

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



**ISSUE DATE:** November 28, 2019

**CASE NO(S):** PL190015

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 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	2072231 Ontario Limited
Appellant:	Burwell Auto Body Ltd.
Appellant:	Drewlo Holdings Inc.
Appellant:	Northview Apartment Reit
Subject:	By-law No. Z-1-192722
Municipality:	City of London
LPAT Case No.:	PL190015
LPAT File No.:	PL190015
LPAT Case Name:	Burwell Auto Body Ltd. v. London (City)

**Heard:** October 29, 2019, in London, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

City of London (“City”)

A. Anderson

Burwell Auto Body Ltd.  
2072231 Ontario Limited

A. Patton

Northview Apartment REIT  
Drewlo Holdings Inc.

A. Baroudi

Middlesex-London Health Unit  
Regional HIV/AIDS Connection  
 (“Applicants”)

K. Mullin

## **DECISION DELIVERED BY BLAIR S. TAYLOR AND ORDER OF THE TRIBUNAL**

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### **INTRODUCTION**

[1] This is a Bill 139 matter concerning appeals against a City Council adopted Zoning By-law Amendment (“ZBA”) for a safe consumption facility (“SCF”) at 446 York Street (“the Subject Lands”).

[2] It would appear that this is the first time the Tribunal or its predecessor the Ontario Municipal Board has ever considered an SCF.

### **THE LEGISLATION**

[3] For this appeal, s. 29 of the *Planning Act* Transition Regulation (Ontario Regulation 174/16) directs that these appeals will be determined in accordance with the *Planning Act* (“PA”) as it read on September 2, 2019.

[4] On September 2, 2019 s. 34(19.0.1) of the PA read:

Basis for Appeal: An appeal under subsection (19) may only be made on the basis that the by-law is inconsistent with a policy statement issued under subsection 3(1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan.

The Tribunal’s jurisdiction on an appealed ZBA is found in s. 34(26) of the PA which effectively provides that the Tribunal shall dismiss an appeal unless the Tribunal determines that part of the ZBA is:

- inconsistent with a provincial policy statement issued under s. 3(1) of the PA; or
- fails to conform with or conflicts with a provincial plan; or
- fails to conform with an applicable official plan (“OP”).

## **DECISION**

[5] Having considered the submissions of counsel, the affidavit evidence of all the land use planners, the decision of City Council and the information and materials that were before it, and s. 2 of the PA with regard to matters of provincial interest, the Tribunal will wholly dismiss the appeals.

## **LOCATIONAL CONTEXT**

[6] The Subject Lands are located on the north side of York Street, about mid-block between Burwell Street and Maitland Street.

[7] The Subject Lands are currently occupied by a small retail store that is well set back from York Street: about 27 metres. The building has a gross floor area of about 353 square metres.

[8] The Subject Lands are about one block east of the downtown core of the City. To the north there is a car dealership and an apartment building, a car dealership to the east, a financial business to the west, and the Men's Mission is located immediately across the street to the south.

[9] In the broader locational context, the Tribunal notes to the north and east of the Subject Lands (and on the north side of King Street) is the Beale Secondary School and on the south side of King Street are the playing grounds of the Beale Secondary School (which occupy one full city block from Maitland Street on the west to William Street and from York Street up to King Street).

[10] About two city blocks north of the Subject Lands is the Catholic Central High School. About two city blocks to the northwest is the Young Men's Christian Association. To the northwest is London Bridge Child Care Services. South of the Subject Lands and cutting across the entirety of the City are the Canadian National railway tracks, south of which there are residential areas and other institutional grounds.

## **PLANNING INSTRUMENTS**

[11] The Subject Lands are designated “Office/Residential Area” in the City’s 1989 Official Plan which is the in-force and of affect official plan.

[12] The City’s new official plan (the “London Plan”) is largely under appeal but would designate the Subject Lands as “Neighbourhoods”. However the land use schedule showing the proposed land use designations (or “place types”) is itself under appeal, which makes the implementation of the London Plan problematic to say the least.

