

**OLT-22-003603**  
**OLT-23-000494**

**ONTARIO LAND TRIBUNAL**

Appeals by Solmar (Niagara 2) Inc. of Official Plan Amendment, Zoning  
By-law Amendment, Plan of Subdivision and Heritage Permit Applications

200 John Street and 588 Charlotte Street, Town of Niagara-on-the-Lake

OLT Lead Case Nos.: OLT-22-003603 and OLT-23-000494

**Written Submissions**  
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## BEST HERITAGE CONSERVATION TOOL: PLANNING ACT APPROVAL

1. The Town will protect the Rand Estate cultural heritage landscape (“**CHL**”) under the *Planning Act* or the *Ontario Heritage Act* (“**OHA**”). If the *Planning Act* process does not result in an approval, the Town will begin OHA Property Standards By-law enforcement. A *Planning Act* approval is the best path forward, however. Conserving heritage as part of a *Planning Act* approval is preferred over property standards orders and appeals. Integrating the Rand Estate CHL into a future community will ensure that its stories are told to future generations.

## CONSERVE HERITAGE AND OPTIMIZE INTENSIFICATION<sup>1</sup>

2. 200 John Street East and 588 Charlotte (“**Property**”) can be designed to conserve heritage and optimize intensification. The “buildings, structures, spaces, views, archaeological site and natural elements”<sup>2</sup> that Solmar seeks to “commemorate” can all be “[identified, protected, managed and used] ... in a manner that ensures their cultural heritage value or interest (“**CHVI**”) is retained”<sup>3</sup> and “maximizes the benefits of these resources.”<sup>4</sup> A “thoughtful, balanced, holistic, and landscape-driven plan”,<sup>5</sup> as demonstrated by the Town’s Demonstration Plan<sup>6</sup> and SORE’s Concept Plan,<sup>7</sup> will optimize intensification.

## SOLMAR’S PATH TO ITS 196 UNIT ASK: ELIMINATE HERITAGE AND COMMEMORATE

3. Two Sisters Resorts Corp. (“**Two Sisters**”) purchased 144 and 176 John Street East in February 2017.<sup>8</sup> It applied for *Planning Act* approvals for its hotel/conference centre proposal that same year.<sup>9</sup> In January and April 2018, Solmar (Niagara 2) Inc. (“**Solmar**”) purchased the Property.<sup>10</sup> It immediately applied to demolish the Calvin Rand Summer House, the Carriage House, the Main Residence and the Sheds.<sup>11</sup>
4. In August 2018, the Town engaged the OHA process to designate by serving Notices of Intention to Designate (“**NOIDs**”).<sup>12</sup> Solmar filed Objections to the NOIDs with the Conservation Review Board (“**CRB**”).<sup>13</sup> In

November 2018, it began its site preparation for development.<sup>14</sup> Solmar clear cut the Property south of the Swimming Pool Garden.<sup>15</sup>

5. Solmar also opposed the NOIDs in the courts<sup>16</sup> while, at the same time, it pursued its July 2020 *Planning Act* applications.<sup>17</sup> The applications were deemed complete on April 16, 2021.<sup>18</sup> Deemed completion does not mean that the applications were satisfactory to the Town.<sup>19</sup>
6. Solmar's applications triggered the Provincial Policy Statement ("**PPS**") policy embrace to conserve the CHL. The July 2020 plan of subdivision showed no heritage building or CHL conservation. It yielded 191 units.<sup>20</sup> Ms. Wallace's Heritage Impact Assessment<sup>21</sup> referred to the NOIDs and the legal challenges. Her approach was to assess what heritage attributes "were in the way" of the subdivision design and mitigate. She shared her approach with the Town at the July 14, 2021 Special Council Meeting:

"When I did my HIA I was given the subdivision plan and I had to work with what I got and so in that case there were certain things which the Town considers to be heritage attributes that were in the way. So, my job then was to see if we could mitigate some of those issues, and so the issue was could they be moved, and I really wasn't given the ability to look at moving the subdivision around or redesigning the subdivision and I am not a subdivision designer, by the way, I am a heritage person, so my issue was attempting to mitigate as best I could the issue with what I considered to be significant heritage attributes. So that is the process that I took. I would think that it is still possible through discussions with the town to think about redesigning, but it's not up to me to discuss that. So that was my approach at that time."<sup>22</sup> [emphasis added]

7. In the hearing, Ms. Wallace confirmed her approach. Solmar gave her the subdivision design. Her job was to "mitigate" cultural heritage.<sup>23</sup>
8. Of all Solmar's experts, Ms. Wallace was the only heritage professional with the potential to inform subdivision design. Mr. Shoalts, Ms. Rivard and Mr. McCormick all completed their assessments or were retained after the July 2020 submission.<sup>24</sup> Of course, as she told Council, Ms. Wallace did not see it as her role to inform subdivision design through a heritage lens.

9. Mr. Lowes acknowledged Ms. Wallace’s approach. He unsuccessfully tried to defend it. He said that had Ms. Wallace told Solmar to retain a building in situ, it would have.<sup>25</sup> The obvious problem with this response is that Ms. Wallace would never have told Solmar to retain a building in situ. She did not see her role as discussing design. What Mr. Lowes describes is how the subdivision design process with NOIDs issued should unfold. Factually, it did not unfold this way given Ms. Wallace’s stated approach.
10. By November 2021, Solmar had exhausted its legal challenges opposing designation. The designation by-laws for the Property were passed on February 28, 2022.<sup>26</sup> In withdrawing its objection before the CRB, the administrative tribunal tasked with resolving disputes about the identification of heritage attributes, Solmar said:

As a direct result of the disclosure required in the CRB process, Solmar (Niagara 2) Inc. has finally been able to gain a much greater understanding of the Town’s position on heritage attributes as it affects the subdivision. Based on this knowledge, our client will be amending its proposed subdivision plan, in particular as it affects heritage features. This will include recognizing, protecting, re-creating and rebuilding heritage features, including some that are (i) beyond the scope of issues identified in the CRB process; and/or (ii) the subject of disagreement between various heritage experts.<sup>27</sup> [emphasis added]

11. The Town’s position was and continues to be the CRB Map.<sup>28</sup>
12. Solmar then submitted its March 2022 resubmission.<sup>29</sup> The March 2022 plan<sup>30</sup> showed no building or landscape conservation as per the CRB Map except for creating Block 75 – Whistle Stop and a relocated Axial Walkway. The resubmission did not include a Heritage Impact Assessment. Neither the Addendum Planning Assessment Report<sup>31</sup> nor the updated Urban Design Brief<sup>32</sup> referred to the designation by-laws. The “recognizing, protecting, re-creating and re-building heritage features” promised by Solmar consisted of commemoration efforts as outlined in the Master Landscape and Heritage Commemoration Plan (“**Commemoration Plan**”).<sup>33</sup> The plan yielded 172 units. Remarkably, no report discussed revisiting the subdivision design given the designation by-laws or the CHL.

13. Solmar seeks approval of the February 2024 updated plan.<sup>34</sup> It adds Block 105 to retain part of the Circular Mound Garden (Memorial Garden) in situ. The plan yields 196 units.
14. Somar's path to its 196 unit ask was, from the start, to eliminate heritage and commemorate only. Mr. Lowes' insistence that numerous revisions to the plan design on the advice of Stantec took place after the designation by-laws were passed<sup>35</sup> is simply not true. Revisions to the commemoration approach were made. Modest conservation outcomes were added – Whistle Stop and Circular Mound Garden (Memorial Garden). But at no time did Solmar fundamentally revisit its design approach to consider having the PPS CHL or heritage outcome in the designation by-laws inform design.
15. To complete its strategy, Solmar applied for heritage permits under the OHA in October 2022<sup>36</sup> to implement the Commemoration Plan. Again, none of the reports submitted offered a conservation strategy. All started with the plan and offered mitigation solutions for heritage attributes that were "in the way". As stated emphatically by Ms. Horne, commemoration is not a conservation strategy.<sup>37</sup>

### **HERITAGE OUTCOME MUST DIRECT FORM AND SCALE OF DEVELOPMENT<sup>38</sup>**

16. This is not a case where the appropriate conservation approach negates intensification. The outcome of this case turns first on the issue of heritage conservation, which then affects the second issue – suitable form and scale of development. It is not the other way around as contended by Solmar. Solmar's approach results in "a patchwork where much of the value is lost, and the dominant landscape character of the Estate is left unrecognizable".<sup>39</sup> Solmar's path to its 196 unit ask should be rejected.

## KEY POLICIES

### Provincial Policy Statement

17. The PPS contains the province’s land use planning vision. This vision includes efficient development patterns that optimize the use of land, resources and infrastructure.<sup>40</sup> The PPS also directs that long-term economic prosperity should be supported by a market based/varied housing supply, long-term resource/infrastructure availability and “encouraging a sense of place, by promoting well-designed built form and cultural planning, and by conserving features that help define character, including built heritage resources and cultural heritage landscapes....”.<sup>41</sup>
18. Specific PPS cultural heritage policies require that CHLs be conserved and that protected heritage properties adjacent to development be evaluated and their heritage attributes conserved.<sup>42</sup>

### Growth Plan

19. The Growth Plan (“GP”) also requires the protection and enhancement of cultural heritage resources. It states that:

The *GGH* also contains important *cultural heritage resources* that contribute to a sense of identity, support a vibrant tourism industry, and attract investment based on cultural amenities. Accommodating growth can put pressure on these resources through *development* and *site alteration*. It is necessary to plan in a way that protects and maximizes the benefits of these resources that make our communities unique and attractive places to live. [emphasis added]<sup>43</sup>

20. Indeed, the conservation and promotion of these resources is one of the GP’s guiding principles.<sup>44</sup> Like the PPS, the GP sees heritage conservation as a tool to “foster a sense of place and benefit communities.”<sup>45</sup> Even the growth forecasts refer to development within the delineated built-up area being contextually appropriate.<sup>46</sup>

### Niagara Region Official Plan 2014

21. Provincial policy is carried forward in regional policies, objectives and directions. The Niagara Region Official Plan (“ROP”) promotes “the preservation and enhancement of cultural heritage resources.”<sup>47</sup> It supports



identifying and conserving significant built heritage resources and significant cultural heritage landscapes<sup>48</sup> while considering the unique context of every site.<sup>49</sup> The ROP requires the conservation of significant built heritage resources and cultural heritage landscapes through mechanisms such as the OHA and *Planning Act*.<sup>50</sup> Protection and conservation of these resources is encouraged through local polices, OHA designations<sup>51</sup> and the establishment and identification of CHLs and significant CHLs.<sup>52</sup> Recommendations for design alternatives and mitigation of negative impacts on identified significant heritage resources are required through heritage impact assessments.<sup>53</sup>

22. Growth management objectives in the ROP direct growth to the built-up areas through intensification and the efficient use of existing municipal sewage and water services.<sup>54</sup> Intensification includes all forms of development within the built-up area and is generally encouraged.<sup>55</sup>

#### **Town of Niagara-on-the-Lake Official Plan 2017**

23. The Town of Niagara-on-the-Lake Official Plan (“**TOP**”) localizes similar policies, objectives, and directions. Cultural heritage resources are important to the Town’s identity.<sup>56</sup> Intensification is encouraged but must not “negatively impact designated heritage areas, heritage resources and estate lots.”<sup>57</sup> Estate Lot policies, unique to the Town and reflecting its unique history,<sup>58</sup> require attention to streetscape, ambience, character, setting and drainage impacts.<sup>59</sup>
24. Specific to heritage conservation, the Town’s goals are to prevent the demolition, destruction or inappropriate alteration or use of heritage resources<sup>60</sup>, to develop and encourage creative and viable uses for heritage resources<sup>61</sup> and to restrict building design and alterations that are not compatible with or detract from the character of a heritage resource.<sup>62</sup> Buildings that contribute towards the heritage value of the Town are to be protected, preserved and encouraged to be restored where feasible.<sup>63</sup>

25. The TOP also requires the preservation and protection of existing trees from unnecessary removal and applies additional policies where tree removal is unavoidable in an urban area [emphasis added].<sup>64</sup>
26. TOP density is measured based on net land area.<sup>65</sup> TOP policies establish density caps for low density development at 14 units per ha and medium density development at 30 units per ha.<sup>66</sup> It identifies minimum and maximum densities throughout the Built-up Area.<sup>67</sup> The density caps are flexible<sup>68</sup> and influenced by the capacity to provide municipal services, site topography and other applicable local and provincial policy.<sup>69</sup> Low density and medium density housing types are specified.<sup>70</sup>

## GUIDANCE DOCUMENTS

27. Guidance documents or guidelines inform Tribunal decision-making. The Tribunal looks to guidelines as a tool, not a milestone.<sup>71</sup> They are often instructive and helpful.<sup>72</sup> In the heritage field, heritage professionals are informed by guidelines as part of their due diligence in interpreting legislation and policy.<sup>73</sup>
28. The Town adopted best practice documents to inform decisions on heritage matters and conservation:
1. "The Standards and Guidelines for the Conservation of Historic Places in Canada" associated with Canada's Historic Places ("**S+Gs**");
  2. The "Ontario Heritage Toolkit" series as prepared by the Ministry of Heritage, Sport, Tourism and Culture Industries, and information sheets which provide a basis for required information in a Heritage Impact Assessment (HIA) and Conservation Plan, as well as the "Criteria for Evaluating Potential for Built Heritage Resources and Cultural Heritage Landscapes;" ("**Toolkit**") and
  3. "Well-Preserved: The Ontario Heritage Foundation's Manual of Principles and Practice for Architectural Conservation".<sup>74</sup>

## **TOWN OP DENSITY VISION**

29. Mr. Lowes says that the TOP permits Solmar’s density ask of 24 - 30 units/ha. This equates to 158-196 units. He says that this is in the range of other infill developments in Old Town and does not exceed the maximum specified for the Built-up Area. He concludes that the proposed development is an appropriate level of intensification.<sup>75</sup>
30. Mr. Lowes deals with Section 9.4 (4) low and medium density caps by invoking the caveat that these caps are preceded by the word “generally”.<sup>76</sup> He points to other developments with similar densities that contain townhouses (with no supporting context<sup>77</sup> until reply, hardly a detailed site area analysis as required by the policy). Mr. Lowes’ interpretation results in a medium density outcome for a site that is, for the most part, designated low density. Mr. Lowes’ interpretation is not reasonable and should be rejected.
31. Mr. Palmer says that the TOP permits a density range of between 14 and 18 units/ha. This results in 91 – 118 units.<sup>78</sup> He agrees with Mr. Lowes that the word “generally” does provide some flexibility. However, in his opinion, that flexibility cannot be used to justify development in a low density designation that is almost twice the permitted maximum resulting in a fully medium density residential neighbourhood.<sup>79</sup> The Tribunal should prefer the evidence of Mr. Palmer and Ms. Anderson on density.

## **THE RAND ESTATE CULTURAL HERITAGE LANDSCAPE AND THE DUNINGTON-GRUBBS**

32. Between 1910 – 1950, the Rand family created a functioning country estate with formal gardens, walkways, leisure areas, mature trees and plantings, hobby-farm uses (orchards, livestock, equestrian) together with supporting buildings and structures. They hired landscape architects, staff and gardeners. They prepared landscape plans for the formal gardens. The planned estate connects landscapes and buildings. The design

vision was largely realized by the mid 1930's under the ownership of George Rand II.<sup>80</sup> This interconnected landscape and built elements is the CHL the Town seeks to protect as directed by the PPS.

33. The components of the PPS protected CHL are<sup>81</sup>:

200 John Street East

- Tea House<sup>82</sup>
- Swimming Pool<sup>83</sup>
- Bath Pavilion<sup>84</sup>
- Whistle Stop<sup>85</sup>
- Wall and pillars at rear of property and John Street East<sup>86</sup>
- Carriage House<sup>87</sup>
- Calvin Rand Summer House<sup>88</sup>
- Designed Landscape:<sup>89</sup>
  - Panhandle and associated trees and plantings
  - Swimming Pool Complex earth berms, paving and paved steps
  - Swimming Pool Complex Garden (hedges, trees)
  - Oriental Cedar hedge
  - Rose of Sharon Hedge
  - Peony Garden
  - Pergola remnants
  - Axial Walkway and view from the Whistle Stop to the Memorial Garden
  - Circular Mound Garden (Memorial Garden) and associated garden and trees
  - Orchard Remnants
  - Bath Pavilion trees
  - Whistle Stop Surrounding Trees
  - Austrian Pine trees

588 Charlotte Street

- Stone wall located along the rear of the property<sup>90</sup>
- Red brick pillars and stone wall located at the entrance on Charlotte Street<sup>91</sup>
- Main Dwelling (Barn and Stables)<sup>92</sup>
- Shed 1<sup>93</sup>
- Shed 2<sup>94</sup>
- Outbuilding<sup>95</sup>
- Oak and Horsechestnut trees
- Chinese Arborvitae Hedge

34. Despite Solmar's closing submissions, all experts agree that the Designed Landscape is a CHL under the PPS whether or not it was designed by the Dunington-Grubbs.<sup>96</sup> Mr. McCormick says this in his witness statement, "While we do not dispute that these elements have merit as cultural heritage landscape elements, we do not agree that they are surviving elements of the Dunington-Grubb landscape."<sup>97</sup> Ms. Rivard said in cross-

examination that “the natural elements that are valued together for their inter-relationship” form “part of that cultural heritage landscape” whether or not that natural element was designed by the Dunington-Grubbs.<sup>98</sup>

35. As explained by Dr. Letourneau, CHLs under the PPS are not limited to OHA protected heritage properties.<sup>99</sup> The PPS CHL definition clearly states that CHLs do not need to be designated under the OHA (in fact, all experts noted that CHLs are not even referenced in the OHA).<sup>100</sup> CHLs can be areas that “have been included on federal and/or international registers, and/or protected through official plan, zoning by-law, or other land use planning mechanisms” [Emphasis added].<sup>101</sup> The Estate Lots Study is the other land use planning mechanism in this case.<sup>102</sup> Ms. Wallace agreed that a study can be a land use planning mechanism under this definition.<sup>103</sup>
36. “Significance” is not dependant on an OHA designation. This is important because the “designed landscape” can be protected under the PPS independently of a designation by-law. Dr. Letourneau says that the CHL meets the PPS definition of “significant”.<sup>104</sup> The definition says that the resources have to be “determined” to have CHVI. The process for determining CHVI is applying the 09/06 Regulation.<sup>105</sup> The Estate Lots Study did this.<sup>106</sup> Dr. Letourneau’s evidence is uncontradicted on this point.
37. The Town and SORE say, that in addition to being components of the protected CHL under the PPS, some of the “structures, spaces, views and natural elements”<sup>107</sup> of the CHL are also “surviving elements of the Dunington-Grubb landscape”, a heritage attribute in the Designation By-law.<sup>108</sup> The Town and SORE say that the CHL Designed Landscape was in fact designed by Howard and Lorrie Dunington-Grubb.<sup>109</sup>
38. Howard and Lorrie Dunington-Grubb were a husband and wife team. Lorrie Dunington-Grubb had particular expertise in horticulture and Howard had particular expertise in landscape architectural design. Howard and Lorrie Dunington-Grubb were leaders in the field of landscape architecture in Canada as founding members of the Canadian Association of Landscape Architects in the 1930s. They founded Sheridan Nurseries, still in

existence today, to grow ornamental plants for their design work, as there were no large nurseries at the time.<sup>110</sup>

39. The importance of trees to the CHL Designed Landscape cannot be underestimated. Howard Dunington-Grubb's own words reveal that removing or retaining trees was part of their design exercise:

The majority of people are greatly influenced by the presence of existing trees on a property. Undoubtedly well-grown and well-placed trees are an inestimable asset. They should provide background and setting for the house, protection from the wind, and may furnish the entire estate with an atmosphere of mystery and romance. Too many, or badly placed trees, however, maybe become more a liability than an asset. A house placed in the middle of a dense forest is neither healthy nor pleasant to live in, and gardening under such conditions is almost impossible.<sup>111</sup>

40. Mr. Stewart's perspective is helpful. If we conserve the CHL properly, it doesn't matter how old trees are or if they have died and been replaced by new trees or pre or post dated a design.<sup>112</sup> We are conserving the visual role that the trees play not the individual trees.<sup>113</sup> Otherwise, "we are effectively putting a clock on the lifespan of a cultural heritage landscape."<sup>114</sup> This is not a sustainable conservation approach for landscapes.<sup>115</sup>
41. Mr. Stewart reviewed the photographs showing how the treed context that creates backdrops that work together across the Rand Estate. At the Sunken Garden (176 John Street East), a canopy of trees form a setting and backdrop for the Garden.<sup>116</sup> The hedges enclose the trees creating an intentional symmetry.<sup>117</sup> When comparing photos from 1920 and 1971, Mr. Stewart reminded us that the Sunken Garden trees planted by the Dunington-Grubs in 1920 are now 100 years old.<sup>118</sup> This treed context continues in the Panhandle on the Property and serves as a backdrop for the Sunken Garden and part of the setting of the main house at 176 John Street East.<sup>119</sup> Trees historically and presently line the John Street frontage creating an arboretum-like setting<sup>120</sup> as described in the Estate Lots Study.<sup>121</sup> Imposing property boundaries to this landscape is artificial.<sup>122</sup>
42. The relationship between the treed backdrop and parts of the Rand Estate continues when looking at the Swimming Pool Garden and Bath Pavilion. The Swimming Pool Garden involves architecture, landscape, a

circulation of system, views and layers of plantings that are all working together similar to the Sunken Garden.<sup>123</sup> Behind the Bath Pavilion, evergreens were intentionally planted to create a backdrop that is seen when viewing it from the Calvin Rand Summer House.<sup>124</sup>

43. The Dunington-Grubbs' design lens is visible across much of the property beyond the Sunken Garden (176 John Street East), Swimming Pool Garden and Bath Pavilion. The Dunington-Grubbs were known for designing "outdoor rooms" to capture activity zones.<sup>125</sup> The CHL reflects this approach.<sup>126</sup> They employed formality and symmetry throughout their design work.<sup>127</sup> At the same time, informality was celebrated:

Every plan, however informal, must be built up on axial lines. The presence of such lines may not be apparent, but their absence would at once be notes. By careful arrangement of these axial lines the attention is drawn in definite direction, and not distracted by a multiplicity of features. In this manner, the eye is drawn toward effective groupings of architecture and landscape which form the composition of the design...This does not necessarily mean formality. The highest art of the landscape architect is designed informality.<sup>128</sup>

Again, the CHL reflects this approach.<sup>129</sup>

44. Beyond these overall design elements, specific Dunington-Grubb design elements are repeated throughout the CHL. The landscape design and architecture are interrelated. Decorative wood brackets on the Tea House match those found on the original pergola.<sup>130</sup> The wooden brackets on the Whistle Stop and the Conical Pavilion at 176 John Street East share the same design. Remarkably, one marks the entrance to the formal gardens near the north end of the Axial Walkway while another marks the entrance to the Whistle Stop. The former ornamental iron gate at the Whistle Stop entrance shares the same style as the 176 John Street East main entrance gate.<sup>131</sup> Plant species for the Panhandle trees, Eastern Red Cedar Hedge, 176 Garden Bed that crosses onto the Property, Swimming Pool Garden Beds, Peony Garden, Whistle Stop and surrounding trees are species found on the Dunington-Grubb Species List from Sheridan Nurseries.<sup>132</sup>

## CONSERVATION: CONTEXT SPECIFIC DECISION-MAKING<sup>133</sup>

45. For *Planning Act* decision-making, “conserve” means ensuring that the CHVI of the CHL is retained.<sup>134</sup> For OHA decision-making, “conserve” means “the actions or processes that protect the heritage attributes or character defining elements of a place in order to retain its importance and extend its physical life.”<sup>135</sup>
46. Ms. Horne’s conservation approach and its application to the Property is in the Horne Report.<sup>136</sup> The Horne Report is policy-driven and fueled by applicable best-practices. The Tribunal should accept Ms. Horne’s evidence in its entirety.<sup>137</sup> The Horne Report does not assess the *Planning Act* applications. It would be inappropriate, as suggested in Solmar’s oral closing, to do so. The Horne Report’s sole purpose is to assess the OHA applications. Ms. Anderson’s opinion balanced the required *Planning Act* and PPS interests.<sup>138</sup>
47. After reviewing the legal/policy framework for decision-making and considering guidance documents, Ms. Horne focused on the “historic place”. She concluded:

The Rand Estate represents a cultural heritage landscape with a high level of integrity. Much of the designed landscapes and built heritage elements have survived from the 1920s and 1930s into today, including early plant and tree species. The surviving Dunington-Grubb landscape drawings for the Rand Estate show the original design plans, and plant and tree species for the formal gardens. The informal designed landscapes include species that are known to be part of the Dunington-Grubb species list. Where plant or tree species have been lost, Sheridan Nurseries provides an opportunity to reintegrate suitable species. The landscape design techniques evident in the Dunington-Grubb’s work on the Rand Estate, and on other estate properties, provide an understanding of the design intent and therefore a process for approaching the preservation of these landscapes. The designed landscape is a rare and unique surviving example of landscape design by the Dunington-Grubb firm as part of a larger estate.

The built heritage elements are in varying states of physical condition, but they are largely intact and in sound condition, with original materials remaining. Many of the built heritage elements have not been substantially altered on the exterior from their construction period. The design features shared between many of the built heritage elements, especially those supporting the hobby-farm use on the estate, show a planned overall design. The built heritage elements are part of a rare and unique surviving ensemble of buildings associated with the estate hobby-farm.

Changes to character-defining elements must respect and protect heritage value. Given the high level of integrity on the subject properties and Rand Estate, I recommend that Preservation be the primary conservation approach. Preservation involves protecting, maintaining and stabilizing the existing form, material and integrity of an historic place, while conserving heritage value.



Within the Swimming Pool Garden, Restoration is proposed as a secondary approach given the level of integrity and the ability to consult documentary evidence for the original garden design and plantings.

Within the farm complex, Rehabilitation is proposed as secondary approach to accommodate new uses.<sup>139</sup> [emphasis added]

48. Mr. Stewart and Mr. McLelland agreed with Ms. Horne’s conservation approach.<sup>140</sup>
49. Dr. Letourneau agreed:
- ... cultural heritage resources cannot be replaced, are matters of provincial interest, and ... relocation and demolition must be a last resort.<sup>141</sup>
50. Ms. Horne’s conservation approach responds directly to the TOP heritage conservation objective to prevent the demolition, destruction or inappropriate alteration or use of heritage resources.<sup>142</sup> This objective is carried forward into the 2019 adopted official plan (not yet approved by the Region): protect, maintain, adaptively reuse, and stabilize existing cultural heritage features rather than remove or replace them.<sup>143</sup>
51. Ms. Rivard acknowledged that the S+Gs do not reference commemoration as a conservation approach.<sup>144</sup> She agreed that they direct structures to be retained in situ except in exceptional circumstances and that demolition is considered a last resort.<sup>145</sup> Yet, she repeatedly supported demolition without identifying any exceptional circumstance. She explored no demolition alternatives. Her focus was solely on commemoration, not conservation. She supported all 3 road options with their varying impacts on the Swimming Pool Garden. Calling these impacts “unfortunate”, her conclusion was telling.<sup>146</sup> She said that if she could choose the tea garden over the road, she might. But, she said “it’s just not the way development works.”<sup>147</sup> In Ms. Rivard’s opinion, the owner’s preferred design determines the heritage conservation outcome. The Tribunal should reject Ms. Rivard’s opinion.
52. Regrettably, Mr. Shoalts shared a similar view. In discussing the Carriage House, he said that its demolition was a reasonable option if there is no viable use. He then said “the viable use is obviously the wishes of my

client because that's who owns the property and has to do something with it." <sup>148</sup> Again, this view should also be rejected. Exploring a viable use is more than an owner rejecting a building's retention.

53. Ms. Rivard's exchange with Ms. Lyons regarding the demolition of the Carriage House was equally telling. She defended the demolition by saying that retaining the Carriage House surrounded by modern development would not afford the public a full understanding of its former use, context and connection. She opined that planting shrubs in the shape of a horse stall with an interpretative panel elsewhere on the property would. When challenged, she conceded that the SORE Plan approach to retaining the Carriage House in situ with an interpretive panel explaining the previous hobby farm use would be a superior way for the public to appreciate the history. She said she would be more supportive of the Carriage House with a public use than a private residence. Of course, neither can be achieved with demolition. <sup>149</sup>

54. Stantec and its heritage work did not inform subdivision design. There is no evidence that either Ms. Rivard or Mr. McCormick or any predecessors on this file weighed in on whether heritage attributes, built or natural, should be retained, moved or altered in the first place. Stantec wasn't retained until after the July 2020 application was submitted. <sup>150</sup> None of its reports were submitted as part of the March 2022 resubmission. <sup>151</sup> Its September 2022 report was submitted as part of the OHA application to alter and demolish. <sup>152</sup> This report was for the stated purpose "to create a commemoration plan" for concentration of some of the CHL elements and protected heritage attributes in the subdivision park. <sup>153</sup> This report was updated in February 2023 to add responses to municipal comments only. <sup>154</sup>

55. Ms. Rivard rejected the suggestion that her firm was given the subdivision design to mitigate heritage. Notwithstanding, the record is unequivocal: the form and scale of development informed Stantec's commemoration task. Stantec was engaged to commemorate not conserve. This approach is the antithesis of heritage legislation and policy and should be rejected.

56. Solmar’s commemoration approach destroys what is left of the CHL puzzle. Half of the puzzle pieces were lost when site preparation started in 2018 with the clear cutting. The remaining puzzle pieces must remain intact. They cannot be treated as stand-alone features to be discarded or moved without respect for the CHL as a whole.<sup>155</sup>

## **THE AXIAL WALKWAY**

57. The Rand Estate “historic place” includes the Axial Walkway stretching from the rear of the Rand Mansion to the Whistle Stop and Surrounding Trees. It provides two “front doors” to the Rand Estate, one at the Whistle Stop and one at the main house.<sup>156</sup> Mr. Bray describes it “as a long carpet” that has been rolled out from the Whistle Stop to the main entrance at 176 John Street East.<sup>157</sup> The Axial Walkway functioned as an area or space providing a primary circulation route for the estate. It was the central organizing feature of the rooms and nodes of the designed landscape.<sup>158</sup> It is intentional in its design<sup>159</sup> and axial sequence of landscapes<sup>160</sup> along the spine of the Estate.
58. The Axial Walkway brings together other CHL features so that their interrelationship is valued together. It was visible in aerial images from the 1930s when the Dunington-Grubbs were actively working on the Property.<sup>161</sup> By the 1960s, the area or space was no longer visible in aerial images.<sup>162</sup> Mr. Stewart says that focusing on whether we can see the gravel path today is “not important” and “misses the point”.<sup>163</sup> This is an opportunity to maintain the “relationship between the elements and the ability to walk between them” on a specific alignment.<sup>164</sup> It is about the spatial and visual relationships.<sup>165</sup>
59. If the Axial Walkway is moved, the CHVI of the Property will not be retained. It supports the heritage value of the Property because it serves as an integrated and “essential organizing feature” that connects the rooms and nodes within the designed landscape.<sup>166</sup> The presence of the railway and development of the Whistle Stop are important to how the Estate developed and its history.<sup>167</sup> For example, Mr. Stewart says that the

axial landscape design responds to the historical railway running along the back of the property. This is part of the CHVI.<sup>168</sup>

60. The alignment of the Main Walk is “critical” to the sense of place.<sup>169</sup> It derives its “raison-d’être” from the railway.<sup>170</sup> It is significant for its design value for the reasons discussed above. It has contextual value by connecting to the property’s surroundings and the railway.<sup>171</sup> It holds historical and associative value, linked to the Dunington-Grubbs, the summer colony history of Niagara-on-the-Lake, and its connection with Buffalo. The design and axuality of the Main Walk respond to these layers of value.<sup>172</sup>

### **EXPLORING VIABLE ALTERNATIVES**

61. Solmar called no evidence to show that it explored alternatives to eliminating or moving CHL components. Why can’t the Whistle Stop and Surrounding Trees block be the same size as the historical FOD7, Fresh-Moist Lowland Deciduous Forest<sup>173</sup> before the 2018 site preparation and clear cutting? Why can’t the Axial Walkway view from the Whistle Stop to the Circular Mound Garden (Memorial Garden) be the same as it was when Mr. Rand got off the train?<sup>174</sup> Why can’t the axuality be the same as envisioned by the Dunington-Grubbs so that there’s symmetry and you can actually see the Circular Mound Garden (Memorial Garden) when you walk north?<sup>175</sup> Why can’t those stories continue to be told in a subdivision design? Why can’t the Circular Mound Garden (Memorial Garden) be sized to ensure its restoration will accommodate Austrian Pines?<sup>176</sup> Why can’t the Bath Pavilion and surrounding trees as they were before the 2018 site preparation and clear cutting be a part of the new subdivision?<sup>177</sup> Why can’t the Panhandle trees be retained and access facilitated through 144/176 John Street East?<sup>178</sup> Why can’t the sheds<sup>179</sup> be used for storage, washrooms, a child’s playhouse or “tiny home”?<sup>180</sup> Why can’t the Carriage House<sup>181</sup> be used as a garage,<sup>182</sup> dwelling unit(s), community centre, office space or storage?<sup>183</sup> Mr. Shoalts’ one sentence reference to the \$1.1 million cost to conserve and renovate the Carriage House (in his reply)<sup>184</sup> is not a “financial hardship” justification that should influence the Tribunal’s conservation decision.

62. Without evidence to show that it explored alternatives to eliminating or moving CHL components, Solmar's applications should be dismissed.

### **TOWN'S DEMONSTRATION PLAN**

63. The Town's Demonstration Plan can achieve the TOP maximum permitted density with a robust mixture of single detached, semi-detached and townhouse dwellings while still conserving heritage.<sup>185</sup> When asked whether the Demonstration Plan was consistent with/conformed to the GP and PPS policies dealing with housing and growth, Mr. Lowes said yes, if the "Whistle Stop Walk" location was changed. He explained that it was a small area and that retaining it where it was located decades ago creates an inefficient plan.<sup>186</sup> Mr. Lowes' minimization of the contribution of the Axial Walkway in contributing to the CHVI should be rejected in favour of Ms. Horne's, Mr. Stewart's and Dr. Letourneau's opinions.

### **144/176 JOHN PROTECTED HERITAGE PROPERTY NOT EVALUATED**

64. The PPS and TOP require that protected heritage properties adjacent to development must be evaluated and their heritage attributes conserved<sup>187</sup> and not impacted.<sup>188</sup> 144/176 John Street East are protected heritage properties.<sup>189</sup> Solmar has not done the required evaluation. Again, Ms. Wallace said that this was not part of her job.<sup>190</sup> The absence of this evaluation is fatal to the applications. They should be dismissed on this ground alone. PPS consistency and TOP conformity cannot be dealt with through draft plan conditions as suggested in Solmar's oral closing.
65. The servicing easement, wetland relocation site and west deviation around the Swimming Pool Garden on 144-176 John Street East make these protected heritage properties part of Solmar's development. Yet again, Solmar has not done the required PPS and TOP evaluation to ensure consistency and conformity. In fact,

these works are all conceptual only. For example, Mr. Tchourkine stated in his oral evidence that if the servicing easement cannot be obtained over 144 John Street East, everything would have to be redesigned and “it’s going to be a problem”.<sup>191</sup>

## **NO PANHANDLE MAIN ACCESS**

66. 200 John Street East is a flag lot with limited frontage. The existing driveway will be widened and a private street<sup>192</sup> (not a driveway as contended by Mr. Elkins)<sup>193</sup> with associated infrastructure constructed. Mr. Elkins’ attempt to make the street location fit the design guidance documents by calling it a driveway<sup>194</sup> should be rejected.
67. A street should not be approved in the Panhandle. It:
- a. Requires tree removal within the PPS protected CHL;
  - b. Requires tree demolition within the OHA protected “surviving elements of the Dunington-Grubb landscape”;
  - c. Creates a conflict between Tree 34B and the Swimming Pool Garden;
  - d. Creates an unsafe traffic and pedestrian condition; and
  - e. Interferes with a potential wildlife corridor and bat habitat.

### **PPS Protected CHL Removed**

68. The Panhandle and its trees are part of the PPS protected CHL.<sup>195</sup> The extent of the tree removal required for the street is unclear. Mr. Buchanan says 52<sup>196</sup> or 39-43.<sup>197</sup> No matter the number, removing any tree that survived the 2018 site preparation and clear cutting, especially in the Panhandle, should be rejected. The Panhandle and its trees, a natural element feature of the CHL are “the most significant aspect of the Rand Estate CHL”<sup>198</sup> and “important part of this broad landscape”.<sup>199</sup> The proposed road through the panhandle will “decimate the majority of the trees”, an impact that is “devastating” on the character and setting of the Main House.<sup>200</sup>

### **OHA Protected Dunington-Grubb Landscape Demolished**

69. The Panhandle and its trees are part of the Property's OHA protected surviving elements of the Dunington-Grubb landscape.<sup>201</sup> The importance of trees to the Dunington-Grubb Designed Landscape cannot be underestimated as described above. The CHVI of the Property cannot be retained without these trees.<sup>202</sup>

### **Tree 34B v Swimming Pool Garden Conflict**

70. Tree 34B is a boundary tree. The McArthurs do not consent to its destruction or injury. It must be retained.<sup>203</sup>

71. The tree 34B TPZ is 7.2m<sup>204</sup> Mr. Kuntz says the minimum TPZ is 3.6m but when he considers the tree's trunk integrity, crown structure, vigor and root zone, the appropriate TPZ is closer to 7.2m.<sup>205</sup> Mr. Buchanan says it is 3.6m.<sup>206</sup> The Tribunal should prefer the evidence of Mr. Richard, Mr. Kuntz and Mr. Ormston-Holloway.

72. Of the street v Tree 34 B scenarios plotted (2m, 4m, 6m) all are "on top of" the Swimming Pool Garden<sup>207</sup> and will "dominate the scene".<sup>208</sup> None reflect the required 7.2m TPZ. All options impact the dimensions and symmetry of the Swimming Pool Garden.<sup>209</sup> At 2m, the external symmetry changes. At 4m (Solmar's request), the external and internal symmetry changes and the garden is "squished".<sup>210</sup> And at 6m, no symmetry remains. All scenarios destroy the Swimming Pool Garden's heritage value, an impact that was described as being "serious" and "unfortunate" by Ms. Wallace and Ms. Rivard.<sup>211</sup>

73. The Swimming Pool Garden was designed by the Dunington-Grubbs in accordance with plans.<sup>212</sup> It has contextual value as a "room" within the Rand Estate as a connection to the Axial Walkway and the rest of the estate.<sup>213</sup> All are all interrelated and valued together as part of the Designed Landscape.<sup>214</sup> Simply put, the required retention of Tree 34B cannot be achieved without destroying the Swimming Pool Garden's heritage value or integrity.<sup>215</sup> A street cannot be located here.

74. Solmar proposed another street that veers around the Swimming Pool Garden ("**West Deviation**")<sup>216</sup>. All Solmar's experts preferred this option to protect the Swimming Pool Garden.<sup>217</sup> It does not address the

impacts of the road in the Panhandle north of the Swimming Pool Garden. It uses Two Sisters' property at 176 John Street East. Its feasibility has not been evaluated. Indeed, it was presented as an option through reply witness statements on March 26, 2024, two weeks before the hearing. The Tribunal has no jurisdiction to approve the West Deviation.

#### **Unsafe Traffic and Pedestrian Condition**

75. The street location in relation to the McAurthur driveway creates an unsafe and undesirable condition.<sup>218</sup> It is too close.<sup>219</sup> Larger vehicles must turn into oncoming traffic when turning right on to John Street.<sup>220</sup> The 4.5m east-side curb radius is substandard and not supported by the guidance documents.<sup>221</sup> Access along John Street is desirable but not here.<sup>222</sup>

#### **Interferes With Potential Wildlife Corridor and Bat Habitat**

76. The Panhandle and its continuous tree canopy may serve as species at risk ("SAR") bat habitat, an ecological linkage and wildlife passage.<sup>223</sup> This assessment has not been completed. Feasibility has not been established.<sup>224</sup>

### **CHARLOTTE STREET EMERGENCY ACCESS NOT FEASIBLE**

77. Solmar has not shown that the Charlotte Street emergency access can work. At this stage in the process, it must prove feasibility, that something is capable of being done. Draft plan conditions are used to facilitate the how or the implementation. This hearing is Solmar's deadline to prove feasibility. It has not done so.

78. 588 Charlotte Avenue is a flag lot with limited frontage. The existing driveway is proposed for the emergency access route. The feasibility of the emergency access route is uncertain:

- a. Tree 81;
- b. Trees 79 and 80; and
- c. Vehicle Maneuvering Diagrams.



### **Tree 81 Not Surveyed**

79. Tree 81 requires removal.<sup>225</sup> The Tree Inventory Plans show Tree 81 on the boundary shared with Town-owned lands.<sup>226</sup> Mr. Buchanan acknowledged that Tree 81 was not included<sup>227</sup> in Solmar's Total Station Survey<sup>228</sup> (completed in November 2023 and January 2024) that was completed "to develop a current and accurate location of boundary trees around the site."<sup>229</sup> He regretted not having Tree 81 surveyed.<sup>230</sup> He went on to say: "[a]s for its exact positioning with relation to the property line, I don't think anyone can determine that unless we were actually to get the station survey to confirm it."<sup>231</sup>
80. If Tree 81 is a boundary tree, its removal requires the Town's consent.<sup>232</sup> Whether the Town will consent is unknown.

### **No Detailed Design to Ensure the Protection of the White Oaks**

81. Trees 79 and 80 are 175-200 and 250 years old respectively.<sup>233</sup> They are part of the PPS-protected CHL that survived the site preparation and clear cutting in 2018 and were likely embraced, augmented and designed around by the Dunington-Grubbs.<sup>234</sup>
82. Mr. Buchanan admitted that the emergency access design encroaches Tree 80's dripline by 0.6 metres.<sup>235</sup> His evidence was unclear as to why he stationed surveyed the dripline as opposed to the TPZ especially because he advised that using the dripline is the less conservative approach to protection of Tree 80. Without a reliable calculation of the TPZ overlaid on the grading plan that shows the emergency access route outside the TPZ, Solmar has not shown that an emergency access can work without injuring the trees.

### **No Reliable Vehicle Maneuvering Diagrams ("VMD")**

83. A day before he testified, Mr. Elkins provided a VMD for the Charlotte Street emergency access.<sup>236</sup> The VMD shows a Heritage Trail (Town-owned) encroachment right turn in and left turn out. The Notes present a disclaimer for the accuracy of the base map.

84. Mr. Elkins had no emergency access Plan B if, for example, Tree 81 must be retained or a route could not avoid the TPZs or the Heritage Trail.<sup>237</sup> Mr. Lowes says that his Plan B is to persuade the Fire Chief to exercise his discretion to allow the access.<sup>238</sup> The Tribunal should reject this approach to establishing feasibility. Leaving feasibility to the draft plan condition stage is not good planning.<sup>239</sup> Solmar must establish that this access can function as intended now. The uncertainty of relying on a future decision-maker's discretion falls well short of attaining this feasibility standard. And, it certainly does not solve the Tree 81 issue – under no circumstances does the Fire Chief have the discretion to consent to the Tree 81 removal if it is in fact a boundary tree.

85. The Charlotte Street emergency access is not feasible. Solmar requires an emergency access route elsewhere.

### **EXPLORE ACCESS SOLUTIONS**

86. Legal frontage in no way creates an entitlement to intensification.

87. Solmar has not demonstrated that the Property can be appropriately accessed to serve the proposed use.

The access solution lies in securing appropriate access from a neighbour.

88. The Town is a southerly neighbour. It offered its land, a portion of the Heritage Trail, to assist with the access issue. That arrangement did not crystallize to the satisfaction of the Town. The Town withdrew its offer.<sup>240</sup>

89. Two Sisters is a northerly and easterly neighbour. Its corporate head office and directors mirror Solmar's.<sup>241</sup>

Its legal challenges to the Town's heritage conservation efforts used the same lawyers and consultants as in this case. While Two Sisters has offered its northerly land to accommodate a servicing easement, wetland relocation and the Western Deviation, it will not permit any part of its John Street frontage to be used to access to the Property.

90. Solmar should fully explore northerly and easterly access options. Mr. Arnott recommends a comprehensive holistic review of how the hotel and subdivision uses can more appropriately connect to John Street.<sup>242</sup> SORE and its team have offered a good starting point concept to explore access solutions along the Two Sisters John Street frontage.<sup>243</sup>
91. Solmar cannot locate a street in the Panhandle. If it cannot secure access from a neighbour, its applications must be dismissed.<sup>244</sup> The Property will remain as residential lots with driveway access. The Town will protect the heritage resources on these lots by enforcing its OHA Property Standards By-law. The Town's requested relief is that Solmar be given a reasonable opportunity to explore access solutions before dismissal and enforcement.

### **SERVICING NOT FEASIBLE**

92. Solmar has not shown that site servicing can work. Again, feasibility cannot be left to the draft plan condition stage, especially for servicing. Unresolved servicing issues could very well affect subdivision design.<sup>245</sup> This hearing is Solmar's deadline to prove that the its servicing can function. It has failed.
93. Ms. Kurtz says that the following matters remain unresolved:
- a. SWM pond sizing;
  - b. External flow calculations (including by-pass sewer sizing, culvert under the emergency access road and ditch sizing); and
  - c. Issues relating to overall hydrology modelling, wetland, site water balance and tree protection as it relates to engineering design.<sup>246</sup>
94. Mr. Schekenberger says that the following matters remain problematic:
- a. Lack of a common modelling platform;
  - b. Absence of an area-wide comprehensive assessment;
  - c. Deficient plan for the management of the on-site One Mile Creek Tributary;
  - d. Uncertainty associated with the feasibility of proposed on-site source controls to achieve water balance;
  - e. Approach to long-term operating and maintenance of private on-site measures;;
  - f. Adequacy of the John Street drainage receiver; and
  - g. Inconsistencies in the drainage areas to the on-site wetland.<sup>247</sup>

## **NO WETLAND RELOCATION**

95. Solmar proposes to remove 70% of the existing wetland, a portion of which is a Key Natural Heritage Feature (“**KNF**”) and Key Hydrologic Feature (“**KHF**”) in the GP.<sup>248</sup> It proposes a 5m buffer to the 30% that remains. Solmar has not shown that the appropriate water balance can be achieved to sustain what remains, the remnant KNF and KHF.<sup>249</sup> Wetlands don’t have property boundaries. The Niagara Peninsula Conservation Authority (“**NPCA**”) has no jurisdiction over this issue.<sup>250</sup> The wetland should not be relocated.
96. If 70% is removed, the NPCA, in its compliance role responding to Solmar’s alteration of the wetland, says that the wetland offset site must be secured and confirmed feasible<sup>251</sup> Leaving aside that fact that the in force Niagara Region Official Plan (2022), relevant but not determinative, does not support offsetting<sup>252</sup> draft plan conditions cannot be used to confirm feasibility. Solmar must show that its relocation site will work. This hearing is its deadline to do so. It has failed.

## **TREE PRESERVATION PLAN (“TPP”) NEEDED NOW**

97. Solmar’s piecemeal arborists reports<sup>253</sup> are not a TPP that responds appropriately to the complexities of the Property. Without a proper TPP, the Tribunal cannot assess the Charlotte Street emergency access, lotting patterns along the south wall<sup>254</sup> the impact on the PPS protected CHL including the Panhandle, the impact on the OHA protected Surviving elements of the Dunnington-Grubb Landscape or the true extent of the OHA protected Whistle Stop and Surrounding Trees.
98. Complex sites require the TPP up front.<sup>255</sup> Its findings must inform subdivision design instead of responding to it. This timing would also permit the coordination of arboriculture, engineering and hydrology. Mr. Ormston-Holloway notes that without a TPZ overlay onto the grading plan, he cannot assess hydrogeological impacts or determine whether existing grades will be adequately matched and maintained at tree protection boundaries.<sup>256</sup> Mr. Richard made a similar observation in that the TPZs are in one document and grading or

servicing impacts are in another. No document assesses the impacts in relation to one another.<sup>257</sup> Detail and coordination cannot be left to the draft plan condition stage. It must be provided up front to inform subdivision design.

### **REGION'S "PARTICIPATION"**

99. The Region was granted participant status on September 9, 2022.<sup>258</sup> It filed a participant statement with its request referring to its May 26, 2022 letter.<sup>259</sup> The comments do not refer to the draft plan before the Tribunal. The Region has participated in this hearing in name only. The Tribunal should give its statement and requested draft plan conditions no weight.

### **REQUESTED RELIEF**

100. The Town asks the Tribunal to dismiss the Solmar appeals. In doing so, it will make findings. We request that the Tribunal withhold its dismissal order and afford Solmar 6 months to redesign its subdivision, with supporting studies, to implement the following Tribunal findings.

- a. No development until 144/176 John Street East are evaluated as adjacent protect heritage properties under the PPS and TOP. OHA permits must be obtained for all development components using 144/176 John Street East;
- b. No street in the Panhandle;<sup>260</sup>
- c. The Property is a significant CHL under the PPS whether or not it was designed by the Dunington-Grubbs. Notwithstanding, it was in fact designed by the Dunington Grubbs;
- d. The PPS protected CHL<sup>261</sup> and OHA designated properties shall be conserved as per the Horne Report. Blocks or lots for CHL features and heritage attributes shall protect the context as well as the feature or attribute;
- e. All remaining trees are survivors of the 2018 site preparation and clear cutting. These trees are components of the PPS protected CHL. They are OHA protected surviving elements of the

Dunington-Grubb landscape. All must be station surveyed and TPZs or driplines determined, whichever is greater. Detailed design that integrates the TPZ or dripline, grading, servicing, heritage wall conservation, rain garden locations and building envelopes will inform the subdivision design. The subdivision must be designed around the trees;

- f. The density range is between 14 and 18 units/ha. This results in between 91-118 units. The primary built form will be single and semi-detached dwellings. Townhouses are permitted but must be limited so as to not detract from the low density built form; and
- g. No wetland relocation.

## CONCLUSION

101. Between 1910 – 1950, the Rand family, with the help of the Dunington-Grubbs, designed and created a functioning country estate with planned formal gardens, walkways, leisure areas, mature trees and plantings, hobby-farm uses (orchards, livestock, equestrian) together with connected buildings and structures. The design vision was largely realized by the mid 1930's under the ownership of George Rand II.<sup>262</sup>

102. This interconnection of landscape and built elements is the CHL the Town seeks to protect as directed by the PPS. This is a heritage resource that is unique to Niagara-on-the-Lake and is part of its identity as referred to in the GP. This is the story. Ms. Horne's conservation approach will ensure that it is told to generations to come.

All of which if respectfully submitted.




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Nancy Smith




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Anna Toumanians




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Meredith Baker

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- <sup>1</sup> *Losani Homes (1998) Ltd. v. Grimsby (Town)* 2022 LNONLT 924, para. 6  
<sup>2</sup> *2575867 Ontario Inc. v. Toronto (City)* 2021 LNONLT 333, para. 85
- <sup>2</sup> Definition of *Cultural Heritage Landscape*  
 PPS – Exhibit 1.12 – p. 1249  
 GP – Exhibit 1.12 – p. 1351  
 ROP – Exhibit 1.14 – p. 534
- <sup>3</sup> Definition of *Conserved*  
 PPS – Exhibit 1.12 – p. 1437  
 GP – Exhibit 1.12 – p. 1351  
 ROP – Exhibit 1.14 – p. 533
- <sup>4</sup> GP s.4.1 – Exhibit 1.12 – p. 1322
- <sup>5</sup> B. Stewart Witness Statement – Exhibit 4.1 – p. 163 – para. 3.7
- <sup>6</sup> Town’s Constraints-Based Demonstration Plan – Exhibit 3.1 – p. 327
- <sup>7</sup> SORE Revised Concept Plan – Exhibit 4.2 – p. 6
- <sup>8</sup> Land Transfer Deed – Exhibit 1.9 – p. 263
- <sup>9</sup> Planning Justification Report - Exhibit 1.6 – p. 43 – para. 1.1
- <sup>10</sup> Land Transfer Deeds - Exhibit 1.9 - p. 274, p. 278 and p. 282
- <sup>11</sup> ERA CHER – Exhibit 1.4 – p. 219
- <sup>12</sup> Notices of Intention to Designate – Exhibit 1.1 – p. 1013-1026
- <sup>13</sup> L. Wallace Witness Statement – Exhibit 1.8 – p. 700 – para. 42
- <sup>14</sup> D. Stephenson – oral evidence
- <sup>15</sup> Aerial Photographs – Exhibit 4.22 – p. 88  
 Ms. Wallace’s evidence that the Town was notified before the clear cutting does not infer consent
- <sup>16</sup> Quash Application Decision – Exhibit 3.9
- <sup>17</sup> Solmar’s PA Application cover letter – Exhibit 1.1 – p. 23
- <sup>18</sup> Notice of Complete Application – Exhibit 1.1 – p. 31
- <sup>19</sup> *1540 BSW Development Inc. v. Toronto (City)* [2010] O.M.B.D. No. 160, para. 17
- <sup>20</sup> Proposed Draft Plan of Subdivision – Exhibit 1.6 – p. 216
- <sup>21</sup> L. Wallace Heritage Impact Assessment – Exhibit 1.4 – p. 534
- <sup>22</sup> Transcript of Special Council Meeting – Exhibit 4.6b
- <sup>23</sup> L. Wallace – oral evidence
- <sup>24</sup> M. Shoalts – oral evidence  
 M. Rivard – oral evidence
- <sup>25</sup> P. Lowes – oral evidence
- <sup>26</sup> Designation By-laws - Exhibit 1.1 – p. 1045-1052
- <sup>27</sup> Solmar’s CRB Withdrawal Letter – Exhibit 1.9 – p. 666
- <sup>28</sup> Town’s CRB Heritage Attributes Map – Exhibit 3.1 – p. 345

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- <sup>29</sup> Resubmission Application Cover Letter – Exhibit 1.1 – p. 33-35
- <sup>30</sup> Plan of Subdivision - Exhibit 2.2 – p. 150
- <sup>31</sup> Addendum Planning Assessment Report – Exhibit 1.6 – p. 294-337
- <sup>32</sup> Updated Urban Design Brief – Exhibit 1.6 – p. 339-377
- <sup>33</sup> Master Landscape and Heritage Commemoration Plan - Exhibit 1.6 – p. 301
- <sup>34</sup> Solmar Visual Evidence - Exhibit 2.2 – p. 154
- <sup>35</sup> P. Lowes – oral evidence
- <sup>36</sup> Notice of Complete Application letter – Exhibit 1.1 – p. 54
- <sup>37</sup> D. Horne – oral evidence
- <sup>38</sup> *Losani Homes (1998) Ltd. v. Grimsby (Town)* 2022 LNONLT 924, para. 53
- <sup>39</sup> B. Stewart Witness Statement – Exhibit 4.1 – p. 164 – para. 3.17
- <sup>40</sup> PPS s.1.1.1(a), 1.1.3.2(a)(b), 1.1.3.6, 1.4.3(d) – Exhibit 1.12 – p. 1401, 1403, 1404, 1405, 1413
- <sup>41</sup> PPS s.1.7.1(e) – Exhibit 1.12 – p. 1418
- <sup>42</sup> PPS s.2.6 – Exhibit 1.12 – p. 1427
- See also: *2575867 Ontario Inc. v. Toronto (City)* 2021 LNONLT 333, para. 86
- <sup>43</sup> GP s.4.1 – Exhibit 1.12 – p. 1322
- <sup>44</sup> GP – Exhibit 1.12 – p. 1289
- <sup>45</sup> GP s.4.2.7.1 – Exhibit 1.12 – p.1330
- See also: *2575867 Ontario Inc. v. Toronto (City)* 2021 LNONLT 333, para. 86
- <sup>46</sup> GP s.5.2.4.5(b) – Exhibit 1.12 – p. 1340
- <sup>47</sup> ROP s.4.G.1.7 – Exhibit 1.14 – p. 280
- <sup>48</sup> ROP s.10.C.1.1 – Exhibit 1.14 – p. 426
- <sup>49</sup> ROP s.10.C.1.5 – Exhibit 1.14 – p. 426
- <sup>50</sup> ROP s.10.C.2.1.1 – Exhibit 1.14 – p. 426
- <sup>51</sup> ROP s.10.C.2.1.2 – Exhibit 1.14 – p.426
- <sup>52</sup> ROP s.10.C.2.1.6, 10.C.2.1.7 – Exhibit 1.14 – p. 427
- <sup>53</sup> ROP s.10.C.2.1.5 – Exhibit 1.14 – p. 427
- <sup>54</sup> ROP s.4.A.1.2, 4.A.1.3, 4.A.1.6, 4.A.1.12 – Exhibit 1.14 – p. 266
- <sup>55</sup> ROP s.4.C.1.1, 4.C.2.1(b)(d)(e) – Exhibit 1.14 – p. 269-270
- <sup>56</sup> TOP s.1 – Exhibit 1.17 – p. 155
- <sup>57</sup> TOP s.4 – Exhibit 1.17 – p. 350-352
- <sup>58</sup> D. Horne – oral evidence
- <sup>59</sup> TOP s.6.9 – Exhibit 1.17 – p. 182
- <sup>60</sup> TOP s. 18.2(3) – Exhibit 1.17 – p. 452
- <sup>61</sup> TOP s. 18.2(5) – Exhibit 1.17 – p. 452
- <sup>62</sup> TOP s. 18.2(2) – Exhibit 1.17 – p. 452
- <sup>63</sup> TOP s. 18.2(1) – Exhibit 1.17 – p. 452
- <sup>64</sup> TOP s.6.33 – Exhibit 1.17 – p. 333
- <sup>65</sup> TOP definition of *Residential Net Density* and *Residential Gross Density* Exhibit 1.17 – p. 164
- <sup>66</sup> TOP s. 9.4(4) – Exhibit 1.17 – p. 394
- <sup>67</sup> TOP s. 4.4(k) – Exhibit 1.17 – p. 352
- <sup>68</sup> R. Palmer – oral evidence
- P. Lowes – oral evidence
- <sup>69</sup> TOP s. 9.4(4) – Exhibit 1.17 – p. 394
- <sup>70</sup> TOP s. 9.3.1, 9.3.2 – Exhibit 1.17 – p. 380-382
- <sup>71</sup> *Sentinel (Broadway) Holdings Inc. v. Toronto (City)* [2014] O.M.B.D. No. 447, para. 29
- <sup>72</sup> *Romandale Farms Ltd. v. Markham (City)* 2018 LNONLPAT 712, para. 42-43
- <sup>73</sup> *Qureshi v. Mississauga (City)*, 2015 LNONCRB 5, para. 31
- <sup>74</sup> The Horne Report – Exhibit 1.1 – p. 130
- <sup>75</sup> P. Lowes Witness Statement – Exhibit 2.1 – p. 33 – para. 7.26-7.27
- <sup>76</sup> P. Lowes – oral evidence



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- <sup>77</sup> D. Anderson – oral evidence
- <sup>78</sup> R. Palmer Witness Statement – Exhibit 3.1 – p. 39-40 – para. 62-66 and R. Palmer – oral evidence
- <sup>79</sup> P. Lowes – oral evidence
- <sup>80</sup> The Horne Report – Exhibit 1.1 – p. 138
- <sup>81</sup> M. McClelland – filed and oral evidence  
B. Stewart – filed and oral evidence
- <sup>82</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1047
- <sup>83</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1047
- <sup>84</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1048
- <sup>85</sup> Also protected heritage attribute under the designation by-law – Exhibit 1.1 – p. 1048
- <sup>86</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1048
- <sup>87</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1048
- <sup>88</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1048
- <sup>89</sup> Also protected heritage attribute as “surviving element elements of the Dunington-Grubb landscape” – Designation By-Law – Exhibit 1.1 – p. 1048 and The Horne Report – Exhibit 1.1 – p. 150-153, 156-195
- <sup>90</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1052
- <sup>91</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1052
- <sup>92</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1052
- <sup>93</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1052
- <sup>94</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1052
- <sup>95</sup> Also protected heritage attribute - Designation By-Law – Exhibit 1.1 – p. 1052
- <sup>96</sup> M. Letourneau – filed and oral evidence  
D. Horne – filed and oral evidence  
M. McClelland – filed and oral evidence  
B. Stewart – filed and oral evidence
- <sup>97</sup> T. McCormick Witness Statement – Exhibit 2.1 – p. 630 – para. 93  
See also: L. Wallace Witness Statement – Exhibit 2.1 – p. 417 – para. 146 and L. Wallace – oral evidence
- <sup>98</sup> M. Rivard – oral evidence
- <sup>99</sup> M. Letourneau Witness Statement – Exhibit 3.1 – p. 79 – para. 47
- <sup>100</sup> M. Letourneau Witness Statement – Exhibit 3.1 – p. 79 – para. 47  
L. Wallace – oral evidence  
M. Rivard – oral evidence  
T. McCormick – oral evidence  
See also: *Black v. Niagara-on-the-Lake (Town)* 2021 LNONCRB 4, para. 31, 40, 49
- <sup>101</sup> Definition of *Significant*: PPS – Exhibit 1.12 – p. 1447  
M. Letourneau Witness Statement – Exhibit 3.1 – p. 79 – para. 47
- <sup>102</sup> M. Letourneau Witness Statement – Exhibit 3.1 – p. 79 – para. 48-52 and M. Letourneau – oral evidence
- <sup>103</sup> L. Wallace – oral evidence
- <sup>104</sup> M. Letourneau Witness Statement – Exhibit 3.1 – p. 72 – para. 7 and M. Letourneau – oral evidence
- <sup>105</sup> *Black v. Niagara-on-the-Lake (Town)* 2021 LNONCRB 4, para. 25
- <sup>106</sup> M. Letourneau Witness Statement – Exhibit 3.1 – p. 79 – para. 48-52 and M. Letourneau – oral evidence  
Estate Lots Study – Exhibit 1.4 – p. 28
- <sup>107</sup> Definition of Cultural Heritage Landscape: PPS – Exhibit 1.12 – p. 1249
- <sup>108</sup> Designation By-Law for 200 John Street East – Exhibit 1.1 – p. 1048
- <sup>109</sup> D. Horne – filed and oral evidence  
M. Letourneau – filed and oral evidence  
M. McClelland – filed and oral evidence  
B. Stewart – filed and oral evidence
- <sup>110</sup> The Horne Report – Exhibit 1.1 – p. 150
- <sup>111</sup> M. Ormston-Holloway Witness Statement – Exhibit 3.1 – p. 281 – para 14 (untested)
- <sup>112</sup> B. Stewart Witness Statement – Exhibit 4.1 – p.182 – para 6.9 and B. Stewart – oral evidence

