

**Local Planning Appeal Tribunal**  
Tribunal d'appel de l'aménagement  
local



**ISSUE DATE:** September 17, 2020

**CASE NO(S):**

PL180244

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Referred by: 2404099 Ontario Limited (JD Development Group)  
Subject: Site Plan  
Property Address/Description: 7190 and 7200 Markham Road  
Municipality: City of Markham  
OMB Case No.: PL180244  
OMB File No.: PL180244  
OMB Case Name: 2404099 Ontario Limited (JD Development Group)  
v. Markham (City)

**PROCEEDING COMMENCED UNDER** subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: 2404099 Ontario Limited (JD Development Group)  
Subject: Application to amend Zoning By-law No. 90-81, as amended - Neglect of the City of Markham to make a decision  
Existing Zoning: “SC1 – Special Commercial One” under By-law No. 90-81, as amended  
Proposed Zoning: “Community Amenity One – CA1” under By-law No. 177-96, as amended, with a number of site-specific development standards  
Purpose: To permit the construction of a 4-storey stacked townhouse development containing 265 residential units and 150 square metres (1,614 square feet) of commercial space, as well as the provision for indoor and outdoor amenity space and an underground parking garage  
Property Address/Description: 7190 and 7200 Markham Road  
Municipality: City of Markham  
Municipality File No.: ZA 17 109850  
OMB Case No.: PL180244  
OMB File No.: PL180313

**Heard:** August 10, 2020 in Markham, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

2404099 Ontario Limited  
(JD Development Group)

Aaron Platt  
Alex Lusty

City of Markham

Francesco Santaguida  
Victoria Chai

1637063 Ontario Inc.  
(Markham Medical Centre)

Robert Ackerman

**DECISION OF THE TRIBUNAL DELIVERED BY BRYAN W. TUCKEY**

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[1] JD Development Group (“Applicant”) filed an appeal of the City of Markham’s (“City”) failure to make a decision on its Zoning and Site Plan applications. A hearing was scheduled to begin on August 10, 2020. The Tribunal is asked to approve a Zoning By-law Amendment (“ZBA”) which would allow the City to finalize a Site Plan Application (“SPA”) and enter into a Site Plan agreement.

**MOTION SEEKING LEAVE TO PERMIT TRANSPORTATION EVIDENCE**

[2] In its decision issued on July 16, 2020, the Tribunal directed that:

Leave will be required by the Hearing Panel as to whether MCC [sic] (1637063 Ontario Inc) will be allowed to have a Transportation expert witness (Mr. Ghariani) give evidence at the Hearing.

[3] Counsel for Markham Medical Centre (“MMC”) filed a motion on August 6, 2020 for:

1. An Order granting leave for Nabil Ghariani P. Eng., a transportation witness to give evidence at the Hearing, and
2. An Order abridging the time for service of this motion.

[4] Counsel for MMC, Mr. Ackerman, in his oral submission noted that the witness proposes to only give evidence in reply to the Applicant's transportation expert, the reply witness statement ("RWS") was served on July 10, 2020 in accordance with the Procedural Order ("PO"), and evidence when given will be only in reply among other matters. The motion was served on August 6, 2020 less than two working and four full days before the commencement of the hearing.

[5] Counsel for the Applicant filed its Responding Motion Record of the Applicant and a Book of Authorities on Reply, Procedure and Costs, prior to the commencement of the Hearing on August 10, 2020. The responding motion record included the affidavit of John Northcote, P. Eng. sworn August 9, 2020 (the Applicant's expert transportation witness). He reviewed the first RWS and the second RWS submitted by Mr. Ghariani received by the Tribunal on July 10, 2020 and July 21, 2020 respectively.

[6] This abridgement of time for service of the Motion and Response to Motion was granted by the Tribunal was granted on consent of the parties.

[7] The grounds for the MMC Motion are:

1. the RWS was filed on July 10, 2020 in accordance with paragraph 17 of the PO;
2. the RWS is limited to, rebutting portions of the anticipated evidence of the Applicant's witness as set out in his witness statement;
3. the Applicant's lawyer was advised that the transportation evidence would be limited to reply evidence only and the RWS would be submitted by July 10, 2020,
4. the Applicant was offered the opportunity to file a Sur-Reply, but the offer was declined. The NOM is Exhibit 1 to this proceeding and where the complete written record is found.

[8] The Applicant in its Response seeks to dismiss the motion and argues that:

1. MMC is represented by able and experienced legal counsel who has not followed the Rules of the Tribunal,
2. since the PO was issued in this preceding or the subsequent Order of the Tribunal, MMC has presented no justification or evidentiary basis for the relief it seeks,
3. parties have the obligation to begin preparation for a Hearing before the Hearing begins,
4. the law is clear on the presentation of evidence and reply,
5. the RWS contains no reply,
6. MMC has repeatedly ignored procedural requirements leading up to this Hearing,
7. the Applicant suffers significant prejudice in the form of additional costs, delay, unfairness, and confusion,
8. there is prejudice to the Tribunal and the City as a result of the disregard for the Tribunal's Rules and Orders, and
9. MMC's motion is deficient and contains important errors which call into question the overall intent of the NOM. The responding Motion Record of the Applicant is Exhibit 2 and the Applicant's Book of Authorities on Reply, Procedure and Costs is Exhibit 3 to this proceeding where the complete written record is found.

[9] The Applicant requested relief in the form of granting costs on a partial indemnity basis to them for the bringing of this Motion. Mr. Ackerman did not address the matter

of costs in his response on behalf of MMC. The Tribunal did not rule on the cost request as part of its oral decision during the hearing. Mr. Ackerman was directed to submit his client's position to the Tribunal prior to 4:30 p.m. on Tuesday, August 25, 2020. The Tribunal will rule on this request as part of its Order in this proceeding.

[10] It is important to note all transportation and parking issues remaining on the Issues List are those of MMC.

[11] The Tribunal considered all written and oral submissions by Counsel of all parties and that it was not prepared to have the MMC transportation witness give evidence at the hearing, but that transportation and parking evidence could be proffered for the reasons that follow.

[12] All parties are represented by experience Counsel who are knowledgeable about the Tribunal's Rules and the development process.

[13] The Tribunal has been clear and consistent in all case management conferences that expert witness statements were to be submitted in accordance with the PO. The MMC's expert transportation witness did not submit a witness statement. The Tribunal confirmed in its decision issued on July 16, 2020 that the MMC acted in a way that is contrary to the PO.

[14] The Tribunal in its July 16, 2020 decision found that the PO is compelling in this instance and that MMC did not comply with this document as well as Rule 7.4 of the Tribunal's Rules and is will exclude MMC's transportation witness.

[15] The Tribunal was clear in its July 16,2020 decision that any RWS by MMC's transportation expert must be proper reply and respond only to the content found in the witness statement filed by the Applicant's transportation expert witness. Counsel for MMC committed that the transportation experts RWS would be a proper reply.

[16] Counsel for MMC is very experienced and fully aware of the consequences of not meeting the PO requirements, Tribunal's Rules or its direction.

[17] MMC has filed no new evidence presented following the Tribunal's July 16, 2020 decision. No affidavit evidence was submitted in support of the motion, hence all matters have been previously considered and dealt with by the Tribunal.

[18] The Tribunal finds that the RWS of MMC's transportation witness does not constitute proper reply for the following reasons:

1. it relies almost exclusively on reports that were in the public record well in advance of the June 18, 2020 submission date for expert witness statements;
2. it makes no direct reference to the Applicant's expert witness statement submitted July 18, 2020 and did not restrict that reply to matters raised in that witness statement in keeping with proper reply;
3. it provides opinion evidence that is not appropriate for a RWS.

[19] The Tribunal finds that MMC has not met the obligations as outlined in the Tribunal's Rules, PO and subsequent decisions as its transportation expert witness went beyond what is considered proper reply. This is prejudicial to the City and the Applicant.

[20] It was clear to the Tribunal from the outset of the Hearing that there are important issues or themes on which a determination must be made. These issues are in two different levels of review, one policy and the other property specific, but lead to the same end: a determination of the best possible development on the property. First, from a City-wide perspective, the City is struggling to implement significant structural change in its efforts to evolve from a suburban to a more 'urban' municipality. These can be described as both considerable in their implementation and considerable in their scope. Second, how this overarching structural change is brought to a property level with respect to implementation. The Tribunal had the benefit of two perspectives on the property level evolution:

1. the Applicant's proposed ZBA and site plan that has the support of the City;

and

2. an Alternative Concept Plan (“concept plan”) brought forward as part of MMC’s planners witness statement.