[13] The Subject Lands are zoned “Restricted Service Commercial” (“RSC2/RSC4”) which permits a range of moderately intense commercial and trade service uses such as automobile repair garages, dry cleaning and laundry depots, pharmacies and repair and rental establishments.

## **DEVELOPMENT PROPOSAL**

[14] The Applicants propose to refurbish the existing building on the Subject Lands and use it as an SCF. The remodeling would include a waiting room, an intake room, a room with injection booths, a nurses’ station, an aftercare area, offices and storage.

[15] Exhibit 6A at Tab 5 provides a conceptual layout dated as of November 27, 2018, with about one-third of the space for clinic use and two-thirds for office uses.

[16] To facilitate this development, a ZBA is proposed on a site-specific basis to permit office and medical/dental office uses with the requirement that these facilities include an accessory clinic in addition to the other uses already permitted. The addition of these uses is intended for the provision of an SCF within the existing building.

## **BACKGROUND**

[17] The evidence is that the impugned ZBA arises out of a provincially declared

health crisis regarding opioid-related deaths and related infectious health problems.

[18] The evidence is that this health crisis has disproportionately affected the Middlesex/London area and the ZBA sought by the Applicants would allow the Applicants to establish an SCF at the Subject Lands.

### **WHAT IS AN SCF?**

[19] Simply put, an SCF is a location where drug users may, under the supervision of trained health-care personnel, safely consume illegal drugs which have been obtained elsewhere. An SCF has integrated and wrap-around services which provide linkages and referrals to other services such as addiction counselling, treatment, housing support, and mental health services.

[20] There are three levels of government involvement with regard to SCFs. Firstly the federal government's role is to grant an exemption from the *Controlled Drugs and Substances Act* ("CDSA") to operate an SCF in the appropriate circumstances.

[21] The province's role is to administer a funding program whereby if a series of operational requirements are met, funding may be provided.

[22] The municipal jurisdiction relates to land use planning.

### **THE ISSUES**

[23] The Tribunal's decision of August 1, 2019 set out the following four issues:

1. Is the ZBA consistent with policy 1.1.1 (c) of the Provincial Planning Statement, 2014 ("PPS")?
2. Does the ZBA conform to policies 5.3.1, 5.4.1, 5.4.2 and 6.2.11 of the 1989 Official Plan?

3. Does the ZBA have appropriate regard to policies that are under appeal (OPA 680, London Plan Policies 916, 918-5, 924, 1091, 919, 920, 921, 922, Table 10 and Table 12) and OPA 679?
4. Is the proposed supervised consumption facility “an accessory use” in conformity with policy 5.3.1 of the 1989 Official Plan?

[24] For the purposes of this decision the Tribunal will deal with the issues as follows: firstly policy 1.1.1 (c) of the PPS; secondly will deal with issues 2 and 4 together as being under the 1989 Official Plan which is in force and of effect; and then consider the policies that relate to the London Plan which are largely under appeal.

### **Issue 1**

[25] The PPS states in s. 1.1.1 (c) the following:

Healthy, livable and safe communities are sustained by: ... (c) avoiding development and land use patterns which may cause environmental or public health and safety concerns.

[26] The Appellants contend that the ZBA conflicts with PPS 1.1.1 (c) in that it would introduce a use into the existing and planned land use pattern of a neighbourhood in a manner that may cause public health and safety concerns. Potential impacts they contend include discarded used syringes, loitering in the area by addicted persons who are vulnerable to and in need of dealers of illicit drugs and who also resort to criminal activity to acquire the drugs upon which they are dependant. Further they contend that this will cause increased safety concerns for neighbourhood residents and students and community members from nearby school facilities and existing businesses.

[27] The Applicants and the City firstly contend that the Appellants are raising “concerns” but no evidence; secondly that the concerns relate to the users and not to land use planning; thirdly that a Crime Prevention Through Environmental Design (CPTED) Report had been prepared as part of the ZBA application that surveyed

existing threats and proposed mitigation strategies and no other evidence has been provided to the contrary; and fourthly that SCFs actually provide a benefit to public health by reducing the public health risks associated with drug injection use and provide support services for those who are consuming the substances.