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- <sup>113</sup> B. Stewart Witness Statement – Exhibit 4.1 – p.182-183 – para 6.9 and B. Stewart – oral evidence
- <sup>114</sup> B. Stewart Witness Statement – Exhibit 4.1 – p. 183 – para 6.9 and B. Stewart – oral evidence
- <sup>115</sup> B. Stewart Witness Statement – Exhibit 4.1 – p.183 – para 6.11 and B. Stewart – oral evidence
- <sup>116</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 15-17 and B. Stewart – oral evidence
- <sup>117</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 15 and B. Stewart – oral evidence
- <sup>118</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 15-17 and B. Stewart – oral evidence
- <sup>119</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 19-20, 22-23 and B. Stewart – oral evidence
- <sup>120</sup> The Horne Report – Exhibit 1.1 – p. 158, 159, 161 and D. Horne – oral evidence
- <sup>121</sup> Estate Lots Study – Exhibit 1.4 – p. 46, 59
- <sup>122</sup> D. Horne – oral evidence
- <sup>123</sup> B. Stewart – oral evidence
- <sup>124</sup> B. Stewart – oral evidence
- <sup>125</sup> The Horne Report – Exhibit 1.1. – p. 150-151 and D. Horne – oral evidence
- <sup>126</sup> The Horne Report – Exhibit 1.1 – p. 153
- <sup>127</sup> The Horne Report – Exhibit 1.1 – p.151
- <sup>128</sup> M. Ormston-Holloway Witness Statement – Exhibit 3.1 – p. 280 – para 13 (untested)
- <sup>129</sup> The Horne Report – Exhibit 1.1 – p.153-155
- <sup>130</sup> ERA CHER – Exhibit 4.1 – p. 261
- <sup>131</sup> ERA CHER – Exhibit 4.1 – p. 265
- <sup>132</sup> M. Ormston-Holloway Witness Statement – Exhibit 3.1 – p. 282-289 (untested)  
Historic Sheridan Nurseries Catalogues, Plant Material Utilized by the Dunnington-Grubbs – Exhibit 1.4 – p. 158-161
- <sup>133</sup> *Losani Homes (1998) Ltd. v. Grimsby (Town)* 2022 LNONLT 924, para. 61
- <sup>134</sup> PPS – Exhibit 1.12 – p. 1437-1438
- <sup>135</sup> The Horne Report - Exhibit 1.1 – p. 124
- <sup>136</sup> The Horne Report – Exhibit 1.1
- <sup>137</sup> The Horne conservation approach supports the OHA demolition permits for the Calvin Rand Summer House and Barn and Stables. See analysis to support this in The Horne Report – Exhibit 1.1 – p. 184-186, 189-195
- <sup>138</sup> D. Anderson – filed and oral evidence
- <sup>139</sup> The Horne Report - Exhibit 1.1 - p. 155
- <sup>140</sup> M. McClelland Witness Statement – Exhibit 4.1 – p. 90 – para. 7.5  
B. Stewart Witness Statement – Exhibit 4.1 – p. 158 – para. 2.20
- <sup>141</sup> M. Letourneau Witness Statement – Exhibit 3.1 – p. 77 – para. 37
- <sup>142</sup> TOP s. 18.2(3) – Exhibit 1.17 – p. 452
- <sup>143</sup> TOP – Exhibit 1.17 – p. 688 and The Horne Report – Exhibit 1.1 – p. 129
- <sup>144</sup> M. Rivard Witness Statement – Exhibit 2.1 – p. 655
- <sup>145</sup> M. Rivard – oral evidence  
See also: *Losani Homes (1998) Ltd. v. Grimsby (Town)* 2022 LNONLT 924, para. 62, 64-65
- <sup>146</sup> M. Rivard – oral evidence
- <sup>147</sup> M. Rivard – oral evidence
- <sup>148</sup> M. Shoalts – oral evidence
- <sup>149</sup> M. Rivard – oral evidence
- <sup>150</sup> M. Rivard – oral evidence
- <sup>151</sup> Resubmission Application cover letter – Exhibit 1.1 – p. 33-35
- <sup>152</sup> Notice of Complete Application (Heritage Permit Application) - Exhibit 1.1 – p. 71-72
- <sup>153</sup> 2022 Heritage Commemoration Plan - Exhibit 1.4 – p. 2011-2121
- <sup>154</sup> 2023 Heritage Commemoration Plan - Exhibit 1.4 – p. 2123-2238
- <sup>155</sup> M. Letourneau – oral evidence
- <sup>156</sup> C. Bray Witness Statement – Exhibit 3.1 – p. 148 – para. 31 (untested)
- <sup>157</sup> C. Bray Witness Statement – Exhibit 3.1 – p. 148 – para. 31 (untested)  
See also: McClelland and Stewart Combined Exhibits – Exhibit 4.22 – p. 4
- <sup>158</sup> The Horne Report – Exhibit 1.1 – p. 153

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- <sup>159</sup> B. Stewart – oral evidence
- <sup>160</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 31
- <sup>161</sup> The Horne Report – Exhibit 1.1 – p. 164 and D. Horne – oral evidence
- <sup>162</sup> The Horne Report – Exhibit 1.1 – p. 163-166
- <sup>163</sup> B. Stewart Witness Statement – Exhibit 4.1 – p. 173 – para. 4.46 and B. Stewart – oral evidence
- <sup>164</sup> B. Stewart Witness Statement – Exhibit 4.1 – p. 173 – para. 4.46 and B. Stewart – oral evidence
- <sup>165</sup> B. Stewart – oral evidence
- <sup>166</sup> The Horne Report – Exhibit 1.1 – p. 165 and D. Horne – oral evidence
- <sup>167</sup> B. Stewart – oral evidence
- <sup>168</sup> B. Stewart – oral evidence
- <sup>169</sup> B. Stewart – oral evidence
- <sup>170</sup> B. Stewart – oral evidence
- <sup>171</sup> B. Stewart – oral evidence
- <sup>172</sup> B. Stewart – oral evidence
- <sup>173</sup> Figure 6, Significant NHS Features – Exhibit 1.5 – p. 204
- <sup>174</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 31, 38
- <sup>175</sup> SORE Concept Plan – Exhibit 4.2 – p.6  
Solmar Concept Plan – Exhibit 2.2 – p. 172, 178
- <sup>176</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 132, 133
- <sup>177</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 51, 53, 54
- <sup>178</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 17, 19-20
- <sup>179</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 87
- <sup>180</sup> M. Letourneau – oral evidence
- <sup>181</sup> McClelland and Stewart Combined Exhibits - Exhibit 4.22 – p. 70, 71
- <sup>182</sup> M. Shoalts – oral evidence
- <sup>183</sup> M. Letourneau – oral evidence
- <sup>184</sup> M. Shoalts Reply Witness Statement – Exhibit 2.1 – p. 554 – para. 12
- <sup>185</sup> R. Palmer Witness Statement – Exhibit 3.1 – p. 31-34 – para. 48-53
- <sup>186</sup> P. Lowes – oral evidence
- <sup>187</sup> PPS policy 2.6.3 – Exhibit 1.12 – p. 1427
- <sup>188</sup> TOP s. 4.4(3) – Exhibit 1.17 – p. 351
- <sup>189</sup> Designation By-Law for 144 John Street East – Exhibit 1.1 – p. 1036  
Designation By-Law for 176 John Street East – Exhibit 1.1 – p. 1041
- <sup>190</sup> L. Wallace – oral evidence
- <sup>191</sup> F. Tchourkine – oral evidence
- <sup>192</sup> T. Arnott – oral evidence
- <sup>193</sup> S. Elkins Witness Statement – Exhibit 2.1 – p. 1045, 1052-1053 and S. Elkins – oral evidence
- <sup>194</sup> T. Arnott – oral evidence
- <sup>195</sup> ERA CHER – Exhibit 4.1 – p. 315-318; B. Stewart – oral evidence
- <sup>196</sup> W. Buchanan Witness Statement – Exhibit 2.1 – p. 296 – para. 22
- <sup>197</sup> W. Buchanan Reply Witness Statement – Exhibit 2.1 – p. 373-374
- <sup>198</sup> B. Stewart Witness Statement – Exhibit 4.1 – p. 161 – para. 3.6
- <sup>199</sup> B. Stewart – oral evidence
- <sup>200</sup> B. Stewart Witness Statement – Exhibit 4.1 – p. 184 – para. 6.16
- <sup>201</sup> The Horne Report – Exhibit 1.1 – p. 156-161  
B. Stewart filed – oral evidence; ERA CHER – Exhibit 4.1 – p. 315-318  
M. Letourneau – filed and oral evidence  
M. Ormston-Holloway – filed evidence (untested)
- <sup>202</sup> The Horne Report – Exhibit 1.1 – p. 156-189
- <sup>203</sup> W. Buchanan – oral evidence
- <sup>204</sup> M. Ormston-Holloway Reply Witness Statement – Exhibit 3.1 – p. 308 – para. 4 (untested)

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- J. Richard Reply Witness Statement – Exhibit 4.1 – p. 679 – para. 80-82 and J. Richard – oral evidence
- <sup>205</sup> P. Kuntz – oral evidence
- <sup>206</sup> W. Buchanan Witness Statement - Exhibit 2.1 – p. 296 – para. 26
- <sup>207</sup> B. Stephenson – oral evidence
- <sup>208</sup> B. Stephenson Witness Statement – Exhibit 4.1 – p. 185 – para. 6.16
- <sup>209</sup> Access Road Setback Alternatives – Exhibit 2.2 – p. 176
- <sup>210</sup> M. Rivard – oral evidence
- <sup>211</sup> L. Wallace – oral evidence  
M. Rivard – oral evidence
- <sup>212</sup> LHC CHER – Exhibit 1.4 – p. 1654-1655  
The Horne Report – Exhibit 1.1 – p. 169
- <sup>213</sup> LHC CHER – Exhibit 1.4 – p. 1654-1655  
The Horne Report – Exhibit 1.1 – p. 169
- <sup>214</sup> LHC CHER – Exhibit 1.4 – p. 1655  
The Horne Report – Exhibit 1.1 – p. 169
- <sup>215</sup> D. Horne – oral evidence
- <sup>216</sup> Solmar Visual Evidence – Exhibit 2.2 – p. 178
- <sup>217</sup> W. Buchanan Reply Witness Statement - Exhibit 2.1 – p. 344 – para. 112  
L. Wallace Reply Witness Statement - Exhibit 2.1 – p. 482 – para. 12  
T. McCormick Reply Witness Statement – Exhibit 2.1 – pg. 622 – para. 58  
M. Rivard Reply Witness Statement – Exhibit 2.1 – p. 695 – para. 34  
C. Jay Reply Witness Statement – Exhibit 2.1 – pg. 814 – para. 14
- <sup>218</sup> T. Arnott Witness Statement - Exhibit 3.1 - p. 264 – para. 2.10(iii) and T. Arnott – oral evidence  
G. Bumstead Witness Statement - Exhibit 4.1 – p. 520  
D. Argue Witness Statement - Exhibit 5.1 - p. 15 – para. 4.14-4.17
- <sup>219</sup> D. Argue Witness Statement - Exhibit 5.1 – p. 18 and D. Argue – oral evidence
- <sup>220</sup> Entrance Design – AutoTURN - Exhibit 1.7 - p. 501-502
- <sup>221</sup> T. Arnott Witness Statement - Exhibit 3.1 - p. 264 – para. 2.10iv);  
G. Bumstead Reply Witness Statement - Exhibit 4.1 – p. 535 – para. 13;  
D. Argue Reply Witness Statement - Exhibit 5.1 – p. 27 – para. 1.4
- <sup>222</sup> T. Arnott Witness Statement - Exhibit 3.1 - p.233 – para. 32.3-32.4  
G. Bumstead Witness Statement - Exhibit 4.1 - p. 518;  
D. Argue Witness Statement - Exhibit 5.1, p. 18 – para. 5.2
- <sup>223</sup> D. Stephenson Witness Statement – Exhibit 4.1 – p. 557, 562-564, 567 and D. Stephenson - oral evidence
- <sup>224</sup> D. Stephenson Witness Statement – Exhibit 4.1 – p. 557, 562-564, 567 and D. Stephenson - oral evidence
- <sup>225</sup> W. Buchanan – oral evidence
- <sup>226</sup> Tree Inventory Plans - Exhibit 1.2 - p. 151
- <sup>227</sup> W. Buchanan – oral evidence
- <sup>228</sup> Total Station Survey - Exhibit 1.2 - p. 153-155
- <sup>229</sup> Arborist Report and Tree Inventory Report - Exhibit 1.2 - p. 123
- <sup>230</sup> W. Buchanan – oral evidence
- <sup>231</sup> W. Buchanan – oral evidence
- <sup>232</sup> Private Tree Protection By-Law – Exhibit 1.18 – p. 426
- <sup>233</sup> Arborist Report (Stantec and Buchanan) – Exhibit 1.2 – p. 403 – section 3.2.2 and W. Buchanan – oral evidence
- <sup>234</sup> M. Ormston-Holloway Witness Statement - Exhibit 3.1 - p. 288 (untested)
- <sup>235</sup> W. Buchanan – oral evidence
- <sup>236</sup> Emergency Access Auto Turn – Exhibit 2.6
- <sup>237</sup> S. Elkins – oral evidence
- <sup>238</sup> P. Lowes – oral evidence
- <sup>239</sup> D. Anderson Witness Statement – Exhibit 4.1 – p. 709 – para. 52-55
- <sup>240</sup> Council Meeting Minutes and Resolution (December 15, 2023) – Exhibit 1.8 – p. 221

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- Council Meeting Resolution (January 12, 2024) – Exhibit 1.8 – p. 232
- Town Statement re Charlotte Street Access (January 17, 2024) – Exhibit 1.8 – p. 234
- <sup>241</sup> Corporation Profile Report (Two Sisters Resorts) – Exhibit 1.9 – p. 206-208
- Corporation Profile Report (Two Sisters Property) – Exhibit 1.9 – p. 214-216
- Corporation Profile Report (Solmar) – Exhibit 1.9 – p. 222-223
- <sup>242</sup> T. Arnott Witness Statement – Exhibit 3.1 – p. 233 – para. 32.3-32.4 and T. Arnott – oral evidence
- <sup>243</sup> SORE Concept Plan – Exhibit 4.2 – p. 6
- <sup>244</sup> *865503 Ontario Inc. v. London (City)*, [2008] O.M.B.D. No. 1159, para. 10, 15-17, 22-23, 34, 43-45
- London Mobile Lunch Ltd. v. Westminster (Town) Committee of Adjustment* [1992] O.M.B.D. No. 1684, para. 21-24
- <sup>245</sup> S. Kurtz – filed and oral evidence
- R. Scheckenberger – filed and oral evidence
- T. Chisholm – filed and oral evidence
- <sup>246</sup> S. Kurtz – filed and oral evidence
- <sup>247</sup> R. Scheckenberger – filed and oral evidence
- <sup>248</sup> E. Bannon – filed and oral evidence
- <sup>249</sup> E. Bannon Witness Statement – Exhibit 4.1 – p. 598, 600, 601, 604, 607 and E. Bannon – oral evidence
- D. Stephenson Witness Statement – Exhibit 4.1 – p. 561
- W. Croft Witness Statement – Exhibit 4.1 – p. 491-494
- R. Scheckenberger – oral evidence
- <sup>250</sup> NPCA Withdrawal Letter – Exhibit 1.1 – p. 1001-1003
- NPCA Policy Letter – Exhibit 1.1 – p. 1009-1011
- E. Bannon – oral evidence
- <sup>251</sup> NPCA Conditions for Draft Plan Approval – Exhibit 1.1 – p. 1004-1007
- <sup>252</sup> ROP (2022) s.3.1.9.6.6 – Exhibit 1.14 – p. 637
- <sup>253</sup> P. Kuntz – oral evidence
- <sup>254</sup> Bubble Diagram – Exhibit 4.27
- <sup>255</sup> J. Richard Witness Statement – Exhibit 4.1 – p. 633 – para. 35 and J. Richard – oral evidence
- <sup>256</sup> M. Ormston-Holloway Witness Statement – Exhibit 3.1 – p. 270-271, p. 273, untested
- <sup>257</sup> J. Richard Witness Statement – Exhibit 4.1 – p. 638 – para. 62-64
- <sup>258</sup> CMC Decision – Exhibit 1.9 – p. 455-456
- <sup>259</sup> Niagara Region Comments – Exhibit 1.1 – p. 975
- <sup>260</sup> Solmar's suggestion in oral closing that Mr. Palmer supports the Panhandle access as an option for the Solmar development is incorrect. In Mr. Palmer's discussion with Member Best, he confirmed that the Panhandle access option was only for driveway access to limited intensification (2-4 houses). Also See: R. Palmer Witness Statement – Exhibit 3.1 – p. 32 – para. 48
- <sup>261</sup> *2575867 Ontario Inc. v. Toronto (City)* 2021 LNONLT 333, para. 103
- <sup>262</sup> The Horne Report – Exhibit 1.1 – p. 138

## *Losani Homes (1998) Ltd. v. Grimsby (Town)*

Ontario Land Tribunal Decisions

Ontario Land Tribunal

Panel: S. Tousaw, Member

Heard: July 4-15, 2022 by videoconference;  
written submissions, July 25,  
2022.

Decision: Decision: September 8, 2022.

OLT Case Nos.: OLT-22-002366, OLT-22-002367,  
OLT-21-001560, OLT-21-001561

Legacy Case Nos.: PL210286, PL210287, CRB2112, CRB2113

OLT Lead Case No.: OLT-22-002366

Legacy Lead Case No.: PL210286

Approval Authority File No.: OPA-26OP-16-2002

Municipality File No.: 26Z-16-2004

### **2022 LNONLT 924**

PROCEEDING COMMENCED UNDER subsection 22(7) of the Planning Act, R.S.O. 1990, c. P.13, as amended Applicant and Appellant: Losani Homes (1998) Ltd. Subject: Request to amend the Official Plan -- Failure of the Town of Grimsby to adopt the requested amendment Existing Designation: Neighbourhood Commercial Area Proposed Designated: Neighbourhood Commercial Area, site specific Purpose: To permit a seven storey mixed-use building Property Address/Description: 141-149 Main St. E. Municipality: Town of Grimsby PROCEEDING COMMENCED UNDER subsection 34(11) of the Planning Act, R.S.O. 1990, c. P.13, as amended Applicant and Appellant: Losani Homes (1998) Ltd. Subject: Application to amend Zoning By-law No. 14-45 -- Refusal or neglect of the Town of Grimsby to make a decision Existing Zoning: Neighbourhood Commercial (NC), site specific exceptions 19 and 126 Proposed Zoning: Neighbourhood Commercial (NC), site specific exceptions (to be determined) Purpose: To permit a seven storey mixed-use building Property Address/Description: 141-149 Main St. E. Municipality: Town of Grimsby PROCEEDING COMMENCED UNDER subsection 29(5) of the Ontario Heritage Act, R.S.O. 1990, c. O.18, as amended Owner/Objector: Losani Homes (1998) Ltd. Subject: Objection to the Notice of Intention to Designate Property Address: 141 Main Street East Legal Description: CON 1 PT LT 6, North Grimsby; PTS 30 & 31 & SUBJECT TO AN EASEMENT OVER PTS 24 to 29, 30R-10405; GRIMSBY Municipality: Town of Grimsby PROCEEDING COMMENCED UNDER subsection 29(5) of the Ontario Heritage Act, R.S.O. 1990, c. O.18, as amended Owner/Objector: Losani Homes (1998) Ltd. Subject: Objection to the Notice of Intention to Designate Property Address: 147 Main Street East Legal Description: PT LT 6 CON 1, North Grimsby (FMLY PCLS 18 & 19, PT PCL 17), as in RO635982 & RO693171; PT 30R-8135; GRIMSBY Municipality: Town of Grimsby

(92 paras.)

### **Appearances**

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Losani Homes (1998) Ltd. ("Applicant"/"Appellant"): R. Kehar, counsel.

Town of Grimsby ("Town"/"Grimsby"): T. Halinski, counsel.

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**DECISION DELIVERED BY S. TOUSAW AND INTERIM ORDER OF THE**  
**TRIBUNAL**

## INTRODUCTION

1 Just as "a picture is worth a thousand words," the retention and preservation of heritage structures ensures their visibility to tell a story much more effectively than attempting commemoration through such measures as documentation or signage, following their demolition. Here, the retention of two heritage fruit-farm houses is supported, while also enabling mixed-use intensification on the same property.

2 The Applicant proposes to develop a six-storey, mixed-use building at 141, 147 and 149 Main Street East, Grimsby (the "site").

3 The Applicant appealed to the Tribunal on the absence of decisions by the Town on applications for Official Plan Amendment ("OPA") and Zoning By-law Amendment ("ZBA") under the *Planning Act* ("Act"). The Applicant also appealed to the Tribunal on the Town's Notice of Intention to Designate ("NOID") 141 and 147 Main Street East ("Main") and the Town's refusal to grant demolition permits on those lots, under the *Ontario Heritage Act* ("OHA"). These dwellings are referred to as "141" and "147."

4 This case underscores the necessary and appropriate balancing of planning issues related to preserving heritage while enabling intensification. One tempers the other, on a range of scale from full heritage protection, with no change and thus no development, to maximizing development and losing all heritage attributes. Here, the Tribunal finds that a balanced solution is achievable that retains two heritage dwellings while also facilitating a desirable mixed-use building which helps meet today's needs.

5 In many ways, this Decision reflects the existing conditions of the site, where an active flower and landscape business operates successfully within and around the heritage houses. The proposed mixed-use of the site can achieve the same result: necessary and desired commercial and residential uses can thrive within, around, and benefit from, the two heritage structures. Such co-existence enables the Town to address the future without forgetting the past.

6 The Tribunal finds a "middle ground" here between the opposing views of the Applicant and the Town, not in an effort to compromise, but in accordance with heritage and intensification policies at every level: provincial, regional and local. Conserve heritage while intensifying development.

## PROCEDURAL MATTERS

7 The Parties agreed that these matters are being heard together, and that the witnesses will direct their evidence to the appeals and issues of relevance to their expertise.

8 At the outset of the hearing, Kevin Pirak, Counsel for the added Party of Burgess Heritage Group Inc. ("Burgess"), advised that Burgess's issues were related only to servicing which have now been addressed, and that Burgess requests to be released as a Party and granted Participant status. With the consent of the Applicant and the Town, the Tribunal withdrew Burgess's Party status and granted it Participant status.

9 At the request of the Parties on the first day of the hearing, the Tribunal adjourned the hearing until day three to allow the Town to consider recent revisions to the Applicant's development plans intended to address certain issues of the Town. Although the revised plans addressed certain issues in part, they resulted in no change to the Town's

overall position. The Parties agreed that the hearing would proceed with reference to the revised plans, as they now represent the Applicant's proposed development.

## APPLICATIONS

**10** This corner site is a 0.89 hectare property extending 120 metres ("m") along the north side of Main and 52 m along the west side of Wentworth Drive ("Wentworth"), within an area designated as Neighbourhood Commercial ("NC") in the Town's Official Plan ("TOP").

**11** The NC designation, including this site, is: somewhat centrally located within the east half of Grimsby's built area; surrounded by extensive residential development; and adjacent to the West Lincoln Memorial Hospital ("hospital"). The site at issue here is 300 m west of the hospital.

**12** The Applicant's revised plans for the site include the following features as displayed in Exhibit 3, p. 90:

- a six-storey, mixed-use building shaped like an elongated "H" in plan view;
- retail uses at grade in the southeast wing near the street, office uses at grade within the east wing and toward the centre of the building, and a total of 201 residential units on the west half of the ground floor and on all floors above;
- retention of the façade of 147 along with the front two to three metres of that dwelling (the "façade"), and the complete removal of 141;
- building stepbacks above the third floor at each of three wings (northwest, southwest and southeast);
- pedestrian access and landscaped open space within the larger setback from Main of the central portion of the building (considered the building's "front"); and
- vehicular access from Wentworth to below-grade and surface parking at the "rear" of the building.

**13** The Applicant requests the Tribunal to make the following decisions:

- Approve the OPA to permit on this site, within the existing NC designation, "dwelling units at or above the first storey" and to require that "the lot area ... shall be a minimum of 0.8 hectares;"
- Approve in principle the draft ZBA, and withhold the final Order pending the ZBA final form to the satisfaction of the Applicant and the Town;
- Approve in principle the demolition permits for 141 and 147, and withhold the final Order pending the final form of conditions for commemoration to the satisfaction of the Applicant and the Town; and
- Recommend to the Town that it withdraw the NOID for 141 and 147 because the cultural heritage value will be conserved through the conditions for demolition and through a site plan application ("SPA").

## STATUTORY REQUIREMENTS

**14** The appeals in this case invoke both the *Planning Act* ("Act") and the *Ontario Heritage Act* ("OHA").

### *Planning Act*

**15** In making a decision under the Act for the OPA and ZBA, the Tribunal must have regard to matters of provincial interest as set out in s. 2. Under s. 2.1(1), the Tribunal must also have regard to any decision Town Council made under the Act that relates to the same planning matter, and the information considered by Town Council in making those decisions.



**16** Under s. 3(5), the Tribunal's Decision on the OPA and ZBA must be consistent with the Provincial Policy Statement, 2020 ("PPS"), and must conform with A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2020 ("GP"), in effect at the date of this Decision.

**17** Under s. 17(34.1), the OPA must conform with the Region of Niagara Official Plan ("ROP"). As an amendment to the Town Official Plan ("TOP"), the OPA need not strictly conform with the TOP but may be evaluated against the TOP's purpose and intent, including policies pertaining to OPAs. Under s. 24(1), the ZBA must conform with the TOP, as amended.

### **Ontario Heritage Act**

**18** The OHA governs decisions on a NOID and decisions on applications for demolition, removal or alteration to an identified heritage attribute.

**19** With the 2021 amendments to the OHA, *O. Reg. 385/21* includes transition rules in s. 18, directing that a NOID published before July 1, 2021 shall proceed in accordance with the OHA as it read on June 30, 2021 (the "former OHA"). Therefore, the NOIDs in this case, having commenced in January 2021, remain subject to the process in the former OHA whereby the Tribunal, after holding a hearing, makes a Recommendation to the Town on whether the property should be designated (former OHA s. 29(12)). The Town may then pass a by-law designating a property or may withdraw the NOID (former OHA s. 29(14)).

**20** Similar transition rules apply to an application to alter or demolish a heritage attribute, per *O. Reg. 385/21 s. 18(3)(e)* and (f). The Applicant appealed to the Tribunal in April 2021 its two applications to demolish heritage structures, resulting again in the application of the former OHA. However, the former OHA was similar to the current OHA wherein the Tribunal is authorized to render a Decision whether to dismiss the appeal or direct the municipality to grant the demolition permit, subject to any specified terms and conditions (former OHA, s. 34.1(6)).

**21** The Parties acknowledge that under OHA s. 30(2), on the issuance of a NOID, a property is considered designated under the OHA, until and unless the NOID is withdrawn by the Town after considering the Tribunal's recommendation. This provision invokes the designation when considering applications for alteration, demolition or removal. The Parties' submissions simply ask the Tribunal to allow or dismiss the OHA appeals, without seeking a sequence of recommendation, then decision. The Tribunal is satisfied that, when hearing these matters together, it may make a recommendation on a NOID while also making a decision on demolition. These determinations (i.e., recommendation and decision) are anticipated to be aligned and consistent.

### **WITNESSES**

**22** The Tribunal affirmed and qualified seven professional witnesses to provide opinion evidence in their field of expertise noted below:

For the Applicant:

- \* Scott Catton, transportation engineering
- \* Andrea Sinclair, urban design
- \* Dan Currie, heritage conservation
- \* David Aston, land use planning

For the Town:

- \* Julia Rady, heritage conservation
- \* Catherine Jay, urban design
- \* Allan Ramsay, land use planning.

## SUMMARY POSITIONS

**23** The issues of this case focus on the conservation of heritage resources and the appropriate scale of development, including height, density and setbacks related to small town character.

**24** The Applicant seeks to build out this site at a scale and intensity it considers suitable for a commercial area on Main, while providing pedestrian-oriented, live-work opportunities, and sufficiently commemorating or preserving certain heritage attributes.

**25** The Town does not oppose a mixed-use building within the NC designation, but seeks to preserve 141 and 147 while allowing for a more limited scale of development along Main, given the adjacent neighbourhoods and the higher-density opportunities in the Town's two Major Intensification Areas ("MIAs").

**26** The positions of the Parties are generally summarized as follows.

### Applicant's Position

**27** The Applicant seeks the decisions and recommendation noted above, arguing that the proposed six-storey, mixed-use building represents suitable intensification on an under-utilized greyfield site. The plans will substantially contribute to a mixed-use, live-work, walkable community along this main street, with convenient access to commercial uses and the hospital, including the hospital's redevelopment which is commencing. The site's heritage attributes will be conserved through the retention of the façade of 147, and through the appropriate commemoration of 141 and 147, as well as the long-running Cole's Florist business ("Cole's"), operating on this site today but dating back to the late 1800s when located across Main from the site.

**28** The Applicant argues that the initiation of a proposed Hospital Secondary Plan, as recommended by Region and Town staff but terminated by Town Council, underscores why intensification is appropriate in this area and at this site. This site will provide potential housing for hospital staff, housing for residents close to the hospital, and commercial and office space available for medical-related businesses, and other business and services, all within a short walk to and from the hospital and the area's stores and services. The Applicant also notes that the Region's Transportation Master Plan identifies Main for future transit, and while no timeframe is known, these future plans support intensification occurring at this site.

**29** The Applicant submits that small town character is supported by this stepped, mid-rise building at this suitable site, in comparison to tall buildings which are directed to the MIAs. Other large floor-plate, mid-rise buildings exist or are planned in the Town, including the nearby hospital and its redevelopment, and the apartment building and retirement home at Main and Bartlett Avenue, all which exist within and contribute to the existing small town character. At this site, the building will comply with the 45-degree angular plane, will not produce adverse shadow impacts, and generally reflects the setback to residential areas as sought by the TOP.

**30** The Applicant asserts that this proposal balances the inherent tension in the TOP's requirements for larger setbacks along Main while also requiring commercial uses to be close to the street. These requirements are represented by the building's east and west wings being close to the street, including commercial uses in the east wing, while setting back the building's central axis reflecting the historic setback of 141 and the retained façade of 147.

**31** In lieu of designation under the OHA, the Applicant intends to conserve the site's heritage value by retaining the façade of 147, along with appropriate commemoration for 141, 147 and Cole's, through proposed conditions to the demolition permits, including through SPA requirements. The Applicant argues that the OHA and the PPS enable some release of heritage resources through provisions for alteration or demolition combined with mitigation measures which conserve heritage values or interests. To that end, the Applicant suggests that Dr. Rady's recommendations can be reasonably addressed through commemoration and retaining the façade of 147, including

the story of early tender fruit farming and the architecture of the farm dwellings. The Applicant submits that its necessary SPA will provide for appropriate views to 147 from Main, and will enable further consideration of a potential front-yard greenhouse in reference to the history of Cole's. The Applicant also submits that the demolition conditions for 141 should include the option of relocation, should that become feasible.

### **Town's Position**

**32** In opposition to the development, the Town requests the Tribunal to dismiss the appeals under the Act and thereby not approve the OPA and ZBA, and to dismiss the appeals under the OHA for the demolition permits and the NOIDs. To the latter request, the Tribunal interprets that the Town seeks a recommendation from the Tribunal to designate 141 and 147 under the OHA, in accordance with the process under the former OHA as described under Legislative Requirements above.

**33** The Town explains that it is not opposed to redevelopment of the site in principle, but that the proposed building is too large, in height, length, and density, for a development in this commercial area of Main and adjacent to a stable residential neighbourhood. It is better suited to, and would be permitted in, the Town's MIAs. The mostly residential function of the building fails to represent the intended function of the NC designation. To heritage, the Town argues that the almost complete removal of two heritage buildings should not occur.

**34** The Town argues that the oversized building would neither reflect the existing character of Main nor the small town character of low-rise, modest-scale development. With retail and office space limited to only a part of the main floor, it represents only 5% of the building's entire floor space and only a portion of the main floor within this commercial area. Regional transit along Main is but a concept at this time, with no plans for public transit throughout the Town, except for the GO Station for which construction has commenced.

**35** The Town refers to this NC designation as following the ROP policies for a hierarchy of commercial areas, serving nearby residential areas, and buildings close to the street. The TOP's two MIAs implement the ROP policy to direct a significant portion of growth to intensification areas, being the downtown and the node centred on the GO Station. The ROP does encourage intensification throughout built-up areas but at a suitable scale and character for the surrounding community.

**36** Under the TOP, this proposal fails to conform with the NC designation, compatibility and growth management policies. It fails to satisfy the Vision for small town character and cultural heritage. As a large, central property within the NC designation, the site is suitable for commercial uses serving the broader community, including the hospital. Unlike other areas, the NC designation is not identified for large mixed-use buildings.

**37** The TOP already incorporates the ROP intensification target of 80%, and the new ROP target of 98%, when in force, will be addressed in the TOP through a comprehensive review. Relying on that target for this site-specific proposal is premature and circumvents a full public process. This development represents one year of current projected growth for the Town.

**38** The Town finds the building too long, with negative effects on the character of Main, the surrounding neighbourhoods, and across the Town. The ground floor requires an active frontage through a function of setbacks, access and landscaped space. A more vibrant streetscape may be achieved through a redesign of the site to include more than one building to address matters of heritage, commercial uses, and access.

**39** To heritage matters, the Town argues that since the heritage experts agree that 141 and 147 satisfy the criteria for designation in *O. Reg. 9/06*, and since the OHA requires these properties to be treated as already designated, the focus is whether they should be demolished. Their near complete removal does not constitute sufficient conservation under the PPS, ROP and TOP. Demolition should be a rare exception. These dwellings contribute to the identified Scenic Heritage Highway, early tender fruit farming, and architectural variations, as does 133, the designated property abutting to the west of the site.

## AGREED FACTS

**40** The Parties' agreed facts and opinions, as filed in advance of the hearing or clarified during the hearing, include the following:

- 141 and 147 represent and constitute heritage attributes which establish their cultural heritage value or interest ("CHVI") worthy of designation in accordance with *O. Reg. 9/06* and the OHA.
- The site is a greyfield within the built boundary, being where planning policies at all levels direct intensification to occur, subject to locational compatibility. Mixed-use development is an appropriate use for this site in support of a complete community within the NC designation, visually fronting onto Main, close to the hospital being a public service facility, and next to, but not within a stable residential area.
- To population growth, the GP and the recently adopted, but not in force, new ROP, establish higher population and employment targets than contained in the TOP. The in-force TOP directs that 80% of new dwellings occur through intensification, whereas the new ROP increases that objective to 98%. These are minimum targets such that general achievement across the Town, including within MIAs, would not prevent suitable intensification elsewhere within the built area.
- Outside the two MIAs, being the downtown and the GO Station area, the vast majority of Grimsby consists of stable residential areas.
- Matters of servicing, transportation and parking are not at issue, having been resolved between the Parties.

## ISSUES and FINDINGS

**41** The primary issues relate to the protection of heritage features and the compatibility of the development within the NC designation and adjacent to a Residential designation to the north.

**42** The Tribunal finds on the evidence that the following policies addressed by various witnesses are more suitably upheld by the retention of 141 and 147 in substantial form, rather than their near complete removal and associated commemorative efforts. The Tribunal also finds that a six-storey, mixed-use development is appropriate for this site, as tempered by various design features, to be suitable for Main and compatible with adjacent residential uses. Changes to the site and building design will be necessary based on the Tribunal's findings on heritage.

**43** The policies are reviewed first, followed by the findings on evidence. Policy directions found to be particularly instructive in this case are underlined.

**44** Key terms are defined in the PPS, including for heritage conservation relevant to this case. "Built heritage resource" refers to a property's CHVI which may be designated under the OHA or included on a municipal heritage register. "Conserved" means retaining the CHVI of built heritage resources, which may include the recommendations of a Heritage Impact Assessment ("HIA"), including mitigative measures, as accepted by the decision-maker. "Heritage attributes" are elements that contribute to a protected heritage property's CHVI. "Protected heritage property" is that designated under the OHA. "Significant" includes resources of CHVI based on criteria established under the OHA.

**45** The PPS, s. 1.7 directs that:

1.7.1 Long-term economic prosperity should be supported by: ...

- b) encouraging residential uses to respond to dynamic market-based needs and provide necessary housing supply and range of *housing options* for a diverse workforce;
- c) optimizing the long-term availability and use of land, resources, *infrastructure* and *public service facilities*; ...

- e) encouraging a sense of place, by promoting well-designed built form and cultural planning, and by conserving features that help define character, including *built heritage resources* and *cultural heritage landscapes*; ...

**46** The PPS Cultural Heritage and Architecture policies of s. 2.6 include:

2.6.1 *Significant built heritage resources* and *significant cultural heritage landscapes* shall be conserved. ...

2.6.3 Planning authorities shall not permit *development* and *site alteration* on *adjacent lands* to *protected heritage property* except where the proposed *development* and *site alteration* has been evaluated and it has been demonstrated that the *heritage attributes* of the *protected heritage property* will be conserved.

2.6.4 Planning authorities should consider and promote archaeological management plans and cultural plans in conserving cultural heritage and archaeological resources. ...

**47** The GP contains policies reflecting the foregoing directions of the PPS, including the achievement of complete communities (s. 2.2.1.4 and s. 2.2.6.2), and to provide a range and mix of housing options (s. 2.2.6.1.a). The GP s. 4.2.7.2 directs municipalities to work with stakeholders to develop and implement official plan policies related to cultural heritage resources. Of particular relevance in this case is s. 4.2.7.1:

1. *Cultural heritage resources* will be conserved in order to foster a sense of place and benefit communities, particularly in *strategic growth areas*.

**48** The GP definition of strategic growth areas refers to areas identified by municipalities as a focus for intensification, including greyfields. Greyfields are defined as underutilized, often former commercial properties.

**49** Along with other relevant ROP policies, key themes and directions of the ROP are established by the following sections (summaries, not quotations):

#### 3.D Commercial Areas

3.D.5 and 3.D.6 - promote the redevelopment of greyfields and commercial areas into mixed-use areas;

3.D.7 - promotes a main street form of commercial development with facades closer to the street, an efficient use of land, and a mix of uses;

3.D.8 - neighbourhood commercial activities are an integral part of residential areas;

3.D.10 - assess redevelopment in relation to community character within existing or proposed neighbourhood fabric, including scale, orientation relative to adjacent uses, and compatible with housing;

#### 4.A.1 Growth Management Objectives

4.A.1.2 - directs growth to built-up areas through intensification;

4.A.1.3 - directs intensification to areas so designated by local municipality;

4.A.1.6 - build communities that are compact, mixed use, and support transit and active transportation;

4.A.1.7 - reduce dependence on the automobile;

4.A.1.10 - provide a framework for complete communities including a diverse mix of land uses, a range of employment and housing types, high quality public spaces, and easy access to stores and services via automobile, transit and active transportation;

#### 4.C Intensification

4.C.1.1 - intensification includes all forms of development within the Built-up Area;

4.C.2.1b - intensification throughout the Built-up Area is generally encouraged;

4.C.2.1c - identify specific intensification areas including downtowns, nodes and greyfield areas;

4.C.2.1d - plan the above areas for a significant portion of population and employment growth, relative to the shape and character of the community;

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4.C.2.1e - a diverse mix of uses in proportions dependent on area characteristics and the intended critical mass of residential development;

4.G.1 Niagara's Urban Community Objectives

4.G.1.1 - sustainable, complete communities;

4.G.1.7 - promote the preservation and enhancement of cultural heritage resources;

4.G.5 Niagara Region's Urban Structure

4.G.5.1 - the key components of urban structure include locally designated Intensification Areas and Transportation Corridors (includes major roads);

4.G.5.2 - other key determinants defining and shaping urban structure include major community facilities such as hospitals;

4.G.11 Local Municipality Designated Intensification Areas

4.G.11.2 - municipalities will define intensification areas in local official plans for intensification and redevelopment pursuant to the policies of s. 4.C.2;

4.I Mixed Use Areas

4.I.1 - encourages the development of mixed use areas;

4.I.2 - accommodate a variety of housing types, with emphasis on medium and high density residential development;

4.I.3 - allow mixed use areas at several scales, including neighbourhoods, blocks, parcels and buildings;

4.I.7 - provide an attractive streetscape environment and public realm.

**50** Through the TOP's similar approach, key themes and directions are framed by the following sampling of policies (summaries, not quotations unless so marked):

2.0 Municipal Structure

- applications for new uses can be evaluated for their conformity with the broad structural policies and guidelines of the Plan;

2.1 The Vision

"Grimsby's future will build on its small town scenic character through managed growth that will provide for a greater choice for housing, alternative modes of transportation, increased employment, a vibrant downtown and an accessible public waterfront. Grimsby's natural heritage, cultural heritage, and arts will be celebrated and protected. The existing urban settlement area of Grimsby will be intensified in a few key areas while respecting the small town character and cultural heritage of the Town. Small-scale infill will be promoted in other parts of the urban settlement area but will be sensitive to the surrounding housing character. ..."

2.2 Municipal Structure Principles

2.2.9 - ensure a wide range of housing types and locations;

2.2.11 "Promote efficient *development* and land use patterns which minimize land consumption through compact *development* in areas best able to accommodate it."

2.2.16 "Promote an urban structure that is less dependent on cars, and encourages alternative modes of transportation ..."

2.2.23 "Protect the small town character and feel of Grimsby."

2.2.27 "Protect Grimsby's cultural heritage."

**51** The above directions of the TOP are elaborated through numerous policies, including the following sections in dispute in this case:

### 2.3.2 The Urban Settlement Area -- Policies

2.3.2.1a "... Any development within the built boundary is considered intensification and contributes to the intensification target of this Plan";

2.3.2.1d "Major *intensification* areas represent two areas where the majority of intensification will be directed";

2.3.2.1f - stable residential neighbourhoods "... are intended to remain stable with change that is in keeping with the established character of the neighbourhoods."

2.3.2.6 - the two major intensification areas "... will be the primary focus for *intensification* ..."

2.3.2.10 - within stable residential neighbourhoods, "... infill and *intensification* may be permitted where it respects the scale and built form of the surrounding neighbourhood ..."

### 2.4 Growth Management -- Policies

2.4.6 - to achieve the 80% intensification target, infill and intensification are encouraged throughout the built-up area; with the majority directed to the two major intensification areas; also permitted within stable residential neighbourhoods at a scale and built form that reflects the neighbourhood;

### 2.5 Housing -- Policies

2.5.5 - infill and intensification "... shall consider the impact on adjacent residential uses including overlook and shadowing, the character of the surrounding area and the need for a transition in heights and densities adjacent to existing residential uses ..."

### 3.4.7 Design Policies for Residential Neighbourhoods

3.4.7.8 - apartment buildings should front and face the road at a minimum setback; buildings taller than 4 storeys are to be set back from low or medium density residential areas according to the specified angular plan; and within 25 m of the property line, not more than 2 storeys taller than adjacent development;

### 3.6.1 Neighbourhood Commercial Area

3.6.1.1 - permits a range of uses including retail, restaurants, medical clinics and offices;

3.6.1.2 - intended to serve the daily and weekly needs of surrounding residents while not usurping the function and range of uses in the Downtown;

3.6.1.5 to 3.6.1.9 -- adequate parking, setbacks, fencing and landscaping to buffer adjacent residential uses;

### 7.3 Main Street

7.3.1 - outside the Downtown, require larger building setbacks to maintain the existing streetscape character;

### 8.0 Cultural Heritage and Archaeology

8.1 "The Town shall encourage the preservation of buildings and sites having historical and/or architectural value or interest and significant cultural heritage landscapes."

8.1a "... Protection, maintenance and stabilization of existing cultural heritage attributes and features over removal or replacement will be adopted as the core principles for all conservation projects."

8.7 "The (heritage) register may include *built heritage resources* that have not been designated but that the Town believes to be of cultural heritage value or interest."

8.15 - the Town's priorities to undertake heritage plans and programs include "b) the protection of the Main Street corridor."

**52** Governing the Tribunal's review is that its Decisions and Recommendations are guided by the legislative requirements, including: regard for provincial interests; consistency with the PPS; conformity with the GP; and conformity with the ROP. As argued by the Applicant and agreed with here, the OPA should consider the high-level intentions of the TOP, but need not conform with every policy of the TOP. As a sought amendment, the OPA addresses a matter not explicitly allowed by the TOP, here being a substantial mixed-use building within the NC area.

### **Heritage Conservation**

**53** The Tribunal finds that the outcome of this case turns first on the issue of heritage conservation, which then affects the outcome of the second issue, being suitable use and scale. The Parties disagree on how best to conserve heritage at this site, while they agree that some form and scale of intensification, including residential uses, are appropriate within this commercial area. The heritage outcome will fundamentally influence the form and scale of new development.

**54** The Tribunal prefers the Town's intention, with the support of Dr. Rady's evidence, to designate 141 and 147 under the OHA and retain these dwellings as representative contributors to the heritage of and along Main, including early farm dwellings and their associated tender fruit farms that occupied relatively narrow, small, farm lots along Main.

**55** The Town's NOIDs for 141 and 147 have the effect of designating these properties, at least temporarily. For the purpose of this hearing and Decision, those dwellings are designated and protected under the OHA. The heritage witnesses both confirm that these dwellings display more than one CHVI worthy of designation.

**56** To allow the proposed development, the Tribunal must find on the evidence, that 141's commemoration is sufficient to warrant the building's demolition, and that 147's retained façade and associated commemoration warrant its substantial removal and its façade incorporated into the new building. For the reasons below, the Tribunal finds the foregoing tests to not be met and will therefore disallow demolition and recommend that the Town designate these properties under the OHA.

**57** Contributing to the Tribunal's findings are the following facts obtained in evidence from Dr. Rady and Mr. Currie. The Town's 2015 report of Grimsby's Special Places identifies 39 cultural heritage landscapes, including all of Main Street as a Scenic Highway Heritage Route used by indigenous people and early settlers, including through the War of 1812, and later as the route of the Hamilton-Grimsby-Beamsville Electric Railway. Both dwellings on site are listed in the Town's Heritage Registry. The Applicant completed HIAs for 141 and 147 in 2019. In February 2021, the Town issued NOIDs for 141 and 147. In September 2021, the Town initiated a Main Street East Heritage Conservation District Study ("Main Street East HCD Study"), which is currently underway.

**58** Both 141 and 147 contain design and physical heritage value: 141 is circa 1910 Queen Anne Revival style with Craftsman influences; 147 is circa 1910 vernacular Italianate style. Both dwellings have contextual value as functionally related to the history of fruit farming. The dwelling at 133, abutting this site to the west, is designated under the OHA for reasons similar to 141 and 147, has a similar setback from Main as the dwellings on this site, and is proposed to be retained and restored when a new building is constructed behind and beside 133's designated dwelling.

**59** Both heritage experts agree that demolition is considered a last resort. Mr. Currie acknowledged that heritage context relates to what is present today and that a demolished building would reduce the overall context. Such reduced context would become the relevant reference for the next heritage request or decision. Mr. Currie also acknowledged that, as an example, retaining the façade of 141, as is proposed for 147, would result in less impact on heritage resources.

**60** The Tribunal disagrees with Mr. Currie's conclusion where, despite the above acknowledgements, he considers



the proposed heritage impact as reasonable due to previous developments and changes along Main, especially within the immediate area of this site. He considers contextual value to exist only between 141 and 147, one to the other, with no effect, for example, on 133 to the west.

**61** The Tribunal prefers the evidence of Dr. Rady in that contextual value engages Main as a whole, where the history of fruit farming is displayed by numerous houses along Main, ranging from those of early, wealthy landowners to those of working fruit farmers. As Dr. Rady opined, such dwellings should be retained as "visual touchstones of Grimsby's past" which enable one to "read the historic streetscape" for past fruit farming and present contrast with the Town's gradual development. Dwellings such as these are "characters in the socio-economic story" and "ideally as many as possible is better than fewer." The Tribunal finds that it is the sum of the parts, being each heritage house, that collectively tell the story of the area's history.

**62** The Tribunal agrees with Dr. Rady's emphasis that "demolition should be a last resort" and is not necessary here to enable the moderate intensification of this large site for mixed-use. The Tribunal finds that incorporating both of these dwellings within a redevelopment plan would achieve warranted heritage conservation while the policy objectives for commerce and housing are also addressed.

**63** The TOP s. 8.1a implements provincial and regional planning documents when it establishes the core heritage conservation principle of preservation being preferred over removal or replacement.

**64** Akin to the cliché of "a picture is worth a thousand words," the very presence and frequency of these heritage dwellings display the story of early settlement and tender fruit farming along Main. While additional commemoration will provide a deeper understanding, the history displayed so effectively through attribute preservation is the reason this option is preferred and why demolition remains the rare exception. Contrary to the Applicant's suggestion that several other listed or designated properties along Main reduces the heritage loss of removing 141, the Tribunal finds that the number, rhythm and repetition of these dwellings carry strong potential as a collective heritage attribute, as is now being considered in the Town's Main Street East HCD Study. Whether or not such HCD proceeds, the positioning of 141 and 147, in step with 133, effectively reflect this area's history worthy of protection.

**65** To the Parties' submissions on cited Tribunal and Court cases, the Tribunal observes that those decisions reflect the balancing of planning considerations relative to each site and application. Some result in the removal or alteration of a heritage structure while others retain all heritage attributes intact. The Tribunal finds the observations of OMB Member M.C. Denhez, at paragraph 82 in *ADMNS Kelvingrove Investment Corp. v. Toronto (City)*, 2010 CarswellOnt 2164, as upheld by the Divisional Court, to be broadly applicable and confirmed by the heritage planners here:

... in the OHA ... 'the conservation, protection and preservation of the heritage of Ontario' ... is the general rule ... and demolition the exception.

**66** The Tribunal will deny the requested demolition permits and recommend that the Town designate 141 and 147 by by-law under the OHA. Their heritage attributes should include a primary emphasis on early fruit farming as advised by Dr. Rady, and include the suggested corrections of certain facts raised by Mr. Currie.

**67** The Tribunal finds that any re-positioning of either 141 or 147 on the site is unlikely to be needed in a redesign, given 141's close proximity to the west lot line and the opportunity for new development on both sides of 147. Their preservation in place will maintain setbacks from Main and influence a final plan based on good urban design for intensification. This Interim Decision will not permit demolition and will direct the Parties to draft final OHA permits and conditions for such matters as removal of non-heritage additions, appropriate restoration of heritage attributes, and any related commemoration.

### **Intensification**

**68** All witnesses agree, including from a heritage conservation perspective, that this site is suitable for some level of mixed-use intensification based on several positive factors: a large greyfield site with extensive frontage on Main;

located at the intersection of Main and Wentworth; centrally located within the NC designation with commercial or mixed uses to the east, west and south; public service amenities nearby including the hospital, parks and the elementary school; and general agreement that intensification, at some compatible scale, constitutes good planning.

**69** To building size and density, the Tribunal prefers the evidence of the Applicant's witnesses. Intensification is encouraged throughout the built-up area by policies at all levels, including TOP s. 2.4.6. While specific direction for intensification is not included in the TOP for the NC designation, the TOP directs that scale respect "small town character" (s. 2.2.23) and the "surrounding neighbourhood" (s. 2.4.6).

**70** The Tribunal finds that intensification at the scale proposed here is warranted, subject to necessary modifications arising from the heritage findings of this Decision. In accordance with the policy directions, this development will: add substantial commercial and office space within the NC designation; diversify the housing supply with apartment units within a surrounding neighbourhood of townhouses and detached dwellings; provide live-work opportunities with the nearby hospital and other employers; and support a safe, walkable community with more people and "eyes on the street."

**71** Subject to compatible scale reviewed below, the Tribunal accepts Ms. Sinclair's opinion that, given this main street commercial area, a building in the height range as proposed does not detract from the small town character of Grimsby. It represents a compatible gradation to the north, from higher height and density here, to lower townhouses and then detached dwellings beyond.

### **Compatibility**

**72** The debate on compatibility relates to certain TOP policy directions: commercial buildings along Main to be close to the street; setbacks to respect those of heritage buildings; and suitable gradation to adjacent residential uses.

**73** On the evidence of Ms. Sinclair, as corroborated in part by Ms. Jay, the Tribunal finds that portions of the building, in final design, can bring commercial uses close to the street, potentially in the form of the current concept plan adjacent to the Main-Wentworth intersection. With the retention of heritage buildings, other portions of the building such as between the heritage structures, should maintain the larger historic setback, again not unlike the current concept. Ms. Jay acknowledges that if the redevelopment is approved abutting to the west of the site, it represents how the varying setbacks of a five-storey building can address both heritage and commercial considerations. The Tribunal agrees with Ms. Sinclair and Mr. Currie, that it is not unusual for oblique views along a street to be concealed temporarily by buildings or parts thereof as one moves along the street. This finding supports the design component of the east end of the building at a minimum setback from both Main and Wentworth.

**74** The Tribunal finds the proposed gradation to residential uses to the north to adequately reflect the policies of the TOP. The Parties agree there are no shadow issues. The final design should generally conform with the TOP's requirement for angular planes and a 25 m setback for storeys 5 and 6, with some exception reasonable for that part of the building adjacent to the townhouse parking area abutting the northeast corner of the site.

**75** The TOP defines "compatible development" as:

development that is not necessarily the same or similar to development in the vicinity, but it is development that improves the character and image of an area, without causing any undue, adverse impacts on adjacent properties.

**76** The Tribunal finds the general scale and massing of the building to constitute compatible development. Of interest, is that the definition prohibits "undue" impacts, which the Tribunal surmises does enable consideration of "due" impacts. It is accepted that abutting neighbours to the north may prefer a lower building height as visible across their rear yards. However, such perception of adverse impact may be "due" -- that is, warranted -- in the reasonable pursuit of mixed-use intensification within a suitable area such as this NC designation and greyfield site.

Similar adjacency between residential and commercial uses exists with the plaza immediately east of the site, where its rear wall and service lane are close to the lot lines of neighbouring dwellings.

**77** As the urban design experts agree, the area includes other relatively long, large-floorplate buildings to the site's east and south, including for commercial, residential or hospital use. While the site could accommodate more than one building, as Ms. Jay suggested should be explored, the Tribunal finds that a well-designed single building is capable of demonstrating suitable conformity with policies regarding heritage, commercial use, and small town character. The plans for this site reflect these considerations and may be pursued in final designs, again with necessary changes arising from the Tribunal's heritage findings. This finding does not prevent the Applicant from redesigning for more than one building if considered necessary given the heritage buildings on the site.

**78** Based on the foregoing findings, the Tribunal's guidance to the Parties' pursuit of final design is set out at the end of this Decision.

### **Statutory Requirements**

**79** Mr. Aston and Mr. Ramsay rely on their Parties' respective heritage and urban design evidence, leading to their opposite conclusions on conformity and consistency under the requirements of the Act. As reviewed earlier, a fundamental issue arises from the TOP's Vision. It says:

... Grimsby will be intensified in a few key areas while respecting the small town character and cultural heritage of the Town. Small-scale infill will be promoted in other parts of the urban settlement area but will be sensitive to the surrounding housing character. ...

**80** Mr. Ramsay reads the TOP as focussing intensification in the MIAs and permitting small-scale infill elsewhere. He recommends a lighter scale of intensification at this site, with lower height, less density, and more three-bedroom units.

**81** The Tribunal makes two observations in support of its finding that intensification at the general scale proposed here by the Applicant is acceptable. First, it is clear that the Town, through the TOP, considers the scale of development permitted in the MIA in the vicinity of the GO Station as not detracting from Grimsby's small town character. Existing and permitted development there includes numerous tall buildings containing high residential densities. This site's development is much smaller and is considered medium scale by the witnesses. Second, small-scale infill is permitted in other parts of the Town provided it is sensitive to the surrounding housing character. While a medium scale here, the Tribunal finds compatibility with adjacent residential areas. As a result, this site exemplifies both of these visions: the NC designation is a suitable "key area" for intensification, while constituting a scale that respects surrounding uses. Should the Parties consider it necessary, the final OPA wording may reference permission for medium scale development on this site.

**82** This development, not unlike buildings to the east at Bartlett Avenue or proposed on the abutting lot to the west of this site, represents sought intensification on a greyfield site, adds apartments to the area's mix of housing types and sizes, supports a more complete community with live-work opportunities, reduces reliance on automobiles, and will support transit on Main, if or when that occurs.

**83** The Tribunal finds that, subject to the heritage findings, the proposed development on this site has regard for Provincial interests, is consistent with the PPS, conforms with the GP, conforms with the ROP, and appropriately implements the TOP via this OPA. The Tribunal has had regard for the matters considered by the approval authorities related to these appeals, and has duly considered the several Participants' lengthy and detailed submissions.

**84** Through this Interim Decision, the Tribunal grants the OPA and ZBA appeals in part, with direction to finalize their content in due course based on further revised plans as necessitated by the heritage matters.

### **Guidance for Next Steps**

**85** Leading from the heritage and planning findings of this Decision, the Tribunal directs that revisions to the plans, OHA permits, OPA and ZBA generally satisfy the following:

- permit medium-scale development on this site in the OPA (if considered necessary by the Parties);
- between 141 and 147, maintain the proposed setbacks along Main, being somewhat deeper than the setbacks of the heritage structures;
- provide sufficient sidewall setbacks from the heritage structures to maintain their detached appearance;
- the new building may be close to or connect with the rear walls of 141 and 147;
- include similar setbacks and stepbacks as proposed for the northwest and southeast wings;
- commercial/office space should dominate those parts of the ground floor that face Main or Wentworth, and result in a substantial portion of the total ground floor in commercial/office space, while also providing visible residential access and the permitted residential occupancy of the northwest wing's ground floor.
- other alterations and minor deviations to the above as agreed to by the Parties and in keeping with this Decision.

**86** To conclude, the stories of tender fruit farming and of Main Street are better conserved and told by the sequence and repetition of early farm houses telling their story by their physical presence and any associated commemoration. Less history and learning are conveyed with fewer remnants of early days of settlement. The retention of such houses along Main not only conserves heritage but also helps retain the small town character of Grimsby while necessary and compatible intensification occurs in an appropriate location amidst them.

## **INTERIM ORDER**

**87** Pursuant to s. 29(12) of the *Ontario Heritage Act* as it read on June 30, 2021, the Tribunal Recommends that the Town of Grimsby designate, by by-law, 141 and 147 Main Street East to be of cultural heritage value or interest, with consideration to including those matters contained in paragraph [66] of this Decision.

**88** Pursuant to s. 34.1(6) of the *Ontario Heritage Act* as it read on June 30, 2021, the Tribunal denies the Appellant's request for demolition permits affecting all or parts of 141 and 147 Main Street East ("Permits"), and leaves those applications open for the Parties to finalize the Permits and conditions for relevant matters, including those contained in paragraphs [67] and [85] of this Decision.

**89** Pursuant to s. 17(50) and s. 34(26)(b) of the *Planning Act*, the Tribunal: allows the appeals, in part; approves in principle an Amendment to the Town of Grimsby Official Plan and an Amendment to Zoning By-law No. 14-45 (the "Amendments"); and directs the Parties to prepare the Amendments in accordance with this Decision, including as contained in paragraph [85].

**90** The Parties may determine how best to incorporate this Decision's directions through the Recommended heritage by-laws and/or through the Ordered Permits and/or Amendments.

**91** The Parties are directed to submit the Permits and Amendments and to confirm compliance with this Interim Order within eight months of the date of this Decision. If unable to complete all documentation within that time, the Parties shall provide a written status report by that date and the expected timeframe to completion. A Party may request that the Tribunal convene a Case Management Conference in the event of difficulties satisfying this Interim Order.

**92** This Member will remain seized to review the Permits and Amendments and to consider issuance of the Final Order.

S. TOUSAW  
MEMBER

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End of Document

## 2575867 Ontario Inc. v. Toronto (City)

Ontario Land Tribunal Decisions

Ontario Land Tribunal

Panel: K.R. Andrews, Member; Carmine Tucci, Member

Heard: July 12 to 23, 2021 by videoconference.

Decision: Decision: September 23, 2021.

