facilities and to make these more "family like settings" so they could integrate into the community more easily and that failure to meet these requirements extended far beyond a mere technicality but cuts to the very heart of the legislative intent of an RCF and how planning in Hamilton has intended to implement provincial social policy in regards to this type of use.

FINDINGS

[61] The Board has carefully considered all of the evidence as well as the submissions of counsel and finds that the appeal should be allowed for the reasons that follow.

[62] The Board is satisfied that the proposed development is consistent with the Provincial Policy Statement 2005 and conforms to the Growth Plan for the Greater Golden Horseshoe as well as the City's Official Plan. The proposal is housing for "special needs" within the meaning of the PPS. Policy 1.4.3 (b) requires planning authorities to permit and facilitate housing for special needs, a powerful direction reflecting an important provincial policy interest. Paragraph 1.1.1(f) of the PPS, which states as follows:

"Healthy, live able and safe communities are sustained by:

f) Improving accessibility for persons with disabilities and the elderly by removing and/or preventing land use barriers which restrict their full participation in society;"

[63] The Board is also satisfied that there are no demonstrated impacts from this proposed development. The proposed use will be compatible with the existing uses in the neighbourhood and will not result in any social impacts. The evidence was quite clear and un-contradicted that both Charlton Hall and the existing COMPASS Day Programs at 121 Augusta Street have operated in their current locations without complaint or significant community impact.

[64] The City's argument that the proposed development will frustrate the planned function of the subject property is simply not tenable based on the evidence before the Board. The City argues that the planned function for this property is "residential" more particularly in the form of "Medium Density Apartments". The City's argument ignores that the current office use is part of the planned function of the property as it is permitted under the zoning by-law and conforms to both the existing Official Plan and the new Urban Official Plan, which is still under appeal. The office uses are not intended to be temporary or for the "short term" as there is no temporal limitation in either the in force official plan or the new Urban Hamilton Official Plan. The only limitation is that the office uses are to be confined to the existing building and the evidence showed that this could

go on for a long period of time given the nature of the building. The COMPASS Day Programs can continue to be offered by LCC on the main floor of the building in conformity with the City's Official Plan.

[65] The proposal is to add housing for those with special needs on the second floor of the building, a use permitted under all residential zones. The Board agrees with counsel for LCC's argument that even if a complete description of the planned function for this site was "Residential" and "Medium Density Apartments", this would not prevent the establishment of either a RCF or an institutional use on the subject property. RCF's are permitted in all residential designations within the City whether uptown, downtown or midtown. Institutional uses less than 0.4 hectares in site area are also permitted in all residential designations in the City.

[66] The City's argument simply does not stand up when one considers the existing Charlton Hall which is under the same policy regime as the subject property except for the office component. If one is to accept the City's argument, one would have to agree that the existing use at the current Charlton Hall operates to frustrate the planned function of that site.

[67] With respect to the City's argument that the proposed use is an institutional use, the Board does not accept this argument as sufficient to deny this appeal. Institutional uses are permitted in residential designations provided the size of the site does not exceed 0.4 hectares.

[68] The City spent a significant amount of time arguing that the project does not meet aspects of the definition of an RCF in the City's zoning by-law. This has always been understood by both the Applicant and the City. However, whether characterized as a new RCF in a mixed use building or a "comprehensive institutional facility", the use is permitted and appropriate.

[69] The City points to the attributes of Charlton Hall proposed to be transferred to the subject site as "hallmarks" of an institutional use. The Board fails to understand how this argument can support the City's position that the proposed use on the subject site will be an institutional use. Charlton Hall is a residential care facility which complies fully with the definition of an RCF in the City's zoning by-law. The City's own definition of an RCF includes dimensions that, to some, are "hallmarks of an institutional use". An

RCF is a “group living arrangement” with “supervised residents” who reside on the premises “because of social, emotional, mental or physical handicaps or problems or personal distress” and is developed for the “well-being of its residents through the provision of self-help, guidance, professional care and supervision...”

[70] There will be no change in the character of Charlton Hall when it is relocated to the second floor of 121 Augusta Street. It will be no more or no less “institutional” than it currently is at 52-56 Charlton Avenue West. However, the evidence was clear that the new environment would be superior for the care of the eight adolescent girls. The attributes of Charlton Hall as these exist in its current location, will continue to exist in its new location. The non-residential component of LCC’s proposal has nothing to do with the relocation of that facility. Instead, it is tied to the COMPASS Day Programs.

[71] With respect to the City’s argument that the proposal would not satisfy that part of the definition of a RCF requiring that such a facility be located “within a fully detached residential building occupied wholly by...”, this is not fatal to the appeal. The Board finds, based on the evidence before it, that it was evident from the outset that LCC proposed a site specific zoning amendment which would permit such a facility in a mixed-use building on the subject site. There is no need under the circumstances to amend the definition of RCF in the main by-law. It is sufficient to permit it specifically on the subject property in the amending by-law. Allowing this use in a mixed-use building is appropriate and will not have the effect of “institutionalizing” the residents.

[72] The Board notes that the property at 124 Walnut Street immediately adjacent to the subject lands was approved to permit a RCF in 1992 to accommodate 70 seniors and other uses. The Official Plan and Neighbourhood Plan designations for this site are precisely the same as exist for the subject lands less the permissions for office uses. City Council in 2007 amended the relevant by-law to remove retirement homes from the separation distance requirements that otherwise apply to RFC’s.

