

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: July 31, 2014

CASE NO(S): PL121394

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

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| Referred by: | Freed (King-Church) Investments Limited |
| Subject: | Site Plan |
| Property Address/Description: | 101 King Street East and 54-70 Colborne Street |
| Municipality: | City of Toronto |
| OMB Case No.: | PL121394 |
| OMB File No.: | PL121394 |

Freed (King-Church) Investments Limited 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 neglect to enact a proposed amendment to Zoning By-law 438-86 of the City of Toronto to rezone lands respecting 101 King Street East and 54-70 Colborne Street to permit the development of a 25-storey mixed-use building containing with 284 residential units and 890 square metres of retail space at grade
O.M.B. File No.: PL121415

Heard: September 23 to 26, 2013 in Toronto, Ontario

APPEARANCES:

Parties

Freed (King-Church) Investments
Limited

City of Toronto

Counsel

Adam J. Brown
Jessica Smuskowitz

Gordon J. Whicher
Nicholas Rolfe (student-at-law)

DECISION DELIVERED BY JAMES R. MCKENZIE AND ORDER OF THE BOARD

INTRODUCTION

[1] Freed (King-Church) Investments Limited (“applicant”) owns an L-shaped property abutting Church Street between King Street East and Colborne Street—known municipally as 101 King Street East and 54-70 Colborne Street (“subject property” or “site”)—that is presently used as a surface parking lot. Desirous of developing the subject property with a mixed-use development consisting of a 25-storey residential condominium building with at-grade retail uses (“proposed development”), the applicant applied for both an amendment to City of Toronto (“City”) zoning by-law no. 438-86, as amended, and site plan approval. The City did not take a decision on either application within the statutory time period for each and the applicant thereafter filed appeals pursuant to s. 34(11) and s. 41(12), respectively, of the *Planning Act*.

[2] This decision is the result of a four-day hearing convened to consider the appeals.

BACKGROUND AND CONTEXT

Physical Context

[3] The subject property is situated in the St. Lawrence Neighbourhood. For readers familiar with the city, the site is at the south-west corner of Church Street and King Street East, cater-corner from St. James Cathedral and St. James Park; one block north of the iconic Flatiron Building at the intersection of Church Street and Wellington Street East; one block east of the King Edward Hotel, and two of Yonge Street.

[4] Surrounding land uses and structures described by the City’s planning staff are as follows:

- to the north, a 17-storey mixed-use building on the north side of King Street East, which steps down to eight storeys at the corner of King Street East and

Church Street;

- to the east, three-storey commercial buildings fronting on King Street East, including a restaurant and sidewalk café along Church Street opposite the site, and the Market Square condominiums;
- to the south, at the corner of Church and Colborne Streets, a nine-storey mixed-use building with at-grade retail uses; and, on the south side of Colborne Street opposite the subject property, four-storey designated heritage buildings;
- to the west, a five-storey commercial building with at-grade retail uses, a surface parking lot, and a three-storey commercial building fronting on Leader Lane. (The King Edward Hotel is situated on the west side of Leader Lane);

Institutional Context

[5] The subject property is located in the *Downtown and Central Waterfront District* and about a half-block east of the *Financial District*, both of which are areas identified in the Official Plan. Its Official Plan designation is *Mixed Use Areas*, a designation that permits the proposed land uses. Specific policies of the Official Plan are addressed in the evidence and analysis section of this decision.

[6] The institutional context upon which planning staff rely to assess development applications and their conformity with Official Plan policies also includes a series of urban design guidelines.

[7] The St. Lawrence Neighbourhood Focused Area Urban Design Guidelines were adopted by Council in July 2005. The goal of these guidelines is:

... to improve the quality of the environment in the Focused Area of the St. Lawrence

Neighbourhood and to ensure that the elements that contribute to the special character of the diverse parts of the area are retained and enhanced. The main planning and urban design objectives for achieving this goal include the enhancement of areas of special character, enhancement of historic buildings and how they are viewed, and improvements to the public realm areas such as parks, plazas, and sidewalks.

[8] The subject property is also situated in an area covered by the Tall Building Design Guidelines, adopted by Council in May 2013, and the Downtown Tall Buildings: Vision and Supplemental Design Guidelines, adopted in July 2012. These guidelines are the product of a consultants' study entitled "Tall buildings, Inviting Change in Downtown Toronto" and build upon pre-existing city-wide Tall Building guidelines known as the Design Criteria for Review of Tall Building Proposals. The newer guidelines:

... relate to the design, spacing, placement and orientation of tall buildings. They have been derived from a detailed on-the-ground assessment of local conditions within Downtown Toronto, through selective testing of chosen sites and through an assessment of best practices relating to tall building development in cities from across North America.

[9] The institutional context also includes the St. Lawrence Neighbourhood Community Improvement Plan; however, the City did not call any substantive evidence on this instrument beyond noting its existence.