OLT Case No.: PL200325

OLT File Nos.: PL200325, PL200326

Municipality File No.: 19 264586 STE 13 OZ

### 2021 LNONLT 333

PROCEEDING COMMENCED UNDER subsection 34(11) of the Planning Act, R.S.O. 1990, c. P.13, as amended  
Applicant and Appellant: 2575867 Ontario Inc. Subject: Application to amend Zoning By-law No. 438-86 - Refusal or neglect of City of Toronto to make a decision Existing Zoning: IC D2 N0.5 Proposed Zoning: Site Specific (To be determined) Purpose: To permit a 31 storey hotel Property Address/Description: 60 Mill Street Municipality: City of Toronto  
PROCEEDING COMMENCED UNDER subsection 41(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended Subject: Site Plan Property Address/Description: 60 Mill Street Municipality: City of Toronto

(124 paras.)

## Appearances

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2575867 Ontario Inc.: Mark Flowers, counsel and Zachary Fleisher, counsel.

City of Toronto: Matthew Longo, counsel and Sara Amini, counsel.

OTP Management Ltd. et. al.: Mark Noskiewicz, counsel (did not participate).

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**INTERIM DECISION DELIVERED BY K.R.  
ANDREWS AND CARMINE TUCCI AND ORDER  
OF THE TRIBUNAL**

### INTRODUCTION

**1** This case involves a proposal to redevelop "Rack House D", a heritage building within the City of Toronto's (the "City") Distillery District, into a 31-storey luxury hotel. To proceed, 2575867 Ontario Inc. (the "Appellant" or the "Applicant") is seeking a Zoning By-law Amendment ("ZBA") and Site Plan Application approval. For the reasons that follow, the Tribunal grants the appeal, ordering the ZBA and Site Plan Application approval, subject to conditions.

**2** In a case of this nature, the Tribunal must determine whether or not the proposal has sufficient regard to the Provincial interests listed at s. 2 of the *Planning Act*, is consistent with the Provincial Policy Statement 2020 ("PPS"), conforms with the Growth Plan for the Greater Golden Horseshoe 2019 ("Growth Plan"), and also conforms to the

applicable municipal planning policies (in the present case, there are several), and generally represents good planning in the public interest.

3 In the present case, the Tribunal's analysis begins with questions of appropriate intensification, optimization and infrastructure support of the subject site. It principally turns, however, on highly contested questions involving urban design and whether or not the existing and planned context of the area supports the proposed tower addition, especially given heritage conservation considerations. These urban design questions, more specifically, turn on an assessment of some of the proposed building's particular design features, including:

- \* Height
- \* Transition
- \* Set-backs
- \* Floorplate
- \* Privacy Concerns; and,
- \* Heritage Conservation of the existing structure and surrounding area.

4 It is noteworthy from the outset that there is largely no dispute between the parties insofar as whether the applicable planning policy framework generally supports intensification and optimization of resources in the area, and also whether the project is supported by existing infrastructure. To put it in another way, even the City agrees that the size and scale of the proposed hotel could conceivably fit in the general vicinity of the proposed site, but it simply does not agree that the proposed built-form fits on this particular property given the existing and planned built-forms immediately surrounding the site -- especially given the various heritage considerations of the site.

5 The City takes the position that the lower heights and proximity of surrounding buildings, plus site-specific heritage considerations, do not mesh adequately with the proposed tower from a design perspective. The Appellant takes the opposite position, citing other taller buildings in the area which seemingly manage to fit in.

6 For reasons detailed further below, the Tribunal's decision has notably turned on a preference for the Appellant's experts' evidence and opinions regarding urban design principles and heritage conservation considerations.

## **BACKGROUND**

7 The appeal arises following the City's failure to make a decision respecting an application by the Appellant for a ZBA pursuant to s. 34(11) of the *Planning Act* (the "Act") and a Site Plan Application pursuant to s. 41(12) of the Act.

8 The subject site is known municipally as 60 Mill Street and it is located at the northeast corner of Mill Street and Trinity Street, within the historic and popular Distillery District tourist destination of the City.

9 The effect of the proposed ZBA and Site Plan Application approval is to permit a 31-storey hotel to be built below, within and above the existing vacant heritage building known as "Rack House D". The proposed development would consist of five underground parking levels, three levels of hotel operations and amenities within the existing structure, two-floors of stepped-in glass-enclosed hotel operations and amenities extending immediately above the existing structure (the "glass reveal"), and another 26-floors of stepped-out hotel structure finished primarily with light-medium-grey manufactured stone and glass (the "main tower") built above the glass reveal (see design and architectural plans attached as Appendix 1). The ZBA would facilitate an increase in height, an increase to Gross Floor Area ("GFA"), an addition to the heritage designated building, and other site-specific performance standards.

10 The site is subject to several Official Plan and Secondary Plan policies and Design Guidelines.

11 It is noteworthy that there is no hotel within a 1-kilometre radius of the proposed development and Distillery District.

## Parties and Participants

**12** The Appellant and the City were the only parties to participate in the proceedings. At the outset of the hearing, Mark Noskiewicz, counsel for the collective party (OTP Management Ltd., Ribbon East Corp., Ribbon West Corp., Cityscape Holdings Inc. and Dream Distillery District Commercial Inc.), confirmed that his clients would not participate despite having been granted party status.

**13** The Tribunal received and reviewed two participant statements, one from Tim Wood (an area resident) and the other from Gooderham and Worts Neighbourhood Association ("GWNA"). Mr. Wood was granted participant status at a previous CMC. The GWNA were granted participant status at the outset of the hearing. The Participants' concerns included potential traffic and safety issues, noise, privacy and light nuisance, maintaining the integrity of the historic area, streetscapes and urban design in general, and height and massing of the proposed building.

**14** All of the participants' concerns were considered by the Tribunal and addressed through the evidence and submissions of the two participating parties. The Tribunal ultimately found that the participants' concerns were either unfounded or at least adequately mitigated to the greatest degree possible through the Appellant's design plan.

## Witnesses

**15** The following expert witnesses were qualified to provide opinion evidence in relation to the scope of their expertise listed below:

### Appellant

- \* Michael Goldberg -- Land Use Planning
- \* Mansoor Kazerouni -- Architecture and Urban Design
- \* Andrew Pruss -- Heritage Architecture and Heritage Planning
- \* Peter Case -- Wind Engineering
- \* Timothy Arnott -- Transportation Planning

### City

- \* Kevin Friedrich -- Land Use Planning
- \* Deanne Mighton -- Urban Design
- \* Joseph Muller -- Heritage Planning

## Rack House D

**16** There was no dispute between the parties regarding the history of Rack House D. Rack House D was constructed between 1884-1895 for the storage of alcohol barrels, and it was one of a grouping of former rack houses situated along the north side of Mill Street that comprised the warehouse portion of the former Gooderham and Worts Distillery District complex. Rack House D was the largest of these warehouses, rising six-levels, and it was an imposing structure within the Distillery District.

**17** Rack House D was originally designed by David Roberts Jr. and constructed of red brick that characterizes many of the buildings in the area. The building's elevations feature a series of brick piers with alternating recessed brick panels. The bricks at the top of the panels are corbelled in a heavy arcaded pattern that is unique within the District. The building is set on a rectangular plan and covered by an almost flat roof. Windows are presently found on the east and west façades only, and are distinctive in the regimented pattern of openings with fitted, green painted metal shutters. The interior of Rack House D features a wood roof structure, wood stairs, a raised walkway along the west side, and timber racking which rises six levels from the stone footings of the building all the way up to support the roof.



**18** Rack House D was designated as a heritage property under Part IV of the Ontario Heritage Act as part of the Gooderham Worts Complex and placed on the City's Heritage Register by Toronto City Council in 1976.

**19** Rack House D is subject to a Heritage Easement Agreement ("HEA") dated April 3, 1996, which is registered on title of the property. The reasons for identification in the HEA describe the architectural and historic significance of Rack House D.

**20** It is noteworthy that two single-level rack houses located immediately east of Rack House D were redeveloped into 12- and 14-storey condominiums in the 1990s (70 and 80 Mill Street), incorporating parts of the façades of the original structures (being only a portion of the original outside walls), with additions added above and beside the retained-façades. The Tribunal finds, as a fact, that these additions are similar in scale (on a ratioed basis, comparing the original single-level heritage structure to the 12-14 storey additions) to that of the proposed addition to Rack House D, but with less-complete retention of the original heritage façades compared to the proposed Rack House D heritage conservation plan.

**21** Rack House D has been vacant for at least 31 years, and it is the last remaining building in the Distillery District that has not yet been re-purposed through some sort of redevelopment plan.

## **ISSUES AND ANALYSIS**

### **Policy Framework**

**22** The municipal planning policies applicable to the subject site include the City of Toronto Official Plan, the Downtown Plan (OPA 406), the King-Parliament Secondary Plan, and the Gooderham & Worts Site and Area Specific Policies ("SASP"). The relative hierarchy of the Official Plan policies give priority to more specific policies, up to the Gooderham & Worts SASP, which states:

The policies of the Official Plan will continue to apply to the Gooderham & Worts Special Identity Area except where they are at variance with the policies contained in this area Site and Area Specific Policy, in which case the provisions of this area specific policy will prevail.

**23** The Tribunal notes that, as part of their submissions, both parties paid particular attention to the updated and geographically specific plans of the Ministry-approved Downtown Plan (July 2019) and Official Plan Amendment 304 ("OPA 304"; approved by L.P.A.T., May 21, 2020), which updated the policies of the Gooderham & Worts SASP. The Tribunal found these policies to be especially instructive in relation to some of the most contested issues of this matter, being largely about detailed urban design and heritage conservation considerations.

**24** In this particular case, the Tribunal also received evidence and considered aspects of the *Ontario Heritage Act* - Part IV designation of the Distillery District and individual buildings thereon (including Rack House D), the Federal designation of the Distillery District as a National Historic Site, and a heritage easement agreement with the City which incorporates, by reference, voluminous reports on the Distillery District authored between 1988-1994.

### **Intensification, Optimization and Infrastructure Support**

**25** The parties are largely in agreement that the policy objectives applicable to the area promote intensification and optimization of resources. The City correctly notes, however, that "optimization" does not necessarily mean "maximization".

**26** Accordingly, the Tribunal accepts the parties' planning experts' evidence and referenced planning policy, which generally supports the redevelopment of Rack House D for some sort of useful purpose as a means to optimize the use of the site and support intensification of the area generally. Similarly, the Tribunal accepts the parties' planning experts' evidence and referenced planning policy, which generally supports the development of a hotel specifically at

or in the vicinity of 60 Mill Street, due to a lack of hotel services within a 1-kilometre radius of the Distillery District tourist destination.

**27** The Tribunal finds that the redevelopment of the site is supported by Policy 2.4 of the King Parliament Secondary Plan, which identifies the re-use of existing heritage buildings as a "major objective". More generally, the redevelopment and use of an otherwise vacant property is consistent with s. 1.7 of the PPS by supporting the long-term economic prosperity of the area. The same applies in relation to a hotel development specifically.

**28** Furthermore, as it relates to intensification and optimization of the subject site, the Tribunal also finds as follows (in support of the proposed development):

- \* Within the City's Official Plan, the subject site is located within the Downtown, which is an identified growth area as well as an Urban Growth Centre in the Growth Plan;
- \* The subject site is designated Mixed Use Areas in the City's Official Plan, which is a land use designation intended for growth;
- \* In the Downtown Plan, the subject site (and the balance of the Distillery District) is designated as Mixed Use Areas 2 (MUA2), where growth is encouraged;
- \* The highest density of development in the Downtown is directed to MUAs in close proximity to existing and planned transit stations (Policy 4.1). Existing transit servicing the subject site and surrounding area include the TTC streetcar services from Cherry Street via the King Street corridor with connections to the King subway station on the Yonge Subway line. The subject site is also located approximately 350 metres ("m") from the planned Corktown Station of the Ontario Line subway corridor;
- \* According to the King Parliament Secondary Plan, King-Parliament is an area targeted for the growth of a broad range of mutually compatible uses (Policy 2.2); and,
- \* There is no policy in the King Parliament Secondary Plan, including the policies for the Gooderham and Worts Special Identity Area, that stipulates that the subject site is not intended for growth and development. Rather, Policy 4.1.2(c) recognizes that an "addition" to Rack House D is expressly permitted.

**29** The Tribunal also received uncontested evidence from the Appellant's transportation expert that there is sufficient transportation infrastructure to accommodate the proposed development and that the proposed hotel use is transit-supportive. The Tribunal is satisfied with this evidence and accordingly finds that the proposal is consistent with the PPS and conforms with the applicable plans in this regard.

**30** Furthermore, there is no dispute that all other existing servicing infrastructure is capable of accommodating the scale of the proposed development on the subject site. The Tribunal is satisfied with this evidence and accordingly finds that the proposal is consistent with the PPS and conforms with the applicable plans in this regard too.

**31** In summary, for the reasons set out above, the Tribunal finds that the above noted policy and evidence supports intensification and optimization of the site, the plan is supported by existing transit and other infrastructure, and the Tribunal is otherwise satisfied that the applicable policy framework broadly supports the proposal for Rack House D.

### **Urban Design Issues not in Dispute**

**32** It is noteworthy that the contested urban design issues were narrowed significantly by the parties from the outset of the hearing. For example, both parties fully endorse the conservation strategy to preserve the exterior structure of Rack House D. The strategy includes preserving all four exterior walls and the original roofline of the building (see architectural plans at Appendix 1). The Appellant's plan also includes a publicly accessible interpretive area on the ground floor of the hotel to show some of the original racking system and how it was used 'back in the day'. The

Tribunal is accordingly satisfied with this conservation strategy and approves this part of the Site Plan on consent of the parties.

**33** The parties are also in general agreement (or at least do not dispute) that the current structure of Rack House D offers limited opportunities for redevelopment without significant engineering challenges (i.e. there are no interior floors, but instead, it features wooden storage racks which extend to and supports the roof). The evidence in this respect was provided by the only architectural expert qualified to testify, Mr. Kazerouni. As a result of these engineering challenges, the building must undergo significant modifications at great cost for it to be re-purposed as a useful structure. The Tribunal accepts this evidence and finds that there is little doubt that this fact has contributed to Rack House D remaining vacant for several decades and why it is the last building in the District to enjoy a new life.

**34** The parties have also notably settled upon a landscape plan for the development, including trees, benches and surface finishes (see landscape plan attached at Appendix 2). The parties' experts similarly agreed that this is good planning and it is supported by the applicable planning policies. The Tribunal agrees and correspondingly also approves this part of the Site Plan on consent of the parties.

**35** In summary, there is no contest between the parties insofar as the Appellant's plan is concerned from the top of the heritage structure on down. The only issues remaining have to do with the perceived built-form and fit of the above tower addition. On consent of the parties, the Tribunal therefore approves the Appellant's heritage conservation strategy related to the existing structure of Rack House D, as it is illustrated and described as attached as Appendix 1, as well as the Landscape Plan, as attached as Appendix 2.

### **Issues in Dispute**

**36** The parties remain clearly at odds with the question of urban design related to the proposed tower addition and, more precisely, whether the proposed tower plan fits into the existing and planned context of 60 Mill Street.

**37** This question of urban design was addressed by both parties through expert opinion evidence and in reference to planning policies and guidelines pertaining to:

1. built-form and fit considerations in general; and,
2. heritage conservation strategies.

**38** It is noteworthy that the parties' respective planning experts generally deferred to their urban design and heritage expert counterparts on such issues. With the deeper issue of this matter being principally about built-form, fit and heritage considerations, the case accordingly turns primarily on the Tribunal's acceptance of the respective experts' evidence and opinions within these fields.

### **A. Built-form and Fit Considerations in General**

#### **Height**

**39** The Toronto Official Plan does not prescribe built-form height, but, in the words of the City's planning expert, Mr. Friedrich, it does provide built-form "instructions" regarding how development is to coexist within its particular "context".

**40** The City highlighted the following instructions from the City's Official Plan:

- \* Built-form Policies - Policy 3.1.2.3 (parent OP) states that "new development will be massed and its exterior façade will be designed to fit harmoniously into its existing and / or planned context";

## 2575867 Ontario Inc. v. Toronto (City)

- \* Built-form - Tall Building Policies - Section 3.1.3.2 (parent OP) states that "tall building proposals will address key urban design considerations, including: c) demonstrating how the proposed building and site design relate to the existing and / or planned context";
- \* Policy 3.3. (Downtown Plan) -- "New buildings will fit within their existing and planned context"; and,
- \* Policy 6.26. (Downtown Plan) - "The scale and massing of buildings will be compatible with the existing and planned context of the neighbourhood, including the prevailing heights, massing, scale, density and building type".

**41** The City's Tall Building Guidelines (i.e. Guideline 1.1) are also instructive regarding built-form objectives and methods of achieving OP Built-form Policies. However, such guidelines are merely that, 'guidelines', without the same conformity requirements as with Official Plan policies.

**42** It is noteworthy that the City made submissions that the SASP Guidelines found at Appendix 3 to the King Parliament Secondary Plan are more than mere 'guidelines' because the SASP Guidelines have been incorporated as part of actual policy. This became a contentious point because the Appellant responded by claiming that the SASP Guidelines are nevertheless still merely 'guidelines' by virtue of being called "guidelines", which intimates something more discretionary and a lower status than actual policy.

**43** The Tribunal finds that, in this particular case, it makes no difference whether the SASP Guidelines have the status of regular guidelines or actual policy. The reason being is that the Tribunal finds that the proposed plan does in fact conform with the SASP Guidelines either way.

**44** The City highlighted the following SASP Guidelines found at Appendix 3 to the King Parliament Secondary Plan:

- \* new buildings or building additions should be highly articulated and modulated to minimize the visual impacts of building bulk, reinforce the modulation of existing heritage buildings and reinforce the heritage character of the site.
- \* where physically possible, the additions should be set back from the street edge on Trinity Street in order to minimize or eliminate their visibility from pedestrian grade level viewpoint on Trinity Street.

**45** The Appellant added the following:

- \* In the Downtown Plan, tall buildings are explicitly permitted in the MUA2 designation; and,
- \* OPA 304 states, without any reference to the scale of an addition to Rack House D:
  7. Amend Policy 4 by deleting Policy 4.1.1 and replace with the following:
 

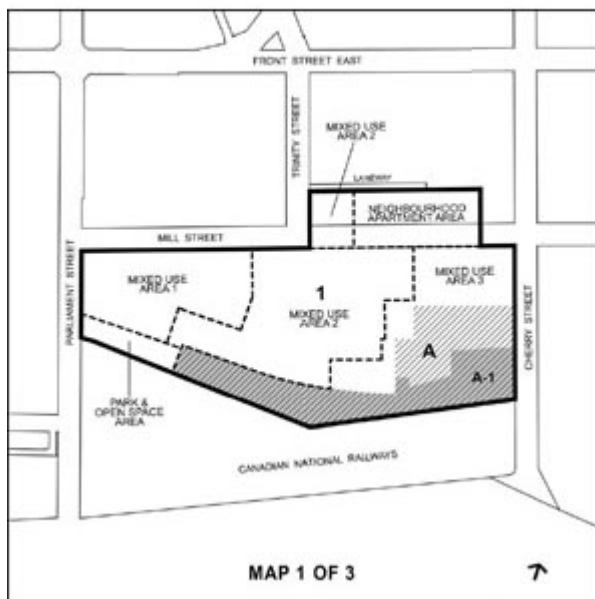
4.1.1 Mixed Use Area '2' will be regarded as the focus of the heritage resources in the Area. The physical character of the heritage buildings will be preserved. New buildings will not be permitted. Additions to existing buildings within Mixed Use Area '2' may be permitted only where they do not negatively impact the cultural heritage value of the resource.
  8. Amend Policy 4 by adding Policy 4.1.2 c) to read as follows:
    - (c) An addition to Rack House D, identified as Building No. 42 on Map 2 of 3, may be permitted in Mixed Use Area '2'.

**46** The City acknowledges that OPA 304 does not set any restrictions on the height of an addition to Rack House D. However, the City contends that tall buildings are simply not appropriate in MUA2 (according to the City's interpretation of Policy 5 of the SASP and, by extension, Appendix 3), and this presumption is what establishes the existing and planned context for the appropriateness of a tall building at 60 Mill Street. The City contends that, if the Plan was intended to permit a tall building at 60 Mill Street, OPA 304 could have removed 60 Mill Street from the SASP, removed it from MUA2, or expressly excluded the site from the urban design structure and patterns that exist in the rest of MUA2.

**47** The fatal flaw with this submission is that it presumes a specific interpretation of Policy 5 of the SASP and, by extension, Appendix 3, which the City contends essentially prohibits tall buildings anywhere in MUA2, regardless of whether it is to be located in the middle of the District, or on the periphery. The Tribunal finds, however, that the plain reading of the policy simply does not bear this out, and certainly not explicitly. Appendix 3 to the SASP does explicitly require setbacks from Trinity Street; but, again, it does not expressly set out a minimum setback. As a result, the Tribunal is left to exercise its discretion to determine what is appropriate in light of the overall context of the area, based on the evidence provided. In the present case, this turns on a preference of one party's urban design expert's opinion over that of the others.

**48** The City also submitted that, in order to determine whether a development fits harmoniously within its existing and physical context, an assessment must be undertaken of the existing physical surroundings and the planned vision for the future of the area. The Tribunal accepts this submission, but also accepts the opinion of the Appellant's experts insofar as the proper context to consider includes surroundings both inside and immediately outside of MUA2.

**49** As shown below in Figure 1, 60 Mill Street is on the extreme northern edge of MUA2, located on the separately labeled knob at the northeast corner of Mill and Trinity Streets. The Tribunal finds that the geography of the location demands a broader contextual analysis than strictly that of MUA2, as the City suggests.



**50** The Tribunal also prefers the context opined by the Appellant's witnesses because the evidence of both parties consistently showed that the Distillery District and its immediate surrounding area contains a wide range of building heights and scales, and it is surrounded on nearly all sides by existing or approved tall buildings, both within and outside the District. Other heritage buildings in the Distillery District, including other rack houses, have been adapted with large building additions, including 70 Mill Street (former Rack House), 80 Mill Street (former Rack House), 390 Cherry Street and 39 Parliament Street.

**51** The Tribunal considered whether the fact that the site is located in MUA2, which is expressly identified in the Plan as the "focus" of heritage resources in the area, necessarily results in it being subject to more restrictions from a built-form standpoint, compared to other properties identified in the rest of the District but outside of MUA2. The City's experts opined that the so-called 'heart' of the District includes all of MUA2 and it is governed by more restrictive standards by virtue of it being the "focus" of heritage resources in the area. Meanwhile, the Appellant's experts asserted that the 'heart' is better identified as the pedestrianized areas located south of Mill Street within the gated portion of the District, which does not include all of MUA2 and, more particularly, does not include 60 Mill Street.

**52** While very little may turn on determining the 'heart' of the District, the Tribunal nevertheless agrees with the opinion of the Appellant's experts insofar as the average person visiting the area would not likely consider themselves to be inside the 'heart' of the Distillery District until they walk through the gates, which declare "Welcome to the Distillery District", into the pedestrianized areas of the District. If there is a 'heart', then the average person would believe it to be within the gates where people congregate and stroll around. This area constitutes most of MUA2, but it does not include 60 Mill Street. Accordingly, the Tribunal finds that, if a tall building is not appropriate in the so-called 'heart' of the District, that does not necessarily preclude such a building to be located at 60 Mill Street.

**53** Unlike the pedestrianized areas within the gates, it is an uncontested fact that 60 Mill Street is located across a vehicular road and faces the rear brick walls of buildings accessed from inside the gates. All of the visual evidence provided to the Tribunal shows the site being clearly on the outside, or at best on the periphery, and the Tribunal finds as a fact that it is located similarly or more detached from the so-called 'heart' of the District compared to other tall buildings located around the District. The Tribunal also finds as a fact that the perception of the proposed tower, in terms of size and fit, viewed from inside the center of the District, would be little different than the perception of other tall buildings around the periphery.

**54** The Tribunal also finds, as a fact, that the height of the proposed development, at 31-storeys, is in keeping with, or less than, the heights of the existing or planned towers surrounding the District (i.e. within 250 m of the subject site) at 33 Mill Street (32 storeys), 70 Distillery Lane (40 storeys), 390 Cherry Street (37 storeys), and the approved towers at 31 Parliament (41 storeys), 33-37 Parliament (32 storeys), 31R Parliament (49 storeys) and 125R Mill Street (45 storeys).

**55** The Tribunal further accepts the Appellant's evidence insofar as the development of the Distillery District area more broadly has been consistently evolving to permit taller and taller buildings over the years. Numerous examples were provided by the Appellant to demonstrate this fact, and the Tribunal finds that the proposed development would be consistent with this trend.

**56** It is noteworthy, as it relates to overall height, that the proposed tower will contribute practically no shadows on the pedestrianized areas of the District by being located to the north of the District, unlike the existing and proposed towers located east, south and west of the center of the District. The Tribunal finds this fact to mean that the proposed tower height will actually have less of an impact on the so-called 'heart' of the District, compared to the other existing or planned towers surrounding it.

**57** In summary, the Tribunal finds that there is no explicit policy prohibiting the 31-storey proposed hotel. For example, Policy 4.1.2(c) of OPA 304 recognizes that an addition to Rack House D may be permitted, without any reference to the scale of that addition. The analysis accordingly rests on a determination of the appropriateness of the proposed height within the existing and planned context of the area. The Tribunal rejects the City's proposal that the proper context to consider for 60 Mill Street is the same as that which would apply to all of MUA2. The Tribunal finds as a fact that 60 Mill Street is on the periphery of the District, outside the pedestrianized area and behind the buildings located in the so-called 'heart'. The proper policy-driven context to consider, therefore, as it relates to height, is the same or similar as other existing or approved tall buildings that are located around the periphery of the District. Seven of these buildings feature heights of between 32 and 49 storeys, and the Tribunal finds that these towers are not at odds with the applicable policy framework in terms of height. At a height of 31-storeys, on the periphery of the District, the Tribunal finds that the relative context of the location supports the proposed development height, in accordance with the applicable provincial and municipal policy framework, and OPA 304 and the SASP Guidelines found at Appendix 3 to the King Parliament Secondary Plan in particular.

### *Transition*

**58** The City views transition as a measure of "fit". The City's urban design expert, Ms. Mighton, expended a significant amount of attention testifying about the appropriateness, or lack thereof, of adequate "transition" regarding the proposed development. This involves both height and setback considerations within the context of surrounding

buildings. It is noteworthy that, while the City submitted that transition is not limited to measures of "angular planes", Ms. Mighton nevertheless spent a great deal of time testifying about exactly that.

**59** Using illustrations of mathematical formulas, Ms. Mighton opined that the proposed development constitutes an unacceptable increase in height relative to surrounding structures and inadequate setbacks of the main tower from the base, surrounding buildings, and streets.

**60** In an effort to illustrate what a tower would look like if it satisfied her setback calculations, Ms. Mighton provided a computer rendering illustrating a narrower tower off to one side of the heritage base. It is noteworthy that none of the City's experts, including Ms. Mighton, provided any evidence to support this rendering being possible from an architectural or engineering standpoint (noting that none of the City's experts were qualified to do so in any event), or desirable from heritage conservation perspective.

**61** On cross-examination, it became clear that Ms. Mighton's witness statement was marred by numerous inaccuracies, particularly with respect to the applicable policy framework she relied on when preparing her opinions. Specifically, Ms. Mighton used the wrong version of the Downtown Plan in forming her opinions regarding built-form and fit, despite the Minister-approved version being in force for over two years. It was eventually acknowledged by Ms. Mighton that the Minister made 224 modifications to the Council-adopted Downtown Plan that she had initially relied upon, many of which, the Tribunal finds, represent significant changes in policy principles, which are directly relevant to built-form and fit in the present case.

**62** Notably, the Minister-approved version of the Downtown Plan removed the "requirement" for built-form transition in the Council-adopted Policy 9.23, and it rewrote Policy 9.24 so that the objective is to achieve built-form compatibility, not adherence to geometric relationships such as the application of angular planes or stepping down of height limits (which was the focus of much of Ms. Mighton's analysis). The Minister also eliminated former Policy 9.26 altogether, which stated "[t]he larger the difference in scale of development, the greater the need for transition".

**63** It is important to point out that Ms. Mighton did acknowledge during her testimony that she used the wrong plan in preparation of her initial opinions, but she claimed that her conclusions expressed during testimony were not affected by the changes featured in the updated policy. However, the Tribunal finds this difficult to accept, especially considering how significant the Minister-approved version changed the policy and, essentially, made the policy much more permissive as it relates to appropriate transition. The Minister's changes clearly have meaning, but this was not readily acknowledged by Ms. Mighton.

**64** The Tribunal, therefore, finds that Ms. Mighton has seemingly drawn her conclusions from the former policy and has been unwilling or unable to re-examine her analysis in light of the policy framework that is actually in force. This was not only apparent through her reluctance to reconsider her opinions, but also through her testimony where she employed a highly formulistic mathematical approach to analyze the appropriateness of the proposed hotel's height and setbacks in relation to surrounding buildings. The revised Plan clearly rejects such a strict approach to transition.

**65** In light of this, the Tribunal prefers the evidence of the Appellant's experts as it relates to the appropriateness of the height of the proposed tower from a transition standpoint. As already noted, the Tribunal finds that the height of the proposed development is in keeping with, or less than, the heights of the existing or approved towers surrounding the District, seven of which are between 32 and 49 storeys. The Tribunal accepts the Appellant's experts' opinions that the transition of the proposed tower height is also appropriate in the given context, because it is relatively the same or similar to the transition of the aforementioned towers surrounding the area, and no evidence was provided to demonstrate that these other examples do not adequately fit.

**66** It is noteworthy that, while Ms. Mighton's evidentiary errors were unhelpful to the Tribunal, it nevertheless helped highlight the significance of the Minister's modifications to the Downtown Plan, which notably removed more restrictive language pertaining to built-form transition. The Tribunal finds that these changes illustrate an obvious objective to limit the City's proposed built-form transition requirements (i.e. rejecting strict adherence to geometric relationships,

the application of angular planes, formulistic stepping down of height limits, etc.), to instead focus on achieving built-form compatibility.

**67** In summary, the Tribunal accepts the Appellant's experts' testimony and opinions regarding the proposed tower's adherence to built-form compatibility, related to transition in particular. The Distillery District and surrounding area is characterized by a mixture of low, mid, and high-rise buildings located adjacent or in close proximity to one another with no apparent compatibility issues. The Tribunal finds that a geometric stepping down of heights is not necessary to achieve overall compatibility. This finding is underscored by the Ministry-approved changes featured in OPA 304. The Tribunal therefore finds that the proposed tower design is adequate from a transition standpoint.

### *Setbacks*

**68** In terms of setbacks, the Tribunal also agrees with the Appellant's experts insofar as the setbacks featured in the proposed design are adequate from an urban design standpoint, considering the existing and planned context of the area.

**69** The only explicit setback requirement found in the policy that was proffered by the parties was that of the Design Guidelines found in Appendix 3 of the King Parliament Secondary Plan, which states "where physically possible, the additions should be set back from the street edge on Trinity Street in order to minimize or eliminate their visibility from pedestrian grade level viewpoint on Trinity Street". The Tribunal finds that the words "where physically possible" infers the application of architectural considerations.

**70** The Tribunal accepts the opinion of the only qualified architectural expert, Mr. Kazerouni, in this regard, insofar as the operational constraints of the proposed hotel means that the 1.8 m setback of the main tower from the lot line at Trinity Street, plus the additional 3 m setback of the glass reveal section, are the greatest setbacks "physically possible" from an architectural standpoint and together work to adequately minimize the visibility of the addition from Trinity Street at pedestrian grade.

**71** The Tribunal also accepts the opinions of the Appellant's experts as it relates to the setbacks on the other three sides of the proposed tower, including the glass reveal setback, for the same reasons.

**72** In performing its analysis regarding setbacks, the Tribunal also considered the City's contention that increased tower setbacks would improve pedestrian comfort (i.e. minimize wind effects). However, it was the uncontested evidence of the Appellant's wind expert who testified that expected wind conditions created by the proposed tower are acceptable and meet the desired comfort class at all of the applicable testing locations.

**73** In summary, the Tribunal finds that there is no express minimum setbacks at 60 Mill Street, except as outlined in the SASP Guidelines found at Appendix 3 to the King Parliament Secondary Plan. The Tribunal finds that the plan, and especially the glass-reveal section, satisfies the applicable policies on all four sides. The Tribunal is also satisfied that the overall design adequately mitigates wind issues, requiring no additional setbacks for that purpose. Altogether, the plan is in accordance with the applicable policy framework as it relates to setbacks.

### *Floorplate*

**74** Regarding floorplate, Policy 9.16 of the Downtown Plan, as modified by the Minister, and the City's Tall Building Design Guidelines, recognizes that flexibility in the maximum floorplate size may be considered where the programmatic requirements of a non-residential building require it. The uncontested evidence of Mr. Kazerouni, the only architectural expert to provide an opinion, confirmed that a hotel of this type must have certain amenities and, correspondingly, have a certain number of rooms to support these amenities. These requirements consequently require a greater sized floorplate. The Tribunal accordingly finds that the programmatic requirements of a full-service hotel necessitates a large floorplate, and the proposed floorplate is correspondingly appropriate.

**75** It is noteworthy that, at 930 square metres ("sq m"), the proposed tower floorplate is similar to the 900+ sq m



residential floorplate of the approved tower at 31R Parliament Street. Within the Tall Buildings Guidelines, there is an acknowledgment that non-residential uses may require slightly larger floorplates, with the following direction: "[a]ny increases in tower floor plate size require that exceptional design attention be given to the shape and articulation of the tower to diminish the overall scale and impact of the building mass". The Tribunal finds that the proposed plan does feature such "exceptional design attention".

**76** The City made a valid point that, while a hotel may be desirable for the area, the desirability of a hotel "should not be used to paper over or rehabilitate other issues with the application". The Tribunal agrees, but nevertheless finds that the proposal does not suffer from a resulting deficiency in other issues from a policy standpoint.

**77** In summary, the Tribunal finds that the Downtown Plan and the City's Tall Building Design Guidelines provide sufficient flexibility to allow the proposed floorplate. The Tribunal finds, as a fact, that programmatic requirements of the hotel necessitate it. The proposed floorplate is also not exceptional in the existing context of the area, nor does it run afoul of any other relevant policy considerations. The Tribunal finds that the plan is therefore in accordance with the applicable policy framework as it relates to floorplate.

#### *Privacy Concerns*

**78** While privacy concerns did not constitute a significant share of either party's submissions, it was raised and is an important issue to consider -- especially from the perspective of area residents.

**79** The Tribunal finds that the proposed development has the potential to impact on the privacy concerns of residents living at 70 Mill Street, which is immediately to the east of the development. However, the Tribunal finds that, in light of privacy-concern mitigation-measures undertaken by the Appellant, any eventual impacts will be minor and acceptable. Such mitigation-measures incorporated into the Appellant's design include strategic staggering of windows to avoid straight-line views into the adjacent building, and use of spandrel (non-transparent) glass to avoid views altogether.

**80** It is noteworthy that the architects of the proposed building conscientiously employed the same privacy-protection strategies associated with the 2017 LPAT Settlement involving the same property, which also featured an addition on top of Rack House D, which had equal potential to impact privacy interests next door. These same privacy-protection strategies were notably endorsed by both the City and the Tribunal at that time.

**81** The Tribunal accordingly finds that the proposal conforms with Official Plan Policy 3.1.2.3.d), regarding providing for adequate privacy.

#### *Built-form and Fit Conclusions*

**82** The Tribunal finds that the evidence and opinions of the parties' urban design experts are critically important to this case, especially as it relates to assessing appropriate built-form and fit of the proposed development. For the reasons stated above, the reliability and strength of Ms. Mighton's evidence was diminished due to her errors in considering the wrong version of the Downtown Plan, while the Appellant's experts did not suffer from similar issues. Mr. Kazerouni was also the only person to be qualified as an expert in the field of architecture, which resulted in much of his evidence being uncontested. As a result, the Tribunal strongly prefers the Appellant's experts' evidence.

**83** In terms of built-form and fit within the given context, the Tribunal accordingly accepts the opinions of the Appellant's experts and finds that the proposed development has appropriate regard for matters of provincial interest, is consistent with the PPS, and conforms with the Growth Plan, the City Official Plan, the Downtown Plan and the King Parliament Secondary Plan (as sufficiently guided by applicable guidelines).

#### **B. Heritage**

**84** At the same time that the proposed plan must support intensification and optimization of the subject site, and

conform to the City built-form policies related to height, transition, floorplate and setback, the proposed development must also concurrently "conserve" cultural heritage resources in accordance with s. 2.6 of the PPS and s. 4.2.7 of the Growth Plan. Such heritage conservation principles reach all the way up to the Act at s. 2(d).

**85** As cited by the Appellant, the former OMB stated the following regarding the relationship between the cultural heritage and intensification policies of the PPS (*Birchgrove Estates Inc. v. Oakville (Town)*, 2007 CarswellOnt 760, para. 30):

While no one section of the PPS overrides others, the Board's decision must be consistent with the Provincial Policy Statement. Just as the Board cannot dismiss or disregard the direction to conserve significant heritage resources, the Board cannot dismiss or disregard the considerable emphasis and priority the Province has placed on intensification within built-up areas. The challenge before the Board is to determine if the provincial goal of intensification can be achieved while meeting the provincial goal of heritage conservation.

**86** The Tribunal finds that the PPS and Growth Plan provides directive language that heritage resources shall be conserved. This is mandatory language, and even with the balancing inherent in reading those documents as a whole, "shall conserve" is a baseline that an application cannot fall below (see: PPS Policy 2.6.1, "Significant built heritage resources and significant cultural heritage landscapes shall be conserved"; PPS Policy 2.6.3, "Planning authorities shall not permit development and site alteration on adjacent lands to protected heritage property except where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved"; Growth Plan Policy 4.2.7.1, "Cultural Heritage Resources will be conserved in order to foster a sense of place and benefit communities, particularly in strategic growth areas").

**87** The Tribunal accepts the opinion of the Appellant's witness, architecture and urban design expert Mr. Kazerouni, who testified that tall buildings have additional civic responsibilities regarding built-form, and even more so when proposed atop a heritage building (referencing the City Official Plan: 3.1.3 Built-form -- Tall Buildings; and 3.1.5 Heritage Conservation).

**88** The heritage policies of the City Official Plan incorporate the Parks Canada "Standards & Guidelines for the Conservation of Historic Places in Canada" ("Standards & Guidelines"). The Tribunal finds that, while these guidelines have no statutory status of their own, it is endorsed by the City Official Plan as a national standard reference representing good guidance for heritage professionals.

**89** The Tribunal considered Standard 11 of the Standards & Guidelines, which states that an addition is to be "physically and visually compatible with, subordinate to, and distinguishable from the historic place". On that point, the City's expert, Mr. Muller, contended that "subordinate" means that an addition should "generally be smaller" than the existing heritage building.

**90** However, the Appellant pointed out that the Standards & Guidelines actually explicitly state that "subordination is not a question of size", and there are numerous examples in Downtown Toronto where the scale of new additions above heritage buildings are far greater than the proposed addition above Rack House D. The Tribunal accepts this evidence, and finds the most obvious examples are immediately beside Rack House D (going from a single level rack house to 12- and 14-storeys at 70 and 80 Mill Street, respectively), plus others in the immediate area, including at 390 Cherry Street and 39 Parliament Street.

**91** The Tribunal agrees that size is not everything, and the specific design features of a particular addition plays as much of a role, if not a greater role, in addressing the Standards & Guidelines. For example, the Appellant's and City's experts both agreed that the additions at 70 and 80 Mill Street were not well done from a heritage standpoint, despite being much lower than the proposed tower.

**92** Among other sections of the City Official Plan, the Tribunal considered Policy 3.1.5.26 to assess the compatibility and integration of the new proposed construction with the values of the subject property, as well as adjacent

properties. The Tribunal's assessment considered the height, scale, form, massing, materiality and articulation of the proposed construction in relation to the existing heritage structure and the surrounding District. The Tribunal ultimately found that the proposed tower will be physically and visually compatible with and subordinate to the historic area, and therefore, conforms with Policy 3.1.5.4 of the City Official Plan.

**93** The Tribunal accepts the expert testimony of the Appellant's heritage expert, Mr. Pruss, insofar as Rack House D is historically noted for its "massive scale" in the Distillery District's National Historic Site registry. Accordingly, the property at 60 Mill Street has always featured an imposing presence in the area. Notably, the six-level Rack House D was substantially larger, historically, than the single-level rack houses located immediately to the east at 70 and 80 Mill Street, which now feature 12- and 14-storey additions above and beside the existing structures. At the moment, these newer residential buildings dwarf Rack House D. The Tribunal finds that the proposed tower for 60 Mill Street will re-establish the historical height, mass and imposing presence of Rack House D relative to the surrounding buildings and the area in general.

**94** The Tribunal further accepts the evidence of the Appellant's experts, insofar as:

- \* The main upper tower draws inspiration from the heritage façade of Rack House D, respecting and reinforcing the rhythm of windows and repetitive bays, thus contributing to its compatibility.
- \* The materiality of the addition, and the glass reveal section in particular, makes the addition easily distinguishable and subordinate to Rack House D, from the perspective of an average person at street level.
- \* The stepped-in glass reveal section, directly on top of the heritage building, acts to highlight the original roofline of Rack House D, as well as the descending original four walls on all sides, leaving very little to the imagination of what the original structure looked like in the past.
- \* The red brick of the original structure figuratively 'pops' in comparison to the muted grey of the main tower above, thus highlighting the original structure.
- \* The overall effect of the addition will showcase the original Rack House D structure.

**95** Upon the uncontested evidence from both parties, the Tribunal finds that, by retaining the three-dimensionality of the existing heritage building, with public pedestrian access all around it, the design allows all four exterior walls to be experienced by the public at street level, in addition to the publicly-accessible portions of the interior of the building.

**96** The Tribunal notes that one of the reasons that it preferred the evidence and opinion of the Appellant's heritage expert, Mr. Pruss, over that of the City's expert, Mr. Muller, involves the more limited scope of Mr. Muller's expertise (Mr. Muller's expertise being "heritage planning", versus Mr. Pruss' being "heritage planning and architectural" expertise), plus other issues that arose from the following testimony.

**97** When Mr. Muller was asked by the Tribunal to provide a comparative opinion with respect to 70 and 80 Mill Street, he admitted to being reluctant to do so. When pressed by the Tribunal to answer the question, he provided an opinion, but also, off-handedly stated that he is "not a design-guy" with the clear intent of excusing himself from offering criticism.

**98** Some of Mr. Muller's reluctance to comment on design matters may be due to his more limited area of expertise; however, this was not made clear at the hearing. Nevertheless, the Tribunal found Mr. Muller's comments to be troubling because there was a general consensus among the experts, including Mr. Muller, that design plays a significant role in assessing the appropriateness of any particular development from a heritage standpoint.

**99** It is the Tribunal's view that Mr. Muller's reluctance to respond to the Tribunal's inquiries, and self-distancing from considerations of design, diminished the strength of his opinions on heritage considerations. This is true especially in comparison to Mr. Pruss' evidence, which capably included opinions regarding the relationship between heritage conservation and design.

**100** Once again, the opinions of the parties' respective experts are critically important to this particular case. Heritage issues play a large role in the overall analysis of the proposed development. For the reasons stated above, the strength and persuasiveness of Mr. Muller's evidence in this regard was diminished, while the Appellant's expert did not suffer from similar issues.

**101** As part of its analysis, the Tribunal further considered submissions of the City regarding whether the proposed development would obstruct any recognized "heritage views". However, based on the totality of the visual evidence provided to it, the Tribunal found that there are no recognized protected heritage views either within or adjacent to the Distillery District on Map 7B of the City's Official Plan. Furthermore, due to the location of the proposed development on the periphery of the District, any general impact on sky-views would be unremarkable considering the Downtown location and proliferation of other tall buildings in the area. The shadow effects would be practically non-existent due to the northern location of the proposed building.

**102** The Tribunal also considered submissions of the City regarding whether the Distillery District should be identified as a "cultural heritage landscape" (CHL), as defined by the PPS. The City made this submission regardless of it being an undisputed fact that, despite being recognized as a National Historic Site and designations under Part IV of the *Ontario Heritage Act*, the Distillery District has not been formally identified by the City as a CHL.

**103** The City takes the position that the PPS definition of CHL does not rely on a formal recognition of a CHL at a municipal level, and the Tribunal is equipped to make a finding that a CHL exists within the meaning of the PPS. The Tribunal agrees, but this finding does not ultimately affect its decision.

**104** If the Distillery District qualifies as a CHL, the Tribunal finds that the proposed development does not fail to conserve it because, as already stated in the context of other heritage considerations, the tower is to be located on the periphery of the District, and any general impact on the landscape would be unremarkable considering the Downtown location and proliferation of other tall buildings in the area. Put another way, the proposed development will appear no differently from the main geographical area of the District compared to other towers on the periphery of the District.

**105** In summary, for the reasons set out above, the Tribunal finds that both the ZBA and the Site Plan application adequately conserve the subject heritage resources (and CHL, if applicable) in accordance with the applicable provincial policy documents and municipal policies and guidelines. It is undisputed that an addition to Rack House D has been anticipated for many years and is supported by planning policy. Reading the PPS policies promoting intensification, optimization and heritage conservation together as a whole, the Tribunal finds the objective of the PPS to be clear: to spotlight a property's heritage attributes while simultaneously assisting its physical and / or economic re-use. The Tribunal finds the proposed development to do exactly that. The Tribunal accepts the Appellant's experts' opinions that the proposed development will not negatively impact the cultural heritage value of the resource and it will, in fact, enhance it. From a heritage standpoint, the Application has due regard for s. 2 of the Act, is consistent with the PPS, and conforms with the applicable provincial and municipal plans.

### **ZBA and Site Plan Application Summary and Conclusions**

**106** As already stated at the outset of this Decision, the Tribunal will allow the Appeal and approve the ZBA and Site Plan applications to enable the proposed development. The Appellant's plan makes a desirable use of the existing and currently vacant heritage structure, employs acceptable built-form and fit in the given context, adequately conserves heritage considerations, all while introducing a much-needed hotel into the area.

**107** The City made extensive submissions intimating that the development's design could be better. In the end, however, the City failed to persuade the Tribunal that the proposal was deficient in any regard. It is important to keep in mind that an appeal to the OLT is not a design contest, and any particular proposal should not be measured against hypothetical alternatives; but, instead, it should only be measured against applicable planning policies and guidelines.

**108** The Tribunal has had due regard to City Council's decision and instructions to oppose the current development application. Nevertheless, the Tribunal approves both the ZBA and the Site Plan applications subject to the particulars of the order outlined below.

**109** As an aside, the Tribunal notes the existence of the 2017 LPAT settlement involving the same property. However, the Tribunal finds that it has no bearing on the present case, especially considering that new planning policies are now in place which would have had a material affect on assessing the merits of the 2017 LPAT settlement.

**110** For all of the above reasons, the Application has due regard for s. 2 of the Act, is consistent with the PPS, conforms with the applicable provincial and municipal plans, and represents good planning in the public interest.

### ***Consideration by the City's Design Review Panel***

**111** The parties jointly submitted an agreed upon Site Plan Approval Conditions to be applied in the event that the Tribunal approves the proposed development. They agreed on everything, but one exception involving a paragraph that the City wanted to include, but which was objected to by the Appellant.

**112** The paragraph in dispute read as follows:

10. Prior to Site Plan approval, the application will be considered at the City of Toronto Design Review Panel on the following issues:
  - i. demonstrate design excellence of the building;
  - ii. demonstrate a high standard of heritage conservation; and
  - iii. include high-quality, durable materials and sustainable and resilient building practices.

and the owner shall revise their drawings to incorporate changes as necessary, to the satisfaction of the Director, Community Planning, Toronto and East York District and Director, Urban Design.

**113** The City took the position that 60 Mill Street is a prominent site in a historically significant part of the City, and it is important that "no steps are skipped to achieve the best and most compatible design for the site", including (the City proposes) a review by City's Design Review Panel. The City further submitted that, in the event that the parties reach an impasse in clearing this particular condition, the Tribunal could be used to resolve the impasse.

**114** The Appellant takes the position that the Tribunal should reject this particular condition proposed by the City, because the City had ample time to request such a procedure prior to the hearing of this matter, but failed to do so. The Appellant further submits that, to embark on such a process at this stage, it will be fraught with uncertainty and will unduly add delay. Lastly, the Appellant takes the position that this is simply a matter for the Tribunal to decide now as part of the Appellant's Site Plan Application appeal. Regarding this last point, to put it another way, the Appellant submits that the Tribunal is now the approval authority for the Site Plan Application and the proposed condition would effectively allow the City to re-assume its approval authority despite the appeal.

**115** The Tribunal is persuaded to accept the Appellant's position.

**116** The evidence shows that, shortly after the Appellant submitted the Site Plan Application in early 2020, the City deemed it complete and never requested additional details or a review by the City's Design Review Panel, notwithstanding the fact that the City failed to make a decision. The Tribunal therefore finds that, for the City to now contend that the application is essentially incomplete by requiring a review by the City's Design Review Panel, it would be unfair to the Appellant because it would also have the effect of circumventing the statutorily prescribed timelines provided for the City to make a decision prior to an applicant appealing a matter to the Tribunal. Those timelines are meant to provide a degree of certainty with respect to how long the overall approval process might take.

**117** There were also submissions from the City contending that the Tribunal does not have enough information

specifying the materiality to be used with respect to the building, to be sufficient to approve the Site Plan. While the Tribunal agrees that this could theoretically happen in a particular case if there is not enough information provided in a Site Plan, it is not the case here. The Tribunal finds that the architectural plans attached as Appendix 1 provide enough details regarding design and materiality to enable the Tribunal to decide the matter.

**118** In summary, the Tribunal finds that, given that the Site Plan Application Appeal is before it with sufficient detail, it is incumbent upon the Tribunal to determine the matter rather than send it back to the City for further review. Accordingly, the Tribunal's approval of the Site Plan is without the condition proposed by the City and is only subject to the conditions set out in the order below and attached as Appendix 3.

### ***Exclusive Hotel Use***

**119** The City requests that, in the event of an approval of the ZBA, the Tribunal make its decision clear that only a hotel use and related amenities be permitted within the building.

**120** The City submits that the Appellant's evidence, purportedly to justify the proposed height and floor plate, as well as the reduced number of bicycle parking spaces, was all based on the building being used as a hotel. The City expressed concerns that the Appellant could conceivably later seek to convert the site to an all residential / condominium use, and this would serve to undermine the Tribunal's findings associated with approving the plan on the basis that it be used as a hotel.

**121** The City correspondingly seeks the Tribunal's endorsement of a tailored implementing zoning by-law to restrict use of the subject building to hotel use and related amenities.

**122** The Appellant did not substantively object to the inclusion of the stated restriction.

**123** The Tribunal therefore accepts the City's submissions and reasoning, and finds it appropriate to include the stated restriction on use within the ZBA, as approved in principle.

## **ORDER**

### **124 THE TRIBUNAL ORDERS:**

1. that 2575867 Ontario Inc.'s appeal of its Zoning By-law Amendment application is allowed in part and approves, in principle, an amendment to the former City of Toronto Zoning By-law No. 438-86, as amended, inclusive of a restriction on the use of the subject building to hotel use and related amenities. The Tribunal's final Order for the Zoning By-law Amendment is to be withheld until such time as the Appellant and City have jointly confirmed the following conditions have been satisfied:
  - a. the owner has provided draft By-laws in a form and with content satisfactory to the Director, Community Planning, Toronto and East York District and the City Solicitor;
  - b. the owner has provided a revised functional servicing report and revised hydrogeological report, such reports to be reviewed to the satisfaction of the Chief Engineer and Executive Director, Engineering and Construction Services;
  - c. the owner has entered into a Heritage Easement Agreement with the City for the property at 60 Mill Street, to the satisfaction of the Senior Manager, Heritage Preservation Services, including the execution of such agreement to the satisfaction of the City Solicitor; and,
  - d. the owner and the City have had an opportunity to discuss and agree on community benefits to be provided in accordance with s. 37 of the *Planning Act*, and the owner enters into and registers on title an Agreement to secure appropriate services, facilities, and/or matters pursuant to s. 37 of the *Planning Act* as may be required by the Chief Planner and Executive Director, City Planning, in consultation with the Ward Councillor.

2575867 Ontario Inc. v. Toronto (City)

2. that 2575867 Ontario Inc.'s appeal of its Site Plan Application is allowed and correspondingly approves, as the Site Plan, the Architectural Plans prepared by IBI Group dated December 18, 2019, attached as Appendix 1, and the Landscape Plans prepared by IBI Group dated October 31, 2019, attached as Appendix 2, in principle and subject only to any minor revisions that may be agreed to by 2575867 Ontario Inc. and the City, and subject to the conditions set out in Appendix 3. The Tribunal's final Order for the Site Plan appeal is to be withheld until such time as the Appellant and City have jointly confirmed that 2575867 Ontario Inc. has satisfied all of the Pre-Approval Conditions in Appendix 3.
3. the Tribunal Members shall remain seized and may be spoken to by the parties if any issues arise with respect to the implementation of the Tribunal's Decision.

K.R. ANDREWS  
MEMBER

CARMINE TUCCI  
MEMBER

\* \* \* \* \*

**APPENDIX 1**

EXHIBIT  
7



DRAWING LIST

A.00 COVER PAGE & DRAWING LIST	A.11 4 FLOOR PLAN
A.01 CONTEXT PLAN & SITE STATISTICS	A.12 5 FLOOR PLAN
A.02 SURVEY	A.13 6 FLOOR PLAN
A.03 SITE PLAN/ROOF PLAN	A.14 7-28 FLOOR PLAN
A.04 P5 PARKING PLAN	A.15 29 FLOOR PLAN
A.05 P3-P4 PARKING PLAN	A.16 30 FLOOR PLAN
A.06 P2 PARKING PLAN	A.17 31 FLOOR PLAN
A.07 P1 PARKING PLAN	A.18 MPP PLAN
A.08 GROUND FLOOR PLAN	A.19 BUILDING SECTIONS
A.09 2 FLOOR PLAN	A.20.1 BUILDING ELEVATIONS
A.10 3 FLOOR PLAN	A.20.2 BUILDING ELEVATIONS

NO.	DATE	ISSUED DESCRIPTION
1	DECEMBER 14, 2019	SUBMITTED FOR RECEIVING
2	MAY 20, 2020	2ND RECEIVING SUBMISSION
3	MARCH 26, 2021	3RD RECEIVING SUBMISSION
4	MAY 27, 2021	RECOMMENDATION SUBMISSION
5	JUNE 28, 2021	ISSUED FOR OLT HEARING

SITE PLAN APPLICATION NUMBER:

PROJECT TITLE:  
EASTON'S GROUPIGUPTA GROUP

3100 STEELES Ave East, Suite 801  
Markham, Ontario, L3R 8T3  
Phone: 905-9459

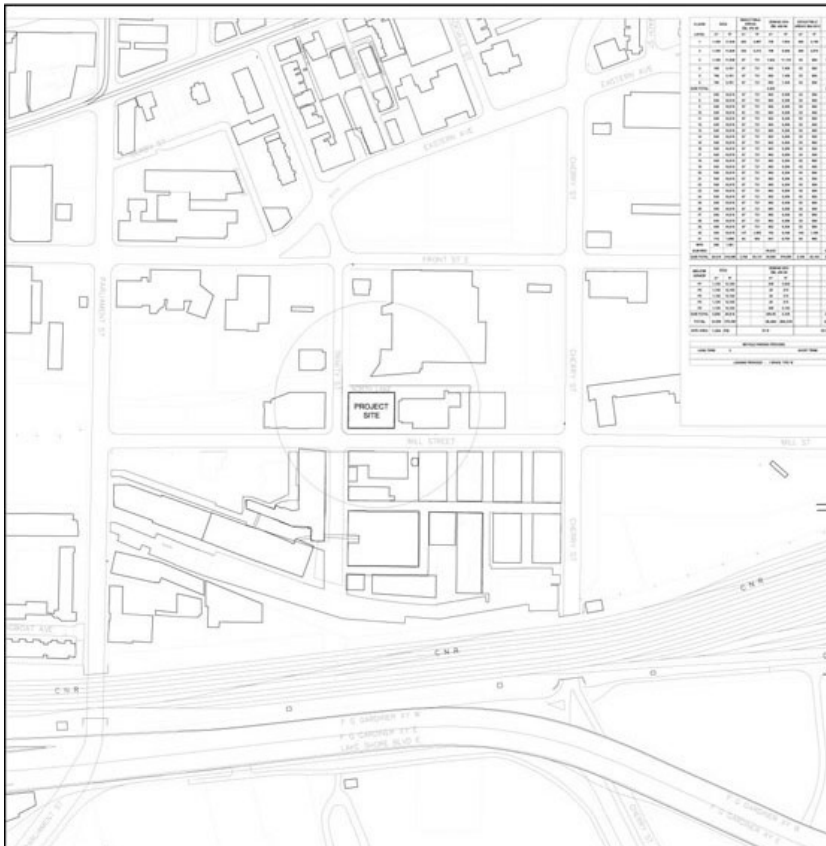
GENERAL NOTES:  
1. THESE DRAWINGS AND ANY OTHER INSTRUMENTS ARE A PART OF THE SUBMITTED SUBMITTAL.  
2. CONTRACTOR SHALL BE IN FULL COMPLIANCE WITH ALL APPLICABLE REGULATIONS AND BY-LAWS.  
3. REFER TO THE CITY OF TORONTO WEBSITE FOR THE LATEST REGULATIONS AND BY-LAWS.  
4. REFER TO THE CITY OF TORONTO WEBSITE FOR THE LATEST REGULATIONS AND BY-LAWS.  
5. REFER TO THE CITY OF TORONTO WEBSITE FOR THE LATEST REGULATIONS AND BY-LAWS.