[21] The Tribunal identifies three overarching public policy issues informed by the Markham Official Plan (“MOP”) being:

1. how best to achieve

the land use framework set out in this Official Plan is informed and aligns with, the principles of sustainable community development ... It is based on the understanding that the essence of sustainability is balance.

The MOP goes on to say regarding development on an individual site

Their built form characteristics, siting access; servicing and parking arrangements are critical to the success of the public realm as each building must complement and enhance its site and its context within the street block and neighbourhood.

2. how to best transform or transition lands designated mixed use development to “ensure new, attractive, street related, complete communities...”.
3. one of the greatest challenges of this significant City evolution is how to transform, in this case, a 45-metre-wide arterial road to a complete street.

The MOP states:

This Plan recommends that a ‘complete streets’ philosophy be applied to the future development of the City’s road network to balance the mobility between modes, increase safety for all users, and position the streets as places within Markham’s communities.

[22] Three site plans and regulatory issues are clear to the Tribunal from the outset of the Hearing, being:

1. are the dual use units the same as mandated commercial or retail (“commercial”) uses?

2. should the majority of commercial uses front onto Markham Road rather than Denison Street and
3. should a minimum of 21 residential units be replaced by a 32-space surface parking lot?

[23] Much of the Hearing revolved on which site plan best conformed to the MOP and represented a superior plan within the meaning of those policies.

### **BACKGROUND, SITE ANALYSIS AND AREA CONTEXT**

[24] Ryan Mino-Leahan provided background, site analysis and area context to the Tribunal.

[25] The subject lands (“property”) are municipally known as 7190 and 7200 Markham Road and are located on the south west corner of Markham Road and Denison Street. It has a total site area of approximately 1.56 hectares (3.86 acres) with frontage on Markham Road, Denison Street and Marydale Avenue.

[26] The property currently contains a commercial plaza known as the Denison Market Square with an estimated total Gross Floor Area (“GFA”) of approximately 3,700 square metres (“m<sup>2</sup>”) (40,000 square feet (sq. ft.)). Most of the commercial uses have been vacant for several years. One stand alone restaurant currently remains operational on the site. The plaza is supported with an at-grade parking lot.

[27] Immediately south of the property is occupied by an existing medical office in a single-storey residential building and is subject to a SPA for a three-storey medical office building. On an adjacent smaller parcel fronting on Marydale Avenue, there is a ZBA to permit townhomes.

[28] The immediate neighbourhood is largely made up of low-density residential development.



[29] The property is in the Markham Road Corridor/Armadale Community (“corridor”). The corridor contains a mix of uses, is in transition and home to several new and proposed developments consisting of residential and mixed-use projects. Specific note was made of the existing regional scale shopping facilities found at Markham Road and Golden Avenue approximately 1 kilometre north of the property.

[30] Applications for a ZBA and SPA were submitted to the City on August 29, 2017. The original proposal consisted of eight stacked townhouse blocks containing 265 residential stacked townhouse units and two commercial units at the corner of Markham Road and Denison Street with a total GFA of 150 m<sup>2</sup>.

[31] Vehicular access made use of existing access points on Markham Road and Denison Street. The MMC’s series of registered easements and rights-of-way are being respected by all parties. Parking is provided as follows: Underground: 332 residential and 50 visitors. At grade: 8 short term visitor and 5 commercial spaces. There was a total of 115 bicycle parking spaces.

[32] On March 27, 2019, appeals respecting the ZBA were filed under s. 34(11) of the *Planning Act* (“Act”) and the SPA pursuant to s. 41(12) of the Act due to a non-decision by the City.

[33] The City and the Applicant continued to search for a common ground which resulted in a revised proposal being submitted. The revised proposal had minor layout changes and the most significant change was an increase in the amount of commercial space from 150 m<sup>2</sup> to 1,250 m<sup>2</sup>. The commercial uses are described as ‘dual use’ units designed to serve commercial function with permission in the ZBA that allow these units to be used as residential.

[34] The final proposal for the property has a total of 258 residential townhouses and 11 flexible dual use units located along the Denison Street frontage. The development will be serviced by a total of 404 parking spaces of which 393 are in an underground garage and 11 at grade parking spaces.

[35] The Applicant and the City reached a settlement prior to the first prehearing conference of the Tribunal. The settlement proposed ZBA is before the Tribunal.

## **LAND USE PLANNING**

[36] Three expert land use planners gave evidence at the Hearing. Mr. Mino-Leahan on behalf of the Applicant, T.J. Cieciora on behalf of the City and Michael Gagnon on behalf of MMC. All were qualified as experts in land use planning.

[37] The MOP designation for the property is “Mixed Use Mid Rise” as shown on the 2014 MOP Map 1 and is subject to Area and Site-Specific policies being: Local Corridor-Markham Road Armadale. The designation permits a variety of residential and mixed uses (including stacked townhouses) and building heights of between three and eight stories.

[38] The property is currently zoned Special Commercial One – SC1 which permits a wide range of commercial uses.

[39] All planners evaluated and gave expert opinion with specific reference to Provincial, Regional and Municipal Policy. All policy discussion related to the ‘degree’ in which the two site plans conform to, or which plan is superior, when evaluated against public policy documents. The two plans are: the Applicant/City’s final proposal (“final proposal”) is the subject of this Hearing or the MMC concept plan delivered as part of their planners witness statement. Evidence was heard by the Tribunal regarding consistency to or conformity with all relevant policy documents.

[40] The concept plan uses the Applicant’s final proposal as its basis. MMC’s planner took great lengths to ensure the Tribunal understood that the changes do not represent a wholesale redesign. The major changes proposed are:

1. the dual use units are replaced by purpose built commercial units,
2. the purpose built commercial uses are relocated to front on Markham Road

within Blocks 7 and 8 rather than fronting onto Denison Street and

3. proposes that Block 5 be eliminated, and the length of Block 8 be reduced with both being replaced with a 32-space surface parking lot. The reduction of residential units in the alternative plan is estimated to be approximately 21.

[41] In his introduction, Mr. Mino-Leahan identified four themes that were important in the planning evaluation of the two proposals. The themes were:

1. should the commercial uses be mandated for dual use as found in the final proposal and approved by the City;
2. where is the most appropriate location for the commercial uses in the project?
3. should the site plan be amended to include 32 surface parking spaces resulting in the loss of a minimum of 21 residential units; and
4. what is the most appropriate way to transition a mixed-use designation along a major arterial road in this location?

### **PROVINCIAL POLICY STATEMENT 2020 (“PPS 2020”)**

[42] In evaluating the Applicant’s proposal against the PPS 2020, the planner for the City made specific reference in his witness statement to the following PPS 2020 guiding principles being:

1. accommodating an appropriate range and mix of residential and employment uses;
2. promoting cost effective development patterns and standards to minimize land consumption and servicing costs;
3. efficient use of existing and planned infrastructure:

4. a land use pattern, density and mix of uses should be promoted that minimize the length and number of vehicle trips and support current and future use of transit and active transportation;
5. planning authorities shall plan for and protect corridors and right-of-way for infrastructure including transportation and transit; and
6. long term economic prosperity should be supported by promoting opportunities for economic development and community investment readiness ... by maintaining, where possible, enhancing the vitality and viability of downtowns and main streets.

[43] It was opinion of the City and Applicant's planners that the final proposal is consistent with the PPS 2020.

[44] The planner representing MMC, in his evaluation of the PPS 2020 referred to policies that related to achieving complete communities, prioritize intensification and higher densities and providing the flexibility to capitalize on new economic and employment opportunities as they emerge. His opinion is the final proposal is predominately residential in nature hence fails to capitalize on the opportunity to provide 'purpose built' commercial along Markham Road and provide for commercial use in this optimal location. The concept plan is a superior approach as it provides 'purpose built' commercial space on the ground floor along the Markham Road frontage.