[28] Further the Applicants and the City rely on the visual evidence filed by the City in Exhibit 11 at page 21. This part of the visual evidence deals with improperly discarded “sharps” (i.e. needles) in the City of London from 2016 to 2018 and shows two “hot spots” with the Subject Lands located in between the two “hot spots” if not part of the easterly “hot spot”. Further Exhibit 11 shows evidence of discarded needles on the Subject Lands and in close proximity to the Subject Lands.

[29] The tragic, but undisputed evidence is that people in the City are dying at an alarming rate due to opioid related causes.

[30] The Tribunal finds that there is no inconsistency with regard to policy 1.1.1(c) of the PPS. Rather the Tribunal finds that the proposed SCF will assist in addressing issues of public health and safety concerns. The evidence is that there is an opioid-related drug epidemic in the Province of Ontario and in the City of London, that the Subject Lands are well located in between two “hot spots” for discarded sharps and the Tribunal finds that the provision of an SCF in this location will be a positive step to bettering public health and reducing safety issues to the community at large.

## **Issues 2 and 4**

[31] Does the ZBA conform to s. 5.3.1, 5.4.1, 5.4.2 and 6.2.1.1 of the 1989 Official Plan and Issue 4, is the proposed supervised SCF “an accessory use” in conformity with s. 5.3.1 of the 1989 Official Plan?

[32] Section 5.3 of the 1989 Official Plan deals with the Office/Residential Areas designation. The introductory paragraph states:

Office/Residential designations will be located near the downtown. These mixed-use developments are intended to serve as transition areas between more intensive commercial developments in the Downtown, and nearby residential neighbourhoods or other sensitive land uses. Office uses in apartment buildings are to be located on the lower floor levels to provide a continuity of pedestrian-oriented land uses at street level.

[33] Section 5.3.1 is entitled “Permitted Uses” and it states:

The main permitted uses in the Office/Residential designations shall be **offices** and residential uses within mixed-use buildings or complexes; apartments; small-scale stand-alone offices and office conversions. Secondary uses which may be permitted as an accessory use include personal services; financial institutions; convenience stores; daycare centres; pharmacies; laboratories; **clinics**; studios; and emergency care establishments.... (emphasis added)

[34] With regard to s. 5.3.1 of the 1989 Official Plan, the Appellants take the position that clinics are permitted only as an accessory use and that the main permitted uses in the Office/Residential designations are that of offices and residential uses. The Appellants contend that in these circumstances the SCF is the main use, not the accessory use, and that the offices and/or medical/dental offices proposed to be integrated as “wrap around” facilities to support the users of the SCF are the accessory uses, and that this is not in conformity with the Official Plan.

[35] The Appellants submit that while there is no definition of accessory use in the Official Plan, there is one in the comprehensive Zoning By-law for Accessory or Ancillary which means:

...a use, building or structure customarily incidental, subordinate and exclusively devoted to the main use and carried on with such main use, building or structure on the same lot.

[36] The Appellants submit that the SCF will operate in the following fashion:

- Users of the facility bring their own illicit drugs to the facility;
- Illicit drugs will be consumed on the premises;

- There is no obligation for users of the facility to stay on the premises for any period of time after they consume; and
- There is no requirement that the user engage in any addiction or health services that may be available at the site and therefore the Appellants submit that this has the potential to create land use conflicts.

[37] The Applicants and the City contest this characterization of the SCF. They submit that the SCF has to be operated in accordance with federal and provincial directives. The provincial directives refer to the services as “Consumption and Treatment Services” which are intended to provide “...integrated, wrap-around services that connect clients who use drugs to primary care, treatment, and other health and social services.”

[38] The City’s land use planner opined that the primary component of the SCF is the wrap-around services, and that the consumption is but one aspect of such a facility and that the support services are the primary function.

[39] The submissions of the Applicants and the City are corroborated by the fact that the office component for the wrap-around services will comprise about two-thirds of the gross floor area.

[40] Counsel for the Applicants and the City also directed the Tribunal to the Supreme Court of Canada decision in *PHS Community Services Society [2011] SCC 44* (“*PHS*”). In that case, then Chief Justice McLachlin wrote the unanimous decision of the Court concerning a supervised injection facility in Vancouver, British Columbia.