IBI GROUP INC. 1800 SHEPPARD AVENUE EAST, SUITE 100, SCARBOROUGH, ONTARIO M1S 1T7  
TEL: 416-291-1111 FAX: 416-291-1112  
WWW.IBIGROUP.COM

PROJECT TITLE:  
60 MILL STREET HOTEL

PROJECT TITLE:  
COVER PAGE & DRAWING LIST

DATE: DECEMBER 14, 2019 1:100  
SCALE: 1:100  
PROJECT NO: 121685 A.00



NO.	DATE	ISSUED DESCRIPTION
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2	MAY 20, 2020	2ND RECEIVING SUBMISSION
3	MARCH 26, 2021	3RD RECEIVING SUBMISSION
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3100 STEELES Ave East, Suite 801  
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Phone: 905-9459

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PROJECT TITLE:  
60 MILL STREET HOTEL

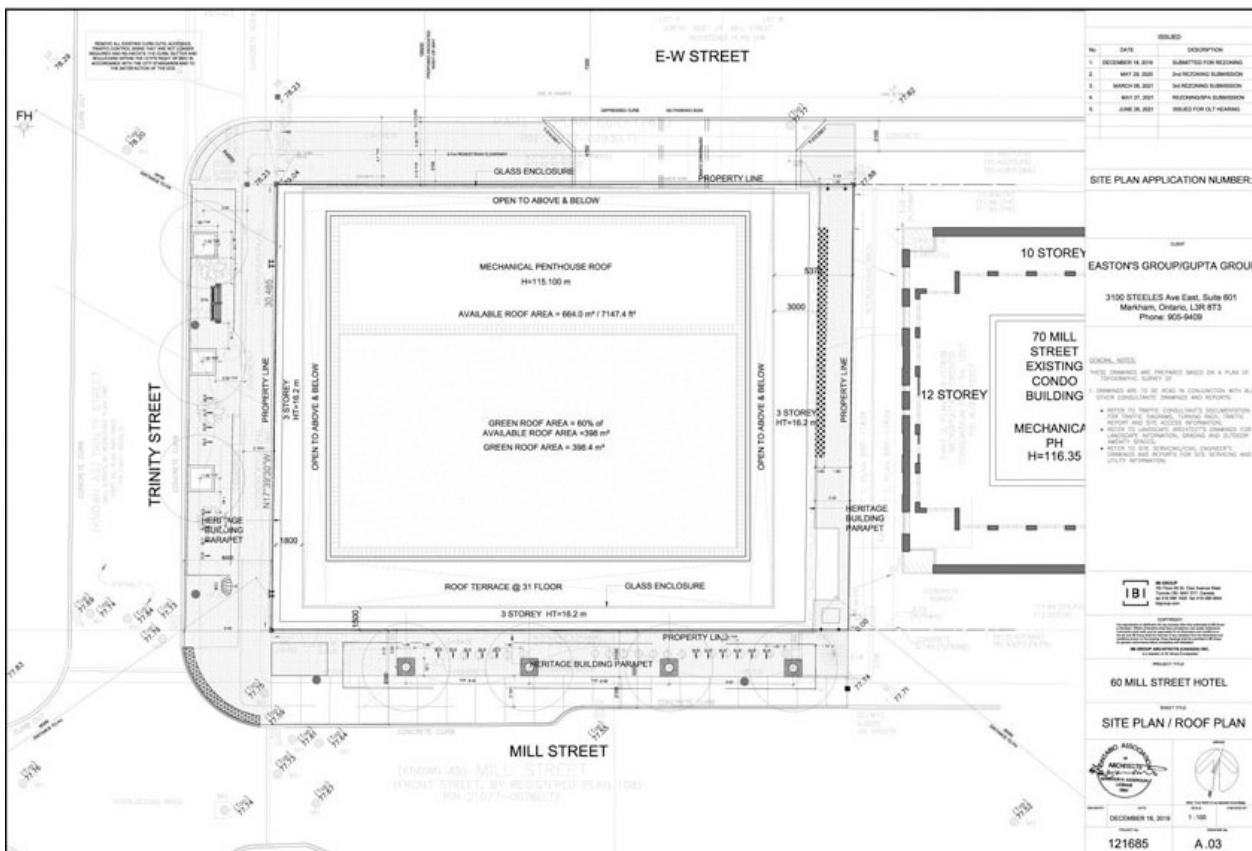
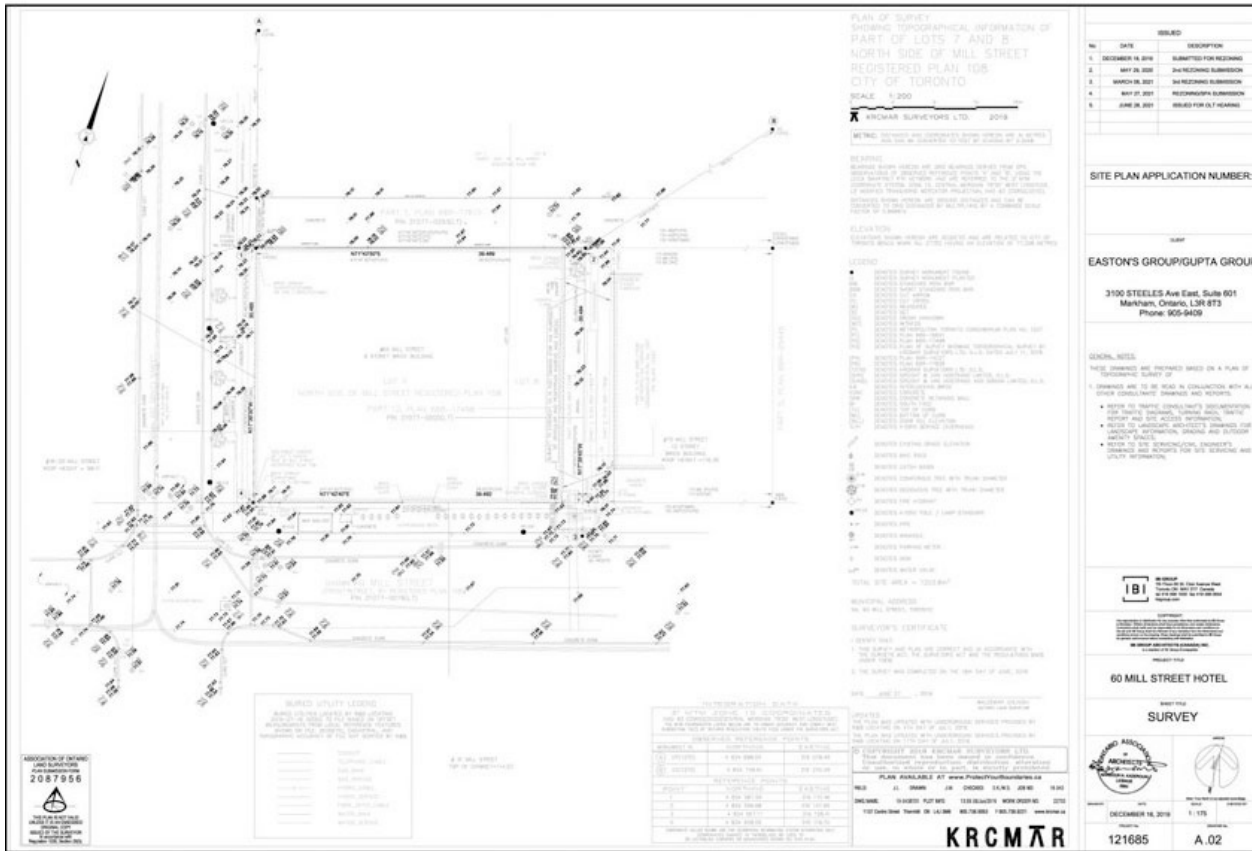
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CONTEXT PLAN & SITE STATISTICS

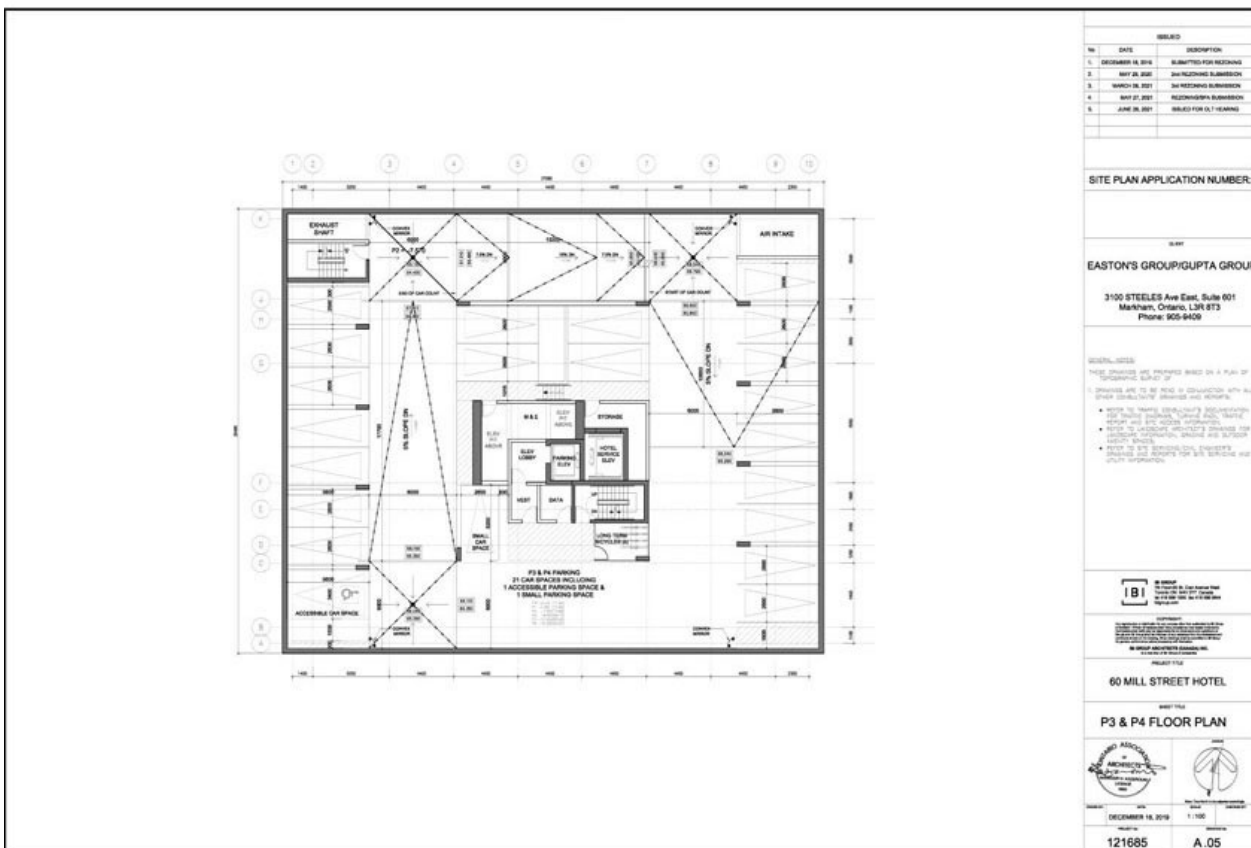
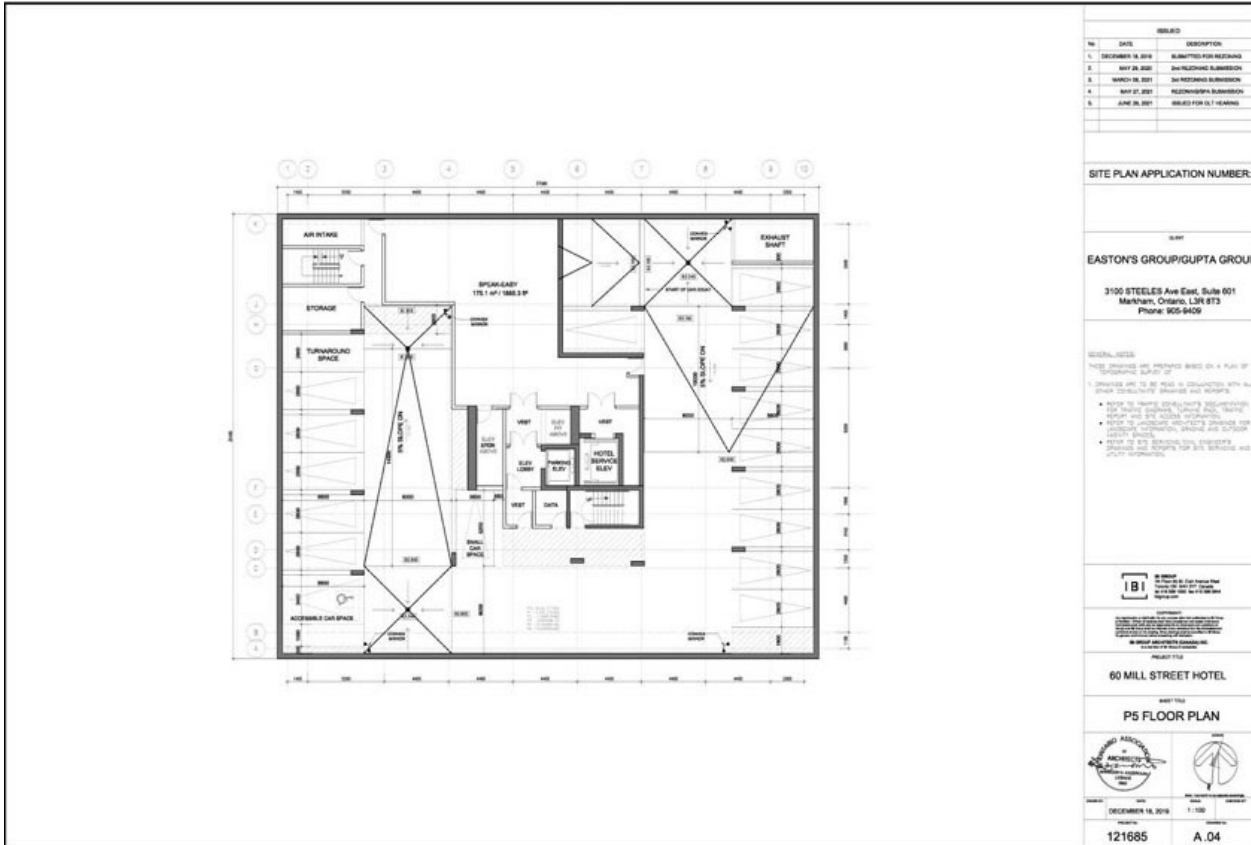
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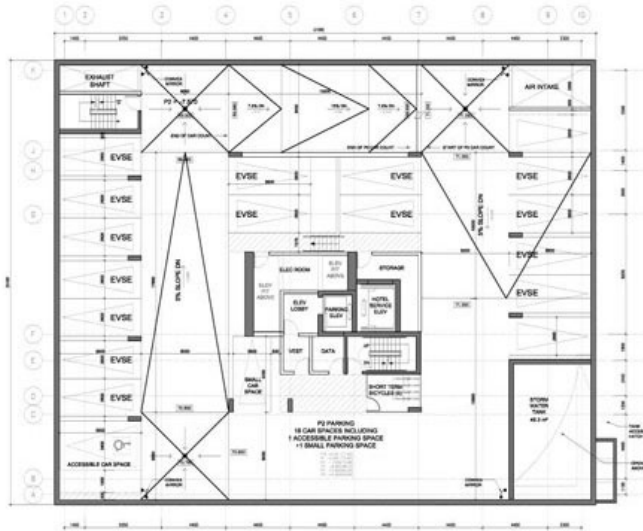
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2.	MAY 29, 2018	2ND RECORDS SUBMISSION
3.	MARCH 26, 2017	3RD RECORDS SUBMISSION
4.	MAY 27, 2017	RECORDS/ISSUE SUBMISSION
5.	JUNE 26, 2017	ISSUED FOR OLT HEARING

SITE PLAN APPLICATION NUMBER:

CLIENT:

**EASTON'S GROUP/GUPTA GROUP**

3100 STEELES Ave East, Suite 601  
Markham, Ontario, L3R 8T3  
Phone: 905-9409

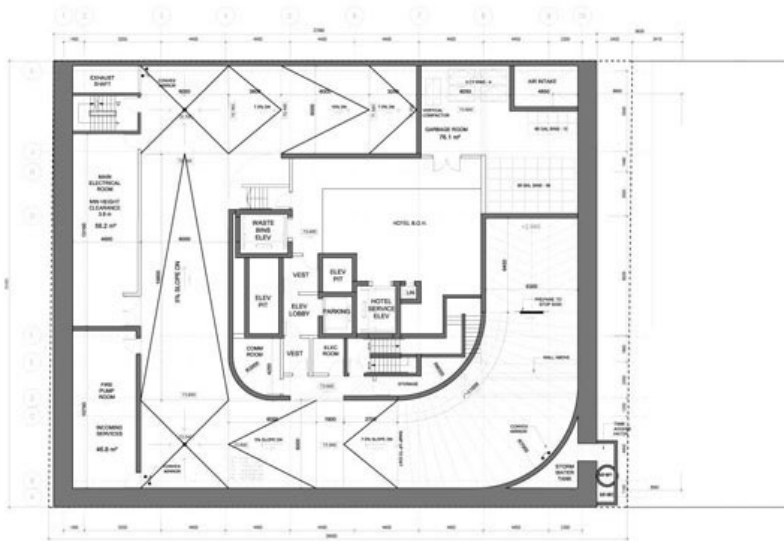
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THESE DRAWINGS ARE PREPARED BASED ON A PLAN OF CONSTRUCTION SUBMITTED BY THE CLIENT. THE CLIENT IS RESPONSIBLE FOR THE ACCURACY AND COMPLETENESS OF THE INFORMATION PROVIDED.  
1. DRAWINGS ARE TO BE READ IN CONJUNCTION WITH ALL OTHER CONTRACT DOCUMENTS.  
2. REFER TO GENERAL CONDITIONS OF CONTRACT FOR THE PROJECT.  
3. REFER TO ALL NOTES AND SPECIFICATIONS FOR THE PROJECT.  
4. REFER TO ALL DIMENSIONS, DIMENSIONS AND SPACING OF ALL ELEMENTS.  
5. REFER TO ALL DIMENSIONS, DIMENSIONS AND SPACING OF ALL ELEMENTS.

**IBI** CONSULTANTS INC.  
1000 SHEPPARD AVENUE EAST, SUITE 100  
MARKHAM, ONTARIO L3R 9V4  
TEL: 905-947-8888  
WWW.IBI-CANADA.COM

PROJECT TITLE:  
**60 MILL STREET HOTEL**

SHEET TITLE:  
**P2 FLOOR PLAN**

DATE: DECEMBER 18, 2019  
SCALE: 1:100  
PROJECT NO: 121685  
SHEET NO: A.06



ISSUED		
No.	DATE	DESCRIPTION
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SITE PLAN APPLICATION NUMBER:

CLIENT:

**EASTON'S GROUP/GUPTA GROUP**

3100 STEELES Ave East, Suite 601  
Markham, Ontario, L3R 8T3  
Phone: 905-9409

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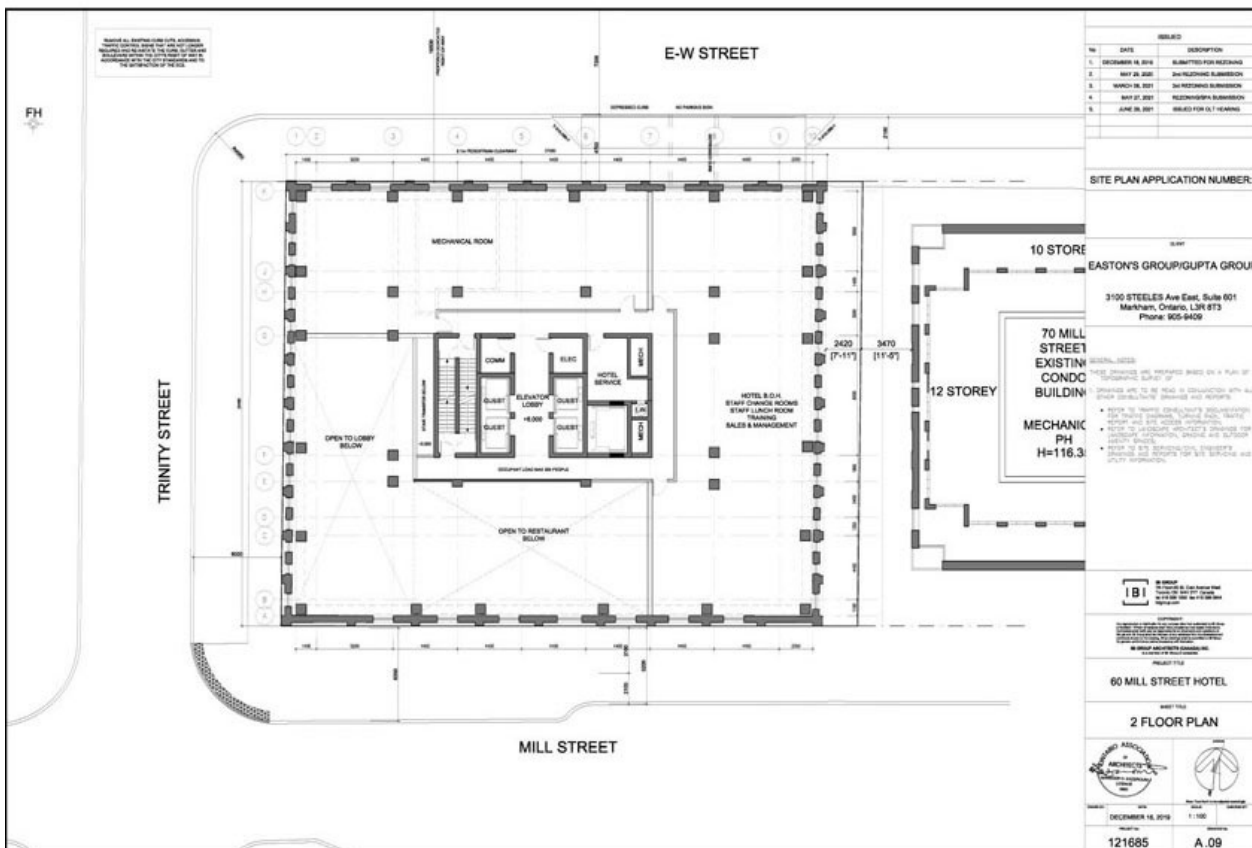
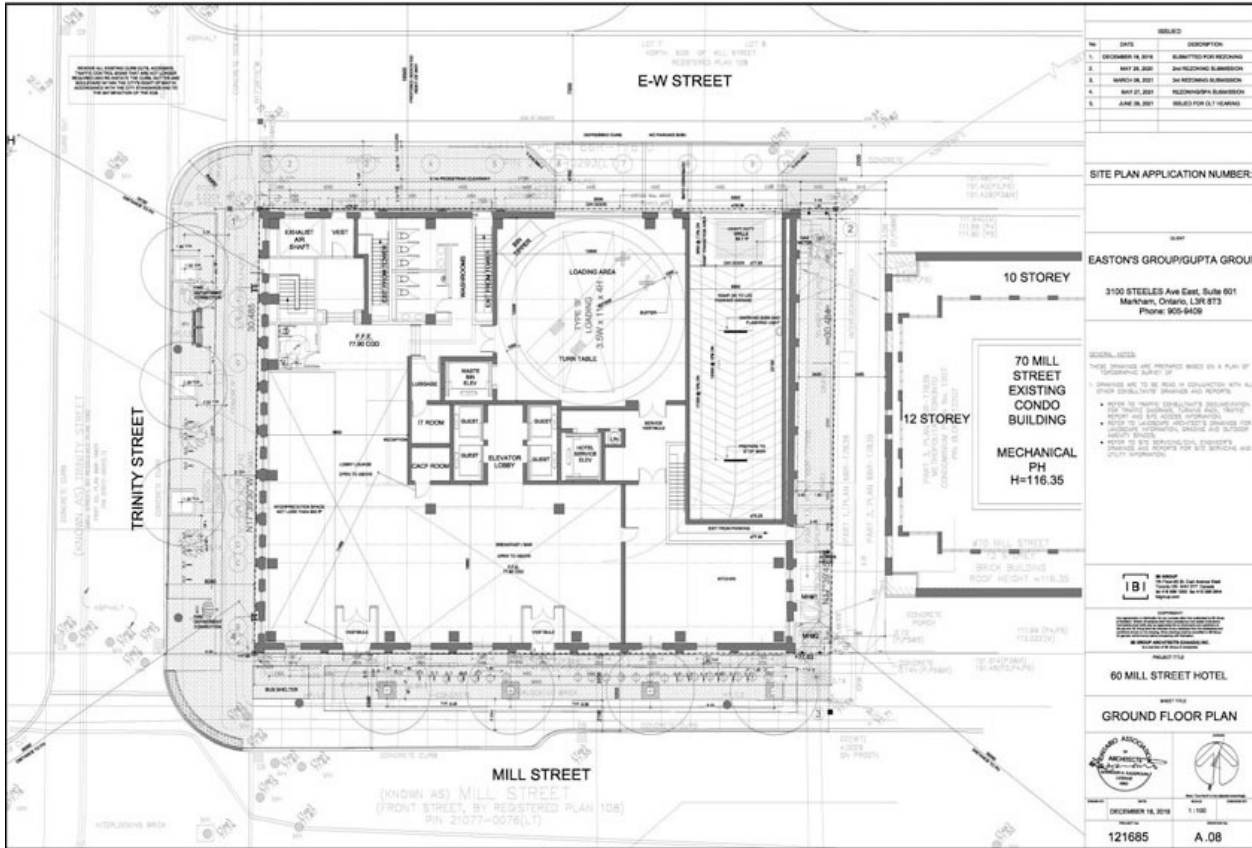
**IBI** CONSULTANTS INC.  
1000 SHEPPARD AVENUE EAST, SUITE 100  
MARKHAM, ONTARIO L3R 9V4  
TEL: 905-947-8888  
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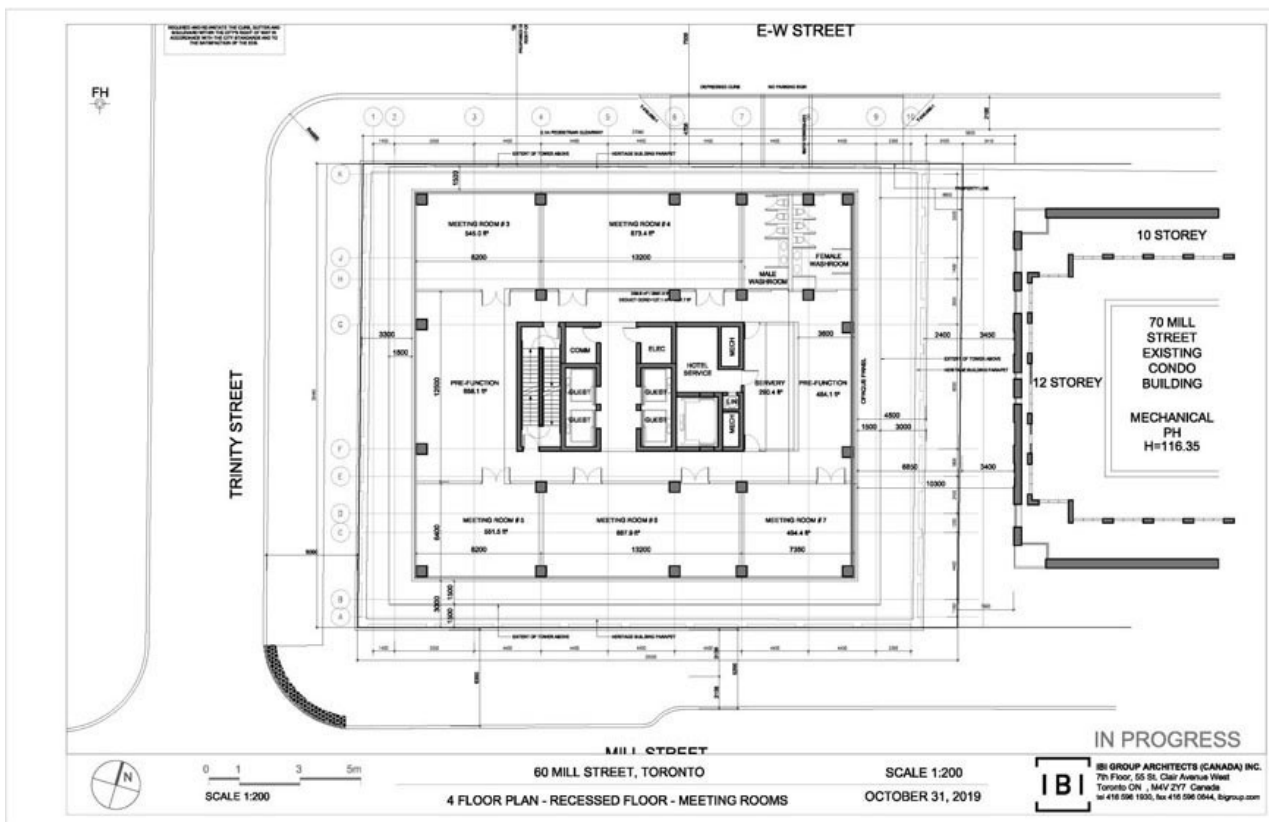
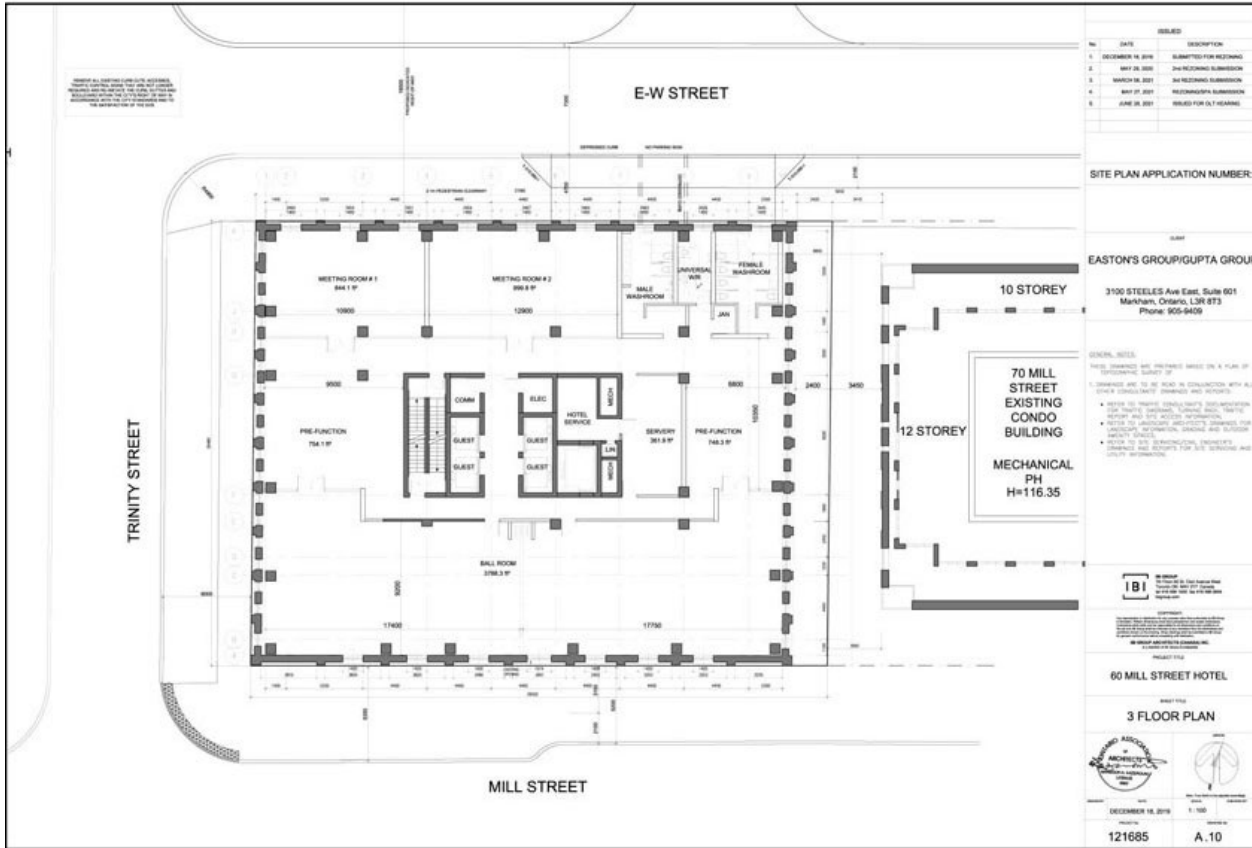
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**60 MILL STREET HOTEL**

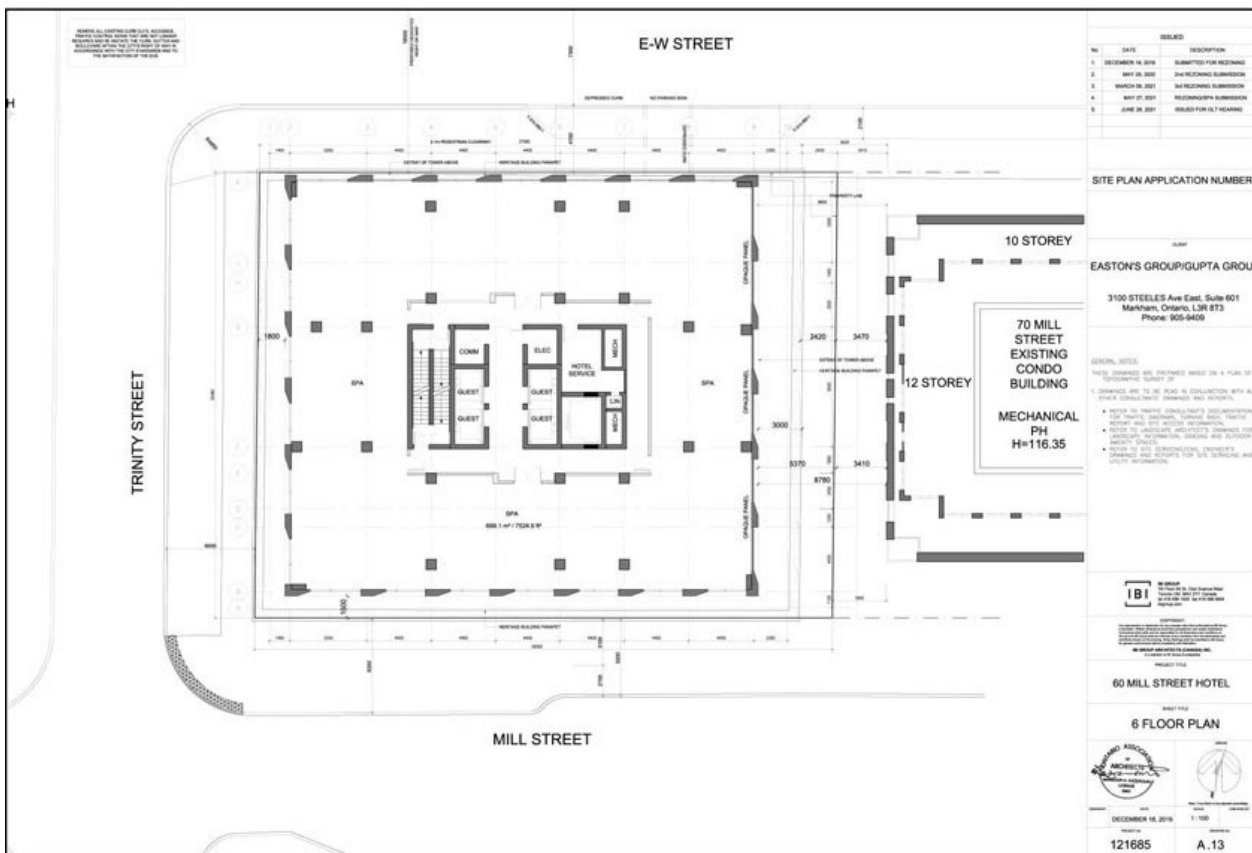
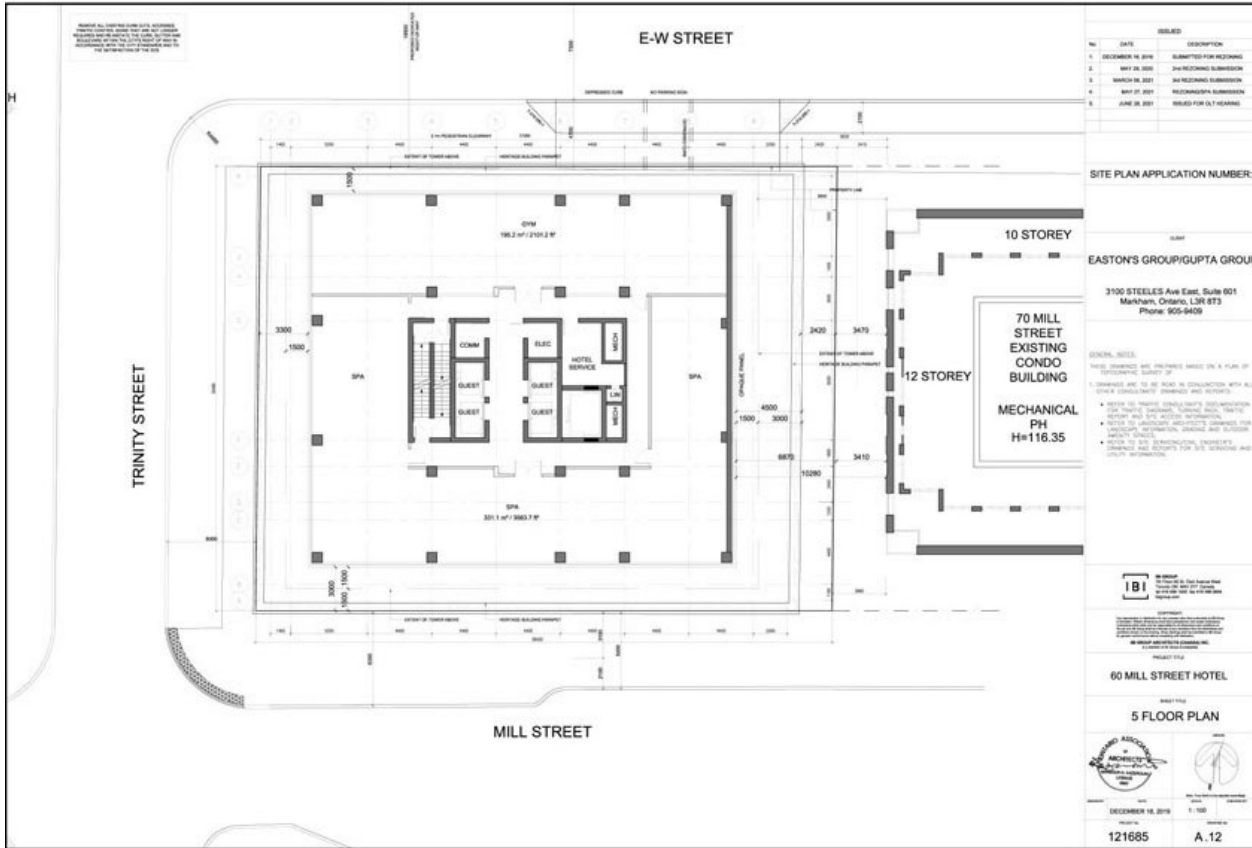
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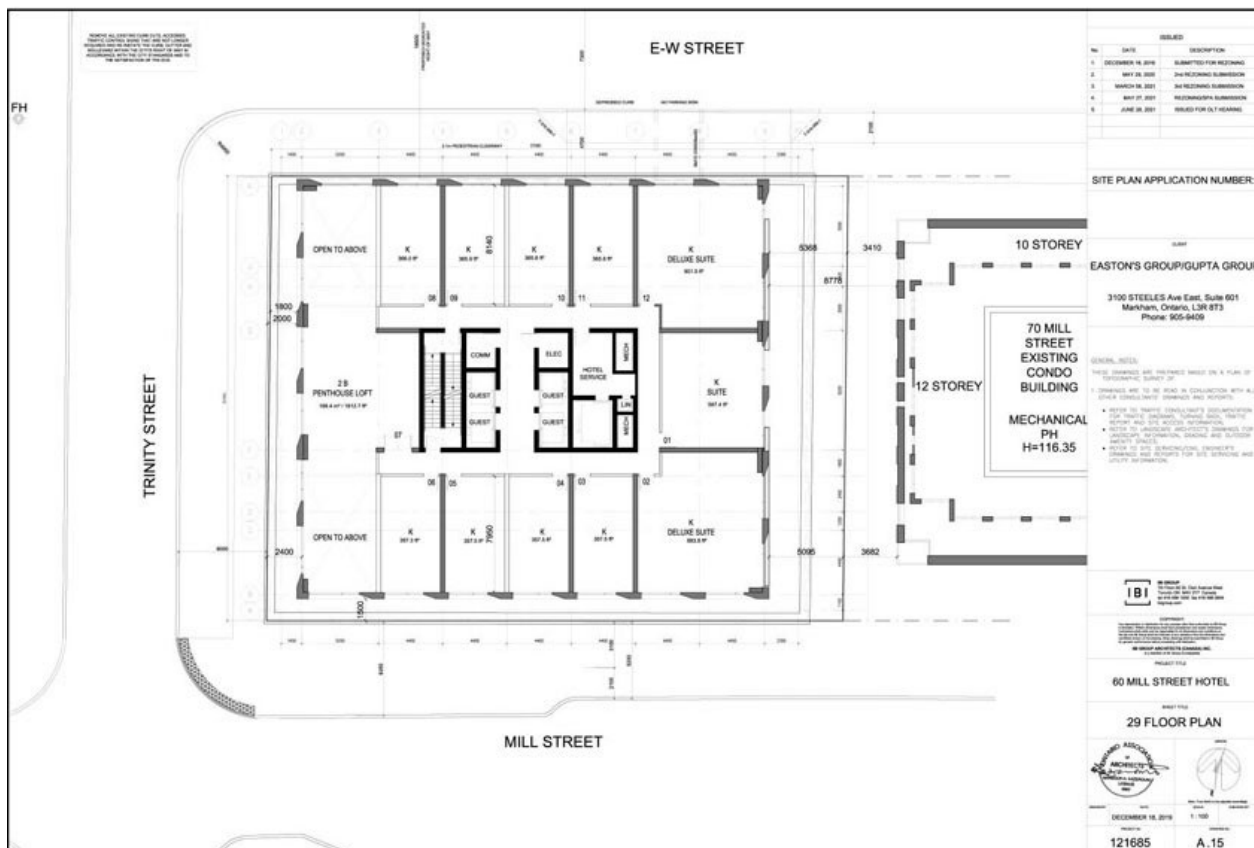
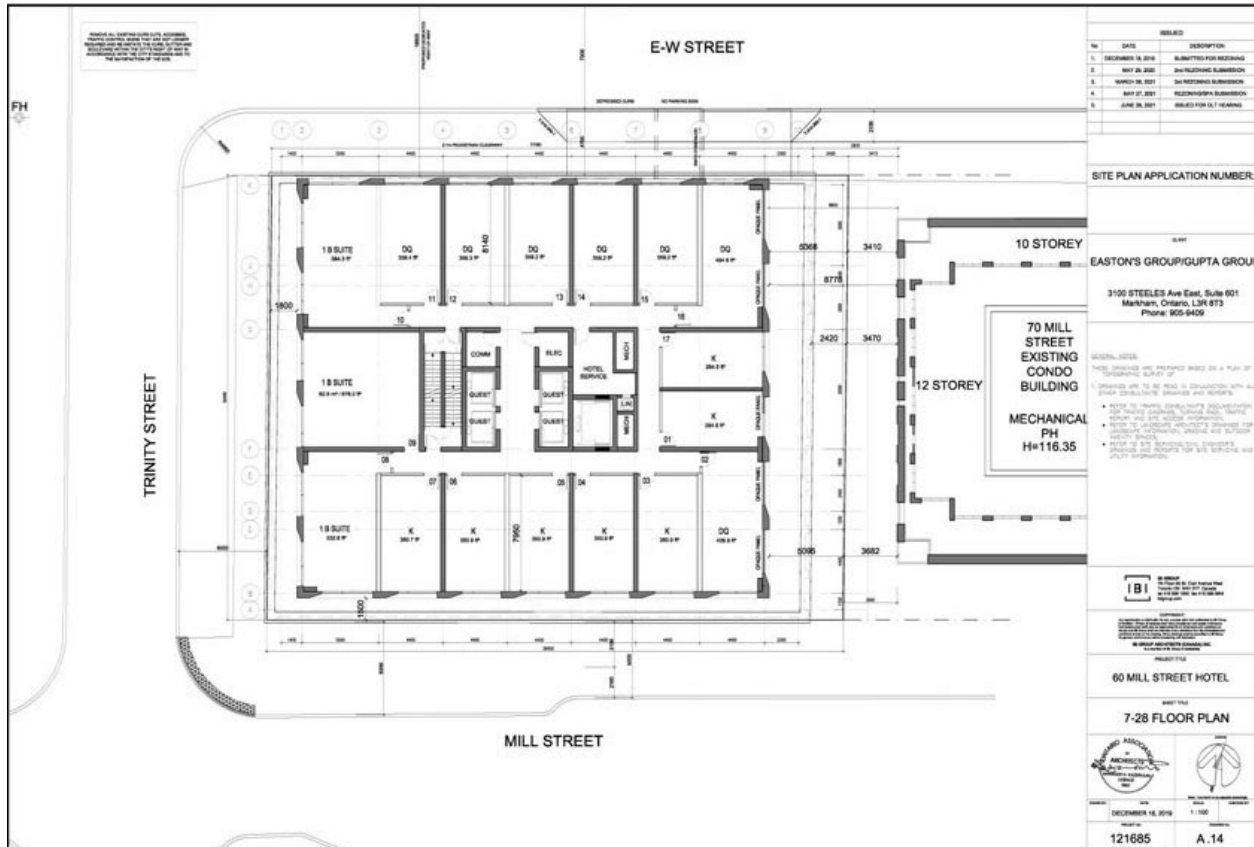
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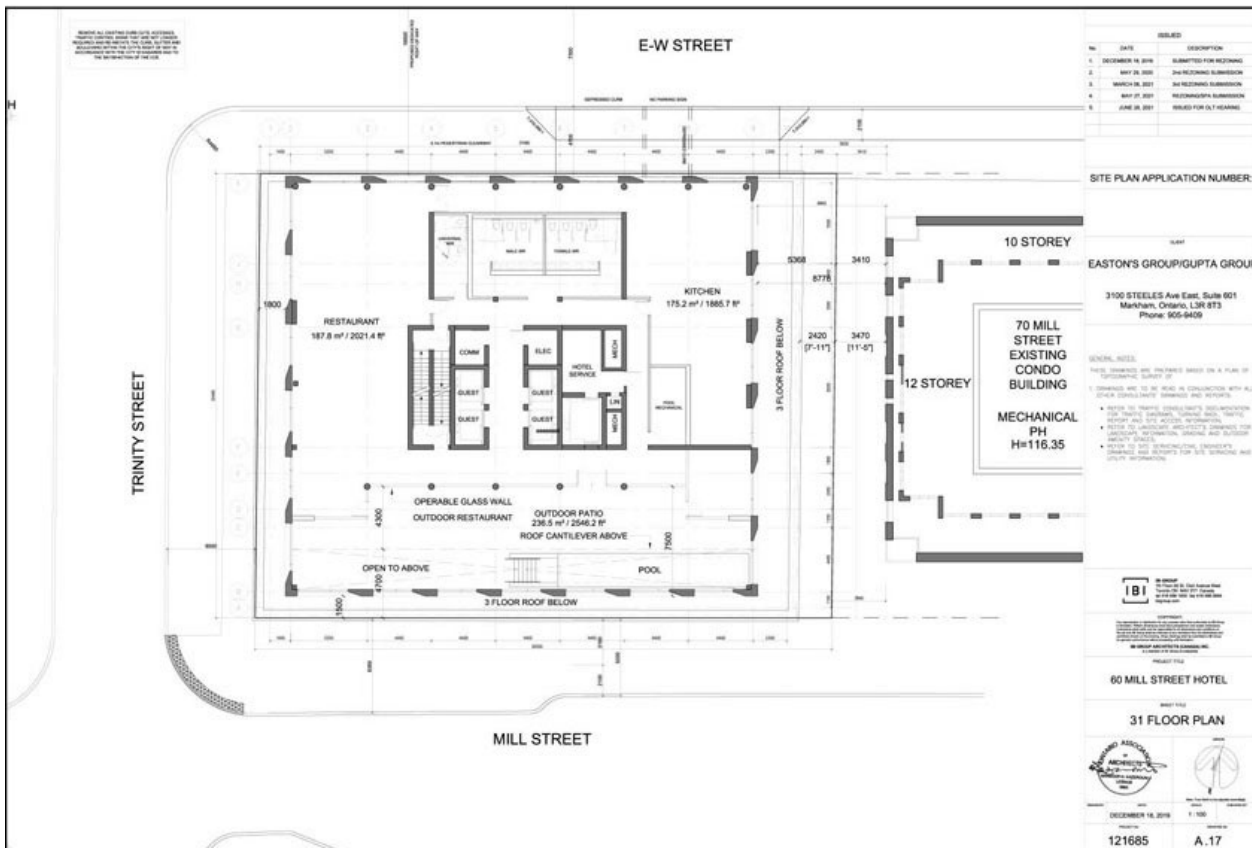
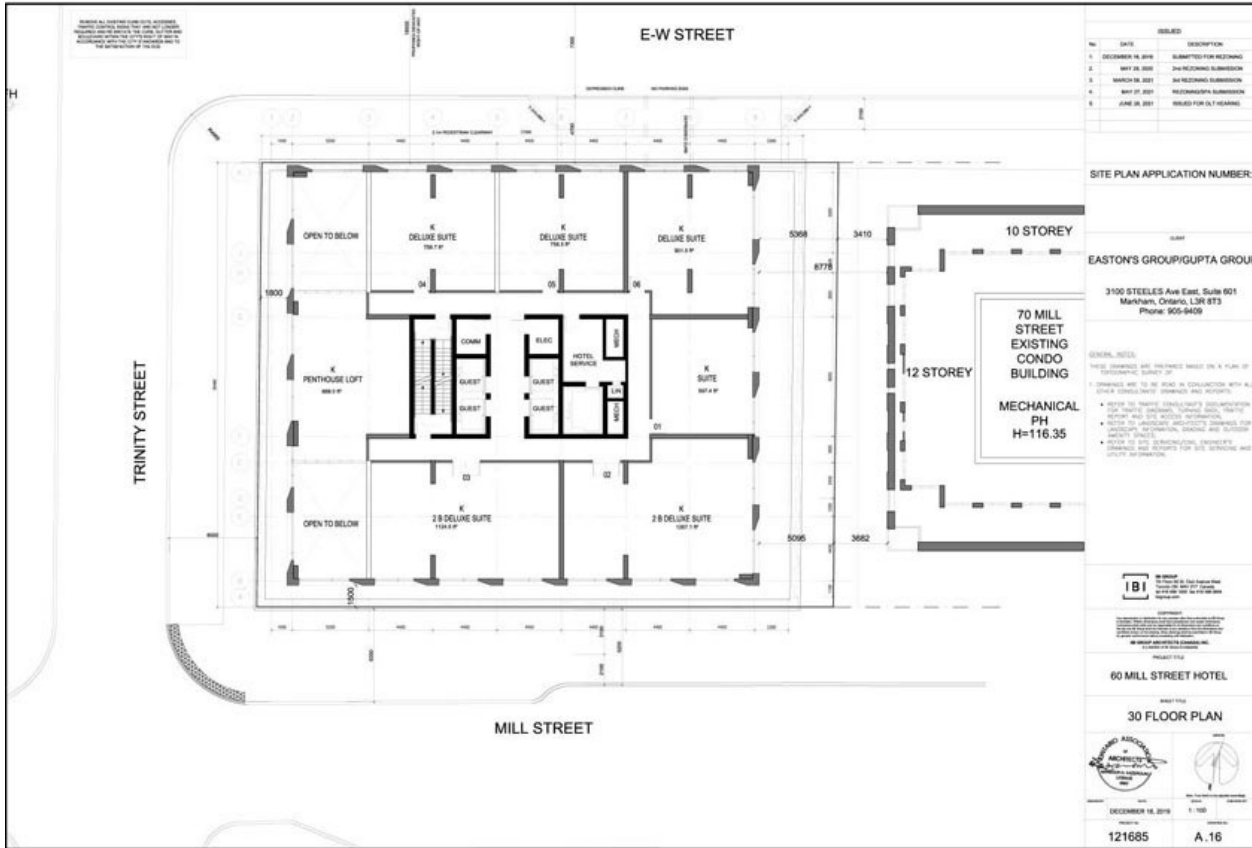
2575867 Ontario Inc. v. Toronto (City)



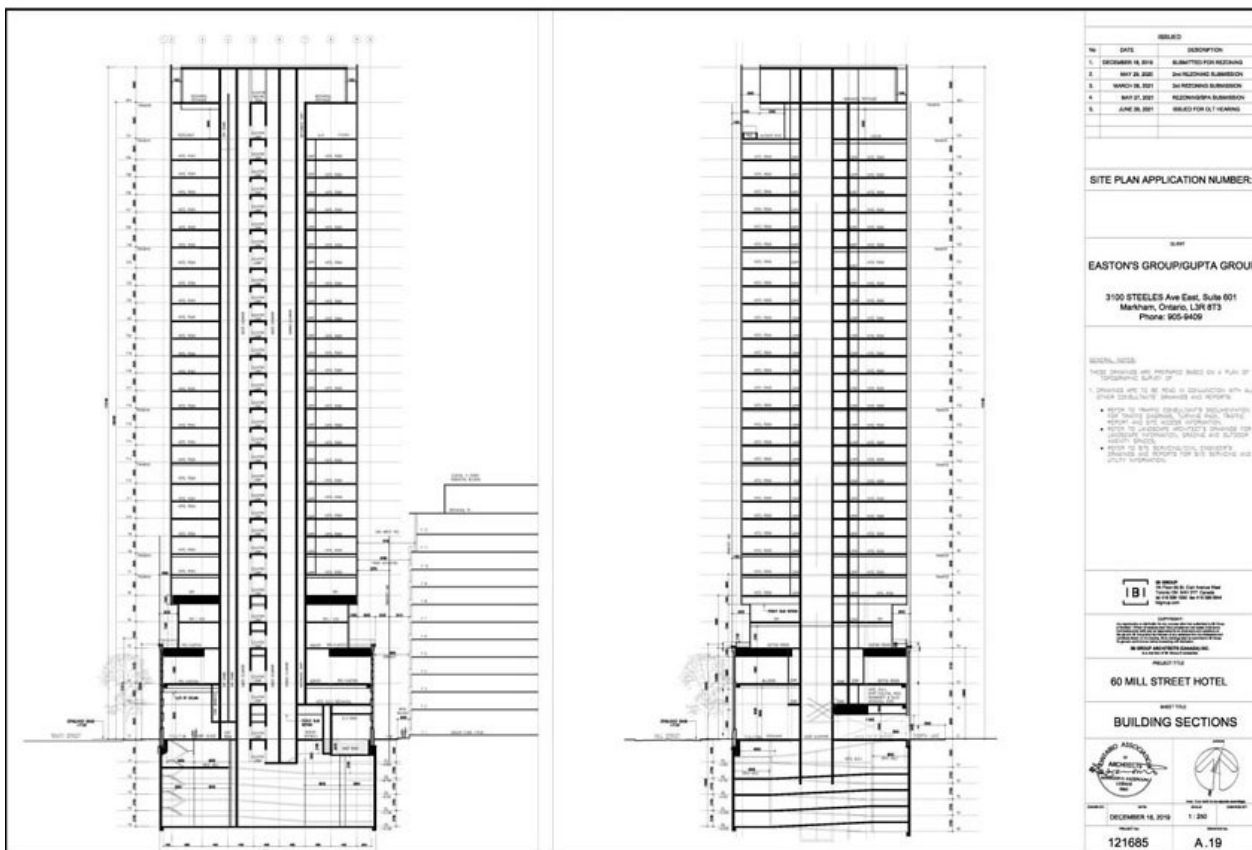
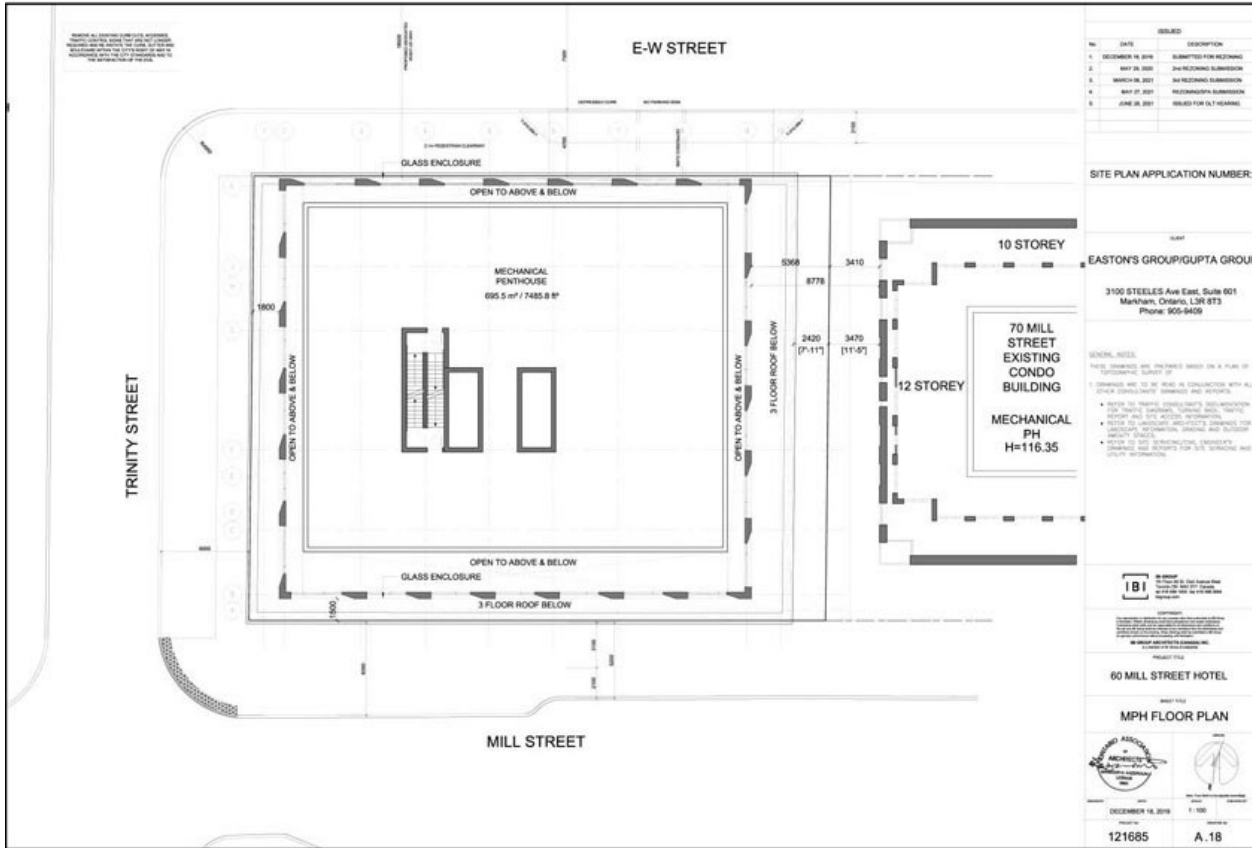












ISSUED		
NO.	DATE	DESCRIPTION
1.	DECEMBER 14, 2016	SUBMITTED FOR REVIEW
2.	MAY 24, 2017	2ND REVISION SUBMISSION
3.	MARCH 16, 2017	3RD REVISION SUBMISSION
4.	MAY 27, 2017	REVISIONS/PH SUBMISSION
5.	JUNE 16, 2017	ISSUED FOR ALL HEARINGS

SITE PLAN APPLICATION NUMBER:

CLIENT:

**EASTON'S GROUP/GUPTA GROUP**

3100 STEELES Ave East, Suite 601  
Markham, Ontario, L3R 8T3  
Phone: 905-9409

GENERAL NOTES:

THESE DRAWINGS ARE PREPARED BASED ON A PLAN OF "EXISTING" SURVEY OF:

1. DIMENSIONS ARE TO BE KEPT IN CONFORMANCE WITH ALL OTHER REGULATORY ORDINANCES AND PERMITS.
2. REFER TO MEASUREMENTS IN ALL DIMENSIONS FOR VERIFICATION OF ALL DIMENSIONS AND TO BE KEPT IN CONFORMANCE WITH ALL OTHER REGULATORY ORDINANCES AND PERMITS.
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**IBI**

60 MILL STREET HOTEL

MPH FLOOR PLAN

DECEMBER 14, 2016 1:200

121685 A.18

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Markham, Ontario, L3R 8T3  
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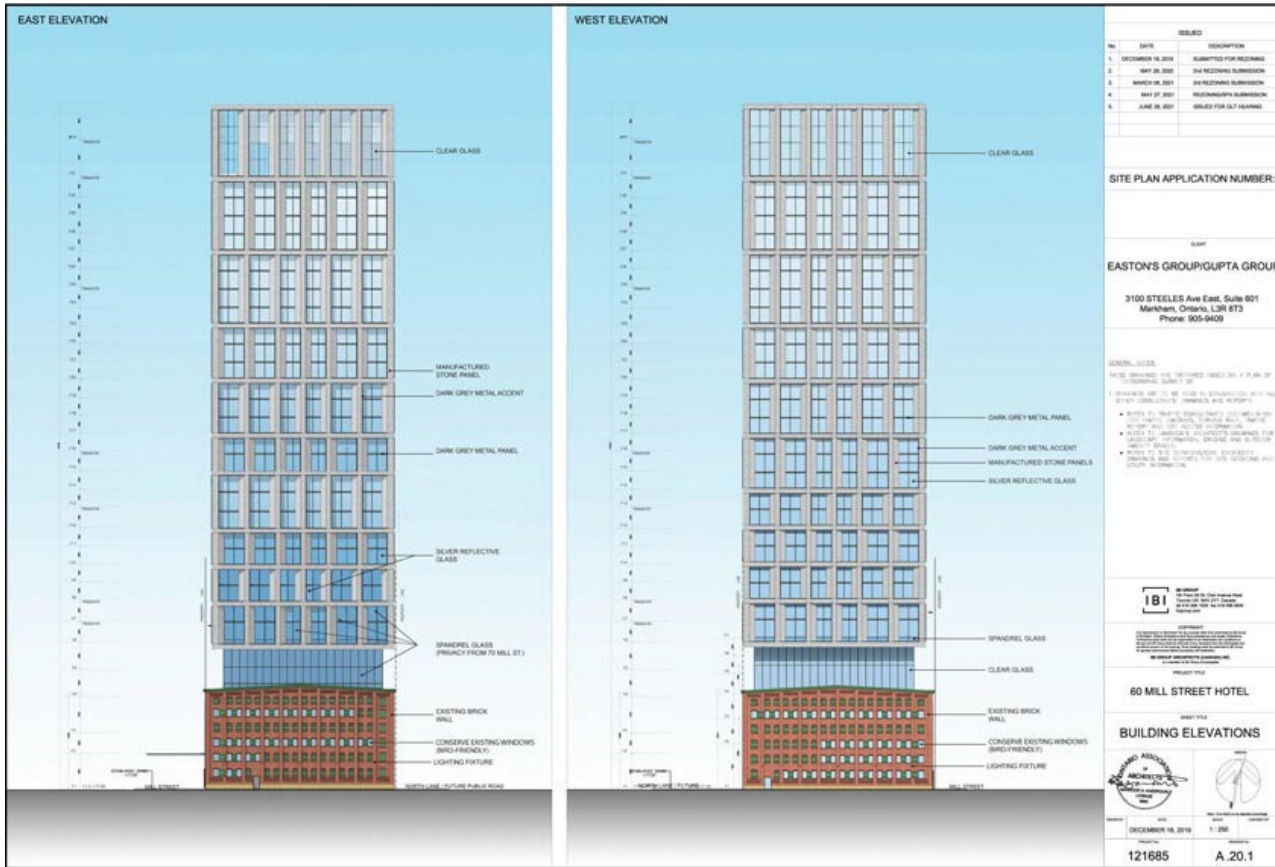
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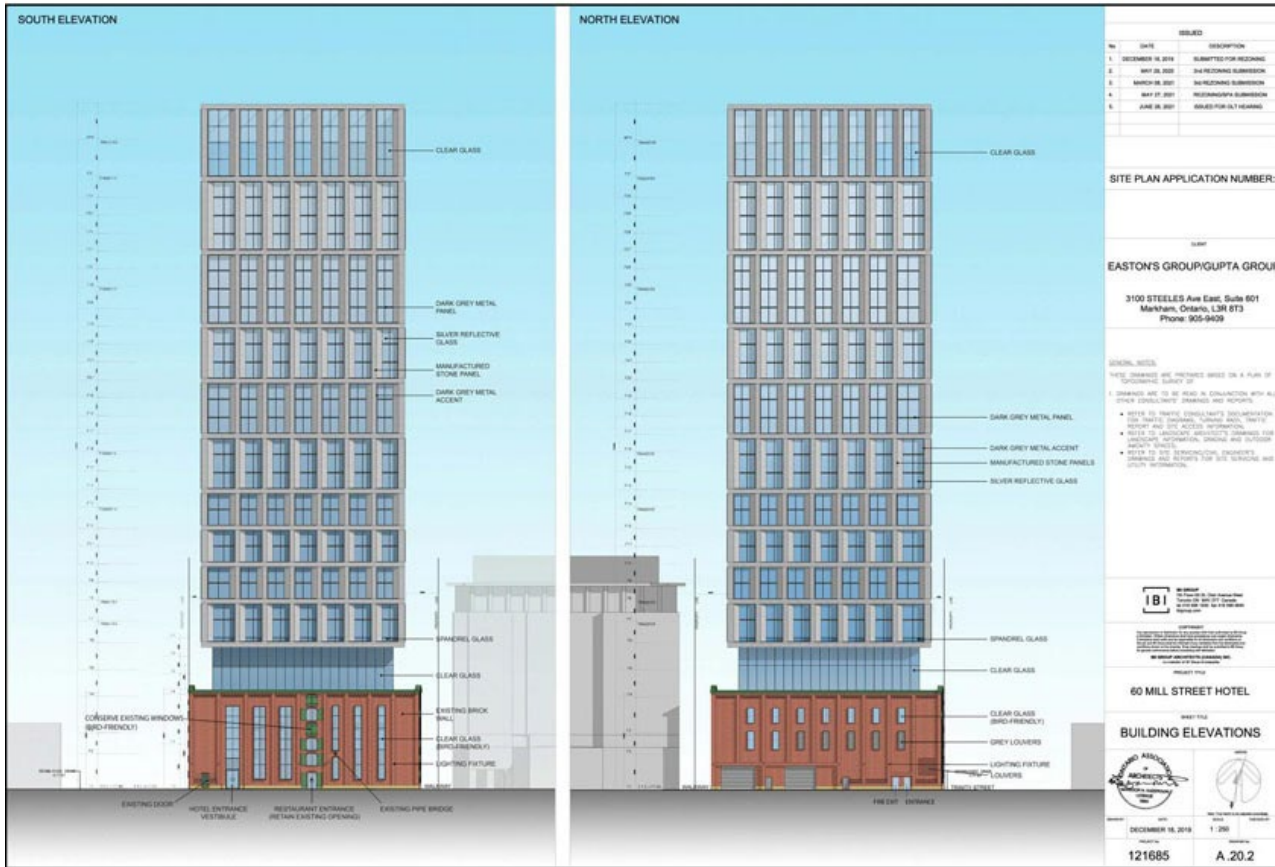
60 MILL STREET HOTEL