[45] The Tribunal prefers the evidence of the planners in support of the City's and Applicant's position because the final proposal contributes to the building of strong communities and contributes to Ontario's long-term prosperity environmental health and social well being. The City is wisely managing change and in doing so promotes efficient land use and development patterns. The Tribunal finds the proposed ZBA and final proposal is consistent with the PPS 2020.

**PROVINCIAL GROWTH PLAN FOR THE GREATER GOLDEN HORSESHOE (“GP”)**

[46] Planners evaluated both proposals against the GP guiding principles and policies. The GP calls for the development of complete communities; prioritize intensification and higher densities in strategic growth areas in order to make the best use of land and infrastructure and the support of transit viability; support a range and mix of housing options to serve all sizes, incomes and ages; and provide for different approaches to manage growth that recognizes the density of communities.

[47] The planner’s evidence on behalf of MMC, made special note of the GP policies that spoke to providing flexibility to capitalize on the new economic and employment opportunities as it emerged. In his opinion the final proposal ‘fails to capitalize’ on the opportunity to provide mandated ‘purpose-built retail commercial space along Markham Road’. The concept plan is a superior alternative when evaluated against the final proposal with dual use units found on Denison Street. The final proposal fails to maximize the opportunity to have commercial at the property’s optimum location. This theme is carried through the analysis of all planning policy in evidence presented by the planner for MMC.

[48] In their evidence, the planners for the City and the Applicant came to similar opinions. The final proposal conforms to the GP. They highlighted policies such as: providing a complete community; mixed use neighbourhoods that offer and support opportunities for all people; provides for a mix of residential and commercial uses on the property, incorporates an appropriate built form and use framework that supports the gradual transition of the corridor; introduces stacked townhouses in a community that is predominately a low density neighbourhood which will result in a greater range and mix of housing options to accommodate families of different incomes and household sizes; prioritizes intensification in a strategic growth area by intensifying an existing underutilized commercial plaza; supports the planned transportation system; will reduce the reliance on the personal automobile; will promote the use of alternative forms of active transportation; and provides a different and creative approach to manage growth.

[49] The Tribunal prefers the evidence of the planners in support of the City and Applicant's position because the final proposal supports the achievement of complete communities, makes intensification and higher densities a priority, makes efficient use of land and infrastructure and supports a range and mix of housing options. The Tribunal finds the proposed ZBA and final proposal conforms to the GP.

### **REGIONAL MUNICIPALITY OF YORK ("REGION") OFFICIAL PLAN ("YROP")**

[50] The YROP provides direction on important sustainability principles regarding how the region will grow and plan for: more sustainable communities, intensification, transportation options, and economic vitality. It calls for: A 'City Building' perspective that focus' development: on Regional Centres and Corridors; much of future development will be in urban areas with a required 40% residential intensification being within the built-up area; strives for innovation in urban design resulting in a design that is of a higher standard; is at a pedestrian scale and orientation; commercial is to be designed as walkable, transit supportive and integrated into the communities it serves; and engage with local municipalities to improve urban design of new commercial developments.

[51] At this point in the testimony, the Tribunal was drawn to critical evidence as it relates to the decision to use a dual use permission rather than mandating commercial on the property. MOP s. 8.3.3.5 speaks to the development criteria to be met by applications on properties greater than 1 hectare. Subsection 8.3.3.5 a) requires

where redevelopment is proposed on sites larger than one hectare with existing commercial uses or where otherwise appropriate, a retail and study as identified in Section 5.1.7.8 shall be prepared to demonstrate how the retail and service needs of the community will be met and integrated as part of the development.

This policy requirement is evidence of how the City is careful and considered in its approach to challenges in the redevelopment of commercial sites to mixed use. The existing commercial plaza is largely vacant and has been so for several years.

[52] The Applicant retained the Altus Group to evaluate the viability of commercial

uses on the property and ensure the commercial and service needs of the community are met. The Tribunal did not hear evidence from the Altus Group at the Hearing. Conclusions are found in Mr. Mino-Leahan's witness statement entered as Exhibit 6a). These conclusions were not challenged by other economic analysis and are important reasons why the City chose dual use units to be part of the final proposal.

[53] The Altus Group report concluded 'that the surrounding neighbourhood is well serviced by a number of existing commercial service and retail centres.' It spoke to the risk associated to having mandated commercial as 'the opportunity to add more convenience-oriented retail and service space is highly limited'. Anticipated population is not expected to generate a significant increase in demand and 'any commercial uses proposed on the site are best suited for small scale convenience-oriented retail and service uses' which are found in the Applicant's final proposal.

[54] Recently the Region completed a Retail Trends Study that concluded "mixed-use development with ground floor retail does not work everywhere and is limited to locations offering the best site locations". It was the opinion of the Applicant and City's planners and the Applicant's urban design expert (evidence to be discussed later in this decision), that there is a risk of at grade unoccupied purpose-built commercial uses on the property. This condition would not contribute to an active streetscape along Markham Road. The challenges of ensuring viable commercial on the property led the City and the Applicant to conclude a dual use unit would best manage this risk and ensure a successful mixed-use development.

[55] Planners for the City and Applicant both gave the opinion that the Applicant's final proposal met the policies of the YROP with respect to:

1. *a Sustainable Region* as it meets the 40% residential intensification targets within the built-up boundary, is designed to a higher standard including sustainable buildings with water and energy management; provision of well-designed public spaces; providing a compact mixed-use development and enhanced mobility options;

2. *Human Health and Well Being* policies are addressed by: the high quality urban design that is pedestrian oriented so residents can safely and comfortably meet their daily needs using a variety of mobility options, a pedestrian scale and orientation as it provides each unit direct connection to public or private space with linkages and connections to the surrounding community, and minimizes the presence of automobiles on the property;
3. Policies related to *Planning for Retail* are addressed as the commercial uses on the property are strategically located to allow users to walk, cycle or take public transit to secure required services, and to ensure the viability of commercial uses;
4. *Reducing the Demand for Services* policies are addressed through a series of Transportation Demand Management (“TDM”) measures, meets all of the Regions Transit Oriented Design (TOD) Guidelines (2006) that speak to the requirement for denser more compact development in order to fully utilize the lands adjacent to transit, and buildings that enhance a human scale and encourage underground parking to ensure the maximum active uses at grade;
5. *Moving People and Goods* policy is addressed by reducing need for automobile trips, improving mobility choices and encouraging more sustainable mobility choices, provision of safe and comfortable pedestrian and cycling alternatives combined with corresponding facilities to ensure their use.

[56] Planning evidence on behalf of MMC regarding the YROP stressed sustainability policies establish a long-term framework for making ‘smarter decisions.’ The policy encourages local municipal partners to re-think the way communities are designed, serviced and supported to incorporate a well-designed built form in new commercial developments and contains objectives related to Economic Vitality. His opinion was the final proposal “fails to maximize and optimize the opportunity to meet the diversity of job opportunities within the neighbourhood...”, purpose built ground floor commercial space



available to residents, the patrons of MMC and the traveling public is more desirable especially when one considers the loss of existing retail facilities in the Denison Market Square. By requiring purpose build commercial to be located along the Markham Road frontage combined with surface parking as proposed by the MMC concept plan makes it superior and more in keeping with the YROP policies relating to Sustainability, Human Health and Well-Being and Planning for Retail.

[57] The Tribunal prefers the evidence of the planners supporting the City and Applicant's final proposal as it contributes to the requirement for 40% residential intensification, provides for enhanced mobility options, implements a complete suite of transportation demand management initiatives and creatively implements the findings of the Regions Retail Trends Study which confirmed that mixed-use with ground floor retail does not work everywhere. The Tribunal finds the proposed ZBA and final proposal conforms to the ROP.

### **MARKHAM OFFICIAL PLAN ("MOP")**

[58] The property is designated as 'Mixed Use Neighbourhood Area' on Map 1- Markham Structure, located in the 'Markham Road Corridor-Armadale' on Map 2 'Centres and Corridors and Transit Network' and designated as 'Mixed Use Mid Rise' on Map 3 – Land Use. Read together, the policy permits a variety of commercial uses, allows building heights between three and eight storeys, and encourages mixed use intensification along arterial roads subject to an appropriate transition to adjacent low-density neighbourhoods.

[59] Planners for the City and the Applicant gave opinion evidence that the property is identified by the City as a location to accommodate intensification intended to contribute to the range of uses, housing types and density. The Tribunal saw little disagreement with the 'principle of development' for the property from all planners and it successfully transforms and transitions the property in keeping with the City's objectives to become a more 'urban' place, therefore meeting overall City public policy.