Chronology

[10] The subject property has been used as a surface parking lot since the mid-1950's.

[11] On September 27, 1994, Council approved a site-specific zoning by-law, (No. 1994-0653), that permitted a mixed-use development and gross floor area of 10,241 square metres, to a maximum height of 26 metres (roughly eight storeys) on Colborne Street, stepping down to 16 metres (roughly five storeys) along Church Street and King Street East. Nothing was ever developed under that by-law, and it remains in effect.

[12] In 2008, Great Gulf Properties Inc., the then-owner of the subject property, submitted an application for its development with a 39-storey mixed-use building

consisting of a condominium tower atop a seven-storey base with at-grade retail uses. The City's planning staff prepared a Directions Report; however, nothing ever came of the application. Staff closed its file in 2009. The site was subsequently acquired by the applicant.

[13] In 2011, the applicant initiated the process for developing the site, beginning with meetings with City planning staff over the period between late-2011 to early-2012. A formal application was filed on February 29, 2012. Planning staff prepared a Preliminary Report, dated March 27, 2012, and contributed to a Request for Directions Report, dated July 8, 2013, released through the City solicitor's office.

The Proposed Development

[14] The applicant is proposing a 25-storey mixed-use development consisting of 251 residential units having a gross floor area of approximately 20,238 square metres (217, 842 square feet), and ground floor retail space having a gross floor area of approximately 890 square metres (9,580 square feet). The unit mix provisionally includes studio suites (31 percent), one-bedroom (including some with den) suites (50 percent), and two-bedroom suites (19 percent). Five levels of underground parking will accommodate 186 parking stalls.

[15] The mass of the proposed building has been deployed in three distinct elements. It rises from grade with a 6-storey, L-shaped podium element built to the street lines of King, Church, and Colborne Streets. At the seventh floor, the building design transitions away (or steps back) from the edge of the podium deck, still maintaining an L-shaped element, but stepping back various distances from each of the three street lines. From the twelfth to the twenty-fifth floors, the building continues its rise as an articulated point tower, again stepping back from the edge of its base.

WITNESSES

[16] Nine witnesses testified, of whom the applicant called three.

[17] Craig Hunter is a registered professional planner, and member of the Ontario Professional Planners Institute and the Canadian Institute of Planners. He prepared a planning justification study to support the applicant's rezoning application. The Board qualified Mr. Hunter to provide opinion evidence in land use planning.

[18] Michael McClelland is an architect, having over 25 years' experience in the fields of heritage conservation, heritage planning, and urban design. Mr. McClelland is the heritage architect on retainer for the King Edward Hotel. He completed a heritage impact assessment for the proposed development scheme, examining its relationship with the St. Lawrence Neighbourhood. The Board qualified Mr. McClelland to provide opinion evidence on the subject of heritage and conservation planning through architecture.

[19] Peter Clewes is an architect and urban designer, with over 30 years' experience. He is conversant about the St. Lawrence Neighbourhood and its immediate surroundings, having designed The Spire, a 45-storey, mixed-use condominium building located one block north of the subject property at the northwest corner of Church Street and Adelaide Street East. The Board qualified Mr. Clewes as an expert in the fields of architecture and urban design.

[20] The City called two witnesses.

[21] Alex Teixeira is a professional planner in the City's planning department, responsible for the general area within which the subject property is located. He is a member of the Ontario Professional Planner's Institute and the Canadian Institute of Planners. The Board qualified Mr. Teixeira to provide opinion evidence in land use planning.

[22] James Parakh is an architect and urban designer, who, at the time of this hearing, was the acting director of urban design in the City's planning Department. The Board qualified Mr. Parakh as an expert in the field of urban design.

[23] The balance of the evidence before the Board came from four individuals who requested and were granted participant status. All spoke against the proposed development scheme.

[24] Suzanne Kavanagh is the chair of the St. Lawrence Neighbourhood Association.

[25] James Bar is a member of the St. Lawrence Neighbourhood Association's development committee. He directed his evidence to the City's Tall Building Urban Design Guidelines and the St. Lawrence Neighbourhood Focused Area Urban Design Guidelines.

[26] Peter Tomlinson resides in The Spire condominium building, (noted above in para. 19). He advised the Board that he was speaking on his own behalf and on behalf of the condominium corporation's board of directors, albeit without a resolution of or correspondence from that board to that effect. Mr. Tomlinson noted that he has lived within 100 metres of St. James Cathedral since 1979, the last seven of which have been in The Spire.

[27] Paul Reuber resides in the Market Square mixed-use, condominium building at 35 Church Street, opposite the subject property. He addressed the Board on behalf of Metropolitan Toronto Condominium Corporation No. 597—that building's condominium corporation—and provided correspondence from the president of that corporation indicating that its board of directors had reviewed his presentation and requested that he present it behalf of the corporation.