BUILDING SECTIONS

DECEMBER 14, 2016 1:200

121685 A.19





\*\*\*\*\*

**APPENDIX 2**

**EXHIBIT**  
**8**

**60 MILL STREET**  
ISSUED FOR OLT HEARING  
JUNE 25, 2021

**SHEET LIST**

- L-000 LANDSCAPE CONCEPT PLAN
- L-001 TREE REMOVAL AND PROTECTION PLAN
- L-100 GROUND FLOOR CONCEPT PLAN
- L-110 TERRACE LANDSCAPE CONCEPT PLAN
- L-120 GREEN ROOF LANDSCAPE CONCEPT PLAN
- L-500 LANDSCAPE DETAILS
- L-501 CITY STANDARD DETAILS SHEET 1 OF 3
- L-502 CITY STANDARD DETAILS SHEET 2 OF 3
- L-503 CITY STANDARD DETAILS SHEET 3 OF 3

ISSUED	
NO.	DESCRIPTION
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6	ISSUED FOR OLT HEARING
7	ISSUED FOR OLT HEARING
8	ISSUED FOR OLT HEARING

KEY MAP

LEGEND

CLIENT

**EASTON'S GROUP/GUPTA GROUP**  
3100 STEELES Ave East, Suite 601  
Markham, Ontario, L3R 8T3

IBI GROUP  
180 EASTERN AVE. TORONTO, ONTARIO M4M 1B7  
TEL: 416-593-9300 FAX: 416-593-9301  
WWW.IBI.COM

PROJECT TITLE  
**60 MILL STREET**  
TORONTO, ONTARIO

SHEET TITLE  
**LANDSCAPE ARCHITECTURE**  
DRAWING SET

DATE: 2021-06-25 1:000 00

122696



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6	ISSUED FOR OLT HEARING
7	ISSUED FOR OLT HEARING
8	ISSUED FOR OLT HEARING

KEY MAP

LEGEND

CLIENT

**EASTON'S GROUP/GUPTA GROUP**  
3100 STEELES Ave East, Suite 601  
Markham, Ontario, L3R 8T3

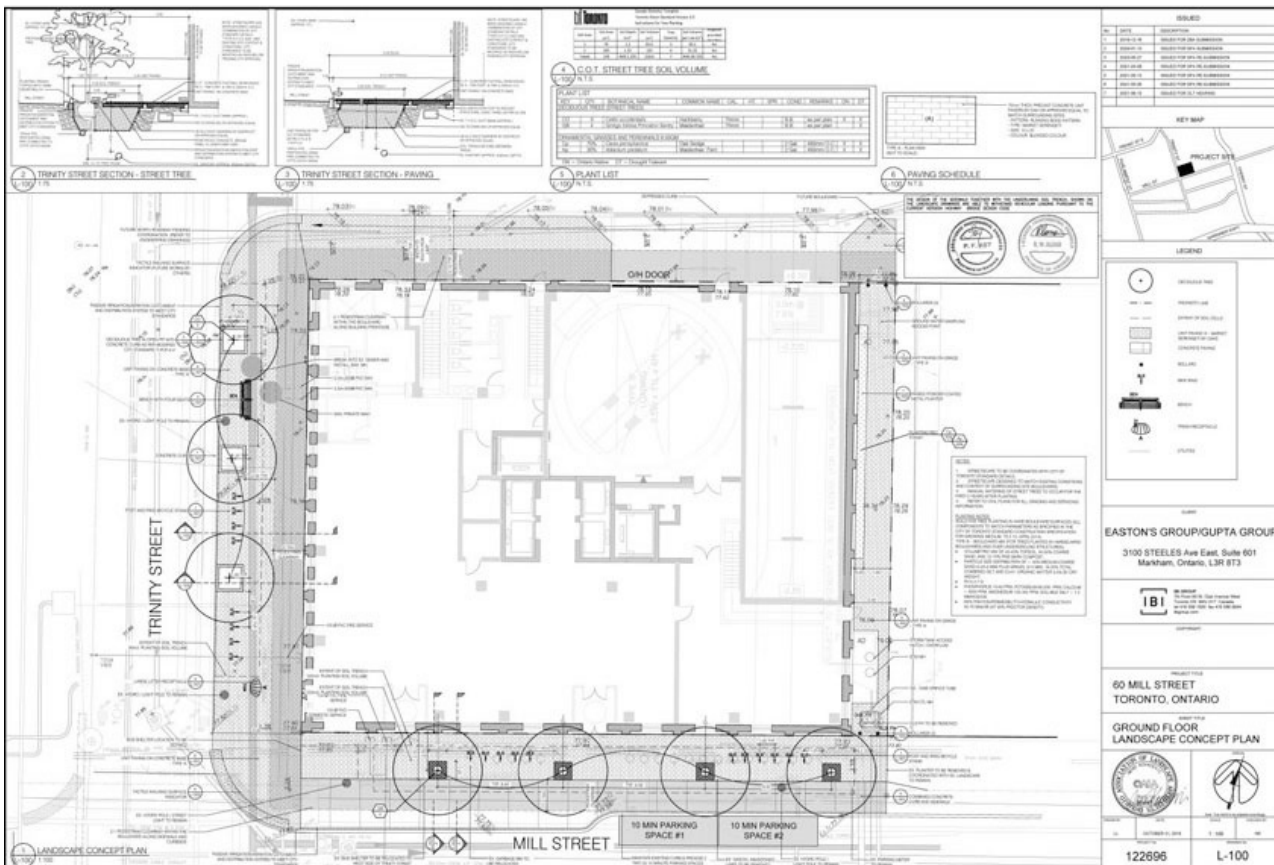
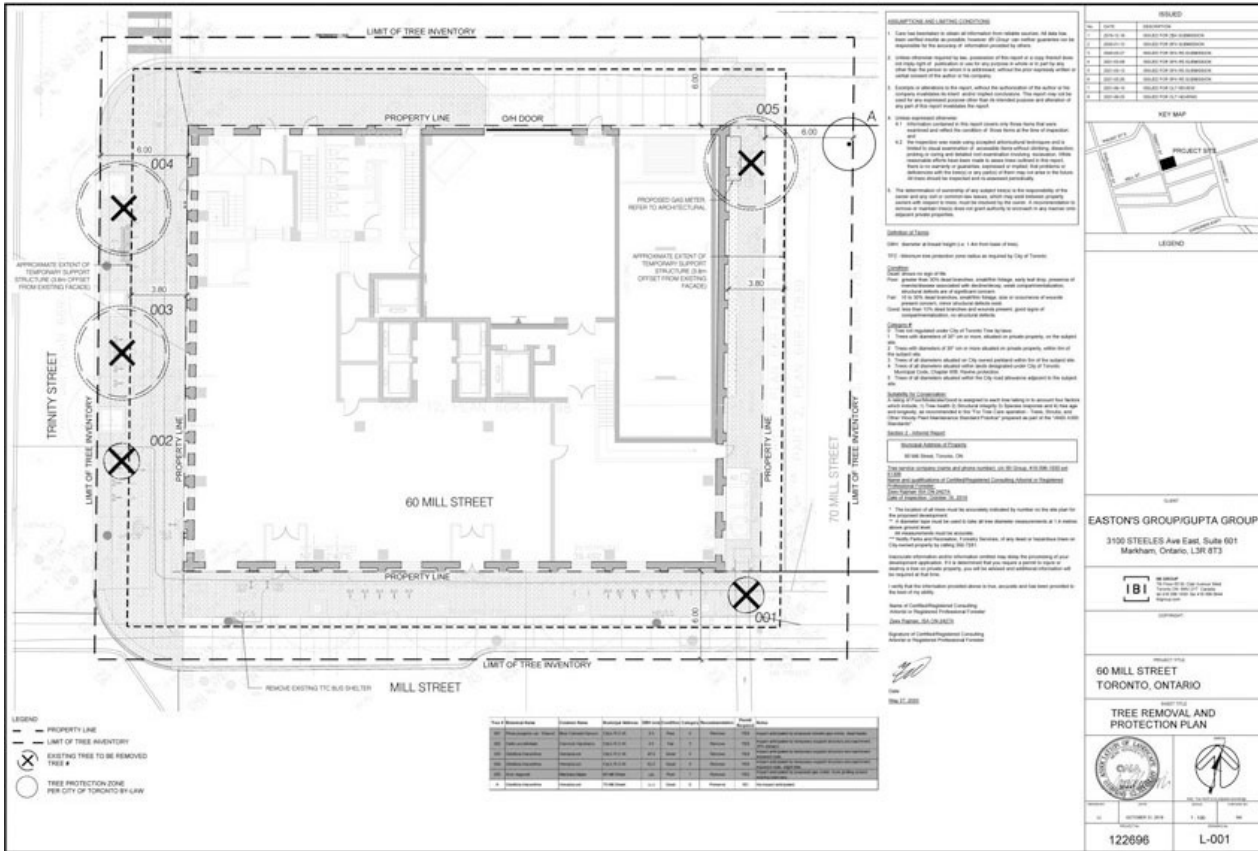
IBI GROUP  
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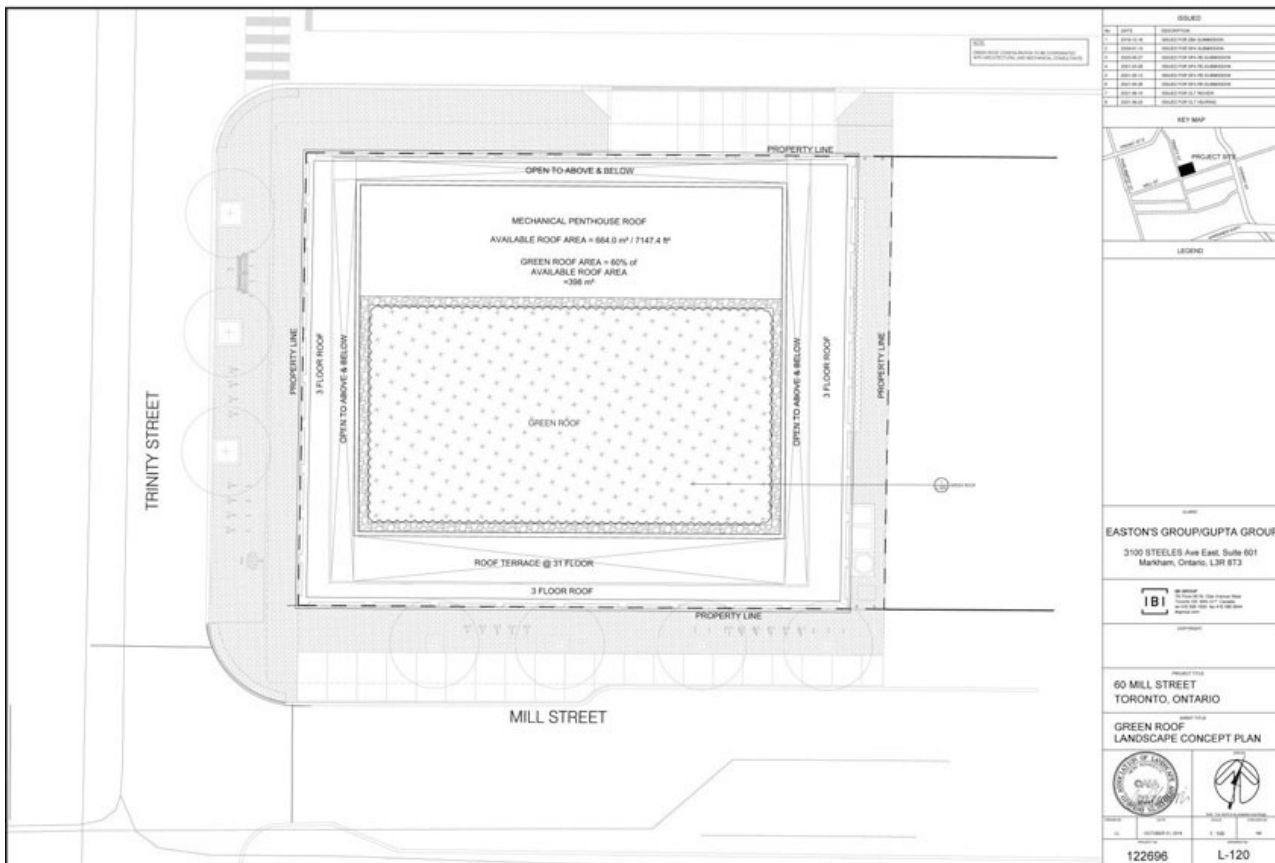
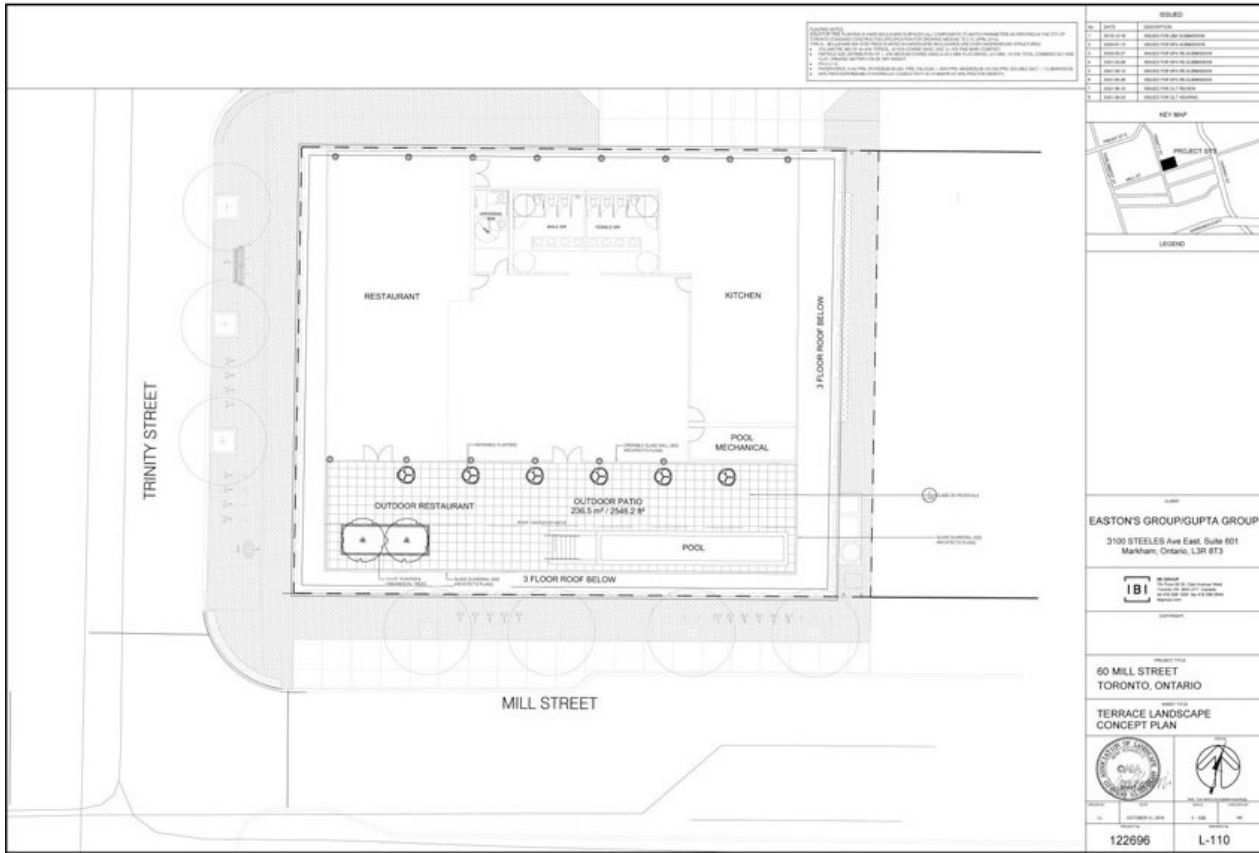
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**60 MILL STREET**  
TORONTO, ONTARIO

SHEET TITLE  
**LANDSCAPE CONCEPT PLAN**

DATE: 2021-06-25 1:000 00

122696 L-000





**REVISIONS**

NO.	DATE	DESCRIPTION
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**KEY MAP**

**LEGEND**

**PROJECT INFO**

**EASTON'S GROU/IGUPTA GROUP**  
 3100 STEELES Ave East, Suite 601  
 Markham, Ontario, L3R 8T3

**IBI**

**PROJECT INFO**

**60 MILL STREET**  
 TORONTO, ONTARIO

**PROJECT TITLE**

**LANDSCAPE DETAILS**

**122696**      **L-500**

**REVISIONS**

NO.	DATE	DESCRIPTION
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**KEY MAP**

**LEGEND**

**PROJECT INFO**

**EASTON'S GROU/IGUPTA GROUP**  
 3100 STEELES Ave East, Suite 601  
 Markham, Ontario, L3R 8T3

**IBI**

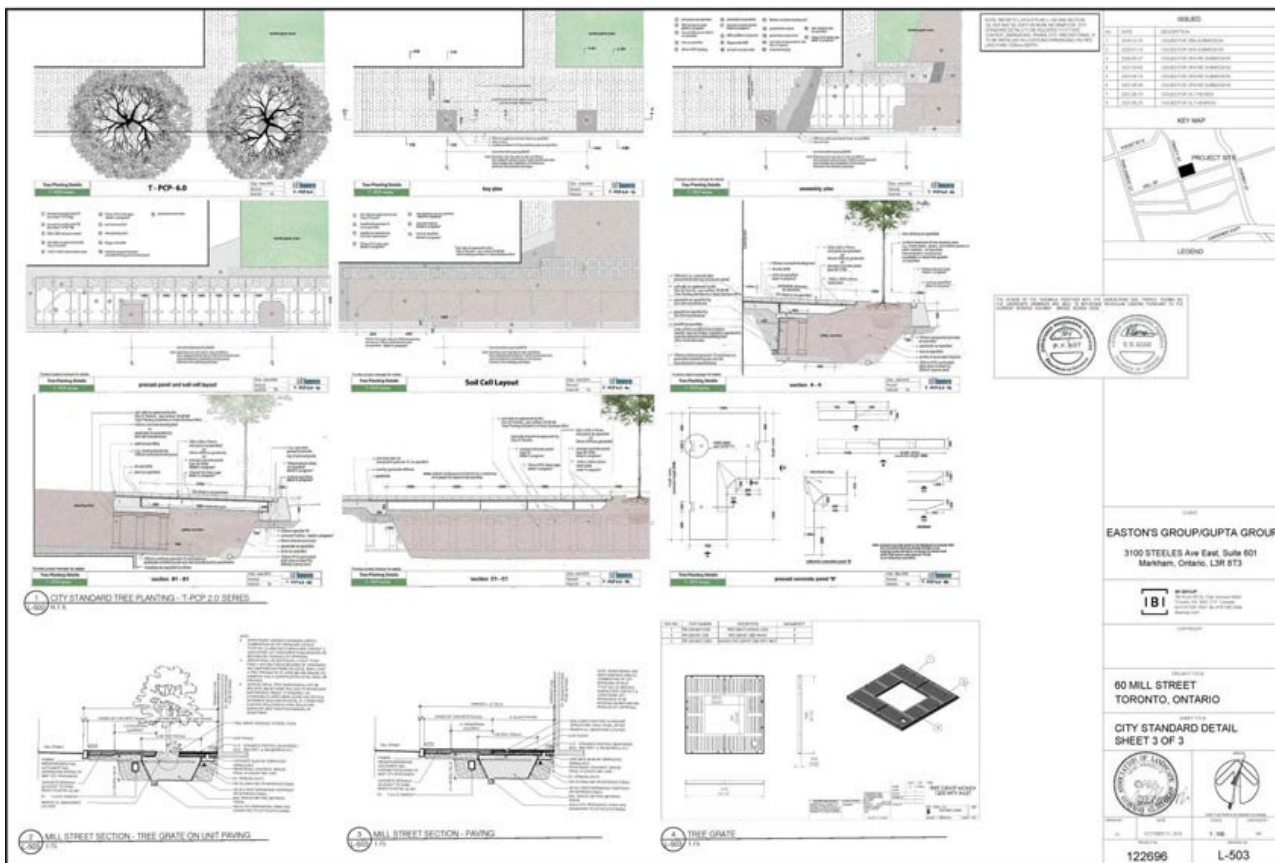
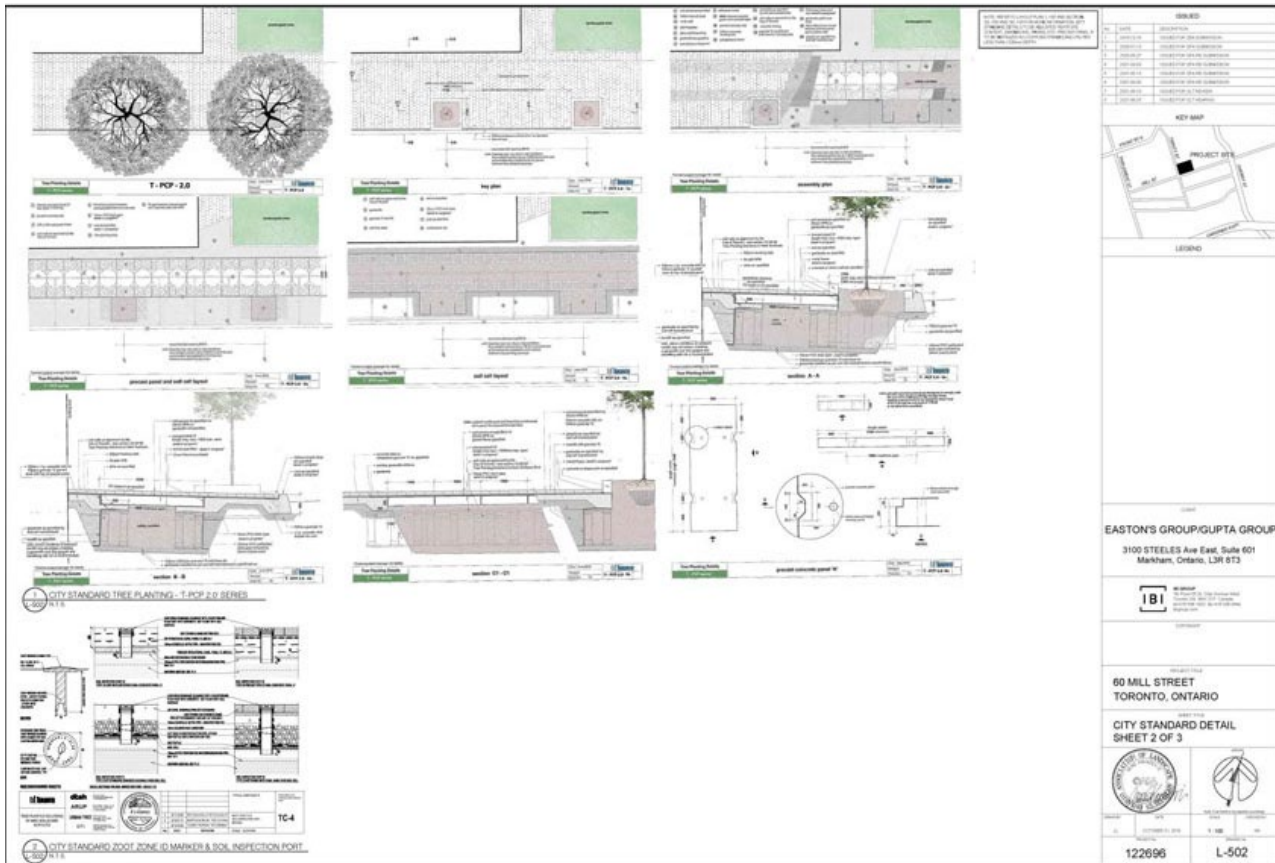
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**60 MILL STREET**  
 TORONTO, ONTARIO

**PROJECT TITLE**

**CITY STANDARD DETAILS**  
 SHEET 1 OF 3

**122696**      **L-501**





\* \* \* \* \*

**APPENDIX 3: SITE PLAN APPROVAL CONDITIONS****A. PRE-APPROVAL CONDITIONS****LEGAL SERVICES**

1. The Owner shall enter into the City's standard site plan agreement to and including registration of the site plan agreement on title to the subject lands by the City at the Owner's expense.

**ENGINEERING AND CONSTRUCTION SERVICES**

2. Prior to site plan approval, the owner shall revise Drawing L-100 to remove or reconfigure all doors that open into the right-of-way/pedestrian clearway along Mill Street, Trinity Street and the proposed new public road at the rear of the site to the satisfaction of the Executive Director & Chief Engineer of Engineering and Construction Services and the Senior Manager, Heritage Planning. Existing and new doors of a heritage façade that opens into the right-of-way may be permitted and retained, subject to the owner entering into an appropriate encroachment agreement.
3. Prior to site plan approval, the owner shall revise Drawing L-100 and L-001 to remove any notation that the existing bus shelter is to be removed/relocated, unless the Owner provides the City with written confirmation and consent from the Toronto Transit Commission that the existing bus shelter will be relocated.
4. Prior to site plan approval, the owner shall submit comprehensive Construction Management Plans (CMP) for each stage of the construction process. These plans must illustrate the location of employee and trades parking, heavy truck access points, material storage, construction site fencing and overhead cranes. We advise the applicant that they cannot use the municipal right-of-way for construction-related purposes without first receiving written authorization from our Permits and Enforcement Section, including payment of the necessary fees.
5. Prior to site plan approval, the owner shall submit an application to Toronto Water, Environmental Monitoring & Protection, for any short-term construction dewatering, and any permanent dewatering that is required for the building, and enter into agreements to discharge groundwater, as required by the General Manager, Toronto Water.
6. Prior to site plan approval, the owner shall enter into an encroachment agreement for the private control maintenance hole proposed in the City right-of-way.

**CITY PLANNING**

7. Prior to site plan approval, the owner shall submit a landscape cost estimate to the satisfaction of the Director, Community Planning, Toronto and East York District for the works detailed on the approved Landscape Plans.
8. Prior to site plan approval, the owner shall submit financial security to the Director, Community Planning, Toronto and East York District, in the form of a Letter of Credit or certified cheque to guarantee the provision of landscape development works as detailed on the approved Landscape Plan.
9. Prior to site plan approval, the owner shall submit a materials sample board to the satisfaction of the Director, Community Planning, Toronto and East York District and Director, Urban Design.
10. Prior to site plan approval, the owner shall provide a lighting plan as necessary, to the satisfaction of the Director, Community Planning, Toronto and East York District and Director, Urban Design.

**HERITAGE PLANNING**

## 2575867 Ontario Inc. v. Toronto (City)

11. Prior to site plan approval, the owner shall provide final site plan drawings substantially in accordance with the approved Conservation Plan required to the satisfaction of the Senior Manager, Heritage Planning.
12. Prior to site plan approval, the owner shall have obtained final approval for the necessary Zoning By-law Amendment required for the subject property, such Amendment to have come into full force and effect.
13. Prior to site plan approval, the owner shall provide an Interpretation Plan for the subject property, to the satisfaction of the Senior Manager, Heritage Planning and thereafter shall implement such Plan to the satisfaction of the Senior Manager, Heritage Planning.
14. Prior to site plan approval, the owner shall provide a Heritage Lighting Plan that describes how the exterior of the heritage property will be sensitively illuminated to enhance its heritage character to the satisfaction of the Senior Manager, Heritage Planning and thereafter shall implement such Plan to the satisfaction of the Senior Manager Heritage Planning.
15. Prior to site plan approval, the owner shall provide a Signage Plan to the satisfaction of the Senior Manager, Heritage Planning.

**URBAN FORESTRY**

16. Prior to site plan approval, the Owner shall submit to the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District a complete "Application to Injure or Remove Trees" and associated application fee in the amount of \$1,848.05 (Current fees: \$369.61 per City Street tree, \$369.61 per private subject site tree, and \$773.77 per private boundary/neighbour tree) for the four (4) City-owned Street trees (Trees 1-4) and the one (1) privately-owned tree located on the subject lands (Tree 5) that are proposed for removal. The Owner is advised that submission of an application does not guarantee that a tree permit will be issued and that fees are subject to change. As part of the review process, Urban Forestry will independently assess the condition of the trees and the reason for their proposed removal against the provisions of the applicable by-law. The Owner may be required to submit revised plans and Urban Forestry may be required to notify the community, (co-)Owner(s) of boundary/neighbour trees, consult with the ward councillor, and/or report to Council. The Owner is advised that By-law regulated trees may not be injured or removed until a Permit to Injure or Destroy a Tree has been issued by Urban Forestry, a Building or Demolition Permit has been obtained, and the construction which warrants tree injury/removal has Commenced.
17. Prior to site plan approval, the Owner shall submit to the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District a non-refundable Tree Loss Payment in the amount of \$12,651.00, which represents the appraised value of City- owned Trees 1-4 to be removed and replacement costs. The Owner is advised that the cost of tree removal will be borne by the Owner.
18. Prior to site plan approval, the Owner shall submit to the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District a Tree Planting Security Deposit in the amount of \$4,081.00 (\$583.00 per tree), equal to the cost of tree planting and maintenance for two (2) years, to ensure the initial planting of seven (7) new trees within the City-owned road allowances and their survival in a healthy condition. The Owner is advised that the deposit will be drawn upon to cover all costs incurred by the City of Toronto in enforcing and ensuring that the trees are planted and kept in a healthy condition during the two (2)-year renewable guarantee period. The General Manager of Parks, Forestry & Recreation shall hold the Tree Planting Security Deposit for the duration of the guarantee period.
19. Prior to site plan approval, the Owner shall submit to the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District a non-refundable cash-in- lieu payment in the amount of \$583.00 (\$583.00 per tree) for the one (1) required replacement tree not being provided on the subject lands due to space constraints.

20. Prior to site plan approval, the Owner shall submit to the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District confirmation that the tree planting and continuous soil trench infrastructure proposed within the Mill Street and Trinity Street road allowances is approved by the utility providers circulated on the Public Utilities Coordination Committee (PUCC).

## **METROLINX**

21. The Owner shall engage a qualified consultant to prepare and submit a final noise study for review and satisfaction of Metrolinx.
22. The following warning clause shall be inserted in all development lease/rental agreements for each unit within 300 metres of the railway right-of-way:

Warning: Metrolinx owns and, through Metrolinx's GO Transit Division, operates the Union Station Railway Corridor ("USRC"), the busiest rail corridor in Canada, adjacent to or within close proximity to the subject lands. Operations are maintained on a continuous basis, 24 hours a day every day of the year, and include: the operation and idling of diesel locomotives that generate diesel fumes and odours; artificial lighting of the USRC; the loading, unloading and switching of passenger rail cars; and the operation of various processes for the maintenance of rail equipment. Noise and vibration originating from a number of different sources, including normal train movements (including bells and whistles), train idling, rail corridor construction, and snow removal (including switch blowers) activities will emanate from the USRC. This warning may be relied upon by Metrolinx and its successors and assigns and any specific successors or assigns of Metrolinx's interests referred to in this warning clause.

23. The Owner shall grant Metrolinx an environmental easement for operational emissions, registered on title against the subject building in favour of Metrolinx.
24. The Owner shall be responsible for all costs associated with the preparation and registration of agreements/undertakings/easements/warning clauses, as determined appropriate by Metrolinx, to the satisfaction of Metrolinx.

## **B. POST APPROVAL CONDITIONS**

### **ENGINEERING AND CONSTRUCTION SERVICES**

1. The Owner shall remove all existing accesses, curb cuts, traffic control signs, etc. along the development site frontages that are no longer required and reinstate the boulevard within the public right-of-way, in accordance with City standards and to the satisfaction of the Chief Engineer and Executive Director, Engineering & Construction Services.
2. The Owner shall provide and maintain an acceptable warning system at the top of the underground parking garage to alert motorists of the presence of large trucks.
3. The Owner shall provide and maintain convex mirrors at the top and bottom of the parking garage ramp and at all right-angled turns within the underground parking garage and position them in such a manner as to give all motorists clear views of oncoming traffic.
4. The Owner shall provide and maintain "No Parking" signs adjacent to the proposed loading spaces.
5. In respect of the proposed boulevards improvements including the installation of decorative pavers within the abutting boulevards, as generally illustrated on landscape drawings with the revision date of June 25, 2021:
  - a) The Owner shall construct and maintain all boulevard improvements within the boulevard areas of the public highways adjoining the Land in accordance with, and as shown on the approved Plans and Drawings, to the satisfaction of the General Manager of Transportation Services (the "Boulevard Improvements"). The Owner's boulevard maintenance obligations do not include municipal concrete sidewalk(s), curbing, trees after all applicable maintenance periods have

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expired and the City is satisfied with the tree planting, or public transit stops/transit shelters within the adjoining public highway.

- b) The Owner agrees that it will, at its expense, maintain the Boulevard Improvements in a state of good repair, free of graffiti, posters, litter, snow and ice, and that vegetation will be maintained in a healthy and vigorous state of growth all to the satisfaction of the General Manager of Transportation Services. The Owner shall not make any additions or modifications to the Boulevard Improvements beyond what is allowed pursuant to the terms of this Agreement. The Owner further acknowledges that should it neglect to maintain the Boulevard Improvements, then the City may perform the required work pursuant to the Toronto Municipal Code Chapter 743, Article VIII and the City may recover its costs in a like manner as municipal taxes.
- c) The Owner agrees that if the City should at any time undertake any widening or other alteration to the adjoining public highway(s) necessitating the removal of any Boulevard Improvements, the City shall not be liable to pay any compensation whatsoever for such removal, nor shall it restore any Boulevard Improvements that it removes. The Boulevard Improvements permitted by this Agreement shall be removed by the Owner, at its expense, within 14 days of receiving written notice from the General Manager of Transportation Services or his/her designate. In default of the removal not occurring as requested, the City may carry out the removal, at the Owner's expense, and may recover its costs in a like manner as municipal taxes.
- d) The Owner acknowledges that there may exist municipal and/or utility services within, upon or under the boulevard, and acknowledges that the City or the utility responsible for such service(s) may need to undertake repairs or carry out maintenance on such service(s) or to replace such service(s) or to install new service(s). The Owner agrees that the City or utility shall have the right to remove the Boulevard Improvements for the purpose of carrying out such installation, replacement, repair or maintenance. Prior to removing the Boulevard Improvements, the City shall give the Owner 48 hour notice of its intention to remove the Boulevard Improvements for maintenance purposes, except in the case of emergency, in which case no notice shall be required. On completing the installation, replacement, repairs or maintenance, the Owner, at its sole expense, shall proceed immediately to restore the Boulevard Improvements to the condition it was in prior to the commencement of such installation, replacement, repairs or maintenance. Under no circumstances shall the City be required to so restore the lands or to compensate the Owner for the cost of doing so.
- e) The Owner agrees to defend, save and keep harmless and fully indemnify the City, its officers, employees, agents and other representatives, from and against all actions, claims, suits or damages whatsoever that may be brought or made against the City in respect of the Owner's use of the boulevard area of the adjoining public highways for Boulevard Improvements.
- f) The Owner releases, waives and forever discharges the City and its agents, officials, servants, contractors, representatives, elected and appointed officials, successors and assigns and any other agencies, corporations, boards, commissions or related in law or equity, in respect of death, injury, loss or damage to the person or any property of the Owner however caused, and all damages, costs, expenses losses and charges whatsoever arising or to arise by reason of the permission granted pursuant to this Agreement, including consequential damages (collectively, "Claims") Without limiting the generality of the foregoing, no Claims shall be made against the Released Parties by the Owner for damage occurring to the Boulevard Improvements as a result of the City's snow removal operations.
- g) The Owner must, with respect to the Boulevard Improvements, obtain and maintain third party bodily injury and property damage insurance in the amount of \$5,000,000.00 or such other coverage as the General Manager of Transportation Services may require, naming the City of Toronto as an additional insured party under the policy, to the satisfaction the General Manager of Transportation Services. Such insurance shall be kept in good standing.

6. The Owner shall construct and maintain stormwater management measures/facilities and site grading as accepted by the Chief Engineer and Executive Director, Engineering & Construction Services.
7. The Owner shall construct and maintain site servicing as accepted by the Chief Engineer and Executive Director, Engineering & Construction Services.
8. The Owner shall provide certification to the Chief Engineer and Executive Director, Engineering & Construction Services by the Professional Engineer who designed and supervised the construction that the stormwater management facilities and site grading have been constructed in accordance with the accepted Stormwater Management Report and the accepted Grading plans.
9. The Owner shall provide certification to the Chief Engineer and Executive Director, Engineering & Construction Services by the Professional Engineer who designed and supervised the construction, that the site servicing facilities have been constructed in accordance with the accepted drawings.
10. The Owner acknowledges and agrees that Staff have reviewed this application on the understanding it will comprise a single parcel of land, under one owner, upon completion. The Owner further acknowledges and agrees that if any party, including the Owner or any subsequent Owner, submits an application for severance, part-lot control, subdivision, condominium approval or any other form of land division for this development not in accordance with this assumption, different servicing connections, including all associated stormwater management facilities and any necessary revised plans and studies, may be required by the city at the sole cost to that applicant.

#### **CITY PLANNING**

11. The Owner agrees that no exterior decorative lighting may be installed above the ground floor without the consent of the Director of Community Planning, Toronto and East York District.
12. In the event that deeply buried and/or previously undocumented archaeological remains are encountered on the property during construction activities, the Heritage Operations Unit of the Ministry of Heritage, Tourism, Sport and Culture Industries, be notified immediately at (416) 212-8886 as well as the City of Toronto, Heritage Planning Unit at (416) 392-4395.
13. In the event that human remains are encountered during construction, the Owner shall immediately contact both the Ministry of Heritage, Tourism, Sport and Culture Industries, and the Registrar of Burial Sites, War Graves, Abandoned Cemeteries and Cemetery Closures, of the Ministry of Government and Consumer Services, (416) 212-7499.

#### **URBAN FORESTRY**

14. The Owner shall remove City-owned trees only upon the approval of the Landscape/Replanting Plan by the Ward Councillor, receipt of the required tree removal payment by the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District, receipt of the building and/or demolition permits, and once the permitted construction- and/or demolition related activities associated with this project warrant the removal of the trees.
15. The Owner shall have a qualified company implement and maintain tree planting in accordance with the approved plans and to the satisfaction of Urban Forestry, on behalf of the General Manager of Parks, Forestry and Recreation. Prior to construction or grading activities and where necessary to ensure the health and vigour of trees to be preserved, the Owner shall have all approved tree preservation and maintenance measures conducted on existing trees by a certified arborist or other qualified expert, according to currently accepted sound arboricultural practices and to the satisfaction of Urban Forestry.
16. The Owner shall plant all trees as per the plans approved by Urban Forestry within one (1) year of occupancy. All trees shall arrive on site in a balled and burlapped condition with a minimum caliper of 70 mm (or as otherwise specified on the approved plans). Prior to planting, each tree shall have

the burlap removed from the upper portion of the root ball (along with part of the wire cage, if necessary), and soil brushed away or removed from the top of the root ball until the first proper root is identified, indicating the top of the original/permanent root crown. The tree shall then be planted with this level considered as the top of the root ball for all other instructions. Any tree found planted with the actual root crown more than 2.5 cm below finished grade may be rejected and require replacement or replanting at the City's discretion. Upon the planting of the new trees on the subject land, the Owner shall assume the full responsibility for the maintenance and health of the private trees and shall take no action or permit any action that will injure, damage, destroy or prevent the trees from maturing to the point that the trunk of the tree measures 30 cm in diameter or more, measured at 1.37 m above ground level.

17. The Owner shall submit to the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District (tpprsouth@toronto.ca), notice of the construction of the continuous tree trenches and/or soil cell trenches at least one (1) week prior to the start of construction of the trenches.
18. The Owner shall provide a detailed report to the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District (tpprsouth@toronto.ca), to sufficiently verify that tree planting has been completed according to approved landscape plans. The Report shall document all materials, sources, quality analysis reports, quantities, dimensions and locations of all trees, soil, and infrastructure to support trees. The report shall provide photographic documentation of all stages of continuous soil trench and soil cell construction including, but not limited to, excavation, base preparation, geogrids/geotextiles, soil cell placement, framing, pouring of concrete, all irrigation and drainage components, soil placement and compaction, soil analysis reports and delivery tickets, and all trees planted.
19. The Owner shall provide a letter of certification and a complete set of as-built landscape drawings to the Supervisor, Urban Forestry -- Tree Protection & Plan Review, Toronto & East York District (tpprsouth@toronto.ca), both of which are stamped by the Landscape Architectural consultant who designed and supervised the construction of landscape works. The letter and as-built drawings shall confirm that all trees, soil, and infrastructure to support trees have been planted, installed, and constructed according to approved landscape plans.
20. The Owner shall maintain all tree planting areas free of litter and weeds, maintain the grade of all in-ground tree planting areas level with the adjacent boulevard, and maintain all approved ground cover and irrigation systems for the life of the Site Plan Agreement. The Owner shall also maintain all curbs, planters, grates, guards, railings, and other tree surrounds that do not conform to City of Toronto standard details in a state of good repair, and shall remove or modify these surrounds to accommodate tree growth, removal, and planting, as required by Urban Forestry.
21. The Owner shall provide a two (2)-year renewable Tree Planting Security Deposit ("guarantee") for all new tree plantings within the City road allowance. If deemed necessary by Urban Forestry, the guarantee shall be drawn upon to cover all costs incurred by the City of Toronto in enforcing and ensuring that the trees are planted and kept in a healthy and vigorous state during the two (2)-year guarantee period. The Owner shall notify Urban Forestry in writing at tpprsouth@toronto.ca of the planting date prior to planting. This date shall be used to establish the anniversary date of the required two (2)-year renewable guarantee. The Owner shall then notify Urban Forestry in writing at tpprsouth@toronto.ca within two (2) weeks after the trees have been planted to initiate an inspection by Urban Forestry to allow the start of the two (2)-year guarantee period.
22. The Owner shall maintain all new tree plantings within the City road allowance in a healthy and vigorous condition. Trees may be inspected during and at the end of the two (2)-year renewable guarantee period. At the end of the period and while the trees are in leaf, the Owner shall notify Urban Forestry at tpprsouth@toronto.ca to allow confirmation that the trees are in a healthy and vigorous condition. If Urban Forestry deems that the trees are in a healthy and vigorous condition at

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the end of the period, the City shall assume maintenance and Ownership of the trees and the deposit will be returned.

23. The Owner shall be responsible for the maintenance or replacement of all new tree plantings within the City road allowance if, during or at the end of the renewable guarantee period, Urban Forestry deems that the trees are not in a healthy and vigorous condition or require maintenance or replacement. The Owner shall be responsible for rectifying the problem as determined by and to the satisfaction of Urban Forestry on behalf of the General Manager of Parks, Forestry & Recreation. At this time, the Owner shall maintain all newly replanted trees within the City road allowance in a healthy and vigorous condition and shall provide an additional two (2)-year renewable guarantee.
24. Following the completion of the two (2)-year renewable guarantee period for new tree plantings within the City road allowance, the Owner shall provide a Certificate of Completion of Work from the qualified tree care or landscape company documenting all maintenance work done to the trees during the guarantee period. The Owner shall also provide Urban Forestry with a complete inventory of the new road allowance trees.
25. The Owner shall develop and maintain the site and adjacent City-owned lands in accordance with the approved plans and conditions of approval associated with the Site Plan, Grading Plan, Site Servicing Plan, Landscape Plan, Building Permit, and Tree Permit(s)/Approvals. Any proposed revisions/ alterations to the approved plans or permits that affect trees shall be approved by Urban Forestry, on behalf of the General Manager of Parks, Forestry & Recreation, prior to the revisions/alterations being implemented.

**ENVIRONMENT & ENERGY**

26. The Owner shall construct and maintain the development substantially in accordance with the accepted Energy Reports dated 31st January, 2020 and prepared by Fluent Group Consulting Engineers to ensure that the energy savings identified continue to be achieved, to the satisfaction of the Environment and Energy Division.

**NAV CANADA**

27. The Owner agrees to notify NAV CANADA of the start date for construction at least 10 business days prior to the start of construction by submitting a completed Construction Start Notification form by email to [landuse@navcanada.ca](mailto:landuse@navcanada.ca) or by fax to 613-248-4094.

**ENBRIDGE**

28. The Owner must contact Enbridge Gas Distribution's Customer Connections department by emailing [salesarea10@enbridge.com](mailto:salesarea10@enbridge.com) for service and meter installation details and to ensure all gas piping is installed prior to the commencement of site landscaping (including, but not limited to: tree planting, silva cells, and/or tree trenches) and/or asphalt paving.
29. In the event that easement(s) are required to service this development, and any future adjacent developments, the applicant will provide the easement(s) to Enbridge Gas Inc. at no cost.

**SITE PLAN ADVISORY COMMENTS**

1. The Owner is advised that the Green Roof By-law (By-law No. 583-2009) (Chapter 492 of the City of Toronto Municipal Code) including Article IV the Toronto Green Roof Construction Standard, may be applicable to the proposed development. For further information, please contact Jamie Atkinson, Toronto Building at 416-392-0449.

**ENGINEERING AND CONSTRUCTION SERVICES**

2. Make separate applications to the General Manager of Transportation Services for permits to carry out any works involving the construction in, or occupancy of the abutting public rights-of-way.

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3. The determination and collection for the maintenance fees for unit pavers within the public Right-of-Way will be part of the Streetscape Permit process.
4. Approval for all work that will be carried out within the abutting public rights-of-way, which may include but not be limited to financial responsibility for removal or relocation of existing street furniture (transit shelters, benches, litter bins, bicycle locking rings, etc.), must be received from the Transportation Services Division. The Owner must contact the Street Furniture Management Unit to co-ordinate the removal or relocation of Astral street furniture or bicycle locking rings. There are Third Party costs associated with the removal and relocation of Astral street furniture and costs to remove the City of Toronto bicycle locking ring(s). The City and Astral will not undertake any work associated with removing, reinstalling or relocating existing street furniture until it receives payment. If clarification is required on how the above standards will apply to this site, the applicant can contact the "Street Furniture Management Unit at [streetfurniture@toronto.ca](mailto:streetfurniture@toronto.ca)." For all other works within the public right-of-way, the applicant can contact the Permits and Enforcement Section, Toronto and East York District, Construction Activities, at 416 392-7877.
5. Submit costs for the installation of the proposed new City of Toronto Standard bicycle locking rings on public right-of-way at the rate of \$433.92/unit, including HST. The cheque is made payable to the City of Toronto Treasurer.
6. Further changes and/or requirements may be imposed by the General Manager of Transportation Services upon receipt of the revised plans and/or additional documentation required under the conditions above.
7. The City of Toronto is implementing Superpave asphalt mixes commencing in the 2018 construction season for all public road infrastructure projects. Superpave asphalt mixes will be mandatory for all new projects approved in 2018 and onward in the City of Toronto. See attached notice dated March 6, 2018 for further information.
8. The Owner must obtain approval from Toronto Hydro Energy Services for removing and/or relocating any utility with attached municipal street lighting and for any upgrades. The Owner is advised to contact 416-542-8000 or [utility.relocations@torontohydro.com](mailto:utility.relocations@torontohydro.com) for comments and cost estimates for required fieldwork.
9. The Owner is financially responsible for all costs associated with the excavation, improvement, removal and/or relocation of any above or below-grade public or private utility resulting from the development of this property.
10. The quality of the groundwater discharge requires a treatment prior to discharging into City sewers. Provide information on the proposed treatment at the time of making application to Toronto Water for a discharge permit.
11. The Owner will be required to make an application to the Toronto Water for the installation of any proposed services within the City right-of-way after acceptance of the stormwater management report and site servicing plan. For further information, please contact George Kamalendran of Toronto Water at 416-392-7819.
12. Wet Tap Procedure - The Owner is advised that pursuant to an order issued by the Ministry of the Environment, Conservation & Parks (MOECP), all wet taps performed on City watermains must be performed by, or under the supervision of, a Certified Operator in accordance with Ontario Regulation 128/04. The City of Toronto Protocol respecting the performance of and verification of wet taps can be found at:

<https://>

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13. Stormwater Storage Tank - The building structure system must be designed to be able to withhold the storm water cistern under the most critical loading condition.
14. The following Tier 1 measures have been met:
  - \* WQ 1.1 -- Erosion & sediment control
  - \* WQ 2.1 -- Stormwater balance
  - \* WQ 2.2 -- Stormwater retention & reuse
  - \* WQ 3.1 -- Total suspended solids (TSS)
  - \* WQ 3.2 -- E. Coli reduction
15. All elements of the proposed streetscape plans, within the limits of the City's right-of- way, must comply with City standards and specifications. Further comments concerning streetscape related issues will be provided upon review of a future streetscape application pertaining to the subject site.
16. That prior to the issuance of a construction permit for work within the public rights-of- way, the Owner must submit in the amount of an Irrevocable Letter of Credit in the amount to be determined to guarantee the work to be undertaken and a certified cheque in the amount to be determined, made payable to Treasurer, City of Toronto, to cover the cost of engineering and inspection fees related to same.
17. The owner is advised that the final exact length specifying the beginning and the end limits of the 10-minute parking spaces will be based on the report proposed to be presented to the City Council for its approval at its meeting on June 9, 2021. Once approved and updated signage installed, Permit Parking staff will re-survey the street to determine the finalized number of parking spaces and the length.
18. The Owner is advised than any future modification of the on-street Mill Street parking configuration will require approval from the Toronto Transit Commission for their review and approval with respect to the removal and relocation of the existing bus stop.

#### **CITY PLANNING**

19. The Owner is advised that revisions to the plans resulting from both pre-approval and/or post-approval conditions, will require a revision to the Notice of Approval Conditions and/or Site Plan Agreement.

#### **URBAN FORESTRY**

20. The Owner is advised that, prior to any tree work (e.g. root exploration, root/canopy pruning, injury, removal, or planting) by a private contractor on City owned land, Urban Forestry -- Tree Protection & Plan Review will require submission of a complete "Agreement for Arborists Retained by Private Property Owners to Undertake Work on City Trees" and supporting documents (Certificate of Insurance, Workplace Safety and Insurance Board (WSIB) Clearance Certificate) from the contractor who will perform this work.

## **1540 BSW Development Inc. v. Toronto (City)**

Ontario Local Planning Appeal Tribunal Decisions (f/k/a Ontario Municipal Board)

Ontario Municipal Board

Panel: S.J. Stefanko, Member

Decision: March 9, 2010.

OMB File No. PL090733, OMB File No. PL09734

### **[2010] O.M.B.D. No. 160**

1540 BSW Development Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 438-86, as amended, of the former City of Toronto to rezone lands respecting 1540 Bloor Street West from Mixed Commercial Residential (MCR T3.0 C1.0 R2.0) zone to include site-specific zoning by-law amendment to permit the development of a mixed-use building 1540 BSW Development Inc. has referred to the Ontario Municipal Board under subsection 41(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended, determination and settlement of details of a site plan for lands respecting 1540 Bloor Street West, in the City of Toronto

(35 paras.)

## **Appearances**

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1540 BSW Development Inc.: A. Brown, counsel.

City of Toronto: S. Bradley, counsel.

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### **DECISION DELIVERED BY S. J. STEFANKO**

#### **AND ORDER OF THE BOARD**

**1** 1540 BSW Development Inc. ("Developer") has appealed its Zoning By-law amendment and Site Plan control application ("Applications") to redevelop property at 1540 Bloor Street West, as a result of City of Toronto ("City") Council's ("City Council") failure to make a decision on the Applications within the time prescribed by the Planning Act.

#### **Background**

**2** The Developer is the owner of property at the north-west corner of Bloor Street West and Dundas Street West in Toronto. The lot in question has frontage along Bloor Street of 31.02 metres, a depth of 41.77 metres and an area of 1365 square metres.

**3** It currently accommodates a two-storey mixed use building along Bloor Street with commercial uses on the ground floor and apartments above. The Developer seeks to demolish the existing structure and replace it with a 27-storey building. This building, including its mechanical penthouse, would be 92.5 metres high. The new structure calls for 258 new residential dwelling units, 1213 square metres of grade related commercial uses, 450 square metres of indoor amenity space and 298 square metres of outdoor amenity space. A five level underground parking garage will provide for a total of 190 parking spaces and a total of 194 bicycle storage spaces will also be provided.

4 The current zoning by-law ("MCR Zoning") permits a combined residential and non-residential density of 3.0 times the lot area and a height limit of 16 metres. The proposal contemplates a density of 16.12 times the area of the site and as I have already stated, a total height of 92.5 metres. In terms of uses, the existing By-law 438-86 zones the site Mixed Use Residential. This permits a wide range of residential and non-residential uses, including apartment buildings and retail stores. No amendment to the City Official Plan ("City OP") is required with respect to the contemplated development.

### Sequence of Relevant Events

5 The initial application for the subject proposal was submitted in June, 2007. Since the proposal contemplated development in Mixed Use Areas on Avenues (as those words are defined in the City's OP) and because an Avenue Study as prescribed by the City OP had not yet been done, the Developer was required to have completed what is known as an Avenue Segment Study ("Segment Study"). An initial draft was prepared in July, 2007 and a final study, after consultations with and comments by City staff, was finalized in November, 2007. The Segment Study endorsed the proposal and suggested it would revitalize the area. On December 6, 2007, the City confirmed to the Developer that its development application was complete.

6 In March of 2008 however, City Council commissioned a Bloor-Dundas Avenue Study ("Avenue Study") which, after significant public input and numerous meetings with affected ratepayers, was completed in September, 2009. Among other things, the Avenue Study recommended mid rise development for the Avenue with an exception for the subject site of a taller building up to 15 storeys in height. This height recommendation was appreciably less than what the Developer had in mind and was a far cry from the development proposal endorsed by the Segment Study.

7 Between March 2008 and September, 2009, it became apparent to the Developer that a co-operative dialogue with City officials would not necessarily lead to an approval of the Applications and therefore, appealed the Applications to the Board in August, 2009.

8 By City Staff Reports, dated October 20 and 22, 2009 respectively, City Staff recommended:

- (i) that the City oppose the Developer's proposal at the Ontario Municipal Board; and
- (ii) that amendments to the City OP and By-law 438-86 and adoption of Urban Design Guidelines to implement the findings and recommendations of the Avenue Study, be made.

9 In December, 2009 City Council adopted the staff recommendations and the Avenue Study and passed the Avenue Study By-law ("Avenue By-law") which limits the height of development on the Developer's property to 10 storeys and limits the density to 5.5 times the area of the lot. Not surprisingly, the Developer has also appealed the Avenue By-law. Its appeal of the Avenue By-law is however, the only appeal which has been lodged with respect to that By-law. To summarize therefore, the height and density comparisons of the MCR Zoning By-law, the Avenue By-law and the proposal are as follows:

	<u>MCR Zoning</u>	<u>Avenue By-law</u>	<u>Proposal</u>
Height	16 m or 5 storeys	32 m or 10 storeys	92.5 m or 27 storeys
Density	3x	5.5x	16x

As is evident from the foregoing standards, the Avenue By-law is more generous, and arguably, far more generous than the MCR zoning.

### Positions of the Parties

**10** The Developer maintains that the proposed 27 storey structure at 1540 Bloor Street West is an appropriate form of development from a land use and urban design perspective. In that regard Robert Glover and Peter Walker provided expert testimony. According to Mr. Glover, the proposal "achieved the provincial and municipal policy goals with respect to intensification" and the "proposed built form and height of development...appropriately addresses the Mixed Used Urban design -- related development criteria". Mr. Walker, the author of the Segment Study, which justified the Developer's proposal, was equally supportive. In his view, the Segment Study was a relevant stand alone document which identified a number of distinguishing circumstances applicable to the subject site. He opined that the proposal represented good planning and that little or no weight should be given to the Avenue Study.

**11** The City, on the other hand, called Andrea Old, Anne McIlroy, the author of the Avenue Study, Corwin Cambray and Christopher Dunn to provide expert urban design and land use planning evidence in opposition to the contemplated development. They were of the view, inter alia, that the Segment Study was no longer required in view of the completion of the Avenue Study, that the proposal does not harmonize, as it should, the main street character of the area at an appropriate level of intensification and that it undermines the Avenue Study because the 27 storey building is disproportionately large for the site. In their professional opinions, the proper scale of development is as set out in the Avenue By-law.

**12** A number of property owners ("Participants") from the area also spoke in opposition. The common thread which ran through their testimony was that the development would exacerbate traffic and parking congestion in the immediate vicinity and that a 27 storey building was not compatible with the main street character of the area.

### Issues

**13** At the beginning of this hearing I was advised by counsel that a number of matters such as traffic, parking, access, wind, shadowing and replacement of the rental units are no longer matters in dispute between the parties even though the Participants still voiced reservation regarding traffic, parking and access. In light of the agreements reached between the parties, the issues to be determined by me are as follows:

- (1) Does the Avenue Study and the Avenue By-law, subject to the Developer's appeal rights in relation to this By-law, apply to the proposal?
- (2) Does the proposed development conform with the City OP and with the Growth Plan for the Greater Golden Horseshoe ("Growth Plan") and is it consistent with the 2005 Provincial Policy Statement ("PPS")? It is acknowledged by the Developer ("Developer's Acknowledgement") that failure to conform with the City OP or the Growth Plan or be consistent with the PPS results in the Developer's appeal being dismissed. In other words, the Developer must establish that the proposal conforms with the City OP and Growth Plan and is consistent with the PPS.
- (3) Should a Section 37 Agreement be entered into and, if so, what, if any, should be the payment obligations of the Developer thereunder?

### Issue (1) -- Avenue Study and Avenue By-law

**14** The Developer argues that because the Avenue Study and Avenue By-law were not in existence at the time the Applications were filed, it would be unfair to take them into account when assessing the Applications. According to the Developer, authority for that proposition is found in the Board decision of Clergy Properties Ltd. V. Mississauga (City) (1996) 34 O.M.B.R 2777. The Board in that case stated at paragraph 15,

The Board, in determining the policy framework under which an application should be examined, has consistently stated that an application must be tested against the policy documents in place at the date of the application. It has done so in order to lend some certainty to the land use planning process.

**15** The Developer submits that the Clergy principle applies to the case at hand, and that I should therefore, adopt it. I do not agree. The Clergy case dealt with a draft plan of subdivision and zoning by-law amendment made under one

official plan which was changed by the time the matter went to the Board. That is not the case here. The City's OP has not changed and in fact, its language is demonstrably clear. Policy 2.2.3.1 states:

Reurbanizing the Avenues will be achieved through the preparation of Avenue Studies for strategic mixed use segments of the corridors shown on Map 2.