[60] The divergence of opinion again related to a requirement for purpose built

commercial, the location of the purpose built commercial, and the desirability of surface parking to better accommodate the commercial uses on the property.

[61] The Tribunal heard an extensive review of the MOP policy as it related to how the final proposal contributes to the planned growth in the corridor. Evidence confirmed the proposed ZBA and final proposal does not require an Official Plan Amendment.

[62] Several important MOP's overarching policy objectives were identified in the City and Applicant's planning evidence in support of the final proposal and being worthy of special consideration by the Tribunal. The final proposal: meets the intent of the MOP including: the intensification strategy to accommodate intensification in the built-up area; has an appropriate transition with limited impact on the established low-density residential neighbourhood on Marydale Avenue; supports the existing character of the City's residential neighbourhoods; the design and placement of buildings respect the area character; positively contributes to adjacent development and the public realm; supports the gradual transition of the Markham Road corridor from suburban area made up of largely single storey and low-density residential housing options to a mixed use corridor; strengthen the coordination of land use planning, transportation planning and urban design; and limit where appropriate, vehicular access to arterial and heavily used collector roads.

[63] Section 2.4.3 of the MOP was the subject of debate. The policy intent is twofold. The first principle is to accommodate residential intensification without significantly impacting established residential neighbourhoods. The final proposal is sensitive to the adjacent low-density neighbourhood and supports the gradual transition of the corridor to a mixed-use area. The second is to maintain the function of existing commercial areas as they transition to mixed use areas. Evidence of the Applicant and City planners specified the final proposal is informed by the Altus Group Report that documented that existing commercial is underperforming and is likely to remain so. The final proposal permits a wide range of commercial uses which add to the mix of commercial uses on the property. The dual use units will be utilized in keeping with the needs of the community as it transitions. The Tribunal agrees with the evidence as presented by the

City and Applicant's expert planning witnesses.

[64] Section 5.1.7 of the MOP contains retail ("commercial") policies because commercial and service are important components to a complete community. This section of the MOP establishes a series of criteria to plan for and accommodate the commercial needs of the larger community. It is the City's policy to move away from large format commercial to a mixed-use format along major arterial and collector roads with the buildings being more aligned to the street and an attractive pedestrian environment.

[65] Two sections were prominent in the discussion of the final proposal and the decision to allow for dual use units. Section 5.1. 7.1 states:

To plan for and accommodate the retail and service needs... in convenient locations by providing for: a) the majority of Markham's retail and service needs on lands designated 'Mixed-Use', 'Commercial' and 'Service Employment' as shown on Map 3 – Land Use through retail and mixed-use building forms

and Section 5.1.7.2 states:

To provide for the integration of new retail and service uses within mixed-use developments on lands designated Mixed-Use.

[66] The planner for MMC gave the opinion unless the commercial uses were purpose built and located on the Markham Road frontage, the final proposal is not consistent with the MOP and s. 5.1.7.2. The development would be better served by mandated purpose build commercial with dedicated at-grade commercial parking as illustrated by the concept plan.

[67] It was clear through the evidence of the Applicant and City planners that the mixed-use designation permits office and other non-residential uses in the dual use units and being dual use provide the flexibility to ensure these units may used as such when the market allows. The conclusions of the Altus Group report found there is a risk these units would remain underutilized or vacant. The provision of flexible commercial space would manage this risk very effectively and allow the units to be used and

modified to meet the needs of the surrounding community. The proposed ZBA provides a wide range of commercial, retail and service use to be in the dual use units.

[68] The City requires a Retail and Service Needs Study in support the final proposal. As previously discussed, a key finding of this report, confirmed by findings by the Region, is that “mixed-use development with ground floor retail does not work everywhere and is limited to locations offering the best site locations, which in the foreseeable future will be the Region’s Centres and Corridors, particularly in the vicinity of transit nodes.” Evidence showed the property is not in a Regional Centre or Corridor and is therefore not considered as a prime area for commercial uses an important consideration to permit dual use units rather than mandated purpose built commercial. The Applicant’s planner confirmed his opinion that ‘based on the conclusions of the Altus Group Report, the potential for retail uses on the Subject Lands are ‘very limited’. The dual use commercial uses have a floor to ceiling height of 4.5 metres (provision in the proposed ZBA), have an entrance flush to the public sidewalk and significant window glazing all features typical to commercial uses in mixed-use developments.

[69] The MOP has policy relating to built form and site development found in s. 6.18. Michael Spaziani addressed many of the policy considerations in his urban design evidence which the Tribunal accepts in its entirety. Key considerations of the MOP policy framework are: encourage parking to locate underground with service and loading areas located at the rear of a building and screened from public view and that all new development will serve to maintain and support the existing character of the surrounding community.

[70] Planners for the City and Applicant supported Mr. Spaziani’s view. The final proposal enhances existing site conditions and positively contributes to the adjacent development and public realm by:

1. a pedestrian first approach and has all required resident parking is found in a single-level underground parking facility;
2. 11 parking spaces are provided at grade for barrier free use, deliveries and to

- service the commercial uses;
3. building placement to enhance existing conditions, contribute to adjacent development and make improvements to the public realm;
  4. buildings along Markham Road and Denison Street have direct access to the street with each having a direct connection to the sidewalk;
  5. the buildings are 'brought forward' on the property to help define the street and the public realm;
  6. there are many design considerations to ensure the interface with the single detached homes on Marydale Avenue is respected.

[71] It is the opinion of MMC's planner that the final proposal "fails to maximize and optimize the opportunity to enhance the public realm along Markham Road." In his opinion the mixed-use commercial component of the development is more appropriately located on the Markham Road frontage which would contribute to the success of the public realm and a 32-space surface parking lot would not diminish the public realm along Markham Road.

[72] Policy 7.1.1 Transportation, Services and Utilities recommends a 'complete street' philosophy be applied to new development applications. Important to the implementation of this perspective is the coordination and integration of land use, transportation and urban design coming together to provide transit supportive densities and allow for increased use of other modes of active transportation. The final proposal is of a density to support transit and the mixed-use policy of the MOP, limits direct vehicular access to existing access points, provides the opportunity for shorter trips, and supports an integrated transportation system.

[73] Section 8.3 are the policies for the Mixed-Use areas in the City. The role and function of mixed-use areas was central to the evidence and whether the final proposal has 'maximized' and 'optimized' its contribution to stated public policy. The mixed-use

areas are on the City's best served transit routes and are intended to transform into complete communities that integrate housing office and commercial uses to increase the use of non automobile modes of transportation.

[74] Complete communities are an important policy direction in the GP and the MOP. The Tribunal has determined previously the proposed ZBA and final development, conforms to the GP and will limit its review to the MOP policy.

[75] Policy 8.3.1.1 a) is important stating: 'provides for a mix of residential, retail, restaurant and service use that contribute to the creation of complete communities.' Evidence is presented with respect to the word 'provide' and whether dual use units meet the spirit of this policy. Evidence from the planners for the City and Applicant is dual units meet the spirit of this policy and provides for commercial uses. The Tribunal agrees.

[76] When the final proposal is evaluated against the Mixed-Use policies found in s. 8.3.1—General Policies and 8.3.3 Mixed Use Mid Rise, it meets the following policy direction and development criteria by:

1. establish these areas as a focal point for neighbourhood activities;
2. provides for commercial and service functions to address the needs of the community;
3. ensure a mix of uses on large sites;
4. has an appropriate range of permitted uses;
5. the coordination and consolidation of vehicular access points;
6. frames the Markham Road and Denison Street with grade related commercial opportunities that serve the area residents;

7. supports the gradual transition of the property and the broader corridor as its mixed-use nature evolves; and
8. the dual use units provide the flexibility needed on the property to allow commercial uses to evolve as the market demands in the neighbourhood become apparent.

[77] The planner for MMC maintains the final proposal does not conform to the Mixed Use Mid Rise policies because the 'purpose built' ground related commercial space is not mandated in the ZBA and the property could conceivably be used entirely for residential uses.