[28] Before moving to the evidence, the Board will comment on a preliminary matter that arose in connection with Mr. Reuber's testimony.

[29] Mr. Reuber is an architect. He presented a 12 page curriculum vitae at the outset of his testimony, asking to be recognised as an expert witness. His request was met with an objection from Adam Brown, the applicant’s counsel, on the ground that he lacked independence. Mr. Reuber retorted, saying that he was, “no less independent than someone paid by a client.”

[30] The Board acknowledged Mr. Reuber’s professional training and experience, and refused his request to be qualified as an expert witness. Neither Mr. Whicher nor Mr. Brown objected to this ruling. Mr. Reuber, however, was miffed by the ruling, telling the Board that he had been qualified as an expert witness in other Board hearings.

[31] The Board does not doubt Mr. Reuber’s abilities as an architect, but, as was explained to him at the time of the ruling, those abilities represent only one of the two ingredients necessary to sustain a qualification as an expert for the purpose of providing opinion evidence. In this case, given that he resides directly across the street from the subject property, alleges that both he and the condominium corporation for whom he spoke will be negatively affected by the proposed development, and is on the public record (prior to this hearing) as being opposed to the scheme, Mr. Reuber lacks independence, the requisite second ingredient. His remark equating his self-perceived independence to that of remunerated professional, unfortunately, betrays a profound and fundamental misunderstanding about the nature, qualities, and responsibilities of an expert witness, notwithstanding that he has been so qualified by other panels of the Board on previous occasions.

EVIDENCE, ANALYSIS AND FINDINGS

[32] Section 3(5) of the *Planning Act* requires that a decision by the Board shall be consistent with policy statements in effect on the date of the decision—in this case, the Provincial Policy Statement 2014 (“PPS 2014”)—and conform with provincial plans in effect on the date of the decision, or not conflict with them—in this case, the 2005

Growth Plan for the Greater Golden Horseshoe (“Growth Plan”). The applicant and City submitted, on consent, that the appeals and proposed development do not raise any issue with the PPS 2014 or Growth Plan. On this basis, the Board accepts the evidence of Mr. Hunter and Mr. Teixeira to sustain a finding that the proposed development and corresponding amendment to the City’s comprehensive zoning by-law are consistent with and conform to, as applicable, these higher order planning instruments.

The Core of the Dispute: Impact on Neighbourhood Character

[33] At the core of this dispute is a divergence of opinion regarding the impact of the proposed development on the character of the St. Lawrence Neighbourhood and whether that impact will erode or maintain the neighbourhood’s character. This was framed in preliminary remarks made by Messrs. Teixeira and Parakh at the outset of their respective testimony. Mr. Teixeira told the Board that character and transition were paramount considerations, asking, as the foundation for his evidence, “does the proposal reinforce the character [of the St. Lawrence Neighbourhood]?” and “does the proposal provide appropriate transition [in building height between the Downtown Core and the St. Lawrence Neighbourhood]?” Mr. Parakh echoed that framing, asking, “is the built form [shown] in the [St. Lawrence Neighbourhood Focused Area Urban Design] Guidelines the best way to achieve [the intent of] Official Plan policies?” The City claims that the development proposal does not maintain the character of the St. Lawrence Neighbourhood, and, as a consequence, does not conform to the policies of the City’s Official Plan requiring neighbourhood character to be maintained and reinforced—a view shared and expressed by the four lay witnesses. The applicant asserts otherwise.

[34] This section will focus on the evidence relating to two subsets of the core of the dispute: transition and urban design, both of which engage considerations of neighbourhood character. It will conclude by addressing the appeal and proposed development in the context of s. 37 of the *Planning Act*. Section 37 enables

municipalities to authorise increases in the height and/or density of development in return for facilities, services, or matters defined by by-law, commonly referred to as community benefits. While this subject is not related to the core of the dispute, it warrants consideration given that Mr. Teixeira spent some time addressing it during his evidence and Mr. Whicher spoke to it during his concluding submissions.

[35] The Board begins with Mr. Teixeira, who took no issue with the land uses proposed by the applicant. Mr. Teixeira did, however, take issue with the scale and intensity of the proposed development. In that regard his evidence focused on several policies in the Official Plan to underpin an overarching planning opinion that the proposed development does not represent an acceptable transition within the *Mixed Use Areas* designation between the intensity of development and corresponding building heights in the *Financial District* and the scale and corresponding character of the St. Lawrence Neighbourhood. His conclusions are that it does not conform to the policies of the Official Plan and that the appeals, therefore, should not be allowed.

[36] Mr. Teixeira directed the Board's attention to a number of policies in the Official Plan, two of which—section 3.1.2.3a) and c), and section 4.5.2c)—are germane to the core of this dispute. For ease of reference, both are reproduced here.