The Clergy case is therefore clearly distinguishable from the facts which are before me. However, even if I am wrong in this conclusion, the Avenue Study and Avenue By-law should still be recognized. In that regard, I would adopt the comments of Mr. Krushelnicki in James Dick Construction Ltd. V. Caledon (Town) (2003) O.M.B.D. No. 1195. On page 12 of that Decision he states:

In short the Board is authorized to conclude when it is fair to apply the Clergy principle and should undoubtedly do so in the vast majority of cases. And equally, it has the authority to conclude when the circumstances of a case warrant the application of another principle. For instance, it may choose in its procedural discretion to consider and apply more recent policies and more modern standards that are consistent in a compelling public interest.

To conclude otherwise is to require that current practices and policies, no matter how reasonable, must be ignored or given so little weight as to be made virtually trivial, in all cases where the date of application precedes them. This would amount in some cases to a wilful blindness that would prevent the merits of an application -- even where it is reasonable to do so -- to apply criteria, standards and tests that are based on the most current research and information.

**16** The Avenue Study was conducted over a considerable period of time with considerable public input. As required by the City's OP, the study engaged, inter alia, businesses and local stakeholders. The compelling language of the City's OP regarding Avenue Studies and their importance in reurbanizing Avenues is the same today as it was when the Applications were filed. In view of that language, the focus of any planning analysis must be on the Avenue Study and, by logical extension, the Avenue By-law. To ignore or reduce the significance of such documents would be a mistake.

**17** Before leaving this issue, some brief comments regarding the City's notice of complete application are in order. The Developer argues, by inference, implication or otherwise, that the notice of complete application sent by the City on December 7, 2007 reflected an acknowledgement by the City that the material filed by the Developer up to that time was satisfactory or was being approved. This conclusion is, in my view, unfounded. The process or act of acknowledging a complete application is not, and should not, be construed as any type of admission on the City's part that an application is satisfactory to the City in all respects. A notice of complete application means no more than confirmation the application is complete enough to be assessed. In this case, when the Developer's proposal was assessed, it was found to be deficient for all the reasons described by Mr. Cambrey in his testimony and in his witness statement.

## Issue (2) -- Conformity

- (i) City OP...Avenues

**18** Notwithstanding Policy 2.2.3.1 which I have already alluded to in these reasons and the existence of an Avenue Study as referred to and required by the City's OP, the Developer argues that Policy 2.2.3.3(b)(i) justifies the proposal and the importance of the Segment Study. This provision reads as follows:

- b) Development in Mixed Use Areas on Avenues, prior to an Avenue Study has the potential to set a precedent for the form and scale of reurbanization along the Avenue. In addition to the policies of the Plan for Mixed Use Areas, proponents of such proposals will also address the larger context and examine the implications for the segment of the Avenue in which the proposed development is located. This review will:
  - i) include an assessment of the impacts of the incremental development of the entire Avenue segment at a similar form, scale and intensity, appropriately allowing for distinguishing circumstances (Board emphasis added)

**19** When I read Policy 2.2.3.3(b)(i) the clear implication of the words "prior to an Avenue Study" in the first line is, in my view, that a segment study is required only if an Avenue Study has not been completed. It is true that, in this case, no Avenue Study existed when the Segment Study was finalized. However, the subsequent completion by the City of the Avenue Study calls into question the need for the Segment Study and therefore, its significance when assessing the planning merits of the proposal. In other words, if a Segment Study is not technically required because there exists an Avenue Study, the issue of distinguishing circumstances may not be relevant. However, in order to ensure that my analysis with respect to Policy 2.2.3.3(b)(i) and the Developer's position in relation to it is complete, I will assume, for the moment, that the concept of distinguishing circumstances is applicable.

**20** The Developer points to a number of distinguishing circumstances which make the site unique from any other sites along the Avenue segment and accordingly, the development of a 27 storey point tower building would set no adverse precedent for the development of the remaining soft sites within the area. The more salient distinguishing circumstances relied upon are as follows:

- (a) The proposed building is across the road from two 29 storey towers ("The Crossways") on the northeast corner of Bloor and Dundas;
- (b) The subject site is at the juncture of two major designated Avenues, namely, Bloor Street and Dundas Street;
- (c) The proximity of the site to TTC facilities at Bloor and Dundas which are characterized as a gateway mobility hub: and
- (d) The separation distance between the site and low density neighbourhoods to the north and south by virtue of the subway corridor to the north and Bloor Street to the south.

**21** I am not satisfied that the arguments which have been made to establish the existence of distinguishing circumstances are convincing.

**22** The Crossways when built in the early 1970's, was permitted as an apartment hotel at a time when the zoning by-law did not have a height limit. In 1973, the City eliminated that loop-hole as a result of developments such as The Crossways. Since then, a development similar to the Crossways has not been replicated. Even if one accepts the proposition that the existence of The Crossways is appropriate justification for the proposed 27 storey structure, I would point out that the lot upon which The Crossways are built is ten times greater than the area of the subject site. If building heights comparable to The Crossways were perceived as desirable or appropriate, the general zoning regulations enacted in 1986 and 1993 would have reflected this desire but they did not. Certain comments set out on pages 36 and 37 of the Avenue Study aptly describe, in my view, the manner in which The Crossways should be viewed from a planning perspective. The relevant passage reads as follows:

Within the surrounding context, The Crossways complex is the exception in terms of building height, massing and relationship to street frontages. It relates poorly to the prevailing character and scale of the Study Area, and as such, exemplifies what is to be avoided in new development. (Board emphasis added).

**23** In terms of location, the site is indeed at the juncture of two major streets. However, a 10 storey structure would also reflect this prominent intersection. It is also in my view noteworthy, that the City's OP does not contain any policy which requires in some way, taller buildings at major intersections.

**24** While it is true that the site is in close proximity to a TTC station this argument doesn't resonate as much as the Developer suggests because there are other sites in the area also in close proximity to transit facilities. Moreover, the argument ignores possible transit infrastructure changes which could be made in the future.

**25** In terms of separation distance from nearby residential development, the Developer's argument has some merit, but it disregards the very important separation distance considerations which must be applied between the subject site and the 2 and 3 storey main street buildings west of the site along Bloor Street. This flaw negates what otherwise might have been a sound argument.

**26** In summary therefore, I am not convinced that the concept of distinguishing circumstances in Policy 2.2.3.3(b)(i) is applicable to the matters before me because of the very language of the Policy: In order for this provision to be relevant, we must have, as the policy stipulates, a development on an Avenue prior to an Avenue Study. What we have in this case is an Avenue Study prior to development. However, even when I assume that the Developer is correct by arguing the application of s.2.2.3.3(b)(i), I am not satisfied a case has effectively been made out in relation to distinguishing circumstances. When I review and assess the arguments made, I am left with the inescapable conclusion that distinguishing circumstances do not exist in a manner sufficient to allow the development to go forward.

### **City OP... Built Form**

**27** The properties along Bloor Street between Dundas and Keele have a decidedly main street character to them. The lots are narrow, relatively small and, for the most part, have 1-3 storey buildings on them. One of the more relevant Official Plan Policies regarding Built Form is Policy 3.1.2.3(b) which reads:

3. New development will be massed to fit harmoniously into its existing and/or planned context, and will limit its impact on neighbouring streets, parks, open spaces and properties by:
  - (b) creating appropriate transitions in scale to neighbouring existing and/or planned buildings for the purpose of achieving the objectives of the plan;

**28** Although the Developer argues that the proposed building adequately addresses building step backs and is appropriate for the area, I am not persuaded that the level of transitioning contemplated by the City's OP is achieved. The size of the site itself, being approximately 34 metres wide by a depth of 41 metres, severely restricts its ability to accommodate reasonable built form transitions between 27 storeys and existing 2 storey or Avenue By-law as of right 6 storey buildings. When viewing the proposed tower in the various exhibits filed in this proceeding, it is abundantly clear that as it rises over its podium, it appears disproportionately larger and out of scale with adjacent properties to the west. In this regard I cannot help but refer to the commentary set out on page 4-10 of the City's OP which reads:

Development along the Avenues will generally be at a much lower scale than in the Downtown and most often at a lower scale than in the Centres.

**29** What is being proposed is more consistent with the built form in the Downtown and perhaps, even in the Centres. The height and density of this proposal does indeed detract from and undermine the main street character of the area.

**30** For the reasons I have outlined above, the contemplated development, does not, in my view, conform with the City's OP. Having reached this conclusion, it is unnecessary for me, based on the Developer's Acknowledgement, to discuss the Growth Plan or PPS. However, before leaving this issue, some brief comments regarding the potential precedent setting nature of the proposal, if it were approved, would, in my opinion, be appropriate.

**31** The Developer insists that the contemplated development would not, if approved, lead or give rise to similar structures westerly along Bloor Street because no one, other than the Developer, has appealed the Avenue By-law. This argument assumes, incorrectly, that any party who did not appeal the Avenue By-law is somehow precluded from attempting to change it in the future. Approval of the proposal before me would, in my view, provide the motivation necessary to bring, in the future, a zoning by-law amendment application to amend the Avenue By-law and, in turn, could lead to and provide the justification for a building of similar height, mass, density and built form. I agree therefore that approval of the development proposed could indeed be precedent setting.

### **Issue 3... Section 37 Agreement**

**32** In view of my comments and conclusions with respect to Issues 1 and 2, it is obvious that no discussion or analysis is required in relation to a Section 37 Agreement.

**Disposition**

**33** In the final analysis, the proposed structure of 92.5 metres in height at over 16 times coverage is simply too large for the site and inappropriate for the area. In my opinion, it is not consistent with the findings and recommendations of the Avenue Study, it does not conform with the City OP and it does not represent good planning.

**34** Based on all of the foregoing therefore, the proposed development is not approved and accordingly, the Developer's appeal is dismissed.

**35** It is so Ordered.

S.J. STEFANKO

MEMBER

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End of Document



## **Sentinel (Broadway) Holdings Inc. v. Toronto (City)**

Ontario Local Planning Appeal Tribunal Decisions (f/k/a Ontario Municipal Board)

Ontario Municipal Board

Toronto, Ontario

Panel: S. Wilson Lee, Associate Chair

Heard: February 24-26, 2014.

Decision: June 19, 2014.

OMB Case No.: MM130048

OMB File Nos.: PL130547, MM130048

**[2014] O.M.B.D. No. 447** | 2014 CarswellOnt 8511 | 25 M.P.L.R. (5th) 150 | 83 O.M.B.R. 109

Applicant and Appellant: Sentinel (Broadway) Holdings Inc. Subject: Amendment to Zoning By-law No.438-86, as amended Failure of the City of Toronto to announce a decision on the application Legislative Authority: Subsection 34(11) of the Planning Act, R.S.O. 1990, c. P.13, as amended Existing Zoning: R2 Z2.0 Proposed Zoning: Site Specific (To be determined) Purpose: To permit two 30-storey residential towers on top of an 8-storey podium Property Address/Description: 95 and 99 Broadway Avenue and 197 Redpath Avenue Municipality: City of Toronto Referred by: Sentinel (Broadway) Holdings Inc. Subject: Site Plan Legislative Authority: Subsection 41(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended Property Address/Description: 95 and 99 Broadway Avenue and 197 Redpath Avenue Municipality: City of Toronto

(67 paras.)

### **Appearances**

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City of Toronto: Amanda Hill, counsel, B. O'Callaghan, counsel.

Sentinel Broadway Holdings Inc.: Adam Brown, counsel, Jessica Smuskowitz, counsel.

Sherwood Park Residents' Association: M. Rubenstein, counsel, B. Daube, counsel.

#### **Participants:**

Magaret Healey.

Diane Lohnes.

Dean Roger.

Helen Riley.

Will Poppe.

Malcolm Martini.

Terry Mills.

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## **DECISION DELIVERED BY S. WILSON LEE**

1 The Yonge-Eglinton Centre is a vibrant urban node in North Toronto. Bustling with verve and energy, it is endowed with a wide-range of uses in its fabrics, including office, retail-commercial, entertainment, residential and institutional uses. Within its midst, there are point towers co-existing in amity and close contact with buildings of wide-ranging vintages and architectural forms. There is no question that the area is undergoing a transformation of a sort as applications for development abound. There is also little doubt that such a transformation would not have been possible had it not been for the number of epoch-making and enabling policy instruments enacted and promulgated within the last decade by the Province and the City of Toronto.

2 This hearing relates to an application for rezoning launched by Sentinel (Broadway) Holdings Inc. for a site of 2,983 square metres ("sq m") with frontages of 36.2 metres ("m") along Broadway Avenue and 41.4 m along Redpath Avenue. The application was submitted to the City in March 2012. In May 2013, an appeal was launched to the Board. In December 2013, a "With Prejudice" settlement offer was submitted to the City based on a revised plan proposing a reduction in height from 38 to 34 storeys for the residential towers and from eight storeys to seven storeys on the podium and a reduction of density from 22 FSI to 18.8 FSI. This hearing is based on the revised plan.

3 At the commencement of the hearing, the Board was advised that the transportation issues have been removed, leaving only the planning matters for adjudication. In addition, the Board was advised by counsel for the City that the proposed height would not be a matter of dispute. On the second day of the hearing, counsel for the City further advised that the parking issue was withdrawn as the parties had come to a mutually acceptable parking ratio.

4 The Board heard conflicting evidence from both the applicant and the City in the area of land use and urban design. The applicant also proffered some transportation evidence albeit cut short because of the vanishing parking issue. A number of area residents gave evidence to the Board as well.

5 In the end, this hearing is focused on the opinions arising from the interpretation of the Growth Plan, sections of the Official Plan, the Yonge-Eglinton Secondary Plan, Council-approved guidelines such as the Tall Building Design Guidelines. The issues between the City and the applicant are nuanced. Neither side disputes that substantial residential growth on this site is appropriate and timely. Neither disputes the urgency and pre-eminence of the higher-order planning documents. Nonetheless, there is a divergence of opinions as to the exact and appropriate density and built-form that can legitimately materialize on this site within the policy context delineated above. It is to these questions the Board will next turn our analysis.

### **THE LARGER PLANNING CONTEXT**

6 The subject site is located within the Yonge-Eglinton "urban growth centre" and two "major transit station areas" pursuant to the Growth Plan. The site is also located within the Yonge-Eglinton Centre "anchor mobility hub" under the Big Move -- Transforming Transportation in the Greater Toronto and Hamilton Areas ("RTP"), a statutory provincial policy document passed under the *Metrolinx Act*. Each of these designations has significant planning meaning in a specific and larger context.

7 What must be pointed out, at the outset, is the potent and binding nature of the Provincial Plans. The Board doesn't only mean that decision-maker cannot readily ignore the fact that the Growth Plan and the RTP act as mandatory guides to planning and development. That much is never in doubt. Provincial Plans bind decision makers not only in the larger sphere of rule-making, such as the design of a master planning document or a comprehensive zoning by-law. They bind them also in this following sense: these Plans are both *omnipotent* and *omnipresent*. Section 3(5) of the *Planning Act* ensures that every time a decision is made, whether it is by a municipality, a local board, the Minister of the Crown, or, indeed the Board, the concern of conformity to the

## Sentinel (Broadway) Holdings Inc. v. Toronto (City)

provincial plans is ever-urgent and ever-present. Such mandatory conformity applies, irrespective whether it is a minor or major event, as long as it affects a planning matter.

**8** Under the Growth Plan, "urban growth centres" are planned to achieve, by 2031 or earlier a minimum gross density target of 400 residents and jobs combined per hectare for each of the five "urban growth centres" for Toronto. The "major transit station area" is an area including and around any existing or planned higher order transit area within an approximately 500 m radius of a transit station. The subject site is within 500 m from the Eglinton Station and 300 m from the Mount Pleasant intersection which is the future location of a new underground, on the Eglinton-Scarborough Crosstown LRT that is now under construction.

**9** Since one of the questions at this hearing concerns density, it is noteworthy that the target density for the urban growth centre is a minimum. The Growth Plan does not set up a maximum. Furthermore, under s. 2.2.4 paragraph 6 of the Growth Plan, if an "urban growth centre" has planned for or has achieved beyond the minimum density target, the higher density will be considered the minimum. In other words, the ceiling will become the floor.

**10** In addition, the site is within an "anchor mobility hub" under the RTP. This and other anchor mobility hubs coincide with the urban growth centres and significant major transit stations identified in the Growth Plan. The RTP considers the area within an 800-m radius of the transit station as part of the Hub and these areas are to achieve a minimum density of approximately 10,000 people and jobs.

**11** Based on the foregoing, the Board finds that the subject site is a candidate within the intensification area of the Growth Plan. The two designations in the Growth Plan, both applicable to this site, enable, encourage and, in fact, call for major growth for population and employment. Underlying these directives are the express policy thrusts of the Growth Plan that new growth for housings and employment must take place in areas that can optimise existing infrastructures; invest and support the uses of transit as well as providing for a focus to attract provincial, national or international employments. The underlying vision is that such policy thrusts would eventually lead to the building of prosperous, healthy, compact, vibrant and complete communities.

**12** The Board also finds that the site is well-positioned to help implement the policy objectives of the RTP which would optimise and support transit, pedestrian walking, cycling and a transit-supportive, compact community. As the Board has noted above, this is a site that is in close proximity to a significant convergence of higher order transit, including the Yonge subway line, the future Mount Pleasant LRT station on the Eglinton-Scarborough Crosstown LRT that is currently under construction. Albeit a peripheral point, the site is well served by the surface transit as well. The site is within walking distance to busing routes on Eglinton Avenue and Mount Pleasant Avenue, which are major connectors. Eglinton Subway Station itself is a major bus station. There are sparse and occasional bus services along Redpath Avenue: 4 in the a.m. peak and 2 at the p.m. peak.

## **THE OVERVIEW OF THE RELEVANT QUESTIONS**

**13** At this point, it is fitting for the Board to address the localised planning issues. The planning issues can be broken into two components. First, does the proposed height, density and scale constitute or result in an unacceptable burden on the existing and future infrastructure or other municipal and public services? Secondly, are the proposed height, density and scale permitted under the City's Official Plan and the Secondary Plan? As a subset of the second question, do the resultant mass and bulk as well as the presentation of the proposal, deriving from the height and density, fit with the public realm? Do they constitute a good urban design and in compliance with the Urban Design Guidelines?

**14** Messrs. Peter Walker, and Tim Burkholder, giving planning evidence on behalf of their respective clients, manifest a subtle but distinct difference on many aspects of all these questions above. Their differential evidence is augmented by Ms. Anne McIlroy and Ms. Rong Yu, who testified respectively and exclusively on the question of urban design.

**15** With respect to the first question, the Board understands that, among others, a functional servicing report, a

traffic impact and parking study, a shadow study, a microclimatic analysis and urban design brief, a planning rationale report, a community services and facilities study and a housing issues report have been filed with the City. For our purposes, there is nothing by way of evidence presented at the hearing indicating any unacceptable impact on infrastructure, both hard and soft. There has not been submission made that the density should be rejected based on any such concerns.

## THE MORE LOCALISED PLANNING CONTEXT

**16** The Board will now address the first subset of the second question. Accordingly, an analysis of the relevant sections of Official Plans and Secondary Plan is in order.

**17** As a preliminary, it is trite but essential to state that the Board, must, in the interpretation of the Official Plan policies, eschew an approach that is narrow, fastidious or unduly legalistic. Instead, it should be guided by a contextual and purposive approach, with a view of furthering the overall policy objectives of the Plan. In *Bele Himmel Investments Ltd. v. Mississauga (City)* (1982), 13 O.M.B.R. 17 (Div. Ct.) the following oft-cited relevant dicta enunciated by the court is applicable and bears a timely re-emphasis:

Official plans are not statutes and should not be construed as such. In growing communities such as Mississauga, official plans set out the present policy of the community concerning its future physical, social and economic development. In such a document there will almost inevitably be inconsistencies and uncertainties when considered in light of a specific proposal. It is the function of the Board in the course of considering whether to approve a by-law to make sure that it conforms with the official plan. In doing so, the Board should give to the official plan a broad liberal interpretation with a view to furthering its policy objectives. There was, in this case, an adequate basis for a finding by the Board that Amendment 160 applied to the Subject Lands and that the by-law conformed. In my opinion, it cannot be said that the Board erred in law in making its decision.

**18** The thesis of the evidence of the planner for the City, Mr. Burkholder, is that although density and height requirements have not been delineated at the Official Plan or at the Secondary Plan, at 18.8 FSI, the density cannot be regarded acceptable even though the proposed height of 34 storeys, in his view, can. Pursuant to s. 5.2 of the Yonge-Eglinton Secondary Plan, his view is that the highest heights, densities and scale of developments are to be assigned to the four quadrants of the intersections. The subject site, which is at Broadway and Redpath Avenues, is expected to have lower density.

**19** Furthermore, he maintains that pursuant to s. 5.3 of the Secondary Plan, there must be a decrease of heights and densities easterly from the intersection of Yonge Street to Mount Pleasant Avenue along Eglinton Avenue. The proposed development density, in his opinions, simply does not fit with this pattern. As a result of such an analysis, he concludes, that an Official Plan Amendment is called for.

**20** These opinions of Mr. Burkholder raise implications far more labyrinthine than at first blush. In the absence of heights and densities being delineated in either the Official Plan or the Secondary Plan, how should height, density and scale of development be evaluated? How does one do a proper comparison of heights and densities for the subject site with the sites at the four quadrants? Is it on a site by site basis? Or is it on the basis of the districts as a whole? Is there a transition required and how and what does it entail? Does the acceptance of a certain height by the City influence the amount of density to be assigned? The Board has pondered on these questions in our deliberations before coming to our final conclusions. Our findings are set out as follows

**21** Firstly, the Board finds that the subject site is strategically located. It is situated at the designated *Apartment Neighbourhood* area within the Yonge-Eglinton Centre. The Board is keenly aware that under s. 5.2 of the Secondary Plan, the highest heights, densities and scale of development will be within the Mixed Use Area "A" on the blocks of the four quadrants of the intersection of Yonge and Eglinton Avenues. However, there are the following considerations relevant to the subject site. Under s. 2.7(e) of the Secondary Plan, there is a specific policy that directs "higher density residential development proposals within the *Apartment Neighbourhoods* to sites with nearby subway station access." As noted in our previous analysis, the site is within 500 m to the Eglinton Subway

## Sentinel (Broadway) Holdings Inc. v. Toronto (City)

Station entrance and 300 m from the future Mount Pleasant LRT station. It is therefore our conclusion that higher residential densities are being planned for and directed by the Secondary Plan for sites such as the subject site because they meet the qualifications handsomely.

**22** Secondly, the site is strategically located in another sense. It is centrally located at the *Apartment Neighbourhood* area. It is not at the edge of its district and is not approximate to any low rise *Neighbourhoods* districts which may attract concerns of transition, overshadowing or interfacing. Mr. Walker in both his written and *viva voce* evidence has highlighted this aspect. Mr. Burkholder, in contrast, has not commented on this feature. His notion of transition that there ought to be a scaling down of height, density and scale in an easterly direction is based on his reading of s. 5.3 of the Secondary Plan only. His appears to gloss over two other contextual considerations. The first contextual consideration is that s. 5.3 of the Secondary Plan relates to the scaling down along Eglinton Avenue. It should not affect the district's core. More importantly, even if the Board is wrong on this point, s. 5.4 specifically indicates that development in "these *Apartment Neighbourhoods* will comply with policies of the Official Plan, particularly the policies in sections 2.3.1 and 4.2."

**23** The second contextual consideration is that there are provisions in s. 4.2 of the Official Plan addressing criteria of development in *Apartment Neighbourhoods*. They affirm precisely and unambiguously that there may be transition requirements to adjacent low rise *Neighbourhoods* areas. Nothing in these policies of the Official Plan requires a transition within the *Apartment Neighbourhood* itself. In other words, the transition is between areas. It is not a linear gradation within the *Apartment Neighbourhood* designated area.

**24** This same point has been re-iterated in other provisions of the Official Plan. Section 2.3 paragraph 6(f) indicates that transition is to be done at the boundary points. Such a provision is specific enough to constitute reinforcement for the interpretation Mr. Walker has urged the Board to adopt. In short, the Board is satisfied that what needs to be protected for transition are the edges to the abutting low-rise *Neighbourhood*.

**25** Thirdly, even if one were to make a comparison based on a crude numerical strength, the height and density on the subject site do not threaten the status of the four quadrants as being the locations for the highest height and density. The recently approved E-Condo in Area "A" is at 58 storeys and 36 storeys at 15 FSI. Minto Midtown, built before the conception of the Growth Plan is at 58 storeys and 36 storeys with a density of 12 FSI. The planned development at the S.W. corner of Yonge and Eglinton is at 40 storeys and 9 FSI. Albeit not in full measures, the Board generally subscribes to Mr. Walker's assertion that given that numerical density targets are not provided for in the Official Plan, the deference by the Official Plan to a set of built form policies out of which density number is derived is sensible. In the inimical aphorism of Mr. Walker, density is a figure that falls out of design, as opposed to being a factor that drives design.

**26** Finally, one must not lose sight of the fact that this is an area in rapid evolution in a milieu that no density targets have been set legally. An artificially chosen density figure under such a regime is, at best, a transient benchmark. At worst, such a density target can be ill-chosen. It is far more appropriate to assess the proposal through the lens of effective OP policies, urban design principles than an arbitrarily chosen target. In our view, a qualitative calibration as opposed to an unquestioning quantitative approach is infinitely preferable.

**27** Based on the above, the Board finds that at 34 storeys and 18.8 FSI, the proposal will not distract, but will instead maintain the status of the Yonge-Eglinton intersection as the locations for the highest heights, densities and scale of development. The Board is also satisfied that the proposal will adhere to the spirits and letters of the Official Plan and Secondary Plans. No Official Plan amendment is needed.

## THE URBAN DESIGNS AND THE BUILT FORMS

**28** Let us now turn to the question of urban designs, which is the second subset of the second planning question. The proposal has a mix of unit types that are quite diverse. It consists of a seven storey--podium with two - 27 storey towers above. The two towers have a pattern of horizontal and vertical bays, which are designed to mitigate the wider tower facades. At Level 8, there is a large outdoor amenity area, with a pool, landscaping, seating and

## Sentinel (Broadway) Holdings Inc. v. Toronto (City)

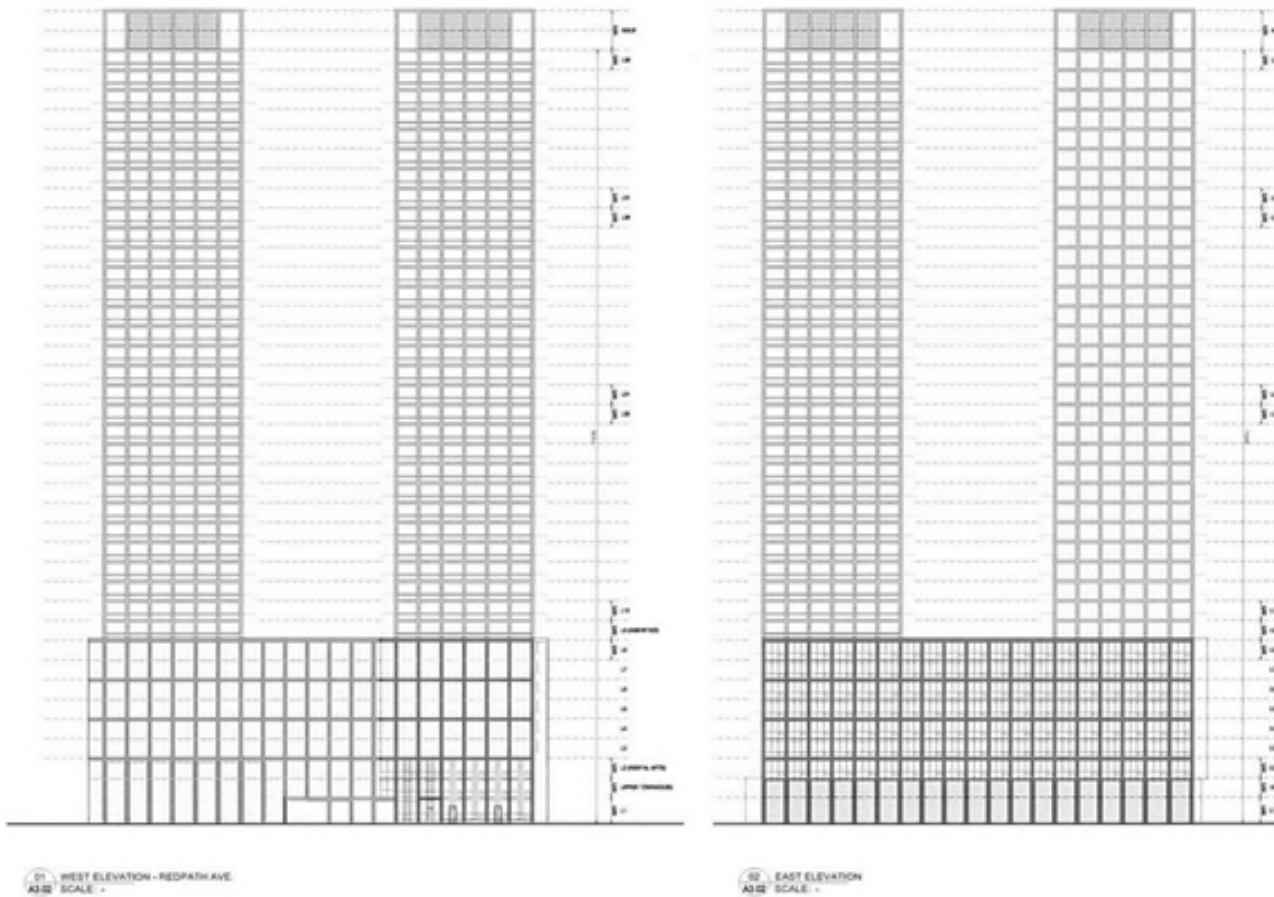
special paving. The two towers are separated by 20 m. A narrower floor plate at Level 8 helps to differentiate the building base from the top. The proposed building has a strong grid-like character extending from the at-grade townhouses units and podium through the towers. It is a modernist architectural specimen, with two highly glazed towers: symmetrical, sleek, with a flourish that is quietly stylish.

**29** The Design Criteria for Tall Buildings & the Tall Building Design Guidelines (2006 and 2013 versions) have some important features that no designer ought to ignore or dismiss. Nonetheless, even if one were to apply the Official Plan Policy, under s. 5.3.2.8, guidelines are not part of the Plan unless the Plan has been specifically amended to incorporate them. They simply are not the same as the enshrined Official Plan policies. They have not been tested by the vigour of the evaluation process pursuant to the *Planning Act*. As such, they do not enjoy the same legal status of the effective Official Plan or zoning by-law. A punctilious insistence on the requirements of the guidelines without a thoughtful and responsive evaluation, in the Board's view, may have results less than felicitous. Nonetheless, designers and decision-makers such as Council or the Board should have regard for the Guidelines by evaluating their intents and in their applicability, attribute the requisite weight to inform one's opinion. It should be treated as a tool; not a millstone.

**30** Unlike the planning evidence of Messrs. Walker and Burkholder, the urban design evidence proffered to the Board at this hearing gives an impression that the two witnesses speak different languages. The urban designer for the applicant applies unfailingly the Official Plan Built Form Policies. She also applies the Council approved Guidelines with a strong visual and contextual perspective. On the other hand, the approach of the urban designer for the City is textual only as she peers scantily into any other relevant realms. Her evidence is punctilious to a fault and like Churchill's pudding, it lacks a theme.

**31** Take the podium design. The City's urban designer complains that most of the tower frontage on Broadway Avenue has no step-backs from the podium. It is therefore her contention that it is non-compliant. What is noticeable is that she follows slavishly conventional wisdom to the point that architectural innovations are considered anathema. In this case, the proposed development consists of two towers, oriented with their lengths running east-west. The towers are slightly set back from the podium, about 1.0 to 3.5 m, creating a "reveal", which allows a differentiation between the base and the middle. The following graphics demonstrates both the east and west elevations how a clearly defined base and top can be done through the "reveal" without the pronounced setbacks. These distinct definitions will be more subtly noted when the lights inside the buildings brighten the glazed façade.

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**32** There is the question involving the landscaped open space at the grade level. The City's urban designer points out that although the total boulevard width from the curb to the wall at grade meets the minimum Tall Building Guidelines, the latter would not countenance cantilevering the building and balconies from the second floor up to cover more than 80% of the proposed landscaped open space.

**33** Such critique misses the mark that the base of the building is designed to frame the streetscape on Broadway Avenue and Redpath Avenue. It is also meant to animate the streets, with wide sidewalks, landscaping, seating, private trees as well as at grade entrances for the townhouse units. The point raised against cantilevering misses the importance of bringing the private realm closer to the public realm as "eyes on the streets". There is enough setback from the building phase to accommodate private trees and landscaping as well as a 3.0-m pedestrian walkways on both streets. In our view, to revive the notion of the "tower in the park" in an "Urban Growth Centre" is not just an anachronism, it is a mistake. The City's witness also ignores the larger trend of making the ongoing evolution of Yonge-Eglinton Centre as a vibrant, compact and complete community. Section 3.2.1 of the Official Plan setting out the requisite Built-Form policies has the following passage that is highly relevant:

New development will be located and organised to fit with its existing and/or planned context. It will frame and support adjacent streets, parks and open spaces to improve the safety, pedestrian interests and casual view to those spaces from the development"

**34** Then, there are concerns expressed relating to the separation distance, to the 17 storeys building to the south, which is 15.4 m and the proposed separation distance between the two towers, which is 20 m. The Board has reviewed an abundance of visual documents from both sides, including computer-generated photos delineating building relations, site plans showing the footprints of buildings, computer-generated aerial views at different vantage points as well as a variety of simulated views within the immediate neighbourhood and beyond. Our assessment is based on a fairly accurate notion what the fabric will look like after the building is constructed.

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**35** We are satisfied that these separation distances, both between the towers and to the building to the south are adequate and fitting. Neither should constitute any serious concern relating to light, view and privacy. The distance between the proposed complexes on the subject site to the apartment building to the south is acceptable not just because the proposed building is slightly offset. The proposal faces this building not to their living rooms face which looks onto the street. More importantly, the owner and none of the tenants at that building have come forward to voice their concerns. The concerns raised by the City are based on a strict textual analysis, lacking the immediacy, intimacy and authenticity of a visual, contextual and ambience approach.

**36** All of the foregoing is a testament that the proposed development represents good urban designs. However, it must not be overlooked that there are key elements of the design that address and comply with the Guidelines. For instance, the placement and the east-west orientation of the towers have been considered to minimize the shadow impacts on the streetscape. The towers are slightly offset, thereby improving the shadow impacts. Shadows are contained within the *Apartment Neighbourhood*, with minimum on the adjacent low rise *Neighbourhood* and none on parks or open spaces.

**37** The site access, servicing and parking will be located internally in the buildings, all of which would be coordinated via common access points. The reorganization will appeal to the Guidelines in more than one aspect. In addition, the urban designer for the applicant enumerates other such instances in her evidence with respect to the architectural mass, which is duly noted by the Board.

**38** The Board is also impressed with the high quality of the planned streetscape for this project, which not only pay homage to, but comply with the Guideline provisions on streetscape and side walk zone. More importantly, the design of accommodating the bicycle racks inside the proposed complex will be infinitely superior to the conventional accommodation at the street level. Given the amount of bicycles to be accommodated, the latter approach, if chosen, will simply mar the quality of the streetscape as well as posing a jarring effect to the animus of street life.

#### **THE NEIGHBOURING RATEPAYERS' CONCERNS**

**39** The Board has heard testimony given by a number of neighbours. Their overriding concern is that there would be more and more inhabitants as a result of the development, with the accompanying effects of greater pedestrian and vehicular traffic and the possible impact to the quality of living.

**40** The Board is sensitive to the misgivings from the residents. However, this vicinity is in rapid evolution and is driven in part by the planning instruments promulgated by both levels of governments. As indicated in our prior analysis, the changes are not only planned for but are within the parameters of acceptance. There is no indication that the area in question is currently in need of any special needs or services, additional to those normally available to those in an established area. Mr. Walker testified that the area in question contains a relatively young and affluent demographical group that lives alone, with children and seniors comprising a smaller percentage as compared to the City as a whole.

**41** Take another source of concern which relates to a peaked vehicular and pedestrian traffic. The City transportation team has not raised any concerns and has in fact, relinquished the earlier requirement for more indoor parking. One must not lose sight of the fact that a service-rich, transit-rich and highly urbanised area as this area does possess certain inalienable features that appear to be overcrowding.

**42** There would be undoubtedly more residents to come. In fact, residents and transit, in financial planning terms, have a relationship that is symbiotic, reciprocal and mutually re-enforcing. Transit needs users as users require transit. The current high (78%) non-auto modes share of transportation for this area is a testament of what the future may behold. In fact, what we will witness and what is anticipated is a gradual metamorphosis and materialisation of this area into an Urban Growth Centre with all its glory, its earthy pace, its fast rhythm, its hustle and bustle.



**SHOULD SECTION 37 PAYMENTS BE ADJUDICATED BY THE BOARD?**

**43** One of the issues raised at this hearing is the s. 37 payment. Counsel for the City, Mr. O'Callaghan asks the Board not to make any definitive rulings at this stage but simply gives the parties opportunity to negotiate once the approved height and density are known. In the event that the parties are unsuccessful at the negotiations, Mr. O'Callaghan would then argue before the Board. Mr. Brown opposed this approach vehemently. He submits that there are issues identified on the issues list relating to these questions. He submits that both on grounds of legality and merits, the Board should simply reject the request of the City. Very extensive arguments have been rendered by Mr. Brown. He also urges the Board not to allow Mr. O'Callaghan to split his case.

**44** In short, there are two preliminary matters relating to issues of s. 37. The first is whether the Board should accede to the City's request not to make any findings on the merits of the contribution at this time. The second is whether the Board is within its legal right to enunciate any findings on the merits. In other words, the question is whether the Board is legally empowered to adjudicate if the parties agree to disagree. The Board finds that it agrees with Mr. Brown on the first question and Mr. O'Callaghan on the second.

**45** The Board is mindful of the pitfalls of splitting the case. These issues concerning the s. 37 issues have been identified in the issues list and the Board expects the parties to be ready to put forward its case on the days scheduled. Furthermore, there are substantial references made respecting these issues in the witness statements filed by both the applicant and the City. Both Mr. Walker and Mr. Burkholder delineated their substantial evidence in their written statements. They form the record for this panel to make findings. There may be voids. There may be some nuanced matters that need to be subsequently fine-tuned as may be directed by the Board. However, there is no reason why the large questions should not be addressed at present. As such, the Board will address these issues as much as we can, on the basis of what have been submitted orally and in written form.

**46** Let us turn to the second preliminary issue. The Board has heard arguments in relation to our authority to address the s. 37 matter. Issue 18 of the Procedural Order in fact addresses this question of legality. On one hand, it is submitted by Mr. O'Callaghan that the Board has the jurisdiction, authority, as well as ample precedents, to impose an amount if the parties were unable to agree. On the other hand, Mr. Brown rejects the proposition that the Board has any authority to order a s. 37 payment. The *Planning Act* contemplates an agreement between the owner and the authority. In his view, if there is no agreement, nothing can be imposed. Mr. Brown further questions the appropriateness of an imposition for this case. He questions that there is a lack of "nexus" between the proposal and the benefits the imposition are purported to endow.

**47** Section 37 of the *Planning Act* states:

37. (1) The council of a local municipality may, in a by-law passed under section 34, authorize increases in the height and density of development otherwise permitted by the by-law that will be permitted in return for the provision of such facilities, services or matters as are set out in the by-law.

**Condition**

(2) A by-law shall not contain the provisions mentioned in subsection (1) unless there is an official plan in effect in the local municipality that contains provisions relating to the authorization of increases in height and density of development.

**Agreements**

(3) Where an owner of land elects to provide facilities, services or matters in return for an increase in the height or density of development, the municipality may require the owner to enter into one or more agreements with the municipality dealing with the facilities, services or matters.

**48** The Board notes, as this panel has pointed out at the hearing, that there is no statutory provision or, indeed, any known precedents for matters of the bonus by-law to be appealed to the Board on a *stand-alone* basis. There is no expressed authority in s. 37 of the *Planning Act* that sets out rights of appeals or the Board's authority to impose if

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there is a disagreement. Almost all the precedents relating to s.37 matters are in conjunction with appeals to the official plans and/or by-laws. When pressed by this panel on this point, Mr. O'Callaghan indicated the reason for such a phenomenon is that s.37 is essentially part of the s. 34 power of the *Planning Act*.

**49** Improvised as Mr. O'Callaghan's on-the spot argument may be, it is not without merits. If a bonus matter can be part of a zoning by-law passed under s. 34, a part of it is appealable insofar as and inasmuch as the by-law is appealable. In this panel's view, if payment pursuant to s. 37 can be included in a zoning by-law, it is part of the by-law or can be construed as a condition of the by-law. As such, it is appealable and therefore can be adjudicated by the Board.

**50** There is no doubt that because of the language in s.37, the consent of the parties should always be the first choice. However, In this case, Mr. Brown has indicated that his client is unwilling to agree. He indicated to the Board emphatically at the hearing.

**51** There are many past precedents where the Board has acceded to the request to adjudicate matters of s. 37 as part of the appeal to Official Plans and/or zoning by-laws. The Board did it primarily because it is expedient to resolve every aspect of the dispute. The legal base for such requests may appear to be slender, but nonetheless alive. Upon this panel's studied reflection, we find Mr. O'Callaghan's position tenable. In addition, this panel takes a rather pragmatic view. An approach to having all the disputed matters resolved is infinitely preferable to having an unresolved s. 37 matter overhanging or holding up the planning instruments that have merits. The Board is also mindful that it has the broad jurisdiction under s. 88 of the *Ontario Municipal Board Act* to lend a helping hand to parties for a proper closure. In conclusion, the legal base may be narrow, but it does exist.

#### **HOW APPROPRIATE ARE THE REQUESTED ITEMS?**

**52** A proposed project such as this will attract a number of municipal charges. There will be development charges, which are charges arising from increased capital costs required because of the increased needs for services arising from developments. These will arise from the by-law passed under the *Development Charges Act*, S.O. 1997; Ch. 27. These will be tied to the number and type of units, or GFA or any quantifiable formula. There will be the park lands requirements either in the form of land conveyances or cash-in-lieu pursuant to s. 51.1 of the *Planning Act*. The quantum of development charges and cash-in-lieu will undoubtedly reflect the magnitude and size of the project.

**53** The universe of s. 37 is quite different from those of the development charges and park levies. Development charges reside in a statutory framework with rules pertaining to both processes and substances, so that it is possible to ascertain the items and quantum that can be charged after a due process of studies and appeals. A little less so, park levies are subject to similar constraints, albeit there are areas of uncertainty that require elucidation at the Board and the Courts in due course. Section 37 bonus charges possess less precision and more uncertainty than these. As disagreements mount, the Board has been increasingly drawn into the orbit of adjudication and is compelled to craft rules in terms of fixed rules in the Official Plan, nexus and justification of quantum, all of which are reflected in a number of decisions rendered in the past.

**54** Let us address now the itemisation and quantum problem of the s.37 matters in this case.

**55** Firstly, the requirement to include a full replacement of the existing 32 rental units and a tenant relocation and assistance plan as part of the s. 37 contribution is accepted by the Board and, as such, it should be included in the contribution.

**56** Secondly, the Board has misgivings with the overall quantum approach enunciated by Mr. Burkholder in paragraph 81 of his witness statement. Using the range of the amounts of the eight recent developments in the area where the parties have agreed on the contribution to s. 37 payments and deriving from it an average of 10% of value of the over-density GFA, he proposes a figure for contribution.

**57** The flaws of such an approach has been highlighted by the Board in *Baywood Homes v. City of Toronto* [2013] O.M.B.D. No. 521, (Board File No.: PL080993), a decision rendered by Mr. Makuch which stands for the proposition that such an important calculation or the underlying approach of the calculation is not grounded on any specific Official Plan policy, and that it offends a line of OMB decision that requires specific, fair, transparent and predictable requirements. Using eight other contributions from 5.4% to 22% to derive a 10% over-density contribution, the approach does not strike one as attaining the height of analytical sophistication. Furthermore, the baseline for the calculation of the density increase is not ascertained at all. If it has been considered, it isn't apparent. There is also Policy 5.4 which may give an exemption of 10,000 sq m. None of these features seem to have been taken into account.

**58** Thirdly, in this case, there are two items of contribution suggested, the streetscape improvement in the Yonge-Eglinton area and the acquisition and construction of the new park on the site of the TTC bus barn at Yonge and Eglinton.

**59** The Board does not have any evidence to make any finding on the item relating to streetscape as to whether it should be included and if included, how is it to be quantified or allocated. The Board has not been presented any evidence or arguments as to its nexus, viability or reasonableness.

**60** As for the TTC bus barn measure, it came under a withering attack by Mr. Brown at the hearing, particularly in his cross-examination of Mr. Burkholder. It is the position of Mr. Brown that the idea of this particular site being earmarked for a park is untenable and unrealistic. In his view, the idea has not left the conception stage. There is no quantification of the market value of this site, its air-rights and no assessment of its viability for anyone to take the idea seriously. The Board agrees that the nexus of this matter is doubtful, and should not be a consideration for contribution. If there is a nexus, the Board is also left with no idea as to whether the park levy by way of cash-in-lieu in this case would defray some of the capital cost of the local park.

**61** In summary, the Board has made the following findings.

**62** The overall quantum approach enunciated in the witness statement of Mr. Burkholder of the City is unacceptable.

**63** In this case, the items of capital works, services and matters that should be ascertained in the neighbourhood in question and whether they are quantifiable and have a nexus relating to the development are determined as follows:

1. The full replacement of the 32 rental units and a tenant relocation and assistance plan should be included in the contribution.
2. Given the circumstances of this case, the contribution to the TTC bus barn as a local park has not been established in this case. The Board is careful to note that the justification has not been demonstrated in this case only.
3. As for the streetscape contribution, the Board is left with little evidence to make any determination and the parties should negotiate on this item on their own.

**64** The Board will withhold the final order for the by-law in abeyance for a period of two months. This will enable the final format for this by-law to be crafted on consent. The parties should use the time to finalise the s. 37 matter, including the s. 37 agreement and continue to negotiate on the matter of the streetscape.

**65** In order that the final negotiation can be a success, the Board suggests the following should be borne in mind:

1. The leads for the parties' negotiation must be Messrs.' Brown and O'Callaghan. They are well aware of the nuances of both the evidence and the submissions presented at the hearing.

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2. Both parties should be guided by this panel's findings. Mr. O'Callaghan undoubtedly is aware of the applicable law and evidence; and Mr. Brown should value the importance of finality for his client. In planning as in life, both should realize that the road to success is paved less with hard-driven positions than with the hard cobbles of realism.

**DISPOSITION**

**66** The Board will allow the appeal and amend the by-law in accordance with the height of 34 storeys for the two residential towers and seven storeys of a podium with density of 18.8 FSI. The complex should be in substantive accord with what has been presented to the Board at the hearing.

**67** The Board will issue the requisite order once the final format of the by-law is agreed to. The Board anticipates the parties will come to a final agreement with respect to the s. 37 matter. Two months from the issuance of this Decision will be the timeline for the issuance of the Order.

S. WILSON LEE  
ASSOCIATE CHAIR

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End of Document

## **Romandale Farms Ltd. v. Markham (City)**

Ontario Local Planning Appeal Tribunal Decisions (f/k/a Ontario Municipal Board)

Ontario Local Planning Appeal Tribunal

Markham, Ontario

Panel: Richard Jones, Member

Heard: July 3, 2018.

Decision: October 19, 2018.

OMB Case No.: PL170781

OMB File Nos.: PL170781, PL171153

### **2018 LNONLPAT 712**

PROCEEDING COMMENCED UNDER subsection 34(19) of the Planning Act, R.S.O. 1990, c. P.13, as amended Appellant: Romandale Farms Limited Subject: By-law No. 2017-50 Municipality: City of Markham PROCEEDING COMMENCED UNDER subsection 51(39) of the Planning Act, R.S.O. 1990, c. P. 13, as amended Appellant: Romandale Farms Limited Subject: Proposed Plan of Subdivision Property Address/Description: North-west corner of Prince Regent Street and Reflection Road/Block 120, Plan 65M-3830 Municipality: City of Markham

(48 paras.)

## **Appearances**

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Romandale Farms Limited: Michael Melling, counsel and Meaghan McDermid, counsel.

2473330 Ontario Limited and Pantheon Group Inc.: Partrick Harrington, counsel and Patricia Foran, counsel.

City of Markham: Mark Joblin, counsel.

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[Editor's note: An amended judgment was released by the Tribunal January 30, 2019. The changes were not indicated. This document contains the amended text.]

### **DECISION DELIVERED BY RICHARD JONES**

#### **AND ORDER OF THE TRIBUNAL**

### **THE APPLICATION**

1 2473330 Ontario Limited and Pantheon Group Inc. ("Pantheon") made applications to the City of Markham (the "City") for a Zoning By-law Amendment ("ZBA") and a draft plan subdivision for lands described as Block 120, Plan 65M-380 ("subject property") located at the north west corner of Reflection Road and Prince Regent Street in the Cathedraltown neighbourhood.

2 The ZBA and plan of subdivision were subsequently approved by the City Council and are appended as Attachment 1 to this Decision.

3 The proposed draft plan of subdivision proposes four single detached residential units, nine rear lane single

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detached residential lots, and eight rear lane townhouses on a total (gross area) of 0.995 hectares ("ha") inclusive of streets, laneways and buffers. The net density is 29.3 units per ha.

**4** The subject property and Block 79 to the north were originally intended for the purposes of a future school (York Region Catholic School Board), but the subject property was released to Romandale Farms Limited ("Appellant") when the School Board advised that the lands were not required. The subject property was then sold to the Applicant in June 2016.

**5** The subject property was designed to integrate with the residential layout of Block 79 and also underwent a series of design revisions before being approved, with conditions, recommended by the City's Planning Department. Of those conditions recommended, all were subsequently endorsed by City Council with the single exception that the Architectural Control Guideline is prepared and a control architect is hired prior to draft approval rather than after draft approval which according to evidence is the usual City practice in this regard. Pursuant to that direction, MBTW WAI, an architectural consulting firm, prepared the Addendum to the Cathedraltown (Phase 1) Architectural Guidelines dated October 2017 which was later approved by City staff on October 2, 2017. Notice of draft approval followed on October 10, 2017.

**6** The ZBA, described as By-law No. 2017-49, (note Attachment 1) which amends the City's comprehensive zoning by-law, By-law No. 177-96 ("ZB"), proposes changes to three distinct areas of the plan of subdivision as follows.

**7** The first exception applied to the four single detached dwellings along the western boundary of the subject property proposing changes to the minimum front yard (3.5 metres ("m") requested, 4.5 m required); minimum rear yard (6.5 m requested, 7.5 m required); minimum front yard to the private garage (6.0 m, no relief required) and permission for 6.1 m wide garage on a 11.34 lot (versus a 11.6 m lot).

**8** The second site-specific amendment applies to the row of nine single family dwellings proposed along the south boundary of the subject property that are accessed along a rear lane. Here the change involves a minimum rear yard of 12.9 m versus the ZB requirement for 14.8 m and the reduction of a minimum setback for a private garage to an interior or exterior lot line to 0.3 m from the existing ZB standard of 1.2 m and 2.4 m respectively.

**9** The third exception applies to the eight townhouses aligned along the east boundary of the subject property which front onto Prince Regent Street but which are accessed via a rear lane. These changes involve: the reduction of the minimum interior side yard for a lot abutting an Open Space zone to 0.9 m from 1.2 m; the reduction of the minimum setback for a detached lot private garage on a lot abutting an Open Space zone to 0.3 m from 1.2 m, and a further reduction of the minimum rear yard accessed by a lane to 12.9 m from 14.8 m.

## THE APPEAL

**10** On behalf of the Appellant Ms. McDermid filed the appeal and in accordance with the cover letter dated June 28, 2017 stated, and I summarize, the following:

- \* The approval of the ZBA in advance of the receipt of architectural control guidelines is premature.
- \* Because, in their view, the architectural control guidelines may oblige revisions to the draft plan of subdivision, it is neither efficient, nor does it represent good planning to approve the ZBA when revisions to the draft plan are likely.
- \* The City's Official Plan ("OP") requires that new developments in Cathedraltown are consistent with the Cathedraltown Community Design Plan ("CDP") which includes the Architectural Control Guidelines approved by the City in 2004. In their view, the ZBA was not consistent with the CDP and accordingly does not conform to the OP (the CDP was approved by the City in September 2005 and amended in October 2009 and requires that for Residential Low Density areas in the Cathedral District that its built form and general guidelines are to be read in conjunction with architectural guidelines). Architectural Design Guidelines were prepared for Phase 1 of

## Romandale Farms Ltd. v. Markham (City)

Cathedraltown, which contains the subject lands, and additional architectural guidelines are required for each plan of subdivision within the Phase 1 area.

- \* As Cathedraltown development is intended to adhere to the OP, the CDP and the Architectural Control Guidelines, the character of new development which will be implemented via the ZBA is not compatible with the surrounding community, nor does reflect the unique character of Cathedraltown.

**11** The witnesses called to testify on behalf of the Appellant provided testimony that was largely consistent with those points raised in the appeal cover letter.

## **MOTION**

**12** In February 2018, the Tribunal convened a hearing to hear a motion advanced by Pantheon (Mover) to dismiss Romandale's appeal on the basis that the appeal was not founded on legitimate planning grounds and that the appeal was frivolous and vexatious and intended to insert Romandale into the approval process regarding the approval of architectural guidelines.

**13** The Motion was dismissed because from the planning evidence heard, presiding Member Bruce found that there was a diversity of planning opinions that expressed "legitimate and genuine planning issues upon which the Board could either refuse or grant Appeals in whole or in part"

## **EVIDENCE**

**14** The Hearing was held for three days beginning April 18, 2018 and was reconvened as a continuation on July 3, 2018 for a final three days.

**15** The following paragraph is provided for background purposes.

**16** Cathedraltown is an area within the larger Cathedral Community bounded by Victoria Square Boulevard on the east, Donald Buttress Boulevard on the north and Highway 404 to the west. Conceived by Romandale, Cathedraltown was designed to reflect traditional European design values centered on the Cathedral of the Transfiguration of Our Lord. Like other neighbourhoods within Markham such as Cornell, the Cathedral Community as a whole does reflect a unique design aesthetic as the planning and architectural witnesses all affirmed in their statements to the Tribunal. Multiple documents relating to policy and guidelines have been produced and approved which support and encourage this unique conception originally envisioned by Romandale.

**17** David Stewart, a professional planning consultant was qualified to provide expert opinion evidence on behalf of the Appellant. Mr. Stewart has been affiliated with the Cathedral Community since its inception involving, in particular, the provision of architectural guidelines on behalf of development applications. He opined that the Secondary Plan for the Cathedral Community (OPA 42) (Tab 8, Exhibit 1) set out the initial requirements for developments within the Community, one of most prominent being the policy requiring that low density housing applications "engage the services of a qualified architect acceptable to the Town (now City) who shall review all low density housing plans and certify their compatibility with design guidelines to be established at the time of development approval" (from page 212, Tab 8, Exhibit 10). Further, he described that OPA 42 provided authorization for the preparation of a Community Design Plan (CDP) for the Cathedral Community where regard shall be given to the design objectives and principles of OPA 42 and the Town's Implementation Guidelines.

**18** Accordingly, the CDP was introduced into evidence by Mr. Stewart and several of the relevant passages from that document are cited below (The CDP was prepared by NAK Design Group, in consultation with Ms. Roman-Barber and Mr. Stewart's firm, John G. Williams Architects, which was the control architect for Cathedraltown):

- \* From the outset, the CDP notes on page 303, Tab 13, Exhibit 1, that the "study is not a statutory document" but was prepared as a "supplement" to OPA 42. "The study includes all of the inherent

## Romandale Farms Ltd. v. Markham (City)

flexibility associated with urban design documents. It represents a vision for the development of the community, design criteria, objectives and guidelines for its component elements that will guide their development through the subdivision and site plan stages towards the described urban form".

- \* With regard to the CDP's prescription for Low and Medium Density Residential uses described on page 310 of Exhibit 1: "the low density residential uses will include single detached, semi-detached, and street townhomes having street related and lane related garages and parking."
- \* With regard to Built Form (page 319 of Exhibit 1) "Dwelling façade details including rooflines, cladding, window and door proportions and surrounds should be consistent with the Georgian or Regency periods and complement the architectural style of the buildings in the Cathedral Precinct"; the Precinct being that area in the immediate vicinity of the cathedral itself which does not include the subject lands.
- \* The CDP guidelines pursuant to Parkside lots (page 320, Exhibit 1) which includes lots facing or adjacent to parks states: "All dwellings and garage elevations visible from the street, park or open space should have enhanced architectural detailing including bay windows or porticoes except where the dwelling is adjacent to a woodlot'. Across Prince Regent Street, the east portion of the subject property lies across from a park space.
- \* The CDP also allows varying lot sizes where site conditions may be variable and some variation in architectural style and detail is also tolerated but style must "remain consistent with or complementary to the style precedents set by the buildings in the Cathedral Precinct". For buildings on Corner Lots; "the building elevation facing the side street should have strong architectural detailing equivalent to the front elevation. Feature elements such as bay windows, porticoes, or other appropriate elements consistent with the Georgian or Regency architectural styles are encouraged on the side elevation" (page 322 of Exhibit 1).

**19** In addition to the CDP, Mr. Stewart in testimony introduced the Tribunal to the Cathedraltown (Phase 1) Architectural Guidelines ("CAG") (Tab 17, Exhibit 1) which apply to grade related housing which is not subject to site plan control and which build upon the principle concepts established by the CDP. The CAG sets out additional architectural guidelines for each plan of subdivision within the Cathedral Community. Their focus is on Phase 1, which alludes to an area of Cathedraltown in the northeast of the community comprising approximately a quarter of the neighbourhood. According to Figure 9 of the CAG, the subject lands form part of Area 5 of Phase 1 which itself is comprised of a total of six Areas. The south boundary of the subject lands is coincident with the south boundary of Area 5, below which lies Area 1 south of Reflection Road. This distinction is explained at this point because witnesses for the Appellant were of the view that the subject lands were part of Area 1 as a possible consequence of its history as a school site and its prior Romandale ownership. Nevertheless, Area 1 requires that all single family dwellings "shall be Georgian/Regency" in style whereas; Area 5 allows (from the CAG on page 434 of Exhibit 1) that: "Dwellings in this area will provide a transition between the Georgian/Regency architecture to the south in Area 1 and the existing architectural influences within the Hamlet of Victoria Square to the east. The architectural style for dwellings within Area 5 shall respect the existing Georgian influences found in Victoria Square and the emerging Georgian/Regency architecture within Cathedraltown". In light of this Area 1/Area 5 dispute, the Tribunal relies on Figure 9 which includes the subject property into Area 5.

**20** In Mr. Stewart's opinion, the architecture style proposed by the Applicant for the subject property as part of Area 5 as documented in the Addendum to the Cathedraltown (Phase 1) Architectural Design Guidelines (Addendum)(updated in October 2017) prepared by the MBTW WAI consultancy represented a hybrid of architectural styles inconsistent with the character of Phase 1. In this regard, he opined that the townhomes' roofs were too steep, the detailing too ornate around the windows and the projecting townhome staircases out of character with Area 1 guidelines. With regard to the proposed single family uses, he opined that the basement windows were "vertically stretched and horizontally compressed" and the provision of full panel doors were inappropriate as were the narrower proposed exterior staircases which all reflected an eclectic Georgian/Regency influence rather than one representative of classical Georgian design cues. He further stated that the three storey height of the townhomes were not in character with homes in the near vicinity of the subject property which were



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uniformly two storeys in height, nor suited by virtue of design and height to front onto the Prince Regent Street Ceremonial Route (which is described as such in CAG although is not described as a ceremonial route in OPA 42)

**21** Mr. Stewart has had a long, professional association with Cathedra town which in part may explain that when asked to prepare a cost proposal by Pantheon in 2017 for architectural control services, he responded by letter on June 5, 2017 (Exhibit 7) in paragraph 2, that: "Model designs and the final Plan of Subdivision shall comply with the intent of the Cathedral Community Design Plan and the Cathedra town architectural design Guidelines and will be subject to review by Romandale". The Tribunal notes at this juncture that Romandale certainly has no administrative role to play in the review process, nor was Romandale conveyed a legal right to intervene in this regard in relationship to the sale of the subject property sale to the Applicant according to the submissions.

**22** Robert Foran, Professional Planning Consultant was qualified to provide expert planning opinion on behalf of the Appellant.

**23** From the outset of his testimony, the planner was of the view that the Area 5 classification was incorrect as the subject lands formed part of the original Romandale land holding (Figure 4, Exhibit 4) which did not include Block 79 to the north which is separated from the Pantheon lands by a hedgerow.

**24** In reference to consistency with the Provincial Policy Statement 2014 ("PPS"), the planner stated that the applications were not consistent with policy 1.7.1 (d) which requires that long term prosperity should be supported by encouraging a sense of place by promoting a well-designed built form and cultural planning and by conserving features that help define character including built heritage resources and cultural heritage resources and he also drew the Tribunal's attention to several policies of the York Official Plan (Tab 3, Exhibit 1) which encourages municipalities to develop urban standards to ensure that each community has a sense of place. The planner did not address the Growth Plan for the Greater Golden Horseshoe 2017 ("GP") in his evidence.

**25** With regard to the Markham Official Plan OP, he outlined policies pursuant to the Cathedral District and the CDP (policies 9.5.2 and 9.5.4) which state as objectives the need to build upon the presence of the cathedral and the need for development to be consistent with community design plans.