[73] It is also noted that the zoning by-law enacted by Council permitting RFC’s in their current form also established two “Moratorium Areas” within the downtown core in which no additional RFC’s may be permitted or expanded. Charlton Hall is located within one of the moratorium areas and the subject property is not within a moratorium area. Allowing this proposal to proceed would mean that a RFC would move from a

moratorium area to a non-moratorium area although the new facility would be located within 300 metres of two other RFC's, the four to six bed facility operated by LCC for severely challenged children at 135 Forest Avenue and the six bed adult RCF at 106 Catherine Street South. There is no evidence before the Board that these facilities have caused any impacts on the neighbourhood or that there would be any interaction between the three.

[74] There is a disagreement between Counsel for the Appellant and Counsel for the City respecting the form of the amending by-law. The City takes the position that in the event the Board allows the appeal, the property should be re-zoned to an institutional use to reflect the actual use of the property. Although the Appellant does not agree or accept that the proposed use is an institutional one, it is prepared to accept the City's proposed amending by-law but is concerned about the lack of recognition for the current permitted use of offices within the existing building because in effect, if the Board were to accept the City's version, this general office use within the existing building would be lost. Mr. Snider argues that there was absolutely no evidence to suggest that the general office use was problematic or caused any significant land use impacts and that accepting the City's version of the amending by-law would amount to a down zoning of the subject property without planning justification. Furthermore, the parties agree that the COMPASS day use programs are permitted as general office uses and were recognized as such in the City's new Urban Official Plan.

[75] Mr. Minkowski on the other hand argues that the office use would not be lost if the City version of the amending by-law was adopted. The definition of "social services establishment" in Zoning By-law 05-200 incorporates the office use. It reads as follows:

Shall mean a building in which non-profit services intended to promote and improve the independence, economic self-sufficiency, social and health development of citizens are provided and shall include but not be limited to clerical, administrative, consulting, counselling, office and recreational functions for a non-profit agency but shall not include facilities in which overnight accommodation is provided.

[76] Mr. Minkowski maintains that it would be redundant and confusing to maintain the separate office use reference in the zoning by-law when the office uses currently permitted would continue to be so under the term "social services establishment" and that therefore there is no need to refer back to the uses permitted under the site specific "L-mr" Zone.

[77] The Board agrees with Mr. Snider in that accepting the City's version would effectively result in a downzoning of the property without proper justification provided during the course of the hearing.

DISPOSITION

[78] Accordingly, the appeal is allowed and Zoning By-law 6593 of the City of Hamilton is hereby amended in accordance with Attachment 1 hereto.

ORDER

[79] It is so Ordered.

"R.G.M. Makuch"

R.G.M. MAKUCH
MEMBER

ATTACHMENT 1

Authority:

Bill No.

CITY OF HAMILTON

BY-LAW NO. _____

**To Amend Zoning By-law No. 05-200
Respecting Lands Located at 121 Augusta Street, Hamilton**

WHEREAS the City of Hamilton has in force several Zoning By-laws which apply to the different areas incorporated into the City by virtue of the City of Hamilton Act, 1999, S.O. 1999, Chap. 14;

AND WHEREAS the City of Hamilton is the lawful successor to the former Municipalities identified in Section 1.7 of By-law 05-200;

AND WHEREAS it is desirable to enact a new Zoning By-law to comprehensively deal with zoning throughout the City;

AND WHEREAS the first stage of the new Zoning By-law, being By-law 05-200, came into force on May 25, 2005;

AND WHEREAS the Ontario Municipal Board, in adopting Item _____ recommended that Zoning By-law No. 05-200, be amended as hereinafter provided;

NOW THEREFORE the City of Hamilton enacts as follows:

1. That Map No. 995 of Schedule "A" to Zoning By-law No 05-200, is amended, by Incorporating additional Community Institutional (I2) Zone boundaries, in the form of a Site-Specific Community Institutional (I2, #, H#) Holding Zone for the lands, the extent and boundaries of which are shown on Schedule "A" annexed hereto and forming part of this By-law.

2. That Schedule "C" - Special Exemptions, of By-law No. 05-200, be amended by adding an additional special exception as follows:

" _____ Within the lands zoned Community Institutional (I2-____) Zone, identified on Map 995 of Schedule "A" and described as 121 Augusta Street, shown

on Schedule "A" of this By-law, **in addition to the special provisions of the Special Provision L-mr-2/S-1345**, the following special provisions shall **also** apply:

- i) To permit a social services establishment together with overnight accommodation, subject to the following provisions:
 - (a) Maximum number of residents that can be accommodated - 8
 - (b) Minimum number of parking spaces - 15

3. That Schedule "D" - Holding Provisions, of By-law No. 05-200, be amended by adding additional Holding provisions as follows:

(H#) Notwithstanding Section 2 of this By-law, within lands zoned Community Institutional (I2-#) Zone, on Map 995 of Schedule "A" Zoning Maps, and described as 121 Augusta Street, a holding provision shall prohibit all uses other than those uses existing at the time of this by-law (being ____ 2013) until such time as:

- (i) The owner/applicant has submitted a signed Record of Site Condition (RSC) to the City of Hamilton, and the Ministry of the Environment (MOE). The RSC must be to the satisfaction of the City of Hamilton, including an acknowledgement of receipt of the RSC by the MOE, and submission of the City of Hamilton's current RSC administration fee.

Council may remove the 'H' symbol, and thereby give effect to the Site-Specific Community Institutional (I2-#) Zone provisions by enactment of an amending by-law once the conditions are fulfilled.

4. That this By-law No. ____ shall come into force and effect and be deemed to come into force in accordance with Subsection 34(21) of the Planning Act, either upon the date of passage of this By-law or as otherwise provided by the said subsection.

PASSED and ENACTED this day of , 2013.

Mayor

ZAR-11-034

[05-200 By-law Schedule must be attached]

Clerk

“R.G.M. Makuch”
R.G.M. MAKUCH
MEMBER