3.1.2.3 New development will be massed and its exterior façade will be designed to fit harmoniously into its existing and/or planned context, and will limit its impact on neighbouring streets, parks, open spaces properties by:

a) massing new buildings to frame adjacent streets and open spaces in a way that respects the existing and/or planned street proportion;

...

c) creating appropriate transitions in scale to neighbouring existing and/or planned buildings for the purpose of achieving the objectives of this [Official] Plan;...

4.5.2 In *Mixed Use Areas* development will:

...

c) locate and mass new buildings to provide a transition between areas of different development intensity and scale, as necessary to achieve the objectives of this Plan, through means such as providing appropriate setbacks and/or a stepping down of heights, particularly towards lower scale Neighbourhoods;...

[37] The Board will return to these policies in its analysis.

[38] Mr. Teixeira also referred to section 2.2.1.6 of the Official Plan which stipulates that design guidelines will be developed and applied to ensure that new development respects the context within which it is proposed. He did not specifically address the St. Lawrence Neighbourhood Focused Area Urban Design Guidelines, the Tall Building Design Guidelines, or the Downtown Tall Buildings Vision and Supplemental Design Guidelines in his evidence-in-chief; he hewed to the structure and points set out in Exhibit 12, his evidence outline. He did, however, indicate that he applied the stated guidelines in his assessment of the proposed development, adding generally that the application of guidelines demands a “critical examination” to determine if they are the “best way” to achieve Official Plan policy. In his opinion, a proposed development should comply with guidelines if it is determined that those guidelines are the best way to achieve policy. Mr. Teixeira did not, however, follow-through on that evidence to articulate the practices he employs as critical examination.

[39] In Mr. Teixeira’s opinion, the proposed development scheme does not fit harmoniously in the St. Lawrence Neighbourhood. The subject property is directly between the King Edward Hotel, at a height of 16 storeys, and the Market Square condominium, at a height of nine storeys. To him, the proposed development at a height of 25 storeys is an anomaly in that it does not maintain a constant reduction in building heights between those two points, and cannot, therefore, be said to conform to the policies of section 3.1.2.3 and 4.5.2 noted above.

[40] Mr. Teixeira was asked in cross-examination about the Downtown Tall Buildings: Vision and Supplemental Design Guidelines. In particular, he was queried about his opinion in light of a significant discrepancy between a graphic entitled “Map 2–Downtown Vision Height Map” and an appendix entitled “Table 5–Canyon Form Base Building Heights–Street Segments,” and whether his opinion would change if the appendix was to be relied on instead of the graphic. The discrepancy in question relates to the characterisation of King Street East between Bay Street and Church Street.

[41] By way of background, the consultants’ study preceding the guidelines identified that section of King Street East as suitable for building heights of 25 to 45 storeys, and Colborne Street as suitable for building heights of 15 to 25 storeys. The lower figures of these ranges were recommended as an as-of-right allowance, and the higher figures recommended as an allowance potentially achievable through a zoning by-law amendment process and the provision of community benefits pursuant to s. 37 of the *Planning Act*.

[42] When the guidelines were adopted by council, the above identifications changed. The identifications for Colborne Street and King Street East, both east of Leader Lane, were removed from the graphic. Moreover, King Street East was identified for building heights of 15 to 25 storeys, but only west of Leader Lane. In the appendix, however, King Street East between Bay and Church Streets was identified for building heights of 25 storeys.

[43] Mr. Teixeira admitted that he did not know about the appendix or the discrepancy, that his opinion was informed by the graphic. When asked if his opinion would change as a result of learning about the appendix, he answered that “it would depend”—he did not say what on—and suggested that the identification of King Street East in the appendix was an error. He admitted, however, that he did not know if in fact it was an error, nor did he know why the graphic and the appendix differed.

[44] Mr. Teixeira was also asked about the lack of any public correspondence or report specifically articulating his planning analysis that the proposed development did not conform with the Official Plan, notwithstanding the passage of some 468 days between the respective dates of the Preliminary Report he prepared and the Request For Directions Report released through the City's solicitor's office and to which he contributed. He told the Board that the applicant was "aware of the non-conformity," saying, "anyone in this business knows that if planning staff won't support an application, it's because it doesn't comply with the Official Plan." He also added, "We [planning staff] don't encourage applicants to gut the Official Plan."

[45] Turning to Mr. Parakh, he, like Mr. Teixeira, took no issue with the proposed land uses. He did, however, also take issue with the scale and massing of the proposed development, calling it an over-development of the subject property that will detract from the character of the St. Lawrence Neighbourhood. He described the neighbourhood's character as reflecting a consistent building scale of low- to mid-rise structures constructed of common materials, typically brick.