**26** With respect to the draft plan of subdivision which the planner critiqued for possessing flanking lots and blocks contrary to the alignment of lots and homes on the south side of Reflection Road, the planner sketched on Exhibit 9, his preferred lotting arrangement/design at the request of the Tribunal. Although the Tribunal acknowledges that the redesign did delete the flanking lots, which he found to be objectionable, and the sketch was undertaken "on the spot" and without prior warning, the redesign also eliminated an important road outlet for the Block 79 subdivision, which is draft approved and proposed a new road intersection with the existing development to the west which would clearly be difficult, if not impossible to implement because of the nature of existing development unlike the proposed draft plan which appropriately integrates with those outside land holdings.

**27** Planning Consultant Billy Tung who provided expert opinion evidence on behalf of the Applicant (and was accordingly qualified) described that the current draft plan design appropriately interconnects and aligns with the lot and road fabric of Block 79 to the north, which also facilitates the provision of engineering services to the subject lands and Block 79 in a manner preferred by the City.

**28** With respect to Provincial policy, the submissions promote the development of "complete communities" and encourage intensification within Built-Up areas of the City, objectives consistent with, and conforming to, the PPS and GP respectively

**29** The applications further conform to the Urban Area designation of the York Region Official Plan applicable to the subject property, a designation encouraging new growth, and he affirmed that the applications will foster a sense of place in conformity with that Plan. With regard to policy 8.2 of the City of Markham OP (Tab 5, Exhibit 1) he opined that the applications served those policies by being: well designed, compatible with existing development and appropriately serviced. As an infill development, the proposed development "respected and reflected" the

## Romandale Farms Ltd. v. Markham (City)

existing pattern and character of existing development. In reference to policy 8.2.3.5 e) of the Official Plan, the planner cited the following:

- \* The new buildings shall have a complementary relationship with existing buildings, while accommodating a diversity of building styles, materials and colours.

**30** In specific reference to the guidelines reviewed earlier in this Decision, the planner testified that in his view, Area 5 was the correct Area designation applying to the subject property and the one also supported by the City's planning staff.

**31** Appropriately, the Tribunal was referred to s. 51(24) of the *Planning Act* which sets out the criteria for plans of subdivision where the planner stated that the criteria had been satisfied by the application for draft plan of subdivision approval. In his view in reference to the proposed ZBA of Attachment 1, there was nothing in the amending bylaw which was adverse or contrary to the CDP.

**32** The Tribunal heard testimony from Michael Hannay, a practicing architect, and an author of the Addendum referred to earlier, originally prepared in August 2003 and updated in October 2017 specific to Area 5 of Phase 1 known as the Victoria Square Neighbourhood. Mr. Hannay was qualified to provide expert opinion evidence on behalf of the Applicant.

**33** The architectural implications of the Area 5 designation were in his view, pre-established by the CDP, the Cathedraltown (Phase 1) Architectural Design Guidelines and the Victoria Square Architectural Guidelines prepared initially in June 2007 and updated in July 2017.

**34** In his opinion, the architectural design of the new housing was consistent with the guiding vision established in the parent guidelines as the proposed architecture reflects the Georgian and Regency design influences in accordance with CDP and is accordingly compatible with the preeminent design style of Area 1.

**35** The Addendum (Tab 18, Exhibit 1) draws frequent reference to the guiding architectural principles of the CDP in relationship to the proposed housing forms including visual references to existing building types already realized in Cathedraltown. Mr. Hannay, as the Control Architect, for the Applicant was satisfied that the Addendum prescribed architectural approaches consistent with the CDP and existing housing forms with regard to height, materials and style. He acknowledged that the urban design review process administered by the City was in his view "thorough".

**36** In his visual evidence, submitted as Exhibit 16, he illustrated the variations of architectural treatments extent in the Cathedraltown (Phase 1) area describing building with Italianate and Queen Anne influences and one multi-plex residence incorporating glass or clear plastic balcony railings. In this regard he described the prevailing architectural expression as being somewhat eclectic, a design outcome consistent with the guidelines which tolerate variations. Mr. Hannay also expressed his support for the subdivision design which he believed was appropriately executed.

**37** Daniel Brutto, Planner 1 was qualified as a professional planner providing opinion evidence on behalf of his employer, the City of Markham. Mr. Brutto prepared the staff report recommending the applications (Tab 21, Exhibit 2).

**38** In lockstep with Mr. Tung, he testified that there was consistency with the PPS, conformity with the GP, the York Region Official Plan and the City OP. The applications had regard to s. 51(24) of the *Planning Act* and subscribed positively to the guidelines. He confirmed that Tabs 27 and 31 of Exhibit 2 were the correct versions of the ZBA and draft plan of subdivision with conditions. Mr. Brutto who has had administrative carriage of the applications from the onset, stated that owners of the subject property and Block 79 had worked together to achieve an integrated design appropriate for future development purposes.

## Romandale Farms Ltd. v. Markham (City)

39 Finally, the Tribunal heard from Yvonne Yeung, a planner with the urban design section of the City's administration. Ms. Yeung was qualified as an expert witness.

40 The planner supported the provision of three storey townhouses which the ZB and the guidelines allow particularly at intersections. She commented the review process administered by the City was interactive and collaborative particularly between her department and the Control Architect who is hired by the Applicant which was in this case Mr. Hannay as noted. She added that there is no requirement or provision for the insertion of Romandale into the review process further asserting that the subject property lies within Area 5 and not Area 1. She was also of the view that the proposed subdivision design was very protective of the existing hedgerow situated along the northern boundary of the subject property.

## FINDINGS

41 The Order pursuant to the findings of the Tribunal dismisses the appeal for various considerations.

42 Throughout the hearing, witnesses were examined and cross-examined by the Appellant's counsel asking whether consistency with the guidelines implied a parallel and perhaps equal status with the test for consistency with the policies of the PPS. In the main the witnesses testifying on behalf of the Appellant were of the view that the guidelines required a more rigorous and elevated adherence than the witnesses for the Applicant. However, the Tribunal does not agree with that contention that guidelines share an enforcement/compliance status co-equal with the statutory instruments enforced under the *Planning Act* which govern the applications before the Tribunal. If they did, the *Planning Act*, would no doubt, impose the same rigorous approval process applicable to subdivisions and ZBA's subjecting each to Council approval and public notification and other requirements, rather than to an administrative review process carried out by municipal staff.

43 Guidelines serve to inform and they provide additional precision to statutory policies which because of their more generalized nature may omit more detailed instruction. The guidelines submitted in evidence fully subscribe to that classification being instructive and helpful, but the Tribunal does not elevate their status for those aforementioned considerations and in further consideration of the abundance of case law supporting that finding.

44 That being said, the Tribunal found that the witnesses testifying on behalf of the Applicant and the City were fully cognizant of the guidelines and implemented same in the direction of compliance. Furthermore those guidelines cited previously in this Decision do anticipate variation in architectural details, and do permit three storey townhomes, flanking built-forms and garages which are both serviced by laneways or direct driveway access to the roadway. The visual evidence of Exhibit 16 was very telling in this regard, and illustrated these variations (including glass balconies) that had been approved and built within Phase 1 of Cathedraltown in presumed accordance with the guidelines and indeed the City's OP which supports a "diversity" of styles as long as they are complementary.

45 Although many hours of testimony were heard from Mr. Stewart and Mr. Hannay regarding preferred architectural details and whether or not Area 1 or Area 5 was the correct designation regarding guideline implementation, the Addendum nevertheless implemented Georgian/Regency styles which is the dominant architectural vernacular for Phase 1 as a whole despite Area 5's reduced insistence on that style

46 Finally, the Tribunal found that instruments that had been appealed were not critiqued or opposed in any material way that would suggest adverse impact or functional impairment by virtue of their layout and the inter-relationship of that layout with exterior roadways and land uses. The range of amendments proposed by the ZBA are minor in the Tribunal's view and the design prescribed by the proposed draft plan is serviceable and protective of the hedgerow along the northern boundary of the subject property which was an important goal of the City.

47 In consideration of the above, the appeals are dismissed and the applications before the Tribunal are approved in accordance with the Order which follows.

**ORDER**

**48** The Tribunal orders that the appeals are dismissed and the zoning by-law amendment and draft plan of subdivision are approved as described in Attachment 1, including draft plan conditions for the lands owned by 2473330 Ontario Ltd. and Pantheon Group Inc. in the City of Markham.

RICHARD JONES  
MEMBER

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End of Document

## Qureshi v. Mississauga (City)

Ontario Conservation Review Board Decisions

Ontario Conservation Review Board

Mississauga, Ontario

Panel: Su Murdoch, Vice-Chair; Daniel Nelson, Member; Laurie Smith, Member

Heard: July 27-29, 2015.

Report: November 12, 2015.

CRB Case No.: CRB1407

### **2015 LNONCRB 5**

PROCEEDING COMMENCED UNDER subsection 29(5) of the Ontario Heritage Act, R.S.O. 1990, c. O.18, as amended Owners/Objector: Latiq Qureshi and Fatima Qureshi Subject: Notice of Intention to Designate Property Address: 2625 Hammond Road Legal Description: Part of Lot 2, Range 1, South Dundas Street, Racey Indian Tract, Township of Toronto, designated as Part 3, Plan 43R-3594 Municipality: City of Mississauga

(93 paras.)

### **Case Summary**

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For the exhibit list, agreed statement of facts in this matter, please see the Appendix.

### **Appearances**

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City of Mississauga: Bruce C. Ketcheson, counsel and Raj Kehar, counsel.

Latiq Qureshi and Fatima Qureshi: Scott Snider, counsel and Anna Toumanians, counsel.

### **Participant**

Charlene Haupt: Self-represented.

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**REPORT OF THE BOARD DELIVERED BY**  
**SU MURDOCH, DANIEL NELSON AND LAURIE**  
**SMITH**

### **SUMMARY OF REVIEW BOARD FINDINGS**

**1** The Conservation Review Board ("Review Board") considered the evidence of the Parties and for the reasons set out in this Report recommends that the City of Mississauga ("City") not proceed with a by-law under s. 29(14) of the *Ontario Heritage Act* ("Act") to designate the entirety of the 2.15 acres of Part 3, Plan 43R-3594, municipally known as 2625 Hammond Road.

**2** The Review Board also recommends that the City not repeal By-law 224-84, which protects the southern portion of Part 3, Plan 43R-3594, but that the City weigh the advantages of amending By-law 224-84 to clarify or correct the statement explaining the property's cultural heritage value or interest and the description of the property's heritage

## Qureshi v. Mississauga (City)

attributes. The purpose of any such amendment would be to provide clarity for the long term protection of that portion of the property as a cultural heritage resource.

**OVERVIEW**

**3** The property known municipally as 2625 Hammond Road in the City of Mississauga (Part of Lot 2, Range 1, South Dundas Street, Racey Indian Tract, Township of Toronto, described as Part 3, Plan 43R-3594) is a 2.15-acre parcel of land just south of Dundas Street West and fronting on the east side of Hammond Road, with an east (rear) boundary of King Forrest Drive.

**4** This 2.15-acre parcel is the remnant of the hundred acre farmstead formerly owned by Oliver Hammond (1812-1874) and his son Thomas (1841-1892). The Hammonds were successful merchants and farmers in the Erindale (formerly Hammondville) village area. Oliver inherited the property in 1858 and the two Hammonds are presumed to have erected the existing brick dwelling about 1866. The family was associated with the property until 1932.

**5** In 1984, the City, acting under s. 29 of the Act, designated the southern portion of Part 3, Plan 43R-3594, describing it in Schedule B of designating By-law 224-84 as Part 1, Plan 43R-11502. This southern portion contains the c.1866 dwelling, part of the traditional laneway, a former root cellar rebuilt as a modern guest house, late 20th century outbuildings, contemporary landscaping, a circular drive, and other structures.

**6** In September 2014, the City issued a Notice of Intention to Designate ("NOID") (Schedule 1) under s. 29(3) to protect what is being described as the "entirety" of Part 3, Plan 43R-3594, as a property of cultural heritage value or interest as prescribed by Ontario Regulation 9/06: Criteria for Determining Cultural Heritage Value or Interest ("[O. Reg. 9/06](#)").

**7** On October 16, 2014, one of the two property owners, Latiq Qureshi, objected to the NOID. The other property owner, Fatima Qureshi, did not file a written objection but appointed the same legal counsel as Latiq Qureshi to be her Representative.

**8** Given that the southern portion of Part 3, Plan 43R-3594, is already designated, the NOID was considered by the Review Board as an intention to protect the northern portion of the 2.15 acres. The northern portion contains an open watercourse (a tributary of Loyalist Creek, also known as Governor's Creek, which enters the Credit River to the east) and treed valley lands. There are no historic buildings or structures on this northern part.

**9** The City's actual intent is to repeal By-law 224-84, replacing it with one designating by-law protecting the entire 2.15-acre parcel of land.

**10** This proceeding arises from an objection under s. 29(5) to the NOID. Although it does not arise from an application to amend a designating by-law under s. 30.1(1), there was prepared testimony from both Parties about amending the content of By-law 224-84 which protects the southern portion of the property.

**11** At the close of the hearing, direction was sought from the Parties on whether they anticipated the Review Board extending its consideration of the evidence to the amending of By-law 224-84. In their written closing arguments and reply received on September 4, 2015, the Parties submitted that the Review Board's jurisdiction under s. 29(12) is broad enough to apply the evidence heard to a consideration of the amending of By-law 224-84. Accordingly, the Review Board also gives consideration in this Report to amending that by-law.

**12** On July 27, 2015, the Review Board panel members, the City's legal counsel, the Owners/Objector and their legal counsel, and the three witnesses (David Cuming, Wendy Shearer, and Amy Choi) conducted a site visit of the property. The hearing commenced on the same day and closed on July 29, 2015. Final written submissions were filed by the parties on September 4, 2015.

**DETERMINATION OF CULTURAL HERITAGE VALUE OR INTEREST**

## RELEVANT LEGISLATION

### 13 *Ontario Heritage Act, Designation of Properties by Municipalities*

#### Definitions

1. In this Act,

"heritage attributes" means, in relation to real property, and to the buildings and structures on the real property, the attributes of the property, buildings and structures that contribute to their cultural heritage value or interest:

#### Designation by municipal by-law

29.(1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,

- (a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and
- (b) the designation is made in accordance with the process set out in this section.

29.(14) After considering the report under subsection (12), the council, without a further hearing,

- (a) shall,
  - (i) pass a by-law designating the property,
  - (ii) cause a copy of the by-law, together with a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property,
    - (A) to be served on the owner of the property and on the Trust, and
    - (B) to be registered against the property affected in the proper land registry office, and
  - (iii) publish notice of the by-law in a newspaper having general circulation in the municipality; or
- (b) shall withdraw the notice of intention to designate the property by causing a notice of withdrawal,
  - (i) to be served on the owner of the property and on the Trust, and
  - (ii) to be published in a newspaper having general circulation in the municipality.

### **Ontario Regulation 9/06 -- Criteria for Determining Cultural Heritage Value or Interest**

1.(1) The criteria set out in subsection (2) are prescribed for the purposes of clause 29(1)(a) of the Act.

1.(2) A property may be designated under section 29 of the Act if it meets one or more of the following criteria for determining whether it is of cultural heritage value or interest:

#### **Design or Physical value**

- 1. The property has design value or physical value because it,
  - i. is a rare, unique, representative or early example of a style, type, expression, material or construction method,
  - ii. displays a high degree of craftsmanship or artistic merit, or
  - iii. demonstrates a high degree of technical or scientific achievement.

#### **Historical or Associative Value**

- 2. The property has historical value or associative value because it,
  - i. has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community,

## Qureshi v. Mississauga (City)

- ii. yields, or has the potential to yield, information that contributes to an understanding of a community or culture, or
- iii. demonstrates or reflects the work or ideas of an architect, artist, builder, designer or theorist who is significant to a community.

**Contextual Value**

- 3. The property has contextual value because it,
  - i. is important in defining, maintaining or supporting the character of an area,
  - ii. is physically, functionally, visually or historically linked to its surroundings, or
  - iii. is a landmark.

**BACKGROUND**

**14** In 1977, the City passed By-law 476-77 (Exhibit 4, page 3) to designate the entire 2.15 acres of Part 3, Plan 43R-3594, for "architectural and historic value or interest" reasons. This by-law describes the c.1866 former Hammond dwelling as the sole heritage attribute.

**15** In 1984, the City repealed By-law 476-77 and passed By-law 224-84 (Exhibit 4, page 13) to designate only the southern portion of the property for its "architectural value and historical interest." The parcel protected by this by-law contains the c.1866 dwelling, part of the laneway, other structures, and landscape features.

**16** As with many designating by-laws passed prior to the amendments to the Act in 2005, the statement of the "reasons for designation" (known after 2005 as the "statement of cultural heritage value or interest and description of heritage attributes") in By-law 224-84 is brief. Schedule A of By-law 224-84 provides:

The Hammond House is listed on the Heritage Inventory and is recommended for designation for its architectural and contextual importance. Built by Thomas Hammond, c.1866, the house is a fine example of the type of farmhouse recommended by the Canadian Journal, *The Canada Farmer* in the mid-1860s. The building achieves distinction through the use of a variety of stylistic details. Architectural features of importance include the central projecting bay terminating at the roof level in a gable, Italianate brackets, stone quoining and paired round headed windows in the gable ends of the rear addition. Contextually, the house is a recognizable reminder of 19th [century] settlement in Erindale and Mississauga.

**17** In August 2014, the City's Culture Division prepared a Cultural Heritage Assessment (Exhibit 4, page 116) which concludes that By-law 224-84 fails to recognize that the "natural features of the site are intrinsically linked to this history [of the property]." These "natural" features are said to contribute to the cultural value or interest of the whole 2.15 acres as a 19th century farmstead, particularly that of the Hammond family. As such, the Cultural Heritage Assessment recommends that the property would be better served by a new by-law that includes the northern portion of Part 3, Plan 43R-3594, which contains a watercourse and treed valley lands, as well as other "natural" features throughout the 2.15 acres. To achieve this, the City needed to pass a new designating by-law and repeal By-law 224-84. To this end, in September 2014, the City issued the NOID.

**18** On July 27, 2015, the Review Board commenced a hearing under s. 29(8). The scope of inquiry was to hear evidence sufficient to report to City Council whether in the opinion of the Review Board, the northern portion of the 2.15 acres should be included in a designation under s. 29 for its cultural heritage value or interest as prescribed by [O. Reg. 9/06](#). The testimony before the Review Board was intertwined with proposed amendments to By-law 224-84. The Review Board thus considered the evidence in the context of this twofold agenda -- the northern lands being proposed for inclusion in a designating by-law and the potential need to amend By-law 224-84.

**19** The City called one witness, the Owners/Objector called two witnesses, and one participant (a member of the public) gave a statement. A list of exhibits filed at the hearing is attached as Schedule 3 of this Report.



**WITNESSES IN ORDER OF APPEARANCE**

**20** Wendy Shearer was called by the City. Ms. Shearer was admitted as an expert witness. She is a landscape architect and cultural heritage landscape specialist with extensive experience in "evaluating and planning for the conservation of heritage properties." She is a member of the College of Fellows of the Canadian Society of Landscape Architects and the recipient of a Lifetime Achievement Award from the Canadian Association of Heritage Professionals. The breadth of her work is outlined in her Witness Statement (Exhibit 3). Of particular note is that she is knowledgeable in "19th century settlement patterns and agricultural practices that are part of the historical development of southern Ontario."

**21** Amy Choi was called by the Owners/Objector. Ms. Choi was admitted as an expert in the identification and inventorying of tree species. She has a B.Sc. in Environmental Science and a M.Sc. in Forestry.

**22** David J. Cuming was called by the Owners/Objector. Mr. Cuming was admitted as an expert in "cultural heritage resource planning, design, conservation and management." He holds professional memberships with the Canadian Institute of Planners and the Royal Town Planning Institute. He is a Registered Professional Planner in Ontario and a member of the Canadian Association of Heritage Professionals.

**23** The Review Board reminded the witnesses that by signing the Acknowledgement of the Duty of an Expert Witness they agreed to give evidence that is "fair, objective, and non-partisan."

**PARTICIPANT**

**24** Charlene Haupt has been a resident of the Sherwood Forest subdivision since 1976 and is a member of the Sherwood Forest Residents' Association. She is aware of the Hammond House as a heritage property in the vicinity. Her statement advocated for protecting the property and using educational tools to interpret its origins as a mid 19th century farmstead.

**CASE FOR THE MUNICIPALITY****Witness Wendy Shearer**

**25** In February 2015, Ms. Shearer was retained by the City to provide her "professional opinion on the merits of the designation of the entire property at 2625 Hammond Road." She was not involved in drafting the current NOID. She categorizes the 2.15 acres of Part 3, Plan 43R-3594, as a cultural heritage landscape.

**26** As a heritage landscape specialist, Ms. Shearer explained her approach to the assessment of a cultural heritage landscape as a process of "seeking physical, on site, evidence of past activity." The challenge is always in identifying and describing what features of a property (heritage attributes) support the cultural heritage value or interest of a cultural heritage landscape, and doing so in a way that can "sustain and retain a living heritage landscape." She explained that heritage conservation policy and practice have evolved since By-law 224-84 was passed in 1984, to now embrace "the cultural landscape setting and context of the property . . . as contributors to a property's heritage significance."

**27** The methodology undertaken by Ms. Shearer for evaluating the property as what she terms "an agricultural heritage landscape" involved applying accepted definitions, policies, and guidelines for analysis. She undertook a site visit on June 8, 2015, reviewed previous designating by-laws and related documents held by the City, and examined mapping and aerial photographs. She did not conduct any independent historical research, instead relying on the Cultural Heritage Assessment prepared by the City's Culture Division in August 2014. When preparing her testimony, she reviewed Ms. Choi's July 2015 report and accompanying Updated Tree Inventory and Preservation Plan, and Mr. Cuming's Witness Statement.

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**28** Ms. Shearer tested her findings against the definition of Cultural Heritage Landscape contained in the Provincial Policy Statement 2014 (the "PPS"). She cited PPS policy 2.6 *Cultural Heritage and Archaeology*, which directs that "significant built heritage resources and cultural heritage landscapes shall be conserved." She also considered the direction provided in the Ministry of Tourism, Culture and Sport's *Heritage Tool-Kit*, and the Parks Canada publication, *Standards and Guidelines for the Conservation of Historic Places in Canada (Second Edition)*.

**29** Ms. Shearer also applied the criteria used in *Cultural Landscape Inventory: City of Mississauga*, compiled in 2005 by The Landplan Collaborative Ltd. (Exhibit 12). The property is not listed in this inventory. In Ms. Shearer's opinion, this omission relates to the ongoing nature of the inventory compilation process, and not any evaluation by Landplan resulting in the rejection of the property as a cultural landscape.

**30** The final step in Ms. Shearer's evaluation was to organize her findings within the three overall categories, but not the subcategories, of [O. Reg. 9/06](#).

**31** At this point in the proceeding, the Review Board clarified that the definitions and provisions of the Act and its Regulations are the authority for this scope of inquiry. Unlike the PPS, the Act does not define or reference the term "cultural heritage landscape." Similarly, the *Heritage Tool-Kit* and Parks Canada *Standards and Guidelines*, although useful evaluative tools, have no legislative authority. The Review Board does view the use of these definitions, policies, and guidelines by a consultant when formulating a recommendation, as an indicator of due diligence.

**32** It is Ms. Shearer's position that the geographic boundary of By-law 224-84 arbitrarily divides one cultural heritage resource, the 19th century Hammond farmstead, into two parts (separating the protected southern part from the unprotected northern part of Part 3, Plan 43R-3594). Also, the end section of the laneway near Hammond Road is omitted, whereas, the entire length of the laneway would be an appropriate boundary that is "easily recognizable." The by-law also omits the natural features of the land that, in her opinion, have attained cultural (human) meaning. She agrees with the City's attempt to reconstitute this resource into one landscape. This is an "appropriate way to consider a complex landscape such as this."

**33** In reviewing the content of Schedule A to By-law 224-84, Ms. Shearer indicated she has "no concern" about the "architectural wording," but she concurs with Mr. Cuming on his proposed "improvements" to the description of the former Hammond farmhouse as provided in Exhibit 5, page 12, paragraph 39.

**34** Ms. Shearer's overall reading of Schedule A is that the intent in 1984 was to identify the property as a remnant farmscape. One indicator is the use of the word "farmhouse" rather than "house" as a distinction that this is being protected as a farm setting. She interprets the wording that the property is a "recognizable reminder of 19th century settlement" as meaning that the property, although now only a remnant of the hundred acres, still embodies elements of the traditional settlement pattern and farm layout of early Ontario.

**35** According to Ms. Shearer, the layout of this "agricultural cultural landscape" can be traced to purposeful and conscious decisions made at the outset by the Hammonds (and possibly the earlier owners, the Carpenters) when establishing their farm. In her opinion, the integration of the natural topography of the hundred acres into the farm layout is legible in the 2.15 acres.

**36** For example, Ms. Shearer asserts that the highest elevation was chosen for the location of the dwelling to ensure its visual prominence within the farm and within the area. This highest elevation, combined with the deliberate orientation, deep setback, and near proximity of the dwelling to Hammond Road, achieved a "visual link from the public realm with the setting of the house." As demonstrated during the Review Board site visit, the primary historic view of the dwelling is still open at two locations: an oblique view southeast from the terminus of the driveway at Hammond Road; and at the southwest corner of the lot where an opening in the vegetation frames the west facade.

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**37** Ms. Shearer considers the proximity of the dwelling to the watercourse and treed valley lands to be another example of purposeful design and intent. She credits the Hammonds (and Carpenters) with choosing to integrate, not eradicate, this natural feature. Clustering the buildings beside a watercourse minimized the loss of arable land. Locating the farmhouse anywhere else would not have been an "efficient use of cultivated lands." In Ms. Shearer's opinion, the fact that the treed valley lands and watercourse were "purposively left" to naturalize was a human decision, and one that can be assigned cultural heritage value.

**38** To Ms. Shearer, the physical evidence of this "purposeful intent" is the contrast edge between the natural valley lands and the manicured landscape of the house yard. "The stream informed the location of the house" and the "edge" between the natural corridor and human landscape took on cultural/human value. "Together they tell an important story."

**39** Testimony was heard from both Parties that this hundred acres was last cultivated in 1967. The east and south fields and the orchards to the north were subsequently severed and redeveloped for residential and commercial uses. (Phase One of the Sherwood Forest housing area on the former Hammond field acreage was developed in November 1975.) A former root cellar of unknown date, northeast of the dwelling, is now the foundation of a 20th century guest cottage. All of the core farm function buildings (barns, driveshed, etc.) and related infrastructure have been removed. By 2014, Hammond Road no longer intersected with Dundas Street West. There are modern outbuildings and recent landscaping on the site.

**40** Ms. Shearer maintains that in spite of these changes and losses over time, it is still possible to distinguish elements of the traditional layout of this farmstead within the remnant 2.15 acres. To demonstrate this, an artistic rendering of the "late Oliver Hammond, Esq., Credit, Ont," farmstead published in the *1877 Illustrated Historical Atlas of Peel County*, was entered as Exhibit 4, page 207 (Schedule 2). Ms. Shearer and Mr. Cuming both describe this depiction as "idealized." Using the depiction, Ms. Shearer demonstrated that many of the features in 1877 are still visible on site. The following is a summary of the features she identified:

- \* the c.1866 dwelling (now with modifications) set perpendicular to the road;
- \* the generous setback, framing the view of the west front façade from Hammond Road;
- \* the curved alignment of the driveway running east from the road, past the house, and to the barns and northeast fields (the barns and fields are now gone);
- \* the creek meandering through a corridor of randomly spaced trees;
- \* the trees (now stumps) as indicators of the traditional tree planting practice along a laneway, and of the original grade level;
- \* a collection of trees first evident in 1877, deliberately retained on the property and renewed over time;
- \* the spatial organization of the lot evident in 1877 continues to exhibit the sense of scale of the property: tall elements are on the north side of the site, and there are elements around the property line, open spaces, and an architectural component; and
- \* the east and south areas around the dwelling have new landscaping but are in keeping with the traditional planting patterns evident in the 1877 depiction; these continue to "respect the 19th century framework, with new materials."

**41** Approaching this property as an "agricultural heritage landscape," Ms. Shearer had previously applied her findings against the statement of cultural heritage value or interest and the description of heritage attributes proposed in the City's August 2014 Cultural Heritage Assessment (Exhibit 4, pages 145-146). (This statement of cultural heritage value or interest and the description of heritage attributes were not transferred directly to the NOID and only appear in that format in the Cultural Heritage Assessment.) She then compiled a list of "recommendations for revisions to the wording of the "draft designation statement" (Exhibit 3, pages 17-18). From this process, she

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assembled the following list of "key attributes" as a supplement to the list of heritage attributes identified in the Cultural Heritage Assessment:

**Design or Physical Value**

Add the following items to the Key attributes that reflect the property's physical/design value:

- \* the outbuilding at the rear side yard, its shape and form and materials including the stone foundation of the lower level set into the sloped stream bank and accessed [by] a door on the north side;
- \* the relationship and proximity of the farmhouse to the stream corridor;
- \* the contrast between the naturalized stream corridor and the maintained and manicured landscape surrounding the residence;
- \* the views to [and from] [stricken by Ms. Shearer during testimony] the house [towards] [from] Hammond Road, open at the driveway and the southwest corner framed by vegetation; [Editor's note: Text in brackets is struck out in the original]
- \* the higher elevation of the house site compared to the adjacent streets and lots;
- \* the gentle grades on the south portion of the site;
- \* the steeper grades along the stream corridor;
- \* the access, curve and location of the driveway on the north side of the residence linking it with Hammond Road;
- \* the species variety, quantity, sizes, and ages of trees.

**Historical or Associative Value**

Key attributes that reflect the historical/associative value:

- \* its connection to Erindale village, St. Peter's Anglican Church and the area once known a Hammondsville;
- \* its association with the prominent Hammond family who were successful farmers on the property in the 19th century;
- \* the recognition of the Hammond legacy in the naming of Hammond Road in their honour.

**Contextual Value**

Key attributes that reflect the property's contextual value:

- \* it is a landmark distinct from the surrounding land pattern in its layout and its varied vegetation collection;
- \* its naturalized stream corridor visible at the surface;
- \* its distinctive architecture and higher elevation compared to the surrounding residential development.

**CASE FOR THE OWNERS/OBJECTOR****Witness Amy Choi**

**42** Ms. Choi prefaced her testimony with the statement that her expertise is as an arborist and not in the evaluation of cultural heritage landscapes. Her report of July 10, 2015, and accompanying charts, were prepared through Kuntz Forestry Consulting Inc. on behalf of the Property owners (Exhibit 7, Tab 3, A and B). Her methodology in updating the 2010 tree report for the Property involved a sampling of canopy trees in the naturalized area (north watercourse and valley lands), measuring these at a DBH of 1.4 metres above ground.

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**43** Ms. Choi determined that the average age of the trees is 85 years, including some over 100 years. Not including the latter, the average age is 58 years. The oldest trees are on the southern bank of the creek, where the majority of trees are 20 to 65 years old. She characterized this wooded feature as lacking in shrubs but with an understory and tree regeneration in process. The invasive Norway maple and spruce are the primary regenerators.

**44** The southern part of the property has ten trees over 60 years, including an open grown tree (Tree 620).

**45** In Ms. Choi's opinion, nothing in the creek corridor has been deliberately planted, other than orchard trees and possibly a Black Walnut for domestic nut harvest. No surviving orchard species were found. If the dead ash trees (destroyed recently by Emerald Ash Borer) are included, the species composition on the property is common in Southern Ontario.

**46** Ms. Choi investigated the surrounding area and found other locations where the watercourse is not channelized, notably the above ground section between Will Scarlett Drive and Lincoln Green. There are numerous other trees in the area, many of which have regenerated from the woodlot on the south part of the original hundred-acre Hammond farm. Their existence confirms that the trees on the subject property are not unique. She could not confirm which, if any, of the trees depicted in 1877 are still on the property.

**Witness David Cuming**

**47** Mr. Cuming was retained by the Owners/Objector to evaluate the City's NOID. He visited the site and reviewed all of the documents and mapping available in City files and elsewhere. He peer reviewed the August 2014 Cultural Heritage Assessment prepared by the City's Culture Division. His objective was to consider the development of the acreage over time and evaluate the findings to determine whether there is sufficient cultural heritage value or interest remaining in the 2.15 acres, notably the northern portion, to warrant protection.

**48** Mr. Cuming's opening statement was that all of the design or physical values, and historical or associative values of the property are vested in the c.1866 former Hammond dwelling as the principal heritage attribute of this property. He generally supports By-law 224-84 as a "sound mechanism for the management of a property with a dwelling as the main feature." Although he would not press for By-law 224-84 to be amended, he recognizes that there is merit in updating this older by-law to meet the provisions of the 2005 amendments to the Act.

**49** Mr. Cuming questions the credibility of the methodology and analysis undertaken by the City. Of particular concern to him is that the City did not formulate an overall statement of cultural heritage value or interest for the property, from which would flow the identification and description of the heritage attributes that support that overall value or interest. In this regard, he finds the NOID deficient. This is the basis for paragraphs 9(a) and 9(b) in the letter of objection dated October 16, 2014, which allege that the NOID is deficient in providing the required statement of cultural heritage value and description of heritage attributes. (The Review Board considers this matter in Schedule 4 of this Report.)

**50** Mr. Cuming disagrees with the City's findings and Ms. Shearer's evidence regarding the identification of the property as a representative example of a 19th century farmstead.

**51** The testimony of Mr. Cuming, as with Ms. Shearer, revolved around finding physical evidence within the 2.15 acres of the purposeful intent of the Hammonds (and the Carpenters as the earlier owners) in laying out this farm. Mr. Cuming sought evidence that illustrates cultural use intent, seeing this as distinct from features and relationships that are simply a product of the topography of the acreage.

**52** To this end, Mr. Cuming noted quotations in the City's Cultural Heritage Assessment from Thomas F. McIlwraith's publication, Looking for Old Ontario. In reference to a farmhouse, McIlwraith states that the "location in the middle of the farm gave best access to the fields, was within earshot of the dinner bell, and made driving the cows home for milking easy regardless of which field was in pasture." A central location allowed the proud owner

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"to gaze on one's domain from the house." "One writer rated view as important as water supply and more so than drainage or wind protection." Mr. Cuming pointed out that the Hammond farmhouse is not centrally located in the hundred acres. He does agree that its location on the highest elevation is purposeful as it gives prominence to the dwelling.

**53** Mr. Cuming noted how the City uses Mcllwraith to corroborate its contention that the location of the Hammond farmhouse near the watercourse served the practical purpose of providing "the family with fresh flowing water." Mcllwraith states: "Water has been crucial in the location of farm buildings. The earliest settlers relied on surface streams -- 'living water.'" The City argues that "what is now a scenic land form today, with important watershed uses, was a critical part of the lives of the pioneering Carpenter and Hammond families" for "providing water for livestock, washing clothes, and basic irrigation."

**54** Quoting the balance of the "living water" passage in Looking for Old Ontario, Mr. Cuming contends that the City has misrepresented Mcllwraith. The balance of the quote excerpted by the City explains that groundwater was preferable over open watercourses and "an increasing number of wells were dug from the 1860s onward." Mr. Cuming interprets Mcllwraith to be saying that it was the location of the dug well, not the open watercourse, that became the principal factor in locating the buildings on a farm. There is a dug well on the south side of the Hammond dwelling.

**55** If the intent of the Hammonds was to embrace the scenic value and enjoyment of the watercourse, Mr. Cuming queries why there are no steps to the stream, no terracing of the bank, and no viewing areas depicted in 1877 or existing today. The water was never dammed to create a pond. The dwelling does not have a double front, one oriented to Hammond Road, the other north to frame a picturesque view of the stream. The age of the former root cellar near the south bank, which now forms the stone foundation of a guest house, is unknown and not depicted in 1877.

**56** Mr. Cuming contends that any orientation of the dwelling to the north is not to the watercourse, but to the laneway flanking the south side of the watercourse and the north side of the dwelling. This lane allowed the family to move between Hammond Road to the west and the core farm buildings that were formerly located to the east of the dwelling. The historic row of planted specimen trees (depicted in 1877 and now reduced to stumps) along part of the north side of the laneway was likely a visual encumbrance to any appreciation of the stream from the dwelling.

**57** Mr. Cuming does concur that the "current entrance and asphalt driveway appear to generally follow the route of the 1877 driveway." The 1877 atlas depicts the laneway terminating farther west and with a gateway within a picket fence. A photograph identified as showing the Hammond Property in c.1870 (Figure 19, Cultural Heritage Assessment, Exhibit 4, page 138) shows a "grassed and rutted track" on the south side of the dwelling. This image appears to be reversed and there is debate on whether this is a depiction of the subject dwelling or of another location.

**58** Mr. Cuming disagrees with Ms. Shearer that cultural heritage value can be assigned to the "contrast between the naturalized stream corridor and the maintained and manicured landscape surrounding the residence." This contrast is simply a circumstance that the landscaping around the dwelling site is manicured and the valley lands are not. Similarly, "gentle grades" and "steeper grades" are a natural topography, not a cultural heritage element.

**59** Mr. Cuming does not accept that "species variety, quantity, sizes, and ages of trees" within the valley lands can or should be protected as heritage attributes. In his opinion, these are an ever changing product of a natural process of regeneration and not a planned landscape.

**60** In the Cultural Heritage Assessment (Exhibit 4, page 124), the City assigns value to this "remnant of Loyalist Creek" as "the last remaining unchannelized portion of this historic creek through Erindale village. The remaining portions have been either buried or channelized." Mr. Cuming gave two examples of sections of open watercourses in the vicinity. This was substantiated by mapping and also identified in Ms. Choi's evidence.

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**61** To Mr. Cuming, a cultural heritage landscape is a type of resource where the whole is greater than the sum of its parts. In his Witness Statement (Exhibit 5, page 14), he delineates the features evident in the 1877 depiction that:

are specifically and permanently lost:

- a. Carpenter Farm house
- b. Drive shed
- c. Barn complex and fencing
- d. Front fence and gate
- e. Front yard plantings
- f. Orchards
- g. Access and driveway over creek
- h. Treelined driveway
- i. Southern woodlot
- j. Field system and boundary fences
- k. Picket fence and boundary hedge

**62** He continues that:

Notwithstanding the contemporary residential landscape substantially remodelled since 1990, new additions or alterations to the two acre parcel or at the perimeter include:

- a. a substantial, high retaining wall to the east, adjacent to King Forrest Drive
- b. a substantial concrete embankment on the west adjacent to Hammond Road
- c. a concrete culvert and gabions to the sets
- d. a concrete and metal grate, screen culvert to the east
- e. chain link fence and gate to the east
- f. a timber fence along the north boundary
- g. a timber fence along the south boundary
- h. a substantial tree-house. (Exhibit 5, page 14),

**63** In conclusion, Mr. Cuming states that all alterations to the dwelling since it was first protected under the Act in 1977 have been approved by the City. The result is:

The former farm house now strictly serves a contemporary twenty-first century residential function and has no functions related to farming operations. (Exhibit 5, page 10)

The only built feature that remains from the one-hundred (100) acre farmscape is the former Hammond Farmhouse. (Exhibit 5, page 14)

**64** In addition, Mr. Cuming concludes that:

...the substantial loss of 98 acres of former farm land from the 100 acre original holding is a critical and detrimental loss that compromises the integrity of the former extensive cultural heritage environment. The loss of farm land together with the loss of many typical farm related features as described previously are impossible to be physically recalled in the remaining two acre parcel. (Exhibit 5, page 15)

## SUMMARY OF THE ISSUES

**65** The issues raised in this proceeding relate to: whether there are cultural heritage value or interest reasons to protect the entirety of Part 3, Plan 43R-3594, using a new by-law; the scope of By-law 224-84; and whether there is merit in amending By-law 224-84. The following is the Review Board's summary of the evidence heard.

### **Statement of Cultural Heritage Value or Interest**

**66** There is no dispute among the Parties that the southern portion of Part 3, Plan 43R-3594, is of cultural heritage value or interest as prescribed by [O. Reg. 9/06](#). This southern portion is currently protected by By-law 224-84. The by-law does not contain a statement of cultural heritage value or interest that has been prescribed by the Act for new designations since 2005. If By-law 224-84 is to be amended, the issue will be in agreeing to the nature and extent of that cultural heritage value or interest under [O. Reg. 9/06](#). The City contention that the property has value for being representative of a 19th century farmstead, is not accepted by the Owners/Objector.

### **Hammond Dwelling as a Heritage Attribute**

**67** By-law 224-84 protects the c.1866 former Hammond dwelling as the sole heritage attribute of the designated property. The Parties agree that the description of the dwelling as a heritage attribute could be improved by Mr. Cuming's proposed wording (Exhibit 5, page 12, paragraph 39). It is acknowledged that to comply with the Act, any amendment to By-law 224-84 must include a statement of cultural heritage value or interest. The description of the c.1866 dwelling as a heritage attribute must be in the context of how it contributes to that stated value or interest. As such, the final wording of the statement of cultural heritage value or interest may result in the need to adjust the description contained in Mr. Cuming's proposed wording.

### **Natural Features as Heritage Attributes**

**68** The City contends that certain "natural" features of the acreage (grades, elevations) attained human/cultural meaning by being purposefully incorporated by the Carpenters and/or Hammonds into the design of the farm layout. The Owners/Objector disagree and consider all of the design or physical, and historical or associative values of the property to be vested in the dwelling as the sole heritage attribute. The parties agree that the choice of the highest elevation for the siting of the dwelling is culturally significant.

### **The Watercourse and Treed Valley Lands as Heritage Attributes**

**69** The City proposes to protect the watercourse and treed valley lands in the northern portion of the property by passing a new by-law and repealing By-law 224-84. As with other topographical features, the City contends that these features attained human/cultural value when they were incorporated into the design of the farmstead by the Carpenters and Hammonds, rather than being eradicated. The Owners/Objector do not agree that the watercourse and treed valley lands hold any cultural heritage value or interest, arguing these are natural, not cultural, features.

### **Trees as Heritage Attributes**

**70** The City considers the collective of "species variety, quantity, sizes, and ages of trees" to be more than a product of natural regeneration. Its retention within the historic farm layout is seen by the City as a conscious decision. The Owners/Objector disagree, arguing that these are natural features that have evolved without human intervention and cannot be assigned cultural value.

### **Former Root Cellar as a Heritage Attribute**

**71** There is agreement that an outbuilding identified as a former root cellar, which now forms the foundation of a 20th century guest house, could be identified and described as a heritage attribute. This is within the boundary of By-law 224-84 but is not described.



### **Driveway/Laneway as a Heritage Attribute**

**72** There is agreement that the driveway follows the traditional path of the laneway as depicted in 1877 and that this could be described as a heritage attribute. The western stretch of the laneway and the gateway and fence at Hammond Road depicted in 1877 no longer exist. The boundary of By-law 224-84 does not include the (modern) west terminus of the driveway at Hammond Road. The City advocates that the full surviving length of the laneway be protected. The Owners/Objector consider the partial length already protected to be sufficient, especially given that the 1877 west section is gone.

### **Views**

**73** The issue of whether certain views should be identified as heritage attributes was debated during the hearing. These included the view of the dwelling looking southeast from the west terminus of the driveway, and the view of the dwelling from an opening in the vegetation at the southwest corner of the lot. During the hearing, the City struck its reference to "views from the house towards Hammond Road," thereby limiting its concern to "views to the house from Hammond Road."

**74** The Review Board has established in other Hearing Reports that a view identified as a heritage attribute must be within the boundary of the protected property. It has also stated that the Act does not require nor result in any public right of access or viewing any building or structure on a protected property. (CRB1003 Township of King -- Intention to Designate the Property known as 12605 Keele Street ("Shift Property"), 17 October 2012; CRB1109 Township of Muskoka Lakes -- Intention to Designate three Properties known as Township Dock at Lake Muskoka; Portage Landing at Moon River; and Shield Parking Lot, in the Town of Bala, 12 March, 2013)

### **Contextual Landmark Criteria**

**75** The Parties debated the definition of "landmark" and how a landmark is evaluated by [O. Reg. 9/06](#). The City considers the property to be a landmark, the Owners/Objector do not.

### **ANALYSIS**

**76** [O. Reg. 9/06](#) sets out criteria for determining whether a property is of cultural heritage value or interest and provides that a property may be designated if it meets one or more of the criteria. In this case, the City is proposing that the 2.15-acre parcel (Part 3, Plan 43R-3594) meets the criterion for design or physical value under section 1.(2)1.i, because it is a representative example of a style or type known as a 19th century farmstead.

**77** "Heritage attributes" are defined in the Act as "in relation to real property, and to the buildings and structures on the real property, the attributes of the property, buildings and structures that contribute to their cultural heritage value or interest."

**78** The City is proposing that the northern watercourse and treed valley lands, and certain topographical features, are heritage attributes that contribute to the property's cultural heritage value or interest as a representative example of a 19th century farmstead. The Owners/Objector disagree, taking the position that these are naturally occurring aspects and that the loss of typical farm related features has fatally compromised the heritage integrity of the property as a mid 19th century farmstead.

**79** In order for the Review Board to be persuaded of the City's case, it must be satisfied that the evidence supports the following findings:

1. The 2.15-acre property is a representative example of a mid 19th century farmstead, and therefore has design or physical value or interest under section 1. (2)1.i;

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2. Topographical features identified by the City as "key attributes," such as "highest elevation," "gentle grades," and "steeper grades," are heritage attributes that contribute to an understanding of the property as a mid 19th century farmstead, and that these are more than naturally occurring aspects of this particular site;
3. The watercourse and treed valley lands are heritage attributes that were perceived in the mid 19th century as integral components of a farmstead; they contributed to the design of the farmstead and the siting of the farm buildings and fields; they were more than an encumbrance to cultivation;
4. The siting of the dwelling supported access to and enjoyment of the watercourse and treed valley lands, and therefore the siting is a heritage attribute that contributes to the design or physical value of the property;
5. The "species variety, quantity, sizes, and ages of trees" are heritage attributes that were design features of the farmstead; they are more than the product of natural regeneration without human intervention;
6. The boundaries of By-law 224-84, which take in the dwelling but not the northern part of the property, do not include all of the heritage attributes that contribute to the cultural heritage value or interest of the property.

**80** The Review Board finds that the City's characterization of the property as a style or type known as a 19th century farmstead, and its interpretation that natural aspects of the property are heritage attributes that contribute to that style or type, relies too heavily on conjecture. The City did not provide clear evidence of the typical features of the style or type, and the extent to which those features were incorporated in this farmstead by the Carpenter or Hammond families. The Review Board is not persuaded that the natural aspects of the property described by the City are attributes of a style or type known as a 19th century farmstead, or that this site meets the criteria in section 1.(2)1.i.

**81** The Review Board is not persuaded that the siting of the Hammond dwelling close to the watercourse reflects design intentions associated with a typical mid 19th century farmstead. The City's reliance on Mcllwraith's reference to the need for nearby "living water" is contradicted by Mcllwraith's commentary that by the mid 1860s, when the Hammond dwelling was erected, the need for open water had been surpassed by dug wells. In this case, there is a dug well on the south side of the dwelling.

**82** There was no evidence provided of view corridors, steps, terracing, a double front façade, etc. to show that there was a functional or aesthetic relationship between the dwelling and the watercourse. The dwelling was/is oriented to the north flanking laneway; a row of specimen trees planted along a section of this laneway (depicted in 1877 and evidenced as remaining stumps) partially blocked the view of the watercourse.

**83** The siting of the dwelling in an elevated location may be a characteristic supporting the design or physical value of the dwelling. However, the Review Board is not persuaded that the natural topography of the treed valley, including elevation, the "gentle grades" and "steeper grades," is part of the design intentions of a 19th century farmstead, or that it can be considered a heritage attribute of that style or type.

**84** In making these findings, the Review Board does not deny that natural features, and a landscape design that accommodates natural features, can function as heritage attributes that contribute to cultural heritage value or interest. As well, the Review Board is not negating any natural heritage value that may exist in the open watercourse and treed valley lands, and that may warrant protection through policy measures and legislation to address conservation of natural resources that are outside of the Act.

**85** It was demonstrated that many key elements that might have been characteristic of a mid 19th century farmstead, and/or might have contributed to an understanding of the Hammond farmstead in particular, have been removed from this property: the barn complex, the driveshed, fencing, the field system, boundary fences, orchards,

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internal laneways, the entrance feature, and the woodlot. The Review Board finds that the surviving natural features cannot substitute for this loss of heritage integrity.

**86** As the 2.15-acre property no longer contains sufficient farm related features to be considered a representative example of a mid 19th century farmstead, it does not meet the criterion in section 1(2)1.i for design or physical value as a farmstead. The dwelling on the southern portion of the property continues to have cultural heritage value or interest under the criteria in section 1(2)1.i and ii. For this reason, the Review Board agrees with the Owners/Objector that only the southern portion of the acreage warrants continuing protection under the Act.

**87** The City is also proposing that the 2.15-acre property meets the criterion for historical value or associative value under section 1.(2)2.i because it is associated with the Hammond family. The Review Board agrees and finds that the key attribute that contributes to the historical or associative value is the former Hammond dwelling, which is adequately protected by the existing designation on the southern portion of the property.

**88** Further, the City is proposing that the 2.15-acre parcel meets the criterion for contextual value under section 1.(2)3.iii because it is a "landmark." There was some discussion during the hearing as to the scope of influence within which a landmark should be measured. The Review Board interprets this section to mean a landmark in the context of its community. Charlene Haupt, a resident of the Sherwood Forest subdivision since 1976, stated there is an awareness of the "Hammond House" in the neighbourhood. The Review Board agrees that the Hammond House contributes to the landmark status of the property within the meaning of section 1.(2)3.iii, and is adequately protected by the existing designation on the southern portion of the property.

**89** In conclusion, on the basis of the evidence before it, the Review Board is not persuaded that Part 3, Plan 43R-3594, or any part of it, can be considered as a representative example of a style or type known as a mid 19th century farmstead, for the purposes of the criterion in section 1.(2)i. The loss of farm related features has been fatal to this interpretation of the property. The Review Board also is not persuaded, in this instance, by the argument that natural features of the watercourse, treed valley lands, elevations, grades, and collection of tree species are heritage attributes that contribute to cultural heritage value or interest. The principal heritage attribute which contributes to the cultural heritage value or interest is the former Hammond dwelling, which is found in the southern portion of the property already protected by heritage designation.

**90** Regarding By-law 224-84, there is merit in continuing the protection of the southern portion of the 2.15 acres, principally because it contains the Hammond dwelling. The cultural value of the former root house foundation is as yet undetermined.

**91** The City considers the geographic boundary of By-law 224-84 to be arbitrary and suggests that a more appropriate boundary would include the full length of the laneway/driveway. A comparison of current conditions at the site with the 1877 depiction of the farmstead suggests that this laneway has already been shortened and the entrance gateway and fencing at Hammond Road has been removed. In the opinion of the Review Board, there is no gain in amending By-law 224-84 solely for the purpose of including the current western terminus of the driveway/laneway. For the west terminus to be included, it would mean a change in the legal description of the property protected by By-law 224-84. The provision of s. 30.1(2)(a) "to clarify or correct" a by-law, may no longer apply.

**92** By-law 224-84 lacks the statement of cultural heritage value or interest prescribed by the Act since 2005 for new designations, but it remains valid. If the City finds merit in updating By-law 224-84 through the amending provisions of the Act, the Review Board recommends that items identified in the Summary of Issues in this Report be considered as part of this amendment.

## RECOMMENDATIONS

**93** Based on the evidence heard, the Conservation Review Board recommends that:

## Qureshi v. Mississauga (City)

The City of Mississauga not proceed with a by-law under s. 29(14) of the *Ontario Heritage Act* to protect the entirety of the 2.15 acres of Part 3, Plan 43R-3594, municipally known as 2625 Hammond Road;

That the City of Mississauga not repeal By-law 224-84; and,

That the City of Mississauga weigh the advantages of amending By-law 224-84 to clarify or correct the statement explaining the property's cultural heritage value or interest and the description of the property's heritage attributes. The purpose of any such amendment would be to provide clarity for the long term protection of the property as a cultural heritage resource.

SU MURDOCH  
VICE-CHAIR

DANIEL NELSON  
MEMBER

LAURIE SMITH  
MEMBER

\* \* \* \* \*

## SCHEDULE 1

### Notice of Intention to Designate

**NOTICE OF INTENTION TO DESIGNATE IN THE MATTER OF THE *ONTARIO HERITAGE ACT*, [R.S.O. 1990, CHAPTER O.18](#), AS AMENDED, AND IN THE MATTER OF THE LANDS AND PREMISES LOCATED AT **2625 HAMMOND ROAD** of The Corporation of the City of Mississauga intends to designate these lands and premises under Part IV of the *Ontario Heritage Act*, [R.S.O. 1990, c. O.18](#), as amended.**

#### Physical/Design Value

The property in its entirety is 0.87 hectares (2.15 acres) in size, but the current designation only covers the southerly portion where the Hammond House and outbuildings sit.

The entire Hammond property merits designation under the *Ontario Heritage Act* as a significant cultural heritage landscape. The 1984 designation acknowledges the property's physical/design value, as the house is a representative example of *The Canada Farmer* farmhouse. In terms of design, the built form is representative of the Italianate style of architecture and it displays a high degree of craftsmanship and artistic merit. The property is also a remnant of a representative example of a nineteenth century farm, as recognized in the contextual significance stated in the 1984 heritage designation by-law. As such, the remaining undeveloped space surrounding the house contributes to the property's physical/design value.

#### Historical/Associative Value

The Hammond Property has historical/associative value because it is associated with the Hammond family, a family that was significant to the local community and beyond. As an early Erindale farmer and merchant and in his many roles, including auditor and Justice of the Peace, Oliver Hammond contributed substantially to nineteenth century Toronto Township society. Son Thomas was also a successful businessman. Additionally, the family helped finance St. Peter's Anglican Church, a principal component of Erindale's history. Moreover, the property yields information that contributes to an understanding of 19th century settlement culture in Toronto Township.

The City of Mississauga recognized the cultural heritage value of the Hammond House in 1984. However, the entire property merits designation under the *Ontario Heritage Act*. The natural features of the site, its elevation, the watercourse, the undulating topography, the lush vegetation and tall trees are all intrinsically linked to the site and are significant elements of its cultural heritage value.

### **Contextual Value**

The Hammond House yields information that contributes to an understanding of nineteenth century culture. The natural features of the site are intrinsically linked to this history. They help explain the siting of the house, they are a reminder of the vast acreages our ancestors owned and farmed, and they give a sense of the significant age of the property. This area is an invaluable natural resource but, it is also a cultural heritage resource, as it helps explain the history of the Hammond property and its role as a cultural heritage landscape.

The *Ontario Heritage Tool Kit* states that "A building, or structure, together with its site, should retain a large part of its integrity -- its relation to its earlier state(s) -- in the maintenance of its original or early materials and craftsmanship." By retaining the relationship between the Hammond property structures, relative to the remnant green space, the context, or integrity, of the Hammond Property will be maintained.

The Hammond House has contextual value as it is a cultural heritage landscape and local landmark that is physically, functionally and historically linked to its surroundings.

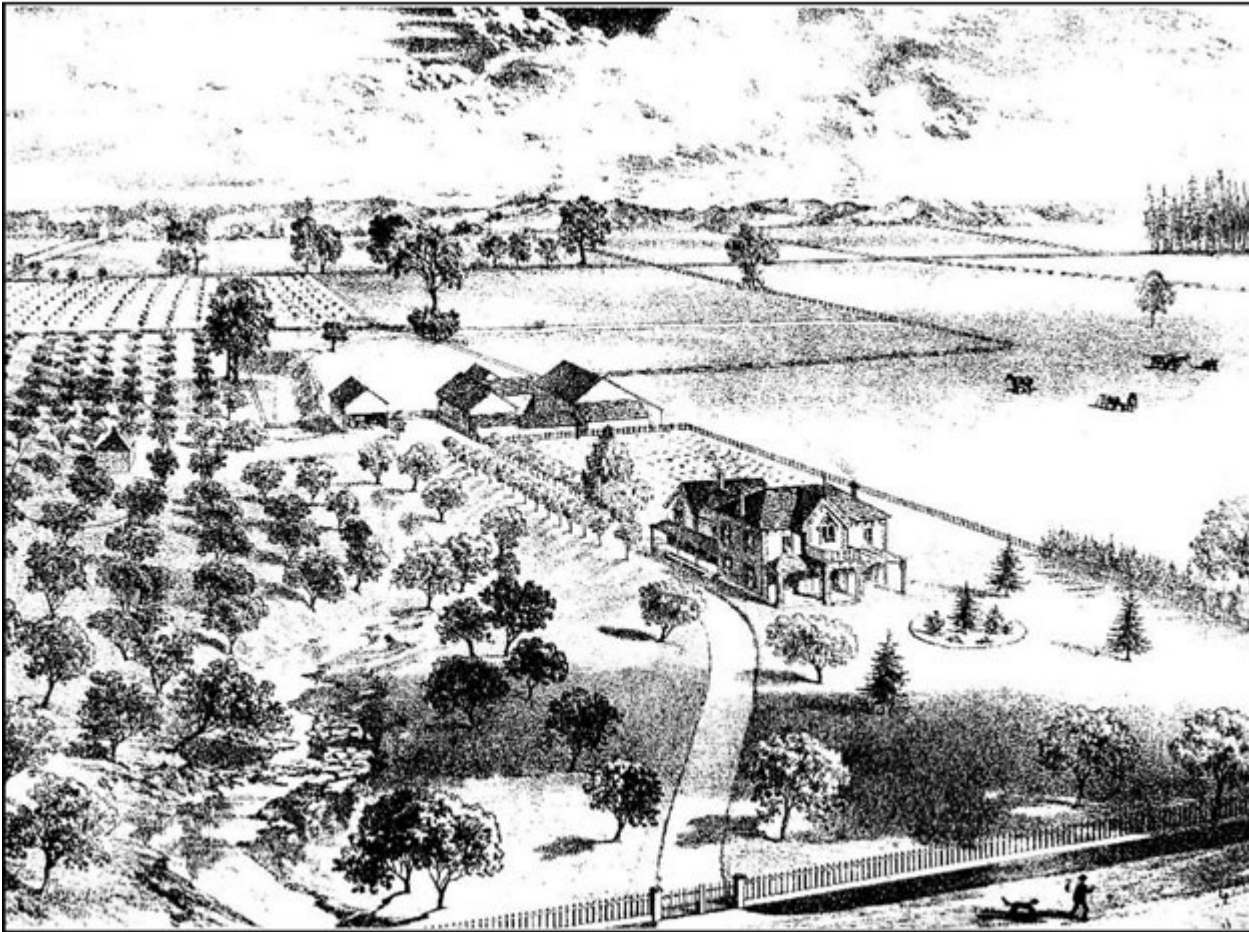
### **Notice of Objection**

**Notice of objection to the designation may be served on Crystal Greer, Director of Legislative Services and City Clerk, no later than 4:34 p.m. on Monday, October 19, 2014** via the following address: The Corporation of the City of Mississauga, 300 City Centre Drive, 2nd floor, Mississauga, ON, L5B 3C1, Attention: Crystal Greer, Director of Legislative Services and City Clerk.

\* \* \* \* \*

### **SCHEDULE 2**

#### **1877 Depiction of Property**



Depiction of "late Oliver Hammond, Esq., Credit, Ont," farmstead in the *Illustrated Historical Atlas of Peel County, 1877*

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### SCHEDULE 3

#### Exhibit List

Exhibit 1: Affidavit of Service of Notice of Hearing on the Parties, Conservation Review Board

Exhibit 2: Affidavit of Service of Public Notice of Hearing, City of Mississauga

Exhibit 3: Witness Statement of Wendy Shearer, City of Mississauga

Exhibit 4: Document Book of the Corporation of the City of Mississauga

Exhibit 5: Witness Statement of David J. Cuming, Owners/Objector

Exhibit 6: Reply Witness Statement of David J. Cuming, Owners/Objector

Exhibit 7: Witness Statement of Amy Choi, Owners/Objector

Exhibit 8: Reply Witness Statement of Amy Choi, Owners/Objector

## Qureshi v. Mississauga (City)

Exhibit 9: Plotting of Kuntz Forestry Consulting Inc. Tree Locations of Tree Core Assessments, City of Mississauga

Exhibit 10: Heritage Property Evaluation, *Ontario Heritage Tool Kit*, Ministry of Tourism, Culture and Sport, Owners/Objector

Exhibit 11: Extract of *Standards and Guidelines for the Conservation of Historic Places in Canada, 2nd Edition*, Parks Canada, Owners/Objector

Exhibit 12: City of Mississauga Community Services, *Cultural Landscape Inventory, January 2005*, Owners/Objector

Exhibit 13: Aerial image and photographs of trees in the vicinity, Owners/Objector

Subsequent to Hearing

Exhibit 14: Final Submissions of the Owner/Objector: Latiq Qureshi, August 15, 2015

Exhibit 15: Written Submissions of the Corporation of the City of Mississauga, August 28, 2015

Exhibit 16: Reply Submissions of the Owner/Objector: Latiq Qureshi, September 3, 2015

\* \* \* \* \*

**SCHEDULE 4**

**Procedural Matter**

This proceeding involved an alleged procedural deficiency in the content of the Notice of Intention to Designate.