[41] There the supervised injection facility (“Insite”) had obtained an exemption from the prohibition on possession and trafficking of controlled substances under the CDSA, and the supervised injection site was given approval for a conditional exemption as a pilot research project. It opened its doors on September 21, 2003. That supervised injection site had 12 injection bays; users were provided with clean injection equipment;

the users were monitored by staff during the injection; and nurses and paramedical staff provided treatment in the event of an overdose.

[42] At paragraph 17 of the Supreme Court of Canada decision, a lengthy passage from the trial judge's decision is cited on the operational process at Insite. Below is but a part of that paragraph:

Staff and support workers interact with users at Insite on a one-to-one basis. Users are provided with health care information, counselling and referrals to Health Authority and other service providers. Records indicate that in 2005, 2006 and 2007, staff made 2,270, 1,828, and 2,269 referrals, respectively, to community clinic, hospital emergency, outpatient medical mental health, emergency shelter and community services; and to addiction counselling, housing, withdrawal, methadone treatment, drug recovery, and miscellaneous other services.

[43] In paragraph 18 then Chief Justice McLachlin stated:

This passage describes a strictly regulated health facility.

[44] The Tribunal prefers the evidence of the land use planners for the Applicants, and the City. The Tribunal does not find that the clinic is an "accessory use" but rather one aspect of a whole use, which the Supreme Court of Canada has described as being a strictly regulated health facility. While the nomenclature attached to an SCF may suggest that the consumption is the "main use", the Tribunal finds that the consumption is simply but a part of an overall health facility where once a user has entered the facility, it provides the venue for a number of the integrated wrap-around services which include referrals for addiction, medical mental counselling, housing, drug recovery and other services.

[45] The Tribunal finds that the clinic use is but the entry point to a highly regulated public health facility that provides a multi-faceted approach to dealing with known issues of the users.

[46] Turning to the other 1989 Official Plan Policies raised in Issue 2, they relate firstly to whether the Applicants should have been required by the City to submit a planning

impact analysis (s. 5.4.1) and secondly to s. 6.2.11 with regard to methadone policies.

[47] Both issues can be readily dealt with.

[48] Section 5.4.1 states that:

... planning impact analysis shall be used to evaluate applications for an official plan amendment and/or zone change, to determine the appropriateness of a proposed change in land use, and to identify ways of reducing any adverse impacts on surrounding land uses. Planning impact analysis is intended to document the majority of criteria reviewed by municipal staff through the application review process to assess any application for change. Depending on the situation other criteria may also be considered.

[49] Section 5.4.2 states that:

... planning impact analysis will be undertaken by municipal staff and will provide for participation by the public in accordance with the provisions for an official plan amendments and/or zone change applications as specified in section 19.12 of this plan.

[50] The Appellants submit that the City should have required the preparation of a Planning Impact Analysis. In this regard they rely on the opinion of their land use planner from Exhibit 4B, Tab 4, Paragraph 51 who opined:

The ZBA does not meet the criteria of a planning impact analysis as required by section 5.41 and 5.42 of the official plan. The proposed use will be incompatible with surrounding land uses. There will be adverse impacts on present and future land uses in the area. There is also potential for adverse impacts of user traffic on pedestrian safety, and on the surrounding properties. It is reasonable to expect there will be a destabilization of the surrounding neighbourhood.

[51] Counsel for the City and the Applicants contend that this bald opinion is lacking any foundation in terms of analysis or basis for that opinion. They point out that the Appellants have not provided any evidence with regard to existing or projected crime, no social analysis, no description of the alleged incompatibilities, and there has been no dispute with regard to the visual evidence with regard to the mapping of the "hot spots". Moreover the City, through its land use planner, opined that a Planning Impact Analysis

is only required if there is an application involving a request for an official plan amendment or a zone change. Since the Applicants sought neither, a Planning Impact Analysis was not requested.

[52] Further counsel for the City submits even if the Planning Impact Analysis had been required, it would have met the criteria. This was evidenced by the City's land use planner in her affidavit found at Exhibit 6B, Tab 9 starting at paragraph 43 where she examines each and every one of the criteria and provides her professional land use planning opinion in terms of conformity to the 1989 Official Plan.