[46] Mr. Parakh directed his evidence to policies in the Official Plan dealing with urban design, as well as the St. Lawrence Neighbourhood Focused Urban Design Guidelines, the Tall Buildings Design Guidelines, and the Downtown Tall Buildings Vision and Supplemental Design Guidelines. The policies he reviewed were those addressed by Mr. Teixeira, including section 3.1.2.3 a) and c).

[47] Mr. Parakh took the Board through numerous axonometric graphics depicting the proposed development in relation to existing buildings to suggest that it does not relate constructively to the subject property's existing and planned context. In his opinion, it does not comply with the urban design policies of the Official Plan, an opinion he reiterated no less than three separate times—twice in chief and once in cross. Following each, he was asked—by the Board the first and second times, by Mr. Brown the third—if that meant an amendment to the Official Plan would be required to

implement the zoning by-law amendment applied for and appealed, were that appeal to be allowed. Each time, Mr. Parakh demurred or declined to answer, saying that the question was better directed to Mr. Teixeira, without offering any explanation for not answering.

[48] Mr. Parakh placed great emphasis on the application of the St. Lawrence Neighbourhood Focused Area Urban Design Guidelines. He told the Board that his approach is largely driven by the organising question he posed at the outset of his testimony; that is, whether the built form reflected in the guidelines is the “best way” to implement the intent of Official Plan policy. In this regard, his attitude very much mirrored Mr. Teixeira’s. He added that the application of guidelines must strike a balance between “more than merely consider[ing them]” and “not elevating [them] to ‘must conform with’ status.” He did not, however, follow-through on this evidence to articulate or explain what he does to achieve a balance when assessing a development proposal through the lens of guidelines—something the Board would have found beneficial, especially in view of admissions he made in cross-examination with regard to the use of guidelines, discussed below.

[49] Mr. Parakh emphasised an area in the St. Lawrence Neighbourhood Focused Area Urban Design Guidelines identified as the “character area.” Its general location is denoted in the guidelines by a dashed-circle centred on the point where Front Street East and Wellington Street East intersect, and roughly covering that area between King Street East (north) and the foot of Church Street (south), and Scott Street (west) and Jarvis Street (east). The subject site falls just inside its north-west boundary delineation.

[50] In Mr. Parakh’s opinion, the proposed development represents the first “point tower” in the character area. He told the Board that a point tower is not of the character the City typically associates with the St. Lawrence Neighbourhood. In his opinion, the subject property is not a point tower site, and the effect of allowing the appeal will be a

loss of skyview.

[51] Mr. Parakh approaches the interpretation of transition policies in the Official Plan differently than does Mr. Teixeira. For Mr. Parakh, the transition of building heights does not automatically mean a constant lowering of height between a starting and ending point, nor that a new building must be lower than a building preceding it as one moves east from the *Financial District*. He acknowledged in cross-examination that undulations may be tolerated.

[52] Mr. Parakh was also cross-examined about his application of the Tall Buildings Design Guidelines and the Downtown Tall Buildings Vision and Supplemental Design Guidelines. In particular, he was asked about two other development projects on which he had input—88 Scott Street, a 58-story mixed-use development; and 94 Cumberland Street, a 22-storey mixed-use development—and how these guidelines were applied in those circumstances. Mr. Parakh acknowledged that planning staff, including him, use discretion on a case-by-case basis when applying any guidelines; that guidelines are not applied as strictly as would zoning by-law standards be applied; that each project and its corresponding context is unique and considered accordingly; and that the two projects (about which he was questioned) were approved based in part on staff-supported departures from the guidelines. He did not, however, provide any explication for how staff discretion is exercised in a particular case or what factors inform or shape whether more, less, or no flexibility will be accorded a development proposal in staff's application of guidelines.

[53] Turning to the applicant's witnesses, Mr. Hunter began his testimony by describing the evolution of the proposed development. He told the Board that no reliance was placed on the previous proposal by Great Gulf Properties Inc.; that the proposed development was designed having regard for the recommendations in the Tall Buildings consultants' study; and that he and the applicant's project team met with planning staff on several occasions, and were ultimately told in 2013 that staff would

only support a proposal reflecting a height in the “mid-teens.”

[54] Mr. Hunter took the Board through the comprehensive planning justification study he prepared and which was filed among the technical materials supporting the application to amend the City’s comprehensive zoning by-law. His report addressed a number of issues, including the proposed development’s conformity with the relevant policies of the Official Plan, its responsiveness to the various urban design guidelines, and the subject of shadowing impacts as regards St. James Cathedral and St. James Park.

[55] Mr. Hunter’s opinion is that the proposed development fully conforms to the policies of the Official Plan. He pointed out that *Mixed Use Areas* represent areas designated for growth. He described how the proposed development has been designed to be responsive to the different pulses of activity typical of a downtown area. In turn, Mr. Hunter took the Board through key policies, describing, in the process, how the proposed development satisfies the 11 development criteria set out in section 4.5, including those emphasised by Messrs. Teixeira and Parakh regarding transition and compatibility.