[78] Section 9.2.5—Local Corridor Markham Road Armadale provides area specific policy that applies for the local corridor where the property is located. The objective of the section is “to provide for a mixed-use corridor that functions as a main street integrating a range of housing, employment, shopping and recreation opportunities, at transit-supportive densities to serve the adjacent Armadale communities”. The policy speaks to possibility of a local area study and establishing requirements for a comprehensive block plan. There is no provision requiring or mandating purpose built commercial.

[79] The planner for the MMC took the Tribunal on an extensive journey around the City illustrating how developments in mixed used designations are being handled on different sites, in different locations and within a different context. This review clearly illustrated the City is very careful and considered in how it deals with mixed use development on different sites, in different locations to ensure they are sensitive to the character and context in which these developments are located. Policy 2.4.9 of the MOP speaks clearly to this objective:

To ensure that intensification is appropriate to the area context in which occurs, through the preparation of area studies that will determine the appropriate built form of development, height and density, the appropriate mix of uses, and the relationship to the surrounding community form and function.

[80] The MMC analysis showed through cross examination that the City carefully considers how commercial uses will be regulated in each area of the study. Exhibit 21, the Secondary Plan for 'Main Street Milliken' is evidence if the City wanted to secure purpose built commercial on the property, it would have been required to do so in the secondary plan. Section 5.3.3 b) of the Secondary Plan for 'Main Street Milliken' states:

... Grade related commercial uses shall be provided within development on these lands to provide amination and pedestrian activity at street level. Residential uses are permitted, but shall not be located on the ground floor of buildings facing Old Kennedy Road.

[81] It is clear from the evidence that if the City's policy required 'purpose built' commercial and a 32-space surface parking lot on the property, there would be specific direction of such in the MOP.

[82] The Tribunal found that the final proposal is a different and creative approach to manage growth, the challenge of transitioning a mixed-use corridor and the how a major arterial road is being 'addressed' by the adjoining uses. The dual use units are a conscious decision by the City to manage the risk and uncertainty in the evolution of commercial use on the property.

[83] The Tribunal prefers the evidence of the planners for the City and Applicant and finds the ZBA and final proposal conforms to the MOP.

[84] The Tribunal has the benefit of Mr. Spaziani's urban design and Mr. Northcote's transportation opinion related to consistency and conformity of the final proposal in relation to the urban design and transportation policy of the planning documents evaluated in the Land Use Planning section of this decision.

[85] Mr. Spaziani's urban design conclusions were entirely consistent with the planning opinion of the City and Applicant's planners. He found that the final proposal was consistent with the PPS 2020, and conforms to the GP, YROP and MOP. At the Hearing, Mr. Spaziani's evidence was not contradicted and stood the test of cross examination. His evidence on urban design elements of the final proposal is found later



in this decision.

[86] The Tribunal accepts the expert testimony of Mr. Spaziani, as it relates to the PPS 2020, GP, YROP and MOP, in its entirety.

[87] Mr. Northcote's transportation conclusions were entirely consistent with the planning opinion of the City and Applicant's planners. He found that the final proposal was consistent with the PPS 2020, and conforms to the GP, YROP and MOP. At the Hearing, Mr. Northcote's evidence was not contradicted and stood the test of cross examination. His evidence on the transportation considerations of the final proposal is found later in this decision.

[88] The Tribunal accepts the expert testimony of Mr. Northcote, as it relates to the PPS 2020, GP, YROP and MOP, in its entirety.

#### **DISCLOSURE OF CONFIDENTIAL AND PRIVILEGED INFORMATION**

[89] The City objected to the testimony of Mr. Gagnon as he disclosed privileged and confidential information regarding litigation between the City and a property owner in the area. The Tribunal believes the breach by the witness was made inadvertently, and the witness confirmed he had no knowledge or was involved in the subject litigation. It was argued that there is a very significant public policy reason the evidence should not be admissible and part of the record. The matter is properly before the courts and that is the appropriate forum for this dispute.

[90] The property that is subject of this litigation is not the matter before the Tribunal in this Hearing. The Tribunal determined that the information disclosed had no relevance to the appeal or the issues that were before it.

[91] The Tribunal gave an oral decision with respect to the disclosure of confidential and privileged information.

## URBAN DESIGN

[92] Mr. Spaziani provided expert urban design evidence to the Tribunal. He was qualified as an expert in urban design.

[93] Mr. Spaziani described the immediate urban design context on Markham Road from Elson Street to the south to Golden Avenue in the north. The Tribunal found the context analysis very compelling and important how the Applicant determined the best alternative to develop the property and choice to have dual use units rather than purpose built commercial.

[94] Denison Street south to Elson Street is entirely low-rise house forms. The urban design “condition can be described as suburban with little animation of the public realm, lined with continuous low-density residential uses. I consider this pattern in a stable condition and, given various factors, is unlikely to change in the foreseeable future.” The stable condition east of the property impacts the expected function and character of the proposed development.

Successful vibrant mixed-use streets thrive when both sides of a street support the same land-use goal and character. One-sided commercial streets tend to fail due to a lack of concentration of commercial activity across the street.

The extensive rear lot conditions of the detached homes in the area create an urban design condition that is not conducive to active, pedestrian oriented commercial. This is the exact condition that faces the property and is addressed in the final proposal.

[95] The objective is to ensure a vibrant urban street and in this context is difficult. It is further challenged by the extensive and robust commercial uses found to the north of the property.

[96] The development along Markham Road increases in intensity as one moves north toward the Golden Avenue node where you find four to eight storey buildings with service and convenience commercial uses. The Golden Avenue node also provides extensive commercial activity that is of city-wide focus and serves to draw attention

away from commercial found on the Applicant's property. The Golden Avenue node 'has emerged as a mid rise/mixed use development node as intended by the Markham OP'.

[97] Mr. Spaziani spoke of the efforts of the Applicant and the City as they searched to find the 'right' response in built form to rethink the use for the property and take the design to a new and vastly improved level in keeping with the general city-wide Urban Design Guidelines. The Applicant wanted to ensure the development would complement the area, fulfill the character requirements of a 'main street', establish a commercial framework that would be the most likely to succeed and establish an appropriate transition to commercial uses, in building form, scale and massing from the largely low density residential uses surrounding the property with the higher density and intensity mixed use development found to the north.

[98] Mr. Spaziani concluded a three-storey stacked townhouse development with dual use commercial is a most appropriate form of development for the property. The scale and massing of the buildings has limited, if any, negative impacts on the surrounding uses and neighbourhoods. It is considered a 'gentle' level of intensification that is visible and encourages pedestrian access to both their residential units and commercial facilities.

[99] Transition to adjacent low-density neighbourhoods is an important consideration in the City's review of projects of this nature. The City in its design guidelines allows an angular plane of 45 degrees from the existing low-density neighbourhood. The final proposal has an angular plane of 20 degrees well within the guidelines.

[100] Pedestrian connectivity and ensuring adequate amenity space are important urban design considerations. The final proposal served to maximize the utility of the public realm surrounding the perimeter of the property. The narrower boulevard with less existing landscaping along Denison Street serves to enhance both the relationship of the dual use commercial uses to the public realm and its viability in this location when compared to the Markham Road frontage.

[101] The City does not have set policies about the amount of common amenity space

or its distribution on a given site. In the expert's opinion, the amenity area found on the property is 'abundant' and connects very well to the public realm. The property has many pedestrian paths, and which serves the residents and visitors well ensuring safe, convenient access.

[102] Mr. Spaziani highlighted for the Tribunal other important elements of the final proposal. The strong corner relationship is important especially with the existing Petro Canada station north of the property across Denison Street. The location of access to the underground parking is tucked into the development not fronting on any street. This is combined with convenient parking location with access to stairs leading to either the residential or dual use units. The distance of the curb line to the building face along the Denison Street frontage will serve to enhance the public realm and assist in the viability of commercial uses.

[103] The Tribunal has the benefit of Mr. Spaziani's architectural experience. The dual use units are small, narrow and shallow, making it difficult to construct purpose-built retail within the final proposal. The floor to ceiling of 4.5 metres is secured in the proposed ZBA and supports commercial uses in these units. Commercial uses that can evolve in design provide a distinct advantage to the proposed dual use units. They can change to meet the commercial needs of the area and is an appropriate way to transition commercial on the property within the context of the larger corridor.