[53] The Tribunal prefers the evidence of the City's and the Applicants' land use planners. The Tribunal does not agree that a Planning Impact Analysis was required as there was no official plan designation change sought, nor was a zoning change sought: but rather simply a modest refinement to the existing zoning and that the overall zone would remain.

[54] In the event that the Tribunal was wrong in this regard, the Tribunal finds that had the Planning Impact Analysis been required, it was the evidence of the City's land use planner that it would have conformed to s. 5.4.2 of the Official Plan.

[55] Turning to the final policy provision relating to the 1989 Official Plan, it concerns methadone clinics. The introductory paragraph to s. 6.2.11 states:

Methadone maintenance treatment represents an important facet of health care delivery within the City of London. In general, methadone clinics are those clinics and medical offices that are used for the prescription and/or dispensing of methadone as more than an ancillary activity. Methadone pharmacies are those pharmacies that dispense methadone as more than an ancillary activity. The zoning by-law will define these uses more precisely.

[56] The Appellants contend that the policies for methadone clinics and pharmacies provide six specific land use designations where such uses are permitted and that the Subject Lands are not located in any of them.

[57] The affidavit of the Appellants' land use planner in paragraph 81 states:

... because of concern for potential impacts, none of these designations has residential use as the primary permitted use. Therefore methadone clinics are not permitted in the office/residential designation. Adequate separation distances are set out in the policies.

[58] Counsel for the City and the Applicants argue that the methadone policies simply do not apply.

[59] Counsel for the Applicants submits that unlike an SCF, methadone clinics do not require federal and provincial approvals and are not therefore subject to the same kind of rigorous approval process.

[60] Counsel for the City submits that methadone clinics are simply a different use, by which users have a choice to enter into recovery from a substance addiction and are able to travel greater distances than those who seek to use an SCF.

[61] The Tribunal finds that the 1989 Official Plan policies with regard to methadone clinics simply do not apply. They relate to a different use; they relate to different circumstances, and while the Official Plan policies are specific with regard to designations within which they may locate, and also provide for distance separation between such methadone clinics, they are simply not applicable in these circumstances.

### **Issue 3**

[62] The emerging policy framework in London falls out of two separate processes. Firstly there is the London Plan (i.e. a Council adopted official plan approved by the Ministry of Municipal Affairs and Housing with modifications) but which is under appeal for a number of policies including 916, 918-5, 1091, 919, 920, 921, 922, 924, Table 10 and Table 12 on which the Appellants rely.

[63] Secondly, in May of 2018 the City adopted Official Plan Amendment No. 679 ("OPA 679") which amended the London Plan to establish that SCFs are permitted in all

place types and established locational criteria to consider when evaluating a zoning by-law amendment which was required.

[64] OPA 679 does not impose minimum separation distances for SCFs and OPA 679 was not appealed, because the entire place type (land use designation) map in the London Plan is under appeal and there technically is no, in effect, place type for the Subject Lands.

[65] In May 2018 as well, the City also adopted Official Plan Amendment No. 680 (“OPA 680”) which amended the 1989 Official Plan to permit SCFs in all designations subject to a zoning by-law amendment. OPA 680 contains the same locational criteria for evaluating a zoning by-law amendment as does OPA 679 and there are no imposed minimum separation distances. However OPA 680 is under appeal and is not in force or effect.

[66] The Appellants submit that notwithstanding the fact that most if not all of the relevant policies of the London Plan are under appeal, the Tribunal should have regard to those policies as the emerging policy direction and to the locational criteria.

[67] The City and the Applicants submit that based on the Clergy Principle (*Clergy Properties Ltd. v. Mississauga (City)*, [1996] O.M.B.D. 1840), the ZBA should be considered in light of the official plan policies that were in force and effect when the zoning by-law amendment application was made.

[68] In the alternative the Applicants and the City submit that even if the Tribunal were to place significant reliance on the emerging policy documents, that emerging policy would direct the Tribunal to the policy position that SCFs were permitted across all place types; that there were no minimum separation distances required; and that all the locational criteria had been considered by the City’s land use planner, and it meets all the criteria for locating SCFs as identified in OPA 679.