[56] With respect to the various urban design guidelines, Mr. Hunter’s report devotes considerable attention to their application as a means of evaluating the proposed development. In his professional opinion, the proposed development implements the intent of the guidelines—the building design complements the vitality of the pedestrian environment and the character of the St. Lawrence Neighbourhood; the incorporation of a podium and the stepping back of elements above is responsive to the human scale of the subject site’s downtown context. Mr. Hunter concluded his evidence on this subject by telling the Board that guidelines are just as their label connotes: they are an aid and as such do not rise to the level of prescription.

[57] Finally, on the subject of shadows associated with the proposed development,

Mr. Hunter took the Board through the Official Plan policies informing shadow impact analysis, and the analysis performed as required by those policies. The Official Plan requires shadowing to be analysed for the spring (March) and fall (September) equinoxes, and the summer (June) solstice; analysis is not required for the winter (December) solstice. Mr. Hunter described how the proposed development was designed with sensitivity for St. James Cathedral. In this regard, shadow impacts on the Cathedral property have been absolutely minimised; there are no shadow impacts in June; in March and September, a shadow falls across the sidewalk and a small portion of the Cathedral forecourt for approximately one hour (2:18 p.m. to 3:18 p.m.) for about one week during those months. There are no shadow impacts on St. James Park during those periods for which Official Plan policy requires analysis. Given its urban context, Mr. Hunter's expressed the opinion that the proposed development does not introduce any deleterious or unacceptable shadow externalities.

[58] Mr. McClelland was responsible for assessing the proposed development in relation to the heritage dimensions of its context and completed a heritage impact assessment that examined its impact on the heritage assets of the St. Lawrence Neighbourhood. He emphasised two things to the Board: first, that there is no predominant building height in the St. Lawrence Neighbourhood west of Church Street, that any appreciation of building heights in that area is only discernable on a block-by-block basis; and, second, that the predominant building height of the Neighbourhood east of Church Street to Sherbourne Street is low and, therefore, sensitive to height.

[59] Mr. McClelland told the Board that he considered the material finishes of the proposed building and the design of its façade along Colborne Street. In his opinion, they both complement the row of heritage buildings situated on the south side of the street.

[60] Overall, it is Mr. McClelland's professional opinion that the proposed development does not negatively impact the heritage character of the St. Lawrence

Neighbourhood—an opinion sustained through cross-examination and which stands as the only evidence before the Board respecting the character of the St. Lawrence Neighbourhood as it relates to heritage considerations.

[61] Having designed The Spire and being conversant with key elements of the St. Lawrence Neighbourhood, (in part, from that experience), Mr. Clewes began his evidence confirming that the Neighbourhood has deep historic significance to the city. He told the Board that key principles informed the design of the proposed building vis-à-vis its height. The first is the impact of shadows on the public realm. He reinforced Mr. Hunter's evidence in that regard.

[62] The second is the sensitivity of street wall heights given the presence of historical buildings proximate to the subject property. Describing the materials and colors with which the podium of the proposed building will be finished and the reasons for their selection, he reinforced the evidence of Mr. McClelland that it will harmoniously coexist with both the historical buildings on the south side of Colborne Street as well as other buildings of brick construction throughout the St. Lawrence Neighbourhood.

[63] The third is the visual impact of the proposed building and whether it will pose a threat to the existing building stock of the Neighbourhood. In Mr. Clewes's opinion, it will not; he told the Board that it is too simplistic to opine that a tall building will *de facto* destabilise historic buildings and areas and put pressure on the remaining fabric of those areas. He also described how the design of the proposed building will ensure that it does not obscure views to prominent buildings.

[64] Regarding the application of the various urban design guidelines, Mr. Clewes drew a parallel with the application of the Ontario Building Code ("Code"). He told the Board that the Code essentially provides a pathway consisting of various routes concerning the design of buildings, and that Code requirements can be achieved through alternate measures that equally achieve compliance. He testified that the

design of the proposed building is tantamount to an alternative measure that satisfies the intent of the guidelines. He told the Board that his approach regarding the application of the various guidelines is consistent with the plain meaning of the notion 'guideline': they are not prescriptive, nor are they meant to exclude other approaches for achieving their intent, and to demonstrate, he took the Board through several guidelines and referenced the proposed building's design showing how its elements are responsive to their intent.