[104] Mr. Spaziani stated it is appropriate to consider the type of commercial required when considering the uncertain times found in the Province of Ontario today. One may find smaller, home based commercial opportunities important. In his view the purpose-built retail had a greater risk of being vacant or 'going dark' is worthy of note. He believed the dual use unit was the appropriate response to retail in this location when one considers the uncertainty of commercial in this location during these times.

[105] Mr. Spaziani took some time to evaluate the concept plan from an urban and site plan design perspective. Two issues are important to the Tribunal's consideration regarding this testimony. First, the concept plan removes 21 residential units and

replacing them with a surface parking lot. The concept plan provides no detail on impacts to the final proposal and therefore the actual impact on the residential units is yet to be determined. In his initial review of the concept plan, changes could result in a reduction of 36 units. Second, is the inclusion of a 32-space surface parking lot at the southern end of the property. His opinion is the alternative plan offends City policy and urban design principles. City by-laws and urban design guidelines generally discourage surface parking lots along major corridors as they interrupt the continuity of the planned built form and “planned streetwalls that are intended to enclose and define the corridor faces.” In his considered opinion, the alternative design found in the concept plan represents a step backward with respect to well established urban design principles and is not an appropriate trade off in this instance.

[106] In conclusion, the final proposal complies with all City policy related to urban design. The three-storey residential blocks with tall two-storey dual use commercial units “is an excellent example of achieving of significant intensification with an appropriate amount, location and configuration of retail use” and is the best possible evolution of the local mixed-use corridor at this point in time and at this particular “low-rise context”.

[107] The witness’s urban design and architectural evidence is uncontested and thoroughly tested in cross examination.

[108] The Tribunal was impressed with and accepts Mr. Spaziani’s evidence in its entirety.

## **TRANSPORTATION AND PARKING**

[109] Mr. Northcote provided expert transportation evidence to the Tribunal. He was qualified as an expert in transportation and parking.

[110] The City and Region both require a comprehensive Traffic Impact Study (“TIS”) be prepared by the Applicant in support of the application. There was a pre consultation meeting to determine study requirements, the TIS was subject to extensive review,

revised in keeping with comments received and ultimately was found acceptable to both the Region and City's technical staff. The TIS was prepared in 2018 by JD Engineering and the firm completed several specific investigations and tasks appropriate to determine potential requirements and evaluate impacts of the proposal.

[111] Studies included: a determination of existing traffic volumes and circulation patterns of the area, estimated future (2020 and 2025) traffic volumes and a level of service analysis of traffic conditions with the proposed redevelopment, estimated the traffic conditions with the proposed redevelopment to determine future operational deficiencies, reviewed the sight distance for access to Markham Road and Denison Street and completed a sensitivity analysis to account for the proposed redevelopment of the MMC immediately south of the property. This analysis was used to identify where enhancements are needed to address required operational improvements.

[112] A parking and active transportation review was completed as part of the TIS analysis and are important considerations in the final proposal.

[113] The TIS found that there is no additional traffic infrastructure recommended to accommodate the final proposal but does suggest minor traffic signal modifications to better serve the transportation requirements in the area. The Region's Transportation Master Plan identifies future required infrastructure improvements in the area that are needed in any event. The final proposal does not impact these improvements which include a cycling corridor on Markham Road from Steeles Avenue East to Highway 7. It was noted that the TIS used a 1% background traffic growth on Markham Road confirmed by the Region.

[114] Proposed parking supply provided on the property meets the required residential parking standards found in the City's Zoning By-law No. 28-97. The Applicant and the City took considerable care to ensure the parking requirements were appropriate for the proposed commercial dual use units. A number of 'proxy sites' that had similar developments were surveyed. The results were reviewed with City staff and provided necessary input to the blended commercial parking rate used.

[115] TDM requirements are important considerations in the Region and City's review of intensification proposals. The Applicant completed a transportation mobility plan for the property and part of that plan spoke to the TDM techniques found in the final proposal when implemented. TDM strategies include: the provision of many dedicated and secure bicycle parking facilities, dual use units will assist in reducing peak time trips, distribution of a comprehensive suite of transit information to new residents, providing an information display board to share updated transportation information, and two transit and transportation related information sessions with new residents.

[116] Mr. Northcote reviewed the concept plan and provided the following observations:

1. the alternative plan provides an oversupply of parking which serves to encourage single purpose trips, undermines the TDM initiatives and discourages active transportation alternatives and the use of transit,
2. raised conformity questions with the GP, YROP and MOP as a result, and
3. found the location of the surface parking area may encourage overflow from the MMC to the Applicant's property resulting in difficult enforcement issues.

[117] In conclusion, Mr. Northcote's opinion is that the proposed ZBA and final proposal is consistent with the PPS 2020 and conforms to the GP, YROP and MOP, the traffic impact is compatible with the adjacent existing and proposed developments, there is sufficient parking provided to ensure there will be no negative impacts on the adjacent public right-of-ways or neighbouring properties, and has sufficient and appropriate parking supply to meet its needs.

[118] The witness's transportation and parking evidence is uncontested and thoroughly tested in cross examination.

[119] The Tribunal accepts Mr. Northcote's evidence in its entirety.

**RESIDENT WITNESS**

[120] Area residents are very interested in the final proposal and attended the Hearing most days. The Tribunal agreed to hear one resident spokesperson to give evidence regarding their issues and opinion with respect to the final proposal. Sworn evidence was given by Taqi Ansari. He is not a member of the South Markham Residents Association who settled with the Applicant and withdrew as a party from this Hearing.

[121] He described how the area has changed over the 18 years he has been a resident. The major concerns of area residents are:

1. a continued overcrowding of an already crowded neighbourhood;
2. insufficient parking;
3. increased traffic on very busy neighbourhood roads which among other things will increase pollution;
4. insufficient transit services;
5. the units could become rental housing;
6. a potential increase of sewage backups in area homes; and
7. the impact the development will have on property values.

[122] He believed the property is best developed with single-family or semi-detached dwellings with individual driveways. A concept of this type would accommodate approximately 40 homes and would be more in keeping with the neighbourhood. Mr. Ansari's evidence was that of one with local knowledge and not as an expert.

[123] In cross examination, it was brought to Mr. Ansari's attention that low density housing would not conform to the MOP. The transportation evidence at the Hearing and



a comprehensive TIS completed to support the application and reviewed by the City, stated there was enough capacity on area roads to support the proposal. The same evidence spoke to the issue of parking provided and the final proposal met parking requirements of the City's zoning by-law.

## **PROPOSED ZBA**

[124] The proposed ZBA uses text and a schedule to define zoning provisions for the property. A revised ZBA was presented to the Tribunal and is identified as Exhibit 27 a) as the City found, with the benefit of further review of provisions, the exact location of the commercial uses required additional clarification. The revised ZBA was reviewed and approved by an internal City committee that evaluates provisions of all ZBAs to ensure proper interpretation. The Tribunal found the approach taken by the proposed ZBA to be a clear and effective way to describe the intended development and how it will be phased. It is a clear, comprehensive, implementation focused document.

[125] The ZBA is site specific and creatively regulates the many important considerations for the development of the property. The City and Applicant's expert witnesses, and the Tribunal found worthy of note, highlighted key provisions of the ZBA to ensure planning objectives are properly implemented. The ZBA states:

- a) adds 'restaurants, take-out' to the uses permitted in the Community Amenity Area One CA1 Zone,
- b) clearly identifies where non-residential uses are permitted on the property,
- c) non-residential units will have access to and face a public street and shall have a minimum vertical distance of 4.5 metres between the floor and ceiling;  
and
- d) the maximum floor area of restaurant and medical office uses are limited to 250 m<sup>2</sup> for each in keeping with the parking provided on the property.

## CONCLUSIONS

[126] The Tribunal finds that the City followed a careful, complete and comprehensive planning and technical review of the final proposal. It aligns with the principles of sustainable development, built form characteristics complements and enhances the neighbourhood, transitions and transforms the property to new, attractive, street related project contributing to a complete community, and meets the challenge of transforming to a complete street, a 45-metre arterial road.

[127] The City was insistent from the outset that the property would meet all the requirements of the MOP. Dual use units are an innovative and well thought out solution to a commercial condition fraught with uncertainty to lead to its eventual success.