**(a) Description of Heritage Attributes**

Paragraph 9(a) in the letter of objection dated October 16, 2014, alleges procedural irregularities in issuing the NOID, specifically in failing "entirely to include a description of the heritage attributes of the property."

Under s. 29(4)(b), "a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property" is required in the notice served on the owner of the property and on the Ontario Heritage Trust ("Trust"). Under s. 29(4.1)(b) "a statement explaining the cultural heritage value or interest of the property" is required in the public notice. There is no requirement to provide a description of heritage attributes in the public notice. As such, Paragraph 9(a) in the letter of objection is interpreted by the Review Board as being in reference solely to s. 29(4)(b), which refers to notice to the property owner and the Trust.

The content of the City's NOID is not organized as a statement of cultural heritage value or interest and description of heritage attributes. Instead, it is arranged into the three categories of criteria in [O. Reg. 9/06](#): Design or Physical Value, Historical or Associative Value, and Contextual Value. Within each category, there is reference to cultural heritage value or interest and a delineation of heritage attributes.

It is evident in the scope of the NOID that it was written in anticipation of the City's intent to repeal By-law 224-84 and to pass a new designating by-law protecting the entire 2.15-acre parcel. Some text in By-law 224-84 is brought forward; and some text is introduced that describes the northern portion and aspects of the whole property not addressed by this by-law. There are references to "the remaining undeveloped space surrounding the house, the natural features of the site, its elevation, the watercourse, the undulating topography, the lush vegetation and tall trees." The inference is that these "natural" features, and not just the buildings and structures identified in By-law 224-84, contribute to cultural heritage value.

Given these references, the Review Board cannot conclude that the NOID is deficient in providing a description of the heritage attributes, as is contended by the Objector. From the start of this proceeding, all Parties understood that the northern portion of the 2.15 acres and other "natural" elements of the whole property were under consideration.

**(b) Statement of Cultural Heritage Value or Interest**

Paragraph 9(b) of the Objection alleges that the City "failed to properly include a statement explaining the cultural heritage value or interest of the property."

As discussed in "(a) Description of Heritage Attributes" above, the content of the NOID served on the property owner and the Trust is not organized as a statement of cultural heritage value or interest and description of heritage attributes. Instead, the City subdivided the NOID into the three categories of [O. Reg. 9/06](#). There is no single statement of the value or interest of the whole property.

The Review Board does find that the several statements, collectively, meet the intent of the Act in identifying cultural heritage value or interest. Therefore, the Review Board does not agree with the Objector's contention that there is no statement of cultural heritage value or interest.



# **Black v. Niagara-on-the-Lake (Town)**

Ontario Conservation Review Board Decisions

Ontario Conservation Review Board

Panel: Daniel Nelson, Member

Heard: March 18, 2021 by videoconference.

Report: May 18, 2021.

CRB Case Nos.: CRB1918, CRB1919, CRB1920

## **2021 LNONCRB 4**

PROCEEDING COMMENCED UNDER subsection 29(5) of the Ontario Heritage Act, R.S.O. 1990, c.O.18, as amended Owners: Dan and Mary D'Alessandro Objector: John Colin Black Subject: Notice of Intention to Designate Property Address: 21 Prideaux Street Legal Description: PT LT 31 TP PL 86 NIAGARA AS IN RO432606 Municipality: Town of Niagara-on-the-Lake PROCEEDING COMMENCED UNDER subsection 29(5) of the Ontario Heritage Act, R.S.O. 1990, c.O.18, as amended Owner/Objector: John Colin Black Subject: Notice of Intention to Designate Property Address: 27 Prideaux Street Legal Description: PT LT 30 TP PL 86 NIAGARA AS IN RO434461 Municipality: Town of Niagara-on-the-Lake PROCEEDING COMMENCED UNDER subsection 29(5) of the Ontario Heritage Act, R.S.O. 1990, c.O.18, as amended Owner: Thomas and Kimberley Elltoft Objector: John Colin Black Subject: Notice of Intention to Designate Property Address: 31 Prideaux Street Legal Description: PT LT 30 TP PL 86 NIAGARA AS IN NTW8087 Municipality: Town of Niagara-on-the-Lake

(59 paras.)

## **Appearances**

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John Colin Black: Brian Duxbury, counsel.

Town of Niagara-on-the-Lake: Terry Hill, counsel.

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## **REPORT**

### **OVERVIEW**

1 The Town of Niagara-on-the-Lake ("Town") seeks to designate the properties set out below for their cultural heritage value or interest ("CHVI") under s. 29 of the *Ontario Heritage Act* ("OHA"):

- \* 21 Prideaux Street, Town of Niagara-on-the-Lake, which is owned by Dan and Mary D'Alessandro (CRB1918);
- \* 27 Prideaux Street, Town of Niagara-on-the-Lake, which is owned by John Colin Black (CRB1919);
- \* 31 Prideaux Street, Town of Niagara-on-the-Lake, which is owned by Thomas and Kimberley Elltoft (CRB1920);

(the "properties").

## Black v. Niagara-on-the-Lake (Town)

**2** Town Council, on September 16, 2020, voted to designate the properties and subsequently issued a Notice of Intention to Designate ("NOID") for each. John Colin Black ("Black") objected to the NOIDs for each of the properties although he was an owner of only one, 27 Prideaux Street. As a result of his objections, the matter was referred to the Conservation Review Board ("Review Board"), which convened a hearing under s. 29(8) of the OHA ("Hearing") for the purpose of recommending whether, in the opinion of the Review Board, the properties should be designated under s. 29 of the OHA.

**3** Mr. and Mrs. D'Alessandro, owners of 21 Prideaux Street, originally objected to the NOID for their property but subsequently withdrew the objection before the Hearing and were not parties at the Hearing. Mr. D'Alessandro remained a participant in the proceedings. Mr. and Mrs. Elltoft did not object to the designation of their property; Mr. Elltoft was a participant in the proceedings.

**4** In the Review Board's Procedural Order of December 3, 2020, the Review Board ordered that, given the overlap of parties and the contiguous nature of the properties, these matters would be heard concurrently.<sup>1</sup>

**5** The list of exhibits entered as evidence at the Hearing is attached as Appendix 1 to this Report.

## BACKGROUND

**6** The parties' respective experts prepared Cultural Heritage Evaluation Reports ("CHER") for the properties and they are in general agreement on the CHVI of the properties. As such, and since the Owner/Objector does not dispute these matters, except for the issues set out below, this Report will not directly address the issues not in dispute. In other words, subject to the issues set out below, the Owner/Objector does not object to the properties having CHVI. It is important to note that only one criterion is necessary for there to be CHVI in a property and therefore qualify for designation.

**7** The Review Board heard from four witnesses.

- \* Denise Horne, who is a planner with the Town, provided testimony as to the process leading to the Town's resolution to issue the respective NOIDs. This was not useful for a determination of the issues and was eventually curtailed since the Review Board has no jurisdiction to consider issues prior to the issuance of a NOID and responding objection.
- \* Dr. Marcus Letourneau and Dr. Carl Pray, both expert witnesses for the Town, and are co-authors of a CHER for the three properties.
- \* Dan Currie, an expert witness for the Owner/Objector and is a co-author of a CHER for 27 Prideaux Street.

**8** With the consent of the parties, the Review Board determined that Drs. Letourneau and Pray, and Mr. Currie, were expert witnesses for the purpose of the Hearing and could provide opinion evidence.

**9** None of the participants, identified above, opted to make presentations to the Review Board.

**10** It is not disputed that the properties are within the Niagara National Heritage District ("NHD"), which was established by the federal government in 2004, and which was designated some 25 city blocks of the old downtown.

## ISSUES

**11** The owners of 21 Prideaux Street and 31 Prideaux Street do not dispute their respective NOIDs and are content with the designation of their properties under the OHA. Black objects to two specific issues in the respective

## Black v. Niagara-on-the-Lake (Town)

Statements of Cultural Heritage Value or Interest ("SCHVI") for the properties discussed below. Black does not otherwise dispute the heritage designation of his property at 27 Prideaux Street.

**12** The parties agree that these two issues would be the focus of the Hearing, *viz.*:

- \* Do the properties constitute a nested cultural heritage landscape ("CHL") as part of the properties' respective SCHVI?
- \* Are the respective setbacks of the properties a heritage attribute for each of the properties?

## RELEVANT LEGISLATION AND REGULATION

**13** The relevant legislation in this matter is s. 29 of the OHA, which sets out the process for designating a property as having CHVI, and Ontario Regulation 9/06 ("[O.Reg. 9/06](#)"), which sets out the criteria for determining CHVI. The relevant extracts of both are set out in Appendix 2 to this Report.

**14** The other key element, for the purposes of this Report, is the *Provincial Policy Statement, 2020* ("PPS"), which includes, *inter alia*, a definition of a CHL. The relevant extracts are set out in Appendix 3 to this Report.

## CASE FOR THE MUNICIPALITY

**15** The Town believes that the three respective properties constitute two CHLs, one within the other. The three properties are part of the federal NHD but, are themselves a three-property CHL. The setbacks of the properties are important heritage attributes.

**16** Dr. Letourneau argued that the three properties are located where they are as a result of a high bank of a now-extinct watercourse. Each of the properties have an unusual setback from the street and, in their view, are aligned relative to each other. They believe that these three properties were only developed after drainage was altered to ensure that they were not flooded while managing the realities of the imposed grid pattern of development. While the watercourse and the risk of flooding may have been important drivers, they note that there were other advantages: better air, drainage, and views.

**17** Dr. Letourneau noted that, while most buildings in the NHD, were sited close to the road, these three properties were not. While the setback may have been forced by the watercourse, it may also have been motivated by changing cultural standards of house placement.

**18** Dr. Letourneau, in cross-examination acknowledged that:

- \* The homes on each property reflect different architectural styles including Greek Revival, French Empire and vernacular Classical, and
- \* Each of the properties have different setbacks.

**19** Dr. Bray invited the Review Board to consider the site around the time of the War of 1812, the area would have been mapped with the application of the standard survey grid. The area would have been largely clear-cut, which would cause an increase in stormwater runoff. Malaria was a serious concern and people would necessarily want to avoid low-lying areas. The ridge, where the properties are located are a bit of an anomaly; other areas are gentler. He believes that people firstly built in more accessible sites earlier on, which is why the three properties were built later, in the 1840s, as a result of the watercourse and low-lying ground at the front of the properties.

**20** The 1840s also saw the development of a more romantic and picturesque approach to landscape, as advanced by writers such as the American landscape designer Andrew Jackson Downing. As communities developed, and

## Black v. Niagara-on-the-Lake (Town)

people moved away from subsistence agriculture, there was less need for outbuildings and houses themselves moved back from the road with an increase in gardens, both practical and ornamental during this period.

**CASE FOR THE OWNER/OBJECTOR**

**21** The Owner/Objector's view is that there is no link between the three properties giving rise to CHVI and, likewise, there is no CHVI in the respective setbacks as potential attributes.

**22** Mr. Currie, for the Owner/Objector, agrees with the Town's experts that the three properties are located where they were, on high ground overlooking a former watercourse, which may have been driven by marshy conditions and flooding. He also agrees that such a siting of the buildings on the properties would offer better air drainage and better views. This was part of a general cultural concern about bad air tied to low-lying and marshy areas. Since the original tree cover had long been removed, there would have been a view, not obscured by subsequent regrowth, in the 1840s.

**23** Fundamentally, in his view, the properties were sited where they were for practical considerations, which were not significant. It could be significant if it was shown to be a designed landscape, where there was purpose to the location, with a designed intent for an aesthetic urban form. In his view, there is no evidence of such purpose or design. If the setback gives variability to the area and should be preserved, then the properties to be protected should be expanded to capture other properties adjoining the watercourse.

**24** Mr. Currie asserts that, since there is no connection between the properties, there can be no nested CHL.

**25** Mr. Currie placed a great deal of emphasis on the idea of "significant" in his testimony. It should be noted that in the 2014 (and earlier) versions of the PPS, the term "significant... means in regard to cultural heritage and archaeology, resources that have been determined to have cultural heritage value or interest for the **important contribution they make to our understanding of the history of a place, an event, or a people**" [emphasis added]. The 2020 PPS has removed the language bolded here. There is no longer a requirement that a significant CHL make an important contribution. Now, for a CHL to be significant, it must meet one or more of the criteria set out in [O.Reg. 9/06](#).<sup>2</sup>

**ANALYSIS**

**26** As previously discussed, the experts in this matter are in general agreement on the factual evidence. The properties are worthy of designation, except for in the areas in dispute already identified. This leaves the Review Board to evaluate the opinion evidence of the respective witnesses regarding whether the issues identified are important and should be included in the respective properties' SCHVI or not.

**Nested CHL**

**27** The Review Board has been asked to determine whether the three properties, together constitute a "nested" CHL. This arises because the Town included the concept as part of the SCHVI in the issued NOID for each of the respective properties. From the NOID for 27 Prideaux Street, as an example:

The property also contains cultural heritage value in its contextual value, as it is physically and visually connected to the adjacent neighbouring properties at 21 and 31 Prideaux Street. The three properties represent a nested cultural heritage landscape and provide a sense of uniformity, all of which have a deep setback from the street.

**28** The Town's CHER goes further in its draft SCHVI for the respective properties. From the CHER for 27 Prideaux Street:

## Black v. Niagara-on-the-Lake (Town)

[The property] is also physically and visually linked to the neighbouring properties, 21 and 31 Prideaux Street as part of a nested landscape defined by their unusually deep setback from the front property line and position on the high point of their respective lots.

29 The Town's experts, in that report, added the nested CHL as a specific heritage attribute in their draft SCHVI. Again, from the CHER for 27 Prideaux Street:

The cultural heritage value or interest associated with the Property is represented in the following heritage attributes...

- \* The Property's role as part of both a nested cultural heritage landscape constituting 31, 27, and 21 Prideaux Street...

30 The concept of a "nested" CHL has not been considered by the Review Board before but it is not a difficult concept to understand and define. In effect, it is a discrete CHL within a larger CHL. Thus, the nested CHL must, itself, be a CHL, independent from the larger CHL that may surround it. In this case, the properties are part of the Niagara NHD, which is, of course a CHL itself.

31 It is important to note that, while the OHA, and [O.Reg. 9/06](#) is binding upon the Review Board, the PPS is not and the OHA and its regulations make no reference to CHLs. In other words, the OHA does not recognise the concept of a CHL, and it is, therefore, not specifically part of the analysis of [O.Reg. 9/06](#).

32 The individual properties may, individually and collectively, constitute a CHL, nested or otherwise and, on its face, there is nothing particularly wrong with that. But, on closer examination, such action creates a very serious concern. By interweaving the interconnected concept of a nested CHL as part of each individual properties' SCHVI, which is used to understand the heritage attributes and evaluate any future changes thereto, and, potentially, naming the nested CHL as a common heritage attribute across the three properties, regardless of property boundary, per the draft SCHVI in the Town's CHER, the Town appears to be attempting to tie the properties together in a way not permitted by Part IV of the OHA.

33 The designation process under Part IV of the OHA, including s. 29, which is the relevant section for these matters, provides for a specific designation on a specific property. Such a designation cannot 'slosh over' that boundary line<sup>3</sup> and for good reason; adjoining property owners cannot be responsible for the actions of their neighbours. Except for a heritage conservation district designation process in Part V of the OHA, there is no provision in the OHA to tie properties together with a common, overlapping, protection.

34 The Supreme Court of Canada observed, in *St. Peter's Evangelical Lutheran Church (Trustees of) v. Ottawa (City)*:

The Ontario Heritage Act was enacted to provide for the conservation, protection, and preservation of the heritage of Ontario. There is no doubt that the Act provides for and the Legislature intended that municipalities, acting under the provisions of the Act, should have wide powers to interfere with individual property rights. It is equally evident, however, that the Legislature recognized that the preservation of Ontario's heritage should be accomplished at the cost of the community at large, not at the cost of the individual property owner, and certainly not in total disregard of the property owner's rights. **It provided a procedure to govern the exercise of the municipal powers, but at the same time to protect the property owner within the scope of the Act and in accordance with its terms** [emphasis added].<sup>4</sup>

35 The OHA, as the Supreme Court noted, not only sets out the scope of municipal power to designate property to preserve the heritage of Ontario, but also limits that scope in order to protect property owners. This is important because, while the preservation of heritage property in Ontario is a "public good"<sup>5</sup> it does, as the Supreme Court noted, necessarily interfere with individual property rights.

**36** It must, therefore, follow, that any attempt to restrict those individual property rights must be found within the authority of the statute. The Town cannot, by stealth, achieve a mini-heritage conservation district without engaging with the provisions of Part V of the OHA. As the Divisional Court has noted:

The decision to designate a property is clearly discretionary. However, there are limits on the exercise of discretion where fundamental constitutional and societal interests are at stake. **That discretion must be exercised 'with the boundaries imposed in the statute**, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter' [emphasis added].<sup>6</sup>

**37** The CHL concept cannot be used to tie multiple properties together, as in this case, to circumvent, accidentally or purposefully, the procedural safeguards of Part V of the OHA, governing heritage conservation districts. To do so is, therefore, improper, and, for these reasons the Review Board cannot recommend that the properties constitute a nested CHL as proposed by the municipality in the draft SCHVI in the Town's CHER. To do so would create a heritage district in all but name.

**38** Having said that, it is, of course, still true that the properties could, individually, constitute a nested CHL provided that there is no attempt to avoid the provisions of Part V of the OHA and that there are no shared heritage attributes. In other words, a property can be linked to its surroundings in keeping with s. 3(ii) of [O.Reg. 9/06](#), without creating a heritage district in the way proposed by the Town's experts.

**39** The Town's experts, in their [O.Reg. 9/06](#) evaluation of 27 Prideaux Street note: "It is also physically and visually linked to the neighbouring properties, 21 and 31 Prideaux Street as part of a nested landscape..."<sup>7</sup> This appears to be a direct allusion to O.Reg. 9/06, s. 3(ii). The question before the Review Board may therefore be reframed as follows: does each individual property have CHVI under O.Reg. 9/06, s. 3(ii) because it has contextual value as a nested CHL since each individual property is physically and visually linked to its surroundings?<sup>8</sup>

**40** As previously discussed, the PPS concept of a CHL is not part of an OHA analysis but it could be a useful tool or lens to understand [O.Reg. 9/06](#) criteria, particularly when considering whether a property has contextual value because it is important in defining, maintaining, or supporting the character of an area or because it is physically, functionally, visually, or historically linked to its surroundings.<sup>9</sup> As was noted by the Review Board in *Qureshi v. Mississauga*,

At this point in the proceeding, the Review Board clarified that the definitions and provisions of the Act and its Regulations are the authority for this scope of inquiry. Unlike the PPS, the [OHA] does not define or reference the term "cultural heritage landscape." Similarly, the *Heritage Tool-Kit and Parks Canada Standards and Guidelines*, although useful evaluative tools, have no legislative authority. The Review Board does view the use of these definitions, policies, and guidelines by a consultant when formulating a recommendation, as an indicator of due diligence.<sup>10</sup>

**41** It may be fruitful, therefore, to examine the 2020 PPS's definition of CHL<sup>11</sup> by deconstructing that definition into its constituent parts and evaluating them in the context of the properties:

1. *Defined Geographical Area*: In this case, there is a clearly defined geographical area being the metes and bounds of the properties together.
2. *May Have Been Modified by Human Activity*: In this case, the geographical area has been modified, over time, by human activity. Note that the definition necessarily means, in its phraseology, that the area does not need to have been modified by human activity.
3. *May include features such as buildings, structures, spaces, views...or natural areas that are valued together for their interrelationship meaning or association*: The properties clearly have all of these

## Black v. Niagara-on-the-Lake (Town)

features. The question that remains is whether they are valued together for their interrelationship meaning or association. Note, again, the use of the permissive "may".

4. *Identified as having CHVI by a community*: The definition indicates that CHVI could be determined, *inter alia*, if the geographical area has been included on a federal register or through an evaluation under the OHA. The properties are not, themselves, on a federal register but are part of the NHD.

**42** There is a defined geographical area here with the three properties identified, the properties have been clearly modified by human activity and, certainly, the area has been identified as having CHVI. Being part of the NHD is not, by itself, in the view of the Review Board, specific enough to establish that the properties are automatically a CHL by themselves but, provided that the properties are themselves a CHL, being within the NHD does establish that it is necessarily nested within. This then leaves the alternative: do the properties, being "nested," have CHVI by operation of [O.Reg. 9/06](#)? Remember that the regulation only requires one criterion to establish CHVI. The parties, in this case, agree that, except for the two issues, set out above, the properties do have CHVI.<sup>12</sup>

**43** What remains, therefore, in this analysis of CHL, is whether the "buildings, spaces, views, and natural elements on the respective properties are valued together for their interrelationship meaning or association" per the definition above. Note, however, that the definition states that a landscape "may" include such features that are valued together. Since the permissive "may" is used, it must follow that a CHL may not have such features valued together. This makes clear the challenge of using the CHL concept as part of a rigorous OHA analysis. There may be a CHL in these matters but that may only become clear retrospectively when properties have already been evaluated under the OHA.

**44** Given this analytical difficulty, the Review Board, therefore, must step back from the macro analysis of CHL in respect to the properties and specifically examine whether or not the individual properties can qualify for designation under O.Reg. 9/06, s. 3(ii) since the Town raises the CHL issue within the context of that subsection. Put another way, the Review Board must determine whether or not the individual properties are physically or visually linked to one another before answering the question about the existence of the CHL.

**45** In undertaking such an analysis of each individual property, it is important to understand the concept of what "linked" means within the context of this criterion. It is not enough, for example, to say that one property is "linked" to another simply because they are side-by-side. Such a definition, *reductio ad absurdum*, would mean that every property in Ontario could qualify for designation, as a daisy-chain, and this cannot be the intention of the Ontario Legislature. Rather, in the view of the Review Board, to be "linked" within the context of this regulation necessarily means there must be some substantial or important connection between the property and its surroundings that "ensure[s] the attainment of the legislature's objectives."<sup>13</sup> In other words, this important connection must establish CHVI.

**46** To establish that the respective properties have CHVI as a result of O.Reg 9/06, s. 3(ii), it would be necessary for the Town to establish, in the affirmative, that each is:

- \* Physically linked; and/or,
- \* Visually linked

to its surroundings, including the other two properties and that such linkage creates CHVI.

**47** Fundamentally, they are three independent properties that happen to be situated side-by-side and there is no evidence that they were built with any common intention or plan. They are three houses, and so are, at a basic level, functionally linked, but they are houses in a residential area of the Town and that, by itself, is not significant or important. No evidence was provided that these properties were historically linked to their surroundings in a significant or important way. Likewise, while the three respective properties are, no doubt, physically and visually linked to their surroundings, it is difficult to imagine, based on the evidence provided, that such linkage is significant or important in a way that gives rise to CHVI. In this regard, the Review Board prefers the evidence of Mr. Currie.

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They are three independent properties with varying setbacks that may or may not have been forced upon the individual builders by the existence of a long-forgotten watercourse.

**48** Therefore, based on the evidence presented to it, the Review Board cannot recommend that each property has CHVI by operation of O.Reg 9/06 s. 3(ii) as it has not been shown that the properties are physically and visually linked to each other in ways that creates significant or important CHVI. Yet this does not, of course, negate the other criteria for designation applicable to the properties under the regulation and any criteria under the regulation can establish a CHL. Thus, for planning purposes, it is clear that, given the CHVI in the respective properties, the area constituting the three properties, in accordance with the PPS definition, is a nested CHL.

**49** Despite this finding, the Review Board wishes to signal a note of caution. It is of fundamental importance to remember that the CHL concept is one found in the PPS and not the OHA and, therefore, is not part of a rigorous O.Reg. 9/06 analysis of property for CHVI. Municipalities must be cautious, when importing the CHL concept into any SCHVI, if such an importation would accidentally create a heritage conservation district, without engaging the procedural protections of Part V of the OHA or unduly prejudice any SCHVI analysis for future change to the property.

### Setback

**50** The final question before the Review Board is whether the respective setbacks of the properties constitutes a heritage attribute for each of the properties individually.

**51** The OHA defines a heritage attribute as "in relation to real property, and to the buildings and structures on the real property, the attributes of the property, buildings and structures that contribute to their cultural heritage value or interest..."<sup>14</sup> Once a property is designated, it may not be altered if such alteration would likely affect the property's heritage attributes.<sup>15</sup>

**52** The Review Board has previously noted:

Therefore, on a plain reading of the statute and its regulation and in the context of their relevant provisions, heritage attributes may relate to a part of a property and contribute to its cultural heritage value or interest, as do the architectural design attributes of the house in this case, but the designation of cultural heritage value or interest relates to the whole of a property.<sup>16</sup>

**53** The term "attribute" itself is not defined in the OHA. Generally, the Review Board understands the term to mean a feature or some other quality of a building or structure on the respective properties regarded as characteristic or inherent to each of them. Thus, put together, a heritage attribute would be:

- a. A feature, quality or characteristic of the property, or of a building or structure on one of the properties that,
- b. Contributes to a property's CHVI.

Note that there is no requirement for such an attribute to be *significant* in itself.

**54** The Review Board has previously examined the issue of setbacks as a heritage attribute in *Deluca, op cit*. In that matter, Mr. Currie, for the Owner/Objector, testified that there was no evidence of a designed landscape on the property in question and that the landscape, having evolved, was not a heritage attribute. Mr. Pruss, the municipality's expert, testified that the setback was a heritage attribute and described it as a "visual setting" for the property. In its recommendation, the Review Board agreed that the property in the matter had CHVI for its architectural design and historic associations. It found, preferring the evidence of Mr. Pruss, that the setback on the property was a heritage attribute.<sup>17</sup>



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**55** In these matters, each of the properties are set back substantially from Prideaux Street. The parties agree that this was likely due to the existence of a long-disappeared creek and the need to place the homes on the respective properties on the high ground away from that watercourse. The experts for the Town further argue that such placement on the high ground reflected changing cultural norms with setbacks increasing throughout this period. People were moving away from subsistence agriculture and there was less need for outbuildings and more time and funds for ornamenting a property. Views and visual prominence would also be gained by siting the properties at the highest location available.<sup>18</sup>

**56** Regardless of the motivation, it would seem that the respective setbacks of the properties are a characteristic of each property. Interestingly, the setback can be both an attribute of an applicable building (where it is located on the property) and an attribute of an applicable property itself (the extinct watercourse altering the use of the property). But does such a characteristic contribute to the respective properties' CHVI?

**57** In considering the evidence before it, the Review Board prefers the evidence of the Town's experts. Each of these properties, separately, were built in the 1840s, likely as infill and were placed where they were because of the now extinct watercourse and cultural changes happening at the time. Whether by design, or as a result of the existing topography, the respective setbacks help people to understand each property in respect to both its time and space. Each respective setback, to borrow a phrase from *Deluca, op. cit.*, is part of each property's "visual setting". Part of the story of each of these properties is that they were built in response to the topography and culture around them, which, in turn, supports the character of the area. There are direct associations with the early settlement of the town, the creation of these lots after the devastation of the War of 1812, and the subsequent infill once the water issue was resolved. They are as integral to the understanding of each property as the architectural features of the respective buildings, which have also been identified as attributes and are not in dispute.

**58** Therefore, the Review Board is satisfied, on the evidence before it, that each property's respective setback is a characteristic of each property that contributes to each of the property's individual CHVI.

### Summary and Recommendations

**59** Having considered the evidence before it and the submissions of the parties at the Hearing, and for the reasons set forth above, the Review Board recommends that the individual properties be designated under the OHA with the following provisos:

- a. That the concept of a common nested CHL be struck from the SCHVI for each of the properties;
- b. That the concept of a nested CHL not be incorporated into the final lists of heritage attributes of the properties;
- c. That each respective setback of each property be identified as a specific heritage attribute applicable thereto. The unique setback measurement for each should be identified in each of the respective property's list of heritage attributes.
- d. As a result of the OHA designation, the properties may, for planning purposes, constitute a nested CHL.

DANIEL NELSON  
MEMBER

\* \* \* \* \*

**Hearing Exhibit List**

<b>Exhibit #</b>	<b>Nature of Exhibit and description</b>	<b>Filed By:</b>
<b>1</b>	<b>CRB Notice Email to Parties</b>	<b>CRB</b>
<b>2</b>	<b>Notice of Hearing Affidavit</b>	<b>Municipality</b>
<b>3</b>	<b>Denise Horne Witness Statement</b>	<b>Municipality</b>
<b>4</b>	<b>CHER Report, 27 Prideau</b>	<b>Municipality</b>
<b>5</b>	<b>CHER Report, 21 Prideau</b>	<b>Municipality</b>
<b>6</b>	<b>CHER Report, 31 Prideau</b>	<b>Municipality</b>
<b>7</b>	<b>Photo Book (in lieu of site visit)</b>	<b>Joint</b>
<b>8</b>	<b>Letourneau Witness Statement</b>	<b>Municipality</b>
<b>9</b>	<b>Bray Witness Statement</b>	<b>Municipality</b>
<b>10</b>	<b>Owner/Objector Document Book, Volumes 1 &amp; 2</b>	<b>Owner/Objector</b>

\* \* \* \* \*

## **Ontario Heritage Act, Designation of Properties by Municipalities**

### **Definitions**

1. In this Act,

"heritage attributes" means, in relation to real property, and to the buildings and structures on the real property, the attributes of the property, buildings and structures that contribute to their cultural heritage value or interest:

### **Designation by municipal by-law**

29.(1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,

- (a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and
- (b) the designation is made in accordance with the process set out in this section.

29.(14) After considering the report under subsection (12), the council, without a further hearing,

- (a) shall,
  - (i) pass a by-law designating the property,
  - (ii) cause a copy of the by-law, together with a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property,
    - (A) to be served on the owner of the property and on the Trust, and
    - (B) to be registered against the property affected in the proper land registry office, and
  - (iii) publish notice of the by-law in a newspaper having general circulation in the municipality; or
- (b) shall withdraw the notice of intention to designate the property by causing a notice of withdrawal,
  - (i) to be served on the owner of the property and on the Trust, and
  - (ii) to be published in a newspaper having general circulation in the municipality.

### **Ontario Regulation 9/06 -- Criteria for Determining Cultural Heritage Value or Interest**

1.(1) The criteria set out in subsection (2) are prescribed for the purposes of clause 29(1)(a) of the Act.

1.(2) A property may be designated under section 29 of the Act if it meets one or more of the following criteria for determining whether it is of cultural heritage value or interest:

#### **Design or Physical value**

- 1. The property has design value or physical value because it,
  - i. is a rare, unique, representative or early example of a style, type, expression, material or construction method,
  - ii. displays a high degree of craftsmanship or artistic merit, or
  - iii. demonstrates a high degree of technical or scientific achievement.

#### **Historical or Associative Value**

- 2. The property has historical value or associative value because it,
  - i. has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community,

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- ii. yields, or has the potential to yield, information that contributes to an understanding of a community or culture, or
- iii. demonstrates or reflects the work or ideas of an architect, artist, builder, designer or theorist who is significant to a community.

**Contextual Value**

- 3. The property has contextual value because it,
  - i. is important in defining, maintaining or supporting the character of an area,
  - ii. is physically, functionally, visually or historically linked to its surroundings, or
  - iii. is a landmark.

\* \* \* \* \*

**Appendix 3****Provincial Policy Statement, 2020**

**1.7.1** Long-term economic prosperity should be supported by...encouraging a sense of place, by promoting well-designed built form and cultural planning, and by conserving features that help define character, including built heritage resources and cultural heritage landscapes...

**2.6.1** Significant built heritage resources and significant cultural heritage landscapes shall be conserved.

**2.6.3** Planning authorities shall not permit development and site alteration on adjacent lands to protected heritage property except where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved.

**6.0: Definitions**

**Conserved:** means the identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment that has been approved, accepted or adopted by the relevant planning authority and/or decision-maker. Mitigative measures and/or alternative development approaches can be included in these plans and assessments.

**Cultural heritage landscape:** means a defined geographical area that may have been modified by human activity and is identified as having cultural heritage value or interest by a community, including an Indigenous community. The area may include features such as buildings, structures, spaces, views, archaeological sites or natural elements that are valued together for their interrelationship, meaning or association. Cultural heritage landscapes may be properties that have been determined to have cultural heritage value or interest under the Ontario Heritage Act, or have been included on federal and/or international registers, and/or protected through official plan, zoning by-law, or other land use planning mechanisms.

**Heritage attributes:** means the principal features or elements that contribute to a protected heritage property's cultural heritage value or interest, and may include the property's built, constructed, or manufactured elements, as well as natural landforms, vegetation, water features, and its visual setting (e.g. significant views or vistas to or from a protected heritage property).

**Significant:** means...in regard to cultural heritage and archaeology, resources that have been determined to have

## Black v. Niagara-on-the-Lake (Town)

cultural heritage value or interest. Processes and criteria for determining cultural heritage value or interest are established by the Province under the authority of the Ontario Heritage Act.

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- 1 *Black v. Niagara-on-the-Lake (Town)*, 2020 CanLII 97421.
  - 2 See Appendix 3 for the new definition of "significant" from the 2020 PPS.
  - 3 See s. 26 of the OHA. See also *Qureshi v. Mississauga (City)*, 2015 CanLII 99223 at para. 74, which discusses how views, identified as a heritage attributes must be within the legal boundary of the protected property.
  - 4 *St. Peter's Evangelical Lutheran Church (Trustees of) v. Ottawa (City)* 1982 CanLII 60 (SCC) at p. 591.
  - 5 *House v Lincoln (Town)*, [2015 ONSC 6286](#) (CanLII) at para. 11.
  - 6 *Tremblay v. Lakeshore (Town)*, 2003 CanLII 6354 (ON SCDC) at para. 18.
  - 7 See page 61 of the Town's experts' CHER.
  - 8 Note that the Town does not suggest that the properties are functionally or historically linked to their respective surroundings.
  - 9 O. Reg. 9/06 s. 3(i) and (ii).
  - 10 *Qureshi supra* at para. 31.
  - 11 See Appendix 3 for the definition.
  - 12 Using this PPS's definition, one could certainly argue that the entire NHD is a CHL but that is not a question before the Review Board.
  - 13 *Tremblay* at para. 15.
  - 14 OHA, s. 1.
  - 15 OHA, s. 33(1).
  - 16 *Deluca v. Bradford West Gwillimbury (Town)*, 2016 CanLII 33703 at para. 63.
  - 17 *Ibid.* at paras. 25, 35 and 53.
  - 18 See *Qureshi, supra* at para. 68 where a heritage landscape architect made a similar observation.

## **865503 Ontario Inc. v. London (City)**

Ontario Local Planning Appeal Tribunal Decisions (f/k/a Ontario Municipal Board)

Ontario Municipal Board

Panel: M.G. Somers, Member

Decision: December 8, 2008.

Municipal File No.: 39T-06512, OMB Case No.: PL080527, OMB File No.: PL080527, OMB Case No.: PL080527, OMB File No.: PL080528

### **[2008] O.M.B.D. No. 1159**

IN THE MATTER OF subsection 51(39) of the Planning Act, R.S.O. 1990, c. P.13, as amended  
Appellant: 865503 Ontario Inc. and Kostos Sorkos (carried on by DLN Group Inc.) Subject: Proposed Plan of Subdivision Property Address/Description: Part Lot 33, Concession 2 - Wharncliffe Road Municipality: City of London 865503 Ontario Inc. and Kostos Sorkos (carried on by DLN Group Inc.). have appealed to the Ontario Municipal Board under subsection 34(11) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 1-88 of the City of London to rezone lands composed of Part Lot 33, Concession 2 - Wharncliffe Road from Urban Reserve (UR4) zone to R1 (R1-1) zone to permit single dwellings with minimum lot frontage of 9m (29.5 ft) and minimum lot area of 250 sq m (2691 sq ft) and to Residential R5 (R5-4) Zone to permit cluster or stacked townhouse dwellings at maximum density of 40 units per ha (16.19 units per ac)

(46 paras.)

### **Appearances**

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865503 Ontario Limited and Kostos Sorkos (carried on by DLN Group Inc.): D. Nuttall, agent.

City of London: J. Page, counsel.

Legend Development: S.J. O'Melia, counsel.

Z-Realty Group: B. Card, counsel.

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### **DECISION DELIVERED BY M. G. SOMERS AND ORDER OF THE BOARD**

#### **1. CONTEXT**

1 This is an appeal brought by DLN Group Inc. ("the Applicant") against the City of London's ("the City") refusal to enact a Zoning By-law Amendment ("ZBA") or to approve a Draft Plan of Subdivision

for lands located on the south side of Wharncliffe Road South, south of Legendary Drive, legally described as Part of Lot 33, Concession 2 (Geographic Township of Westminster; hereinafter called "the Subject Property").

**2** The Applicant is requesting to rezone the Subject Property from Urban Reserve (UR4) zone to R1 (R1-1) zone to permit single dwellings with minimum lot frontage of 9 metres and minimum lot area of 250 square metres and to Residential R5 (R5-4) zone to permit cluster or stacked townhouse dwellings at maximum density of 40 units per ha. In addition, the Applicant filed a plan of subdivision that involved 5 residential blocks and 1 multi-family development block. However, the Applicant has revised its plan to include only townhouses.

**3** Berta Krichker, a civil engineer specializing in water resources management and who is currently the Manager of Storm Water Management in the Environmental and Engineering Service Department for the City, and Heather McNeely, a qualified land use planner with the City, were present and both provided evidence opposing the Applicant's appeal.

**4** Robert Stratford, a civil engineer specializing in storm water management, was retained by Z-Realty Group ("Z-Group") and provided evidence opposing the Applicant's appeal.

**5** The Applicant retained Robert Stevenson, a civil engineer specializing in sanitary management, and Narinder Sharma, a civil engineer specializing in storm water management; both provided evidence in support of the appeal. In addition, Kenneth Briggs an engineering technician, provided evidence regarding storm water management supporting the Applicant's appeal.

**6** Mr. O'Melia, Counsel for Legend Development ("Legend") and Mr. Card, Counsel for Z-Group were present. Counsel advised the Board that both development companies owned lands that abutted the Subject Property and had an interest in the appeal and requested party status. Both Legend and Z-Group opposed the applications. Neither the Applicant nor the City objected to the request. The Board finds that Z-Group and Legend have an interest in this appeal and grants them party status.

## **2. HISTORY OF THE SUBJECT PROPERTY**

**7** It was Ms McNeely's evidence that on May 20, 2003, Municipal Council considered the proposed North Longwoods Area Plan ("the Area Plan"), which included the Subject Property, and an Official Plan Amendment ("OPA 290"). Ms McNeely maintained that given the demand for development in the area and the number of property ownerships in the area, a comprehensive review of the area was necessary to address broader community issues such as, parks, road connections, traffic, servicing studies, land use compatibility prior to consideration and approval of development applications in the area.

**8** Ms McNeely testified that a public participation meeting before the Planning Committee was held on June 30, 2003 to consider OPA290 and the Area Plan. On July 7, 2003, Municipal Council adopted OPA290. No appeals were filed with the City within the prescribed appeal period regarding OPA290.

**9** Ms McNeely further testified that a draft approval of the Legend draft plan (39T- 02502) was granted on November 7, 2003, located to the north and east of the Subject Property. Phase 1 of the Legend subdivision plan was registered on May 2, 2005 as registered plan 33M-518, Phase 2 was registered on

September 5, 2007 as registered plan 33M-581, Phase 3A was registered on September 20, 2007 as registered plan 33M-582 and Phase 2A was registered on July 28, 2008 as 33M-594. Legend has requested an extension of the draft approval for a period of 3 years to accommodate obtaining an approval for the balance of their lands.

**10** It was Ms McNeely's evidence that the Subject Property is land-locked to subdivisions that are being developed by Legend. As a result, the Applicant is dependent on Legend's developments for municipal services, including road connections to open public roads.

**11** On September 15, 2006, the Applicant submitted a subdivision plan for draft approval. The application was placed on hold pending the completion and approval of the Bradley Avenue Environmental Assessment ("Bradley Avenue EA"). On October 16, 2007, after the Bradley Avenue EA was approved, the subdivision application was re-circulated for comments, as was the associated ZBA application.

**12** On April 16, 2006, the Applicant appealed the draft plan of subdivision and ZBA to the Board.

### **3. EVIDENCE OF THE PARTIES**

**13** Ms McNeely testified that the City's Planning Staff reviewed the applications and found that the applications did not satisfy the criteria set out in section 51(24) of the *Planning Act* and did not conform to the Official Plan.

**14** Ms McNeely maintained that the processing of the applications involved several complex issues regarding viable servicing arrangements to service the Subject Property and securing frontage and access to a public street. She testified that the need for the required information was carefully conveyed to the Applicant at an Administrative Planning Advisory Group ("APAG") meeting held on March 15, 2006. A summary of the meeting was provided to the Applicant, which stated a range of issues that had to be addressed and confirmed; otherwise the plan of subdivision would be considered premature. (Exhibit 2, Tab 5) Ms McNeely testified that as of the date of this hearing the Applicant had not resolved these concerns.

**15** It was Ms McNeely's evidence, that in accordance with section 2 of the *Planning Act*, the proposed development did not have regard to the following matters of provincial interest:

- (f) the adequate provision and efficient use of transportation, sewage services and waste management systems;
- (h) the orderly development of safe and healthy communities;
- (n) the resolution of planning conflicts involving public and private interests;
- (o) the protection of public health and safety;
- (p) the appropriate location of growth and development; and
- (q) the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians.



**16 Ms McNeely** maintained that the Applicant did not demonstrate whether the transportation system for the proposed development was safe, energy efficient and/or facilitate the movement of people and goods. (PPS Section 1.6.5.1) In addition, the Applicant did not demonstrate whether the connectivity within and among transportation systems, including the provision of the Bradley Avenue Road dedication was within the limits of the draft plan. (PPS Section 1.6.5.3)

**17 Ms McNeely** testified that the proposed development did not satisfy PPS section 1.1.1. It was her evidence that a healthy, liveable and safe community could not be sustained in this instance for the following reasons:

- i) The proposed development may cause environmental, or public health and safety concerns because there are no viable sanitary and storm servicing available to serve the development and there are no readily available public road connection to access the development; and
- ii) The necessary infrastructure and public service facilities, specifically sanitary and storm sewer servicing and appropriate road connections are not available to meet current needs.

**18 Ms McNeely** further testified that the Applicant did not demonstrate that the development satisfied the required infrastructure as defined in the PPS Section 1.1.3.7. She maintained that the development did not ensure an orderly progression of development within the designated growth area and a timely provision of infrastructure required to meet current needs of the area. (PPS section 1.1.3.8)

**19 Ms McNeely** stated that the Applicant has not demonstrated whether the proposed development promotes the efficient use of existing municipal sewage services and whether the sanitary sewer system would be provided in a manner that was financially viable and whether it would comply with all the regulatory requirements. In addition, she maintained that the Applicant did not demonstrate whether there would be sufficient reserve sewage system capacity within municipal sewage services for the proposed development.

**20** The Board notes that the Applicant provided three witnesses that addressed the issues of sewage services and storm water management in regard to the provincial interest and the PPS. However, the Applicant did not provide any evidence to address section 2 (f) (the efficient use of transportation) (h) (n) (o) (p) and (q) of the *Planning Act*, or to address the land use planning policies of the PPS.

**21** It was Ms McNeely's evidence that the proposed development created a leapfrog pattern of development, jumping over undeveloped areas to develop the Subject Property. It is Ms McNeely's opinion that the proposal was not in conformity with the policies of the Official Plan.

**22 Ms McNeely** testified that the City had concerns regarding the proposed road pattern of the development and its integration with Legend's proposed plan of subdivision to the north (39T-06502). Ms McNeely maintained that to date, there was no resolution, between the Applicant and Legend, regarding the integration of the proposed plan of subdivisions.

**23 Ms McNeely** maintained that the lands necessary to protect the Bradley Avenue extension right-of-way was requested to be included in the limits of the draft plan. Ms McNeely testified that the Bradley

Avenue right-of-way was required to be dedicated to the City in conformity to the Official Plan and the PPS. Ms McNeely noted that notwithstanding City's request, the original submitted plan, dated November 9, 2006 and revised submitted plan, dated September 5, 2007 does not show Bradley Avenue within the limits of the draft plan.

**24** Mr. Nuttall provided land use planning evidence for the Applicant. His land use planning evidence was brief and vague and nearly non-existent. Mr. Nuttall testified that the proposed plan of subdivision conformed to the policies of the Official Plan. However, he did not support his statement with any land use planning evidence, it was just his view. He did not direct the Board to specific provisions of the Official Plan to support his position.

**25** It was Mr. Stratford's and Ms Krichker's evidence that the development would be premature, until viable sanitary servicing options were provided, such as external works and capacity allocations at treatment plants. Both Mr. Stratford and Ms Krichker maintained that there is currently no municipal sanitary treatment plant capacity or sanitary sewer conveyance capacity available for this development and therefore it is not in accordance with the City's Allocation Strategy for Growth. Ms Krichker and Ms McNeely testified that to date, the City has not received viable sanitary servicing options from the Applicant that are acceptable to the City.

**26** Mr. Stratford and Ms Krichker testified that there is no available storm outlet for this plan of subdivision. Mr. Stratford and Ms Krichker maintained that the Regional Storm Water Management Facility to serve this plan is external to the plan and that the required storm/drainage system servicing has yet to be constructed.

**27** Ms Krichker described a regional storm water management system works as an integration of components. Ms Krichker maintained that one should not just deal with a new component without regard to the rest of the components.

**28** It was Mr. Stratford's evidence that a pond (storm water management facility No. 1) is required when growth is experienced in the area. Mr. Stratford testified that this was specifically mentioned in the White Oak Area Storm Water Management facilities Class EA ("White Oak EA"; Exhibit 16, at p. 8)

**29** Mr. Sharma disagrees with the City. He testified that there is a viable storm water option and that the proposed subdivision is not premature. It was Mr. Sharma's evidence that the storm outlet for the Subject Property, as identified in the White Oak EA, is the existing storm water management facility No. 2 located immediately north of the future Bradley Avenue extension, west of White Oak Road. The pond is an extended detention wet pond (permanent pool), providing quality and quantity control functions. Frequent (minor system) flows will be conveyed to the facility *via* storm sewers, with major flows conveyed to the facility *via* overland flow. Mr. Sharma maintained that storm water management facility No. 2 was constructed to address the existing flooding problems and serve future growth (including the Subject Property) within the intended service area.

**30** It was Mr. Sharma and Mr. Briggs' evidence that the White Oak EA recommended that a dry quantity detention area be located between White Oak Road and Wharncliffe Road to accommodate major system storage during extremely large, infrequent storm events. It is Mr. Sharma's opinion that a pond is not necessary until the development area exceeds 50 ha. Mr. Sharma maintains that once the 50 ha

development threshold is reached, the system stream flows will be too great to be safely conveyed on the road allowance, at which point major system storage will be required.

**31** In summary, it was Mr. Sharma's evidence that the proposed development may occur once a storm sewer outlet to pond 2 is available. Construction of a trunk storm sewer across the Legend lands to the east limit of the Subject Property would be required to provide a sufficient outlet. In his opinion, construction of pond 1 will not be required for the Subject Property to be developed. However, Mr. Sharma notes that the Applicant will be required to extend a trunk storm sewer across its lands to provide the future pond 1 with an outlet to pond 2. In his opinion, the proposed subdivision could be developed in accordance with the requirements of the White Oak EA.

**32** Mr. Briggs testified that the City Staff stated at the APAG meeting held on March 15, 2006 that a pond was not required for the Subject Property. (Exhibit 3, Tab 5, at p. 21). Ms McNeely and Ms Krichker note that APAG meeting was held prior to the Applicant filing its application. Ms Krichker testified that this was a pre-consultation meeting and the various Departments had not participated nor asked for their final comments. Ms Krichker testified that once the applications were reviewed, the City's position was consistent that the construction of pond 1 would be required for the Subject Property to proceed.

**33** It was Mr. Stevenson's evidence that the draft plan of subdivision would satisfy the sanitary concerns of the City, for the following reasons:

- \* Provides reduced sanitary sewer flow demand on existing facilities;
- \* Provides alternative housing use for the public interest;
- \* Has minimal or no drain on the City's development funds or capital budget.

**34** The Board has carefully considered all the documentary and *viva voce* evidence regarding the sewage services and storm water management. The Board agrees with the evidence of Ms Krichker and Mr. Stratford that there is no available storm outlet for the plan of subdivision and that the regional storm water management facility to serve the plan is external to the plan and that the storm/drainage system servicing has to be constructed. As such, the Board finds that the storm water and sanitary services for the proposed plan of subdivision are not adequate and that proposed plan of subdivision is premature.

#### **4. CONCLUSIONS AND REASONS**

**35** The Applicant provided three witnesses that led evidence in respect to sewage services and storm water management and their regard to the provincial interest, the PPS and the Official Plan. However, the only land use planning evidence provided by the Applicant was that of Mr. Nuttall. The Board notes that it is not common for an agent such as Mr. Nuttall to be a witness. The Board finds that not only is Mr. Nuttall not qualified in the area of land use planning, but that his evidence is not objective. The Board finds that Mr. Nuttall did not provide any land use evidence that specifically addressed the policies of the PPS, such as the efficient use of transportation; the orderly development of safe and healthy communities; the location of growth and development and whether the development was supported by public transit and whether it would be pedestrian friendly.

**36** The Board finds that Mr. Nuttall has not demonstrated whether the development has regard to section

2 (f) (the efficient use of transportation) (h) (n) (o) (p) and (q) of the *Planning Act*. On the other hand, the Board finds Ms McNeely's uncontradicted land use planning evidence to be persuasive and based on her evidence finds the development to be premature and not consistent with the policies of the PPS.

37 It was Mr. Nuttall's view that the proposed draft plan of subdivision conforms to the policies of the Official Plan. Mr. Nuttall only provided a few vague comments regarding the conformity of the plan of subdivision and the associated ZBA with the Official Plan. The Board finds that Mr. Nuttall had not adequately addressed the required criteria that a subdivision and ZBA must satisfy.

38 Mr. Nuttall stated that one of the key issues regarding the plan of subdivision is transportation. However, his only evidence regarding this issue was a statement that the proposed subdivision plan adequately addresses the issue of transportation and that the development will make minimal use of the existing road system.

39 The Board finds that Mr. Nuttall did not address the land use planning criteria set out in section 51(24) of the *Planning Act*. This is a pivotal section of the Act. The proposed plan of subdivision shall have regard to the pertinent provisions set out in this section. The Board acknowledges that the testimonies of Mr. Sharma, Mr. Briggs and Mr. Stevenson tried to address the issues of sewage and sanitary services in this section; however, there are other equally important land use planning issues that have to be addressed to provide the orderly development of a safe and healthy community as required by provincial policy.

40 It is the Applicant's responsibility to show that the subdivision plan has regard to the pertinent provisions of section 51 (24) of the *Planning Act*. In his testimony Mr. Nuttall failed to address sections 51(24) (a)-(g) at all.

41 As previously mentioned, the Board finds that the storm water and sanitary services proposed by the Applicant for its plan of subdivision does not satisfy the requirements of section 51(24) (i).

42 On the other hand, Ms McNeely provided uncontradicted expert land use planning evidence that showed why the proposed plan of subdivision was premature and why the ZBA was not in conformity with the Official Plan and why it did not represent good planning and was not in the public interest.

43 Based on the uncontradicted land use planning evidence of Ms McNeely the Board finds the following:

- \* The development parcel is constrained, as it does not have a readily available, safe access to an open public street;
- \* The proposed draft plan of subdivision and rezoning are not in conformity to the Official Plan;
- \* Integration with the adjacent surrounding land uses and provision of a block for the Bradley Avenue Road dedication have not been provided; and
- \* It is premature to pre-zone the Subject Property in the absence of an approved draft plan of subdivision.

**44** The Board finds that the Applicant has not demonstrated that the proposed draft plan of subdivision and proposed ZBA conforms to the Official Plan.

**45** Based on the reasons mentioned above the Board Orders that the appeals are dismissed.

**46** The Board so Orders.

M.G. SOMERS  
MEMBER

# London Mobile Lunch Ltd. v. Westminster (Town) Committee of Adjustment

Ontario Local Planning Appeal Tribunal Decisions (f/k/a Ontario Municipal Board)

Ontario Municipal Board

D.L. Santo

September 28, 1992

File No. C 900254

## [1992] O.M.B.D. No. 1684

IN THE MATTER OF Section 52(7) of the Planning Act, 1983 AND IN THE MATTER OF an appeal by London Mobile Lunch Ltd. from a decision of the Committee of Adjustment of the Town of Westminster whereby the Committee granted, upon conditions, an application numbered B-15/89 by Thomas W. Johnstone, lands being composed of Part Lot 32, Concession 2

(724 ppparas.)

## **COUNSEL:**

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David Williams, for the Town of Westminster. Carolyn Stobo, for Goodhand Diversified Inc. John Driesman, for T.W. Johnstone.

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## **DECISION delivered by D.L. SANTO AND ORDER OF THE BOARD**

**1** T. William Johnstone seeks a consent to convey a parcel of land some 3.9 acres in size located on the northerly side of Highway 135, known as Exeter Road. The purpose for such conveyance is to create a lot for industrial purposes. In the past Mr. Johnstone has created, by way of consents to convey, two other parcels of similar size located immediately to the west of the subject proposed lot. The retained lands are some 89 acres in size.

**2** The subject lot contains a parcel of land some 86 feet in width that was the subject of a previous consent application for the purpose of granting an easement and right-of-way to provide the parcel to the immediate west with access onto Highway 135. An access permit was subsequently granted by the Ministry of Transportation.

**3** The original appellant is a company known as London Mobile Lunch Ltd. that had title to the parcel immediately adjacent to the subject property that enjoys the right-of way and right-of-access to Highway 135 from a portion of the proposed new lot. Subsequent to the appeal of the decision of the Committee of Adjustment being lodged the title was transferred by way of sale to Goodhand Diversified Inc. which has assumed the appellant status in this matter.

**4** The evidence is clear that the Committee of Adjustment, the planning department of the Town and the Ministry of Transportation were unaware of the consent that was granted in 1980 for the right of way over the portion of the property that is the subject of this consent application. As a result of that ignorance, the Ministry of Transportation recommended that certain conditions be imposed if consent was granted. The Committee of Adjustment, in granting the consent, imposed the conditions verbatim given to it from the Ministry of Transportation.

**5** The conditions relate to the Ministry's goal, which is also a goal adopted by the Town of Westminster, to reduce the number of access points to Highway 135 and introduce an internal road system into this area that has been designated for future industrial purposes. Conditions 6 and 7 state as follows:

"6. The easement established on the retained parcel be registered against the deeds of the severed and retained parcel for common access to the highway. The easement area on the severed parcel and the retained parcel must be registered against the deeds of the severed and retained parcels and London Mobile Lunch property for access onto Highway 135 replacing the existing mutual access located on the severed parcel in favour of London Mobile Lunch and T.W. Johnstone, which is to be closed.

7. All existing access onto the highway from the severed and retained parcels are to be physically closed and removed."

**6** The conditions imposed anticipate the creation of a new public access road running north from Highway 135. They anticipate the closure of all other accesses from any property along the Johnstone frontage including parcels that had been previously conveyed and are in third party ownerships. The conditions also anticipate the creation of an internal road to the rear of the two parcels previously conveyed and presently in industrial use and that access be gained solely from those lots through the newly created roads onto Highway 135.

**7** The response from the Ministry of Transportation and the imposition of the conditions were never discussed with the previous owners, London Mobile Lunch Limited prior to the Committee of Adjustment issuing such conditions. The Board understands that since the launching of the appeal and the change of ownership, discussions still had not ensued between Johnstone and the present owners Goodhand Diversified Inc. Goodhand is very concerned about the closure of its legitimate access onto Highway 135. The property has been developed and its uses are all orientated towards the existing access.

**8** Counsel for Goodhand asked the Board at the commencement of the hearing to dismiss the application on the basis that the Committee was without jurisdiction in imposing a condition that had the effect of closing a legitimate access of an adjoining property owner against that property owner's wish. The Board decided to reserve on a the motion and hear the merits and handle all of the issues at the some time.

**9** In terms of the jurisdictional matter the Board finds that it is beyond the jurisdiction of the Committee of Adjustment and this Board to force the closure of a legal access that belongs to a party other than the subject applicant. In addition, this Board does not have, nor did the Committee of Adjustment have, any

jurisdiction to rid the subject proposed lot of the legal easement and right-of-way and licence of access over it. The conditions in no way can, no matter how they are written, force the closure or the abandonment of the easement and access as a result of the conditions imposed by the Committee of Adjustment. The access exists and cannot be denied over the objector who enjoys the access.

**10** Likewise, the conditions not only require the closure of all the access points but impose another access network on an abutting owner which is totally against the wishes of the abutting owner. The conditions in no way address the issue of costs of the development of alternate road arrangements, the dedication of such road arrangements to the Municipality or, in effect, the timing of the completion of the alternative road network should the access be closed. In addition should the new road network not be dedicated immediately and assumed by the Municipality it then is dependant on a further consent being required to grant an easement and right-of-way and access over the new road network and given to the two industrial properties previously created and conveyed by Johnstone.

**11** As well, Section 50(5), which applies here to a consent, indicates that conditions can be imposed that are considered to be "reasonable" in the circumstances of the application. The Board finds given the above findings and discussion that conditions 6 and 7 as quoted above are totally unreasonable. They effect a legal access and a legal right-of-way and easement granted by the very committee that has issued these conditions and which are opposed by the land owner affected and can, in effect, seriously jeopardize the successful functioning of the appellant's property.

**12** Therefore the Board finds that the Committee lacked the jurisdiction to impose such conditions and that such condition should not have been imposed. The above ruling does not, though, in any way derogate from the Committee of Adjustment's jurisdiction to grant the consent in question. The Board has before it an appeal of the decision of the Committee of Adjustment together with the conditions. Therefore the above findings on the inappropriateness of those two conditions does not necessarily negate or nullify the consent that was granted by the Committee of Adjustment.

**13** The Board conducted a hearing de novo and the Board then must make findings as to whether or not a consent should be granted subject to the requirements of Section 52(1) of the Planning Act and 50(4) of the same Act. It is always open to the Board to grant the consent without the imposition of conditions 6 and 7. Therefore the Board must now turn to the merits of the consent application itself.

**14** The applicant did not call any evidence to satisfy the requirements of the Planning Act. The applicant relied on the evidence of the planner called by the Municipality who was in support of the consent being granted. It was through his evidence that it was determined that a legitimate consent had been granted to create the easement over which the property now owned by Goodhand Diversified Inc. gains access to Highway 135. It was also through his evidence that it was determined that none of the agencies nor the Committee of Adjustment had recalled that such a consent had been granted.

**15** Notwithstanding that oversight, Mr. Bruce Smith of the Town's planning department was of the view that consent could still be given and that the lot being created even with the continuation of the easement and access was sufficiently large and located appropriately to be suitable and desirable for industrial purposes.

**16** There was no issue as to conformity with the Official Plan or the Zoning By-law.



**17** It was Mr. Smith's opinion that the Official Plan made it very clear that it was the goal of the municipality to reduce the number of individual accesses on Highway 135 while developing an internal road network to the north and the south of Highway 135. The proposed new road that was required as one of the conditions would project northerly an existing road known as Southfield Drive that runs south of Highway 135. The new proposed road would be in direct alignment with Southfield Drive.

**18** While Mr. Smith indicated that the preferred method of developing the Johnstone property would be a plan of subdivision, it was his view that, with the reservation of the proposed new road, there was sufficient land for one additional lot to be created without prejudicing the future development of the remaining 89 acres by way of a proper plan of subdivision.

**19** None of the parties subpoenaed an official from the Ministry of Transportation to determine its comments should conditions 6 and 7 not be imposed as they had originally requested.

**20** The first finding that the Board must make in determining the merits of a consent application is the requirement of Section 52(1) which says:

"Give a consent if satisfied that a plan of subdivision of the land is not necessary for the proper and orderly development of the Municipality."

Counsel for the appellant persuaded the Board in argument that a plan of subdivision should be the preferred method of developing the Johnstone property. The Committee in granting the consent imposed conditions that would, in effect, create an internal road network. The Municipality, its planning department and the Ministry of Transportation recommended in favour of the consent solely on the basis of this internal road network being established. However, the conditions as imposed by the Committee of Adjustment provides no real formal mechanism for the creation and the development and the timing of development of such an internal road. Such matters can most effectively be handled through the plan of subdivision process. Therefore the Board finds that a plan of subdivision of the land is necessary for the proper and orderly development of the site Municipality.

**21** This then leads the Board to Section 50(4)(b) of the Planning Act in which the Board finds that the proposed consent is premature entirely dependant on the creation of an internal road system and in resolving legal access points that presently exist from adjoining property owners. Until these matters are resolved and the manner in which an internal road system can be effectively developed, any such applications are deemed premature.

**22** Likewise, Section 50(4)(g) requires the Board to look at the restrictions, if any, on the land that is the subject of the application. The restriction on the parcel that is the subject of the application with regard to the legal access and easement has not, in any way been looked at and determined as to how it can continue to function with the addition of any development to the east.

**23** As there were no alternatives put to the Board as to how a consent can be granted to the subject property without the internal road system and without all of the conditions that were requested by the Ministry of Transportation the Board finds that the application is premature and is subject to restrictions that have not been resolved with regard to accesses that are legal and in effect.

24 Having made the above findings the Board orders that the consent is not granted and allows the appeal.

D.L. SANTO, Vice-Chair

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