[65] Turning to its analysis, the Board was first struck by a number of inconsistencies in the City's evidence, starting with the transition policies of the Official Plan and, in particular, the divergence of professional opinion in the respective evidence of Mr. Teixeira and Mr. Parakh regarding how those policies are interpreted and applied. Mr. Teixeira maintains that the policies require the transition between land uses of differing intensities to be constant; that is, to not undulate between the starting and ending points framing the analysis. In other words, in applying the policy, Mr. Teixeira would draw a line between the starting and ending points—between the *Financial District* and the Market Square condominium—and interpret and apply the transition policies to require that no building rising between those points either pierce that straight line or that any new building proposed or built east of an existing building not be taller than the existing building it is east of. This latter approach is made evident by Mr. Teixeira's opinion that the proposed development, being east of the King Edward Hotel, must be lower in height than the King Edward Hotel.

[66] Mr. Parakh, on the other hand, acknowledged under cross-examination that transition does not require a constant lowering of building heights as one moves east from the *Financial District*; that undulations may still maintain the intent and purpose of the transition policies of the Official Plan. Mr. Hunter shares Mr. Parakh's interpretation in this regard.

[67] Notwithstanding that the difference between the respective opinion of Mr.

Teixiera and Mr. Parakh was not reconciled, the Board finds Mr. Parakh's interpretation to be the more compelling of the two. First, there is no language in the Official Plan policies explicitly requiring constancy in the lowering of building heights between starting and ending points for the purpose of analysing a transition of building heights. In this regard, the Board finds Mr. Teixeira's opinion to be founded on a specious intent read into the policies. Second, given that Official Plan policies are characteristically framed to capture a broad spectrum of circumstances—and that certainly bears out on the face of the language of sections 3.1.3.2, 3.1.3, and 4.5.2—Mr. Teixeira's interpretation strikes the Board as pedantic and unreasonable in the circumstances.

[68] Second, in his consideration and analysis of the proposed development, especially as it engaged the various Tall Building guidelines, the Board finds that Mr. Parakh has taken an approach in this case that is not consistent with the approach he took on other development projects that share the fact of being a tall building, and that has implications for how the Board makes sense of his appropriation of the St. Lawrence Neighbourhood Focused Area Urban Design Guidelines. The Board readily accepts that the context of a development proposal shapes the consideration and application of any guidelines. That cannot mean, however, that discretion in the application of any guidelines may be exercised so liberally as to have little to no regard for consistency and basic fairness when relying upon them. Mr. Parakh did not explain why the circumstances surrounding the proposed development warrant so strict an application of certain guidelines.

[69] Moreover, given that discretion is exercised and that departures from the various Tall Building guidelines have been deemed acceptable by Mr. Parakh and planning staff elsewhere in the city, the Board is left wondering what that means in the context of Mr. Parakh's evidence-organising question, namely: are the St. Lawrence Neighbourhood Focused Area Urban Design Guidelines the best way to achieve Official Plan policy? Does the fact of departures in those other cases mean that staff concluded the guidelines were not the best way to achieve policy, that other design responses better

met policy? If they were not the best way to achieve policy, what does that suggest about the sapience of relying so heavily, as Mr. Parakh and Mr. Teixeira did, on guidelines as a means for assessing compliance with Official Plan policy? Whether in reference to the various Tall Building guidelines or the St. Lawrence Neighbourhood Focused Area Urban Design Guidelines, the neglect to provide any account for how discretion was exercised in applying guidelines in this case has done nothing to dispel the sense that the guidelines were self-servingly appropriated in this case without any regard for consistency.

[70] The Board was also struck by what may be characterised as evasive elements of the City's evidence. It cannot, for example, make any sense of why Mr. Parakh refused to follow-through on his opinion—that the proposed development does not comply with urban design policies in the Official Plan—with a response when asked if an amendment would therefore be necessary to the Official Plan. His qualification to provide opinion evidence on the substance of the Official Plan policies relating to urban design *de facto* subsumes what were effectively related procedural questions. The Board, however, was not provided with any reason to explain his reticence—and that, consequently, raised doubt in the Board's mind about the fidelity of his opinions to the point that any confidence it might have found in those opinions was significantly compromised.

[71] Taken together, the Board is left with serious reservations about the City's evidence, so much so that it finds it cannot be relied upon in these circumstances. For this reason, as well as those above, the Board prefers the evidence of Messrs. Hunter, McClelland, and Clewes and finds that the proposed amendment to the City's comprehensive zoning by-law conforms to its Official Plan and constitutes good planning.

Section 37 of the *Planning Act*

[72] A question that permeated the hearing was whether s. 37 of the *Planning Act* should be applied in the event the Board was to allow the appeal and approve an amendment to the City's comprehensive zoning by-law. The City led evidence that it should, and Mr. Whicher encouraged the Board to require that as a condition in the event the appeal was allowed.

[73] For readers unfamiliar with s. 37 of the *Planning Act*, its provisions are set out below for convenience:

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.

(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.

(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.

(4) Any agreement entered into under subsection (3) may be registered against the land to which it applies and the municipality is entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land.