[69] Again the Tribunal prefers the evidence of the City’s land use planner and the

Applicants' land use planner.

[70] For the Tribunal, it is problematic to attempt to glean anything from the emerging policies other than the following: firstly there is a significant public health crisis; secondly to address that public health crisis it was the intent of City Council to permit SCFs in all place types; thirdly that there were no minimum separation distances provided; and fourthly SCFs were to be implemented through a zoning by-law amendment process which include the consideration of locational criteria.

### **SUMMARY AND CONCLUSION**

[71] Section 34(19.0.1) of the PA directs that an appeal under s. 19 may only be made on the basis that the zoning by-law is inconsistent with a provincial policy statement, fails to conform or conflict with a provincial plan or fails to conform with an applicable official plan, and in such cases the Tribunal shall dismiss the appeal unless the Tribunal determines that part of a ZBA is inconsistent with the PPS, fails to conform or conflicts with a provincial plan, or fails to conform to an applicable official plan.

[72] The Provincial Interests as set out in s. 2 of the PA include the protection of public health and safety (o) and the appropriate location of growth and development (p).

[73] In these circumstances the Tribunal finds that the impugned ZBA is consistent with the PPS, and in particular with policy 1.1.1(c) concerning public health and safety. The Tribunal finds that the proposed ZBA is consistent with the PPS in regard to section 1.1.1(c) in as much as it avoids development and land use patterns which may cause environmental or public health and safety concerns. The Tribunal finds that the ZBA enabling the SCF at the Subject Lands will advance issues of public health and safety and is intended to save lives.

[74] With regard to the applicable official plan, the Tribunal finds that it is the 1989 Official Plan that is in force and of effect. The Tribunal finds that the Subject Lands are designated Office/Residential Area in the 1989 Official Plan and zoned Restricted

Service Commercial and the impugned ZBA proposes to add offices with accessory clinics and medical/dental offices with accessory clinics to the existing Restricted Service Commercial zone and specifically noted as being for the purpose of an SCF.

[75] In this instance the Tribunal is faced with a proposed “new” land use: one that the Tribunal believes has never before been considered by the Tribunal. The ZBA appeal arises in the context of a 1989 official plan that is in force and of effect.

[76] The Tribunal notes that the jurisprudence of the Tribunal is that official plans are not statutes and they are not to be considered as such and that when considering whether to approve a zoning by-law to make sure it conforms with an official plan, the Tribunal should give the official plan a broad liberal interpretation with a view to furthering its policy objectives. (*Bele Himmell Investments Ltd. v. Mississauga (City), et al* 1982 CarswellOnt 1946). This seems a very apt approach given that the Tribunal is attempting to interpret a 1989 official plan in light of a proposed use that did not exist in 1989.

[77] With regard to the in force and of effect 1989 Official Plan, the Tribunal finds that it is not appropriate to characterize the main use as simply a safe consumption use, but rather that the appropriate characterization of an SCF is as the Supreme Court of Canada found in *PHS* as being a strictly regulated health facility. This strictly regulated health facility is designed to attract users to a safe consumption site where their drug intake can be supervised and monitored, and then enabling the integrated and wrap-around services to foster appropriate treatment and referrals on a voluntary basis.

[78] With regard to the alleged lack of conformity with the London Plan, the Tribunal firstly notes that the relevant provisions of the London Plan are problematic at best for consideration due to all the appeals. Having said that, it would appear that the London Plan envisions SCFs as being permissible in all place types across the City, that they are not subject to any minimum distance restrictions, and that there are locational criteria to be considered. In this case if those locational criteria were applied, it was the evidence of the City’s land use planner that the locational criteria would have been met.

[79] In these circumstances the Tribunal finds that the impugned ZBA is consistent with the PPS and conforms to the applicable official plan.

**ORDER**

[80] Accordingly, the appeals are wholly dismissed.

[81] This is the order of the Tribunal.

*“Blair S. Taylor”*

BLAIR S. TAYLOR  
MEMBER

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

**Local Planning Appeal Tribunal**

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