

ISSUE DATE:

Sept. 17, 2007

DECISION/ORDER NO:

2532



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Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

1640830 Ontario 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 of the City of Toronto to rezone lands respecting 371, 373-377, and 379 King Street West from "Reinvestment Area District (RA)" to permit the development of a 34 storey condominium with at grade retail uses
OMB File No. Z060076

1640830 Ontario 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 composed of municipal addresses 371, 373-377, and 379 King Street West, in the City of Toronto
OMB File No. M060060

APPEARANCES:

Parties

City of Toronto (the "City")

1640830 Ontario Inc. (the "Applicant")

Soho Met

Counsel

S. Haniford and
R. Jhan (Student-at-Law)

A. Brown

C. Lantz

DECISION OF THE BOARD DELIVERED BY H. GOLDKIND AND ORDER OF THE BOARD

INTRODUCTION

This is an appeal by 1640830 Ontario Inc. ("Appellant") from the Council of the City of Toronto's ("City") refusal or neglect to enact a proposed amendment to Zoning By-law 438-86 of the City to rezone the Applicant's lands, being 371, 373-377, and 379 King Street West ("Subject Land") from "Reinvestment Area District (RA)" to permit the

development of a 34 storey condominium with at grade retail uses ("Development"). The Applicant has also referred to the Board the determination and settlement of details of a site plan for the Development. The Applicant's application for by-law amendment and site plan approval was filed with the City on December 16, 2005, with subsequent revisions.

1. BACKGROUND

The Subject Land is located on the south side of King Street West, between Spadina Avenue and Blue Jays Way. There are three storey and one storey buildings on this property. The three storey building is used for a restaurant and residential use and the one storey building is used for a Speedy Auto Service shop, with a driveway onto King Street West. There is a public lane adjacent to the rear of the Subject Land. This lane extends from Blue Jays Way to Spadina Avenue. The Subject Land is served by a public transit street-car line, with the track area dedicated for street-cars during rush-hour times. This street-car line connects with the subway line at University Avenue and Yonge Street.

In the surrounding area, known as the King-Spadina Area, there are currently a variety of uses, including theatre, restaurant, residential, hotel, office and retail. There are a mix of building heights ranging between 1 storey and about 21 storeys.

There has been a number of recent applications to build tall residential condominiums in the area, which the City has approved. There is a public park on Spadina Avenue, known as Clarence Square, in close proximity to the Subject Land.

2. PROPOSAL

The Applicant proposes to redevelop the Subject Land with a 34-storey residential condominium building comprised of about 240 units with commercial uses on the lower levels, accessible directly from King Street West. The podium of the building is proposed to be built to the lot lines, with step-backs at the top of the 8th storey podium and above the 10th storey.

3. WITNESSES

On matters concerning urban design, the Board heard evidence from Anne McIlroy on behalf of the Applicant and from James Parakh on behalf of the City.

In relation to land use planning, the Board heard from Peter Walker on behalf of the applicant and from Sharon Hill on behalf of the City.

Traffic impact evidence was given by C. Alan Mihalj on behalf of the Applicant and by Ray Bacquie on behalf of Soho Met, a residential condominium and hotel on Wellington Street. Soho Met uses the public lane, which separates the Subject Land from Soho Met, for vehicular access to its property.

Karl Matar gave evidence on behalf of Matar Holdings Ltd., the owner of an adjacent property, 369 King Street West. This owner gave evidence in opposition to the Applicant's Development.

4. URBAN DESIGN

(a) Physical Character of Development and Context

The Subject Land has a frontage of about 30 metres on the south side of King Street West and backs onto a public lane which accesses Blue Jays way and Spadina Avenue. The Subject Land has a depth of about 36 metres on the east limit and about 41 metres on the west limit.

The Applicant proposes to demolish the existing buildings on the Subject Land, close the existing driveway onto King Street West, and construct a 34 storey residential condominium building. The building height is about 109 metres to the roof and 119 metres to the top of the mechanical roof top. The lower part of the building will feature a 28.5 metre high podium which will abut King Street West and the east and west limits of the Subject Land.

At the top of the podium, there is a minimum step-back of 3 metres and a further minimum step-back of 1.25 metres above the 10th storey. The east and west sides of the podium are to be constructed of masonry. The Applicant submits that the podium height and masonry side walls reflect the height and exterior building surface of existing older buildings in the area. The rest of the proposed building is comprised of a slender tower rising out of the podium. The exterior face of the tower and the front of the podium is to be covered in tinted glass.

The podium will offer commercial activities in its lower levels, with direct street access and a visual connection between the ground floor interior and the street, to act as an invitation to the public and provide security from an overview of the adjacent street. Pedestrian access to the condominium suites will be through a courtyard adjacent to King Street West. The courtyard will act as a lobby and will feature private art, with public access for viewing. The tower suites will have access to adjacent balconies.

The Applicant submits that the tower is designed to emphasize its slender vertical character, reduce the impression of mass and cast a narrow shadow, (which it is alleged gives the impression of the shadow moving quickly).

The Applicant contends that the height of the podium and tower will blend in with the new tall buildings in the King-Spadina area, east of Spadina Avenue, and the tall buildings