[128] The City was fortunate to have an Applicant that respects its long-term objective of keeping surface parking to a minimum. The City ensured the final proposal is an efficient use of the property, meets all the attributes of a main street, respects the existing built form of the neighbourhood with an appropriate scale and urban presence, found the dual use units were appropriate in keeping with City's policy and priorities, using a study of proxy sites found the parking arrangements to be sufficient and the design balance between underground and limited surface appropriate.

[129] The Tribunal finds that the addition of a surface parking lot *in lieu* of 21 (or possibly up to a 36) unit loss to be an unacceptable when it relates to stated priorities of governments in the Province of Ontario to increase the supply of housing. To use the words of Mr. Spaziani, "the loss of units being replaced by a front yard parking lot is a step backwards in urban design principles and is not an appropriate trade-off."

[130] The Tribunal accepts the planning evidence of the City and Applicant's planners that the final proposal is consistent with the PPS 2020, conforms to the GP, YROP and the MOP. The Tribunal accepts the urban design evidence of Mr. Spaziani and the transportation and parking evidence of Mr. Northcote.

[131] The Tribunal finds that the revised ZBA, as presented, represents good land use

planning, is consistent or in conformity with and meets the objectives of all requisite public policy, and is in the public's interest. The outcome of the planning efforts that culminated with a revised ZBA when implemented will create an appropriate mixed use, transit oriented and pedestrian friendly, livable development that will further the complete community objectives of the City.

[132] Considering the above, the Tribunal reviewed all evidence presented at the Hearing and finds that the Applicant's final proposal for a stacked townhouse development with limited surface parking and the permission for dual use units to be the superior plan and is worthy of approval as presented.

### **REQUEST FOR COSTS**

[133] The Tribunal reserved its decision on costs giving MMC's Counsel until 4:30 p.m. on August 25, 2020 to provide a written response to the Tribunal to clarify his clients position on this matter. A submission was received in keeping with the oral direction.

[134] The Motion seeking leave to introduce transportation evidence was submitted on the Thursday, August 6, 2020 less than two working days before the August 10, 2020 Hearing. The Applicant has sought relief and requested:

An Order of the Tribunal granting costs, on a partial indemnity basis to JD for this Motion of \$4,000.00 to be paid by August 14, 2020 and baring interest under s.129 of the *Courts of Justice Act*.

[135] Rule 23.10 of the Tribunal's Rules provides the authority to award costs:

The Tribunal may deny or grant the application for costs or award a different amount and fix the costs of and incidental to the proceeding and direct payment be made by a certain date by order.

[136] There is a considerable case law addressing the issue of costs and in what circumstances the Tribunal (or Board) has awarded them. It is important to note that each case is specific to its own facts and therefore the Tribunal will not attempt to summarize the cases provided during the argument of this motion. Unlike the courts, applications for costs are not routine, and awards are not common. A party appearing

before the Tribunal should have no expectation that it will recover its costs. Therefore, each case is determined on its own facts and decided on its own merits.

[137] The test commonly used by the Tribunal on a request for costs is as provided in *Midland (Town) Zoning By-law 94-50, Re*, 1995 CarswellOnt 5227 at paragraph 37:

[37] The Guidelines suggest that there is a relatively simple test to be applied in determining whether an order of costs should be made, and this member finds it a good, rough-and-ready standard (at p. 4):

... would a reasonable person, having looked at all of the circumstances of the case, the conduct or course of conduct of a party proven at the hearing, and the extent of his or her familiarity with the Board's procedure exclaim "that's not right"; that's not fair; that person ought to be obligated to another in some way for that kind of conduct".

[138] Counsel for the Applicant, Mr. Platt submitted that MMC's conduct has been clearly unreasonable as MMC failed to serve its notice within the period required by the Rules; did not seek consent, nor did it provide any notice that it would be serving its NOM late and within 1.5 business days of the Hearing; materials provide no justification or explanation whatsoever for the lateness of the Motion's service; and the motion ignores and seeks to re-litigate the direction of the Tribunal that Mr. Ghariani was only be permitted to enter proper reply evidence, necessitating needless steps in the proceeding causing prejudice to the Applicant in preparation for the Hearing.

[139] The response from the counsel for MMC, Mr. Ackerman, included the following: MMC has a very direct interest in the issues surrounding the application; preparation for the Hearing has been hampered by the COVID 19 pandemic; there has been continued cooperation with the other parties to narrow issues and the elimination of witnesses; and the conduct did not necessitate unnecessary adjournments or delays among others.

[140] Mr. Ackerman goes on to say: Pursuant to the provisions of Rule 10.10, "A Motion may be made at an oral Hearing event with leave of and in accordance with any procedures ordered by the presiding Member, it is therefore submitted that MMC was not required to file a NOM seeking leave since the Tribunal had already directed that

leave would be required and that MMC was entitled to bring the motion as an oral motion at the hearing.”

[141] The Tribunal in its decision issued July 16, 2020 found that MMC failed to comply with the Tribunal’s PO and therefore ordered the following:

Leave will be required by the Hearing Panel as to whether MCC [sic] (1637063 Ontario Inc) will be allowed to have a Transportation expert witness (Mr. Ghariani) give evidence at the Hearing.

[142] The Tribunal did not provide direction on whether the request for leave was to be by written motion or orally at the start of the Hearing. The Tribunal was fully expecting a request for leave and was prepared to deal with the request no matter how it was presented as should all parties.

[143] Therefore, the Tribunal is not prepared to exercise its discretion to make an award of costs against MMC. In doing so it is based on an assessment of conduct. All parties were put on notice by the Tribunal in its July 16, 2020 decision, that a request for leave to permit Mr. Ghariani to give transportation expert witness was required and was in all likelihood be forthcoming either as a formal written motion or orally at the start of the Hearing and therefore needed to be prepared to address the issues.

## **ORDER**

[144] Accordingly, the Tribunal orders the following:

- a) that the expert transportation witness for 1637063 Ontario Inc. (MMC) is not permitted to give evidence at the Hearing commencing August 10, 2020 and his first and second RWS received at the Tribunal July 10, 2020 and July 21, 2020 respectively be struck from the record.
- b) that the Tribunal is not prepared to strike transportation and parking issues from being heard at this Hearing for the following reasons. The issues are:

1. properly addressed in the PO;
  2. appropriately heard by this Tribunal to be clarified and properly tested by Counsel; and
  3. the evidence should be in the public record and it is in the public interest to have the issues heard.
- c) that the confidential and privileged information be struck from the record and the Tribunal will not refer to any of the statements made by the witness respecting this matter in its decision.
- d) that the request for costs against 1637063 Ontario Inc. (MMC) is hereby dismissed.
- e) that the appeal by 2404099 Ontario Limited (JD Development Group) be allowed.
- f) that the ZBA identified as Exhibit 27a) and found as Attachment 1 to this decision is approved.

[145] The Tribunal so orders.

*“Bryan W. Tuckey”*

BRYAN W. TUCKEY  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.olt.gov.on.ca](http://www.olt.gov.on.ca) to view the attachment in PDF format.

**Local Planning Appeal Tribunal**

A constituent tribunal of Ontario Land Tribunals

Website: [www.olt.gov.on.ca](http://www.olt.gov.on.ca) Telephone: 416-212-6349 Toll Free: 1-866-448-2248

# BY-LAW 2020-\_\_\_\_\_

## A By-law to amend By-law 90-81, as amended

(to delete lands from the designated areas of By-laws 90-81)

## and to amend By-law 177-96, as amended

(to incorporate lands into the designated area of By-law 177-96)

The Council of the Corporation of the City of Markham hereby enacts as follows:

1. That By-law 90-81, as amended, is hereby amended by deleting the lands shown on Schedule 'A' attached hereto, from the designated area of By-law 90-81, as amended.
2. By-law 177-96, as amended, is hereby further amended as follows:
  1. By adding the lands outline on Schedule 'A' attached to this By-law to the designated area of By-law 177-96, as amended.
  2. By rezoning the lands outlined on Schedule 'A' attached hereto as follows:
 

From: **Special Commercial One (SC1) Zone**

To: **Community Amenity One\*606 (CA1\*606) Zone**
  3. By adding the following subsections to Section 7 – EXCEPTIONS

Exception 7. 606	<b>2404099 Ontario Limited 7190-7200 Markham Road</b>	Parent Zone CA1
File No. ZA 17 109850		Amending By-law 2020-
Notwithstanding any other provisions of this By-law as amended, the following provisions shall apply to the land denoted by the symbol *606 on the schedules to this By-law. All other provisions, unless specifically modified/amended by this section, continue to apply to the lands subject to this section.		
<b>7.606.1 Additional Permitted Uses</b>		
The following additional uses are permitted:		
a)	<i>Restaurants, Take-Out</i>	
<b>7.606.2 Special Zone Standards</b>		
The following specific Zone Standards shall apply:		
a)	Notwithstanding any further division or partition of any of the lands subject to this Section, all lands zone CA1*606 shall be deemed to be one <i>lot</i> for the purpose of this By-law.	
b)	Markham Road shall be deemed to be the <i>front lot line</i>	
c)	Non-residential uses are only permitted on the <i>first storey</i> of a <i>building</i> located in units that are within 70 metres of Denison Street (north <i>lot line</i> ), and 110 metres of Markham Road (east <i>lot line</i> ), with direct access to and facing a <i>public street</i> and shall have a minimum vertical distance of 4.5 metres between the floor and the ceiling above, non-inclusive of dropped bulkheads and mezzanines or lofts, and shall be considered a single storey.	
d)	Minimum required <i>yard</i> : <ol style="list-style-type: none"> <li>i) <i>Front yard</i> – 1.6 m</li> <li>ii) <i>Exterior side yard</i> – 1.5 m</li> <li>iii) <i>Interior side yard</i> – 5.5 m</li> <li>iv) <i>Rear yard</i> – 1.5 m</li> </ol>	
e)	Minimum required setback from a daylighting triangle – 1.3 m	
f)	Maximum <i>height</i> of a <i>building</i> containing <i>multiple dwellings</i> – 16.5 m	
g)	Minimum setback for an underground <i>parking garage</i> to any <i>lot line</i> – 0.5 m	
h)	Maximum <i>Floor Space Index (FSI)</i> – 2.0	
i)	A maximum of 269 <i>dwelling units</i> shall be permitted on a <i>lot</i> .	

j)	<i>Porches</i> , stairs and/or landings used to access a <i>main building</i> are permitted to encroach into the <i>required front, exterior side, and rear yard</i> provided they are no closer than 0.3 metres from the <i>lot line</i> .
k)	Maximum square metres of all <i>restaurant</i> uses – 250 square metres
l)	Maximum square metres of <i>medical office</i> uses – 250 square metres
m)	<i>Home occupation</i> uses located in the area identified in c) above may occupy up to 50% of the <i>gross floor area</i> of a unit.
n)	Minimum number of <i>parking spaces</i> required: i) 1.25 spaces per <i>dwelling unit</i> ii) 0.15 spaces per <i>dwelling unit</i> for visitor parking iii) For all non-residential uses – 1 space per 30 square metres of <i>net floor area</i> .
o)	For the purpose of this zone, loading spaces are not required.

3. A contribution by the Owner to the City for the purposes of community benefits and public art, in accordance with Section 37 of the Planning Act, as amended, shall be required. Payments shall be collected in accordance with the terms of an agreement to secure for the Section 37 contribution. Nothing in this section shall prevent the issuance of a building permit as set out in Section 8 of the Building Code Act or its successors.

Read a first, second, and third time and passed on August XX, 2020.

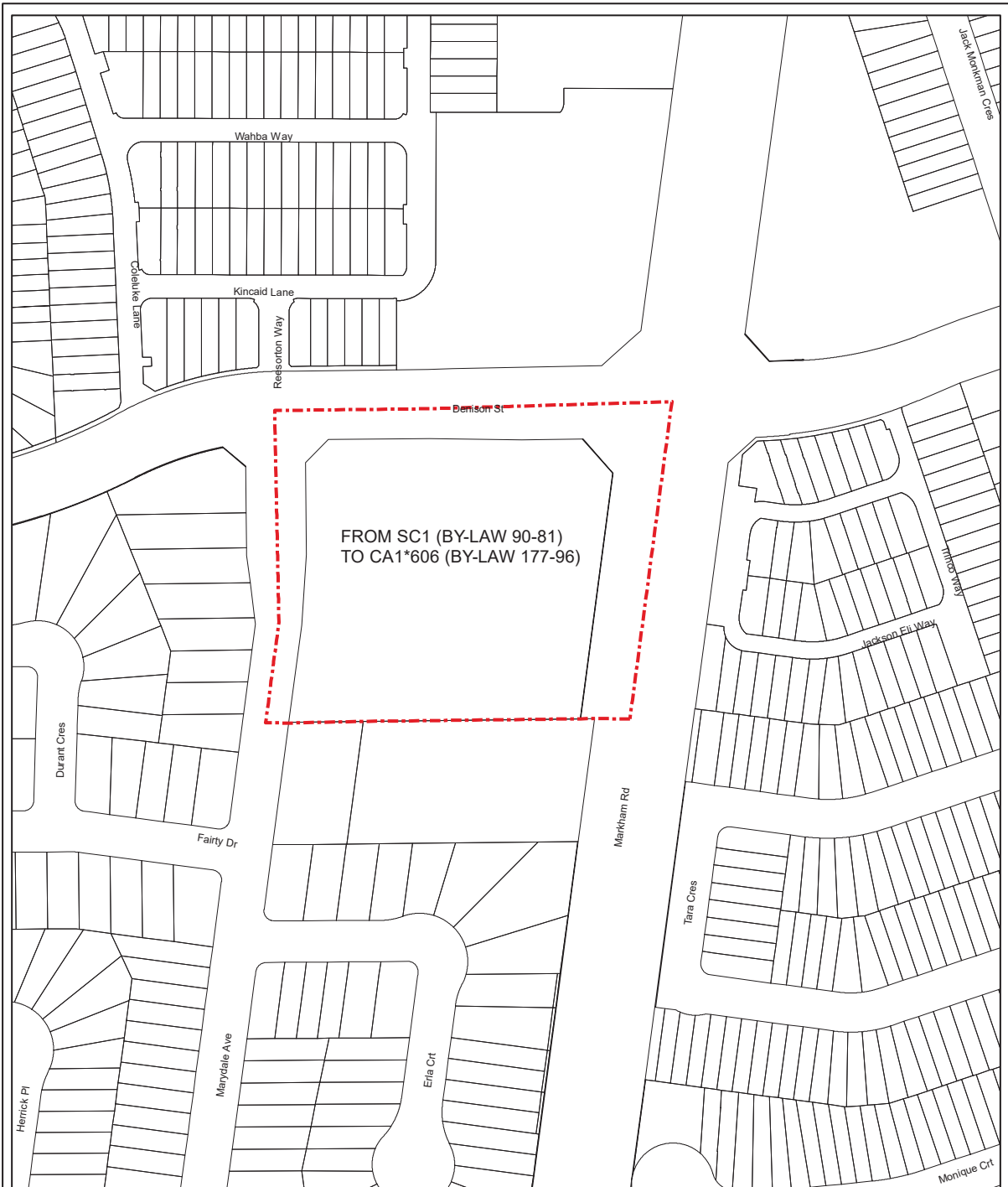
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Kimberley Kitteringham  
City Clerk

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Frank Scarpitti  
Mayor





## BY-LAW SCHEDULE "A" TO BY-LAW AMENDING BY-LAWS 90-81 AND 177-96 DATED

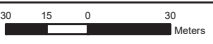


BOUNDARY OF AREA COVERED BY THIS BY-LAW SCHEDULE  
TO BE DELETED FROM 90-81 AND ADDED TO 177-96

CA1 COMMUNITY AMENITY AREA ONE    \*(No) EXCEPTION NUMBER



DEVELOPMENT SERVICES COMMISSION



Drawn By:DD

Checked By:SC

DATE:11/02/18

Q:\Geomatics\New Operation\By-Laws\ZA\ZA17109850\ZA17109850.mxd

THIS IS NOT A PLAN OF SURVEY. Zoning information presented in this Schedule is a representation sourced from Geographic Information Systems. In the event of a discrepancy between the zoning information contained on this Schedule and the text of zoning by-law, the information contained in the text of the zoning by-law of the municipality shall be deemed accurate.

NOTE: This Schedule should be read in conjunction with the signed original By-Law filed with the City of Markham Clerk's Office