[74] Mr. Teixeira directed the Board's attention to policies in s. 5.1.1 of the Official Plan which deal with height and/or density incentives. These policies implement the permissions given to a municipality under s. 37 of the *Planning Act*. Mr. Teixeira testified that the proposed development, were it to be allowed, was a suitable candidate for applying those permissions, and told the Board that the additional height and density reflected in the proposed development warranted a \$1.5 million contribution for community benefits. Mr. Whicher, moreover, spent a portion of his cross-examination of Mr. Hunter on this subject and at one point suggested that the Board might "provide

assistance” to the parties on the issues of a quantum and particular benefits.

[75] Mr. Brown argued that s. 37 does not apply in these circumstances because any provision of money for community benefits would not be voluntary as contemplated by the legislation. In spite of those submissions, however, he told the Board and the City’s representatives at the hearing that the applicant would provide a payment of \$250,000 as a voluntary contribution to the City for community benefits in the event the appeal was allowed.

[76] The Board will say the following regarding the submissions of counsel regarding the application of s. 37 in these circumstances, ever-mindful of the findings and enunciations set forth in keynote decisions of the Board, differently constituted, on the question of including a s. 37 contribution as a condition of allowing an appeal that would facilitate development. Those decisions—from *Toronto (City) Official Plan Residential Amendment (Re)* [2000] O.M.B.D. 1102 (Board File No. PL000351); to *Toronto (City) Official Plan Low Density Mixed Commercial Residential Area Amendment (Re)* [2006] O.M.B.D. No. 595 (Board File No. PL050918); and most recently to *Sentinal (Broadway) Holdings Inc. v. Toronto (City)* [2014] O.M.B.D. No. 447 (Board File No. MM130048)—conclude that the Board has the jurisdiction, albeit narrow, to include such a condition and set forth parameters to frame the imposition of such a condition. While it is established law that the Board may make any decision on an appeal that a municipal council could have made on the original application, and that arguably encompasses the inclusion of s. 37 benefits as a condition, this panel does not read the s. 37 jurisprudence as having engaged the question of whether the Board, in view of the full intent of the legislation, should exercise its powers as requested. To be clear, that jurisprudence clearly considers the should-the-Board question through the lenses of clarity and certainty vis-à-vis enabling Official Plan policy. The consideration engaged by this panel, however, is more fundamental in this sense: should the Board allow itself to be appropriated as a proxy to secure through conditioning what private negotiations could not, either because they did not launch or failed in spite of the efforts of the

parties?

[77] A plain reading of s. 37 lays bare an intention to allow and facilitate negotiation between a municipality and an owner as it relates to land development, and then secure the product(s) of such negotiation where it comes to fruition. Negotiation, by its very nature, is a voluntary exercise of exchange and mutual adjustment, and this is reflected in the explicit use of the words “in return for” in subsection (1) for referring to what a municipality may decide to do, and “elect” in subsection (3) for referring to what an owner may decide to do. Section 37, in essence, codifies the Latin principle *quid pro quo*. The legislative requirement for Official Plan policies to inform the application of s. 37 makes eminent sense as a measure to ensure that the tool is not misappropriated or leveraged capriciously in the context of such negotiations. Moreover, it strikes this panel that s. 34 is appropriated in the application of s. 37 only as a means of implementation; that is, to ensure that the outcome of any negotiation is publicly codified in a zoning by-law. In this fundamental regard, therefore, this panel concludes that there is no place for the Board in the application or operationalization of s. 37 between a municipality and an owner; it is an activity that is exclusively theirs to be mutually determined—or not, as in this case—in accordance with Official Plan policies relating to its application.

[78] It is for this reason that the Board, in this case, cannot and will not accede to the request advanced by the City. Were it to, it would be interfering and in so doing offending the spirit and intent of s. 37. If the City or any municipality is desirous of securing benefits through the application of s. 37, then it behooves it to engage in meaningful, properly calibrated negotiation for that exact purpose. It must not expect or even hope for the Board to do what it elected, by design or by default, to not do.

[79] With regard to the voluntary payment offered by the applicant, the Board concludes that is a matter between the applicant and the City. As such, it will not make any finding on its suitability nor will it require the applicant to follow-through on the

payment as a formal condition of approval.

ORDER

[80] The appeals are allowed. The City's comprehensive zoning by-law is amended in accordance with the by-law filed as Exhibit 10. The plans and drawings filed as Exhibit 9 are also approved, as are the terms set out in the proposed site plan agreement filed as Exhibit 8. The Board will withhold this order only insofar as it applies to the site plan appeal, and then only for 30 days from the date of this decision, to allow Messrs. Brown and Whicher to confirm that the site plan agreement has been executed.

"James R. McKenzie"

JAMES R. MCKENZIE
VICE-CHAIR

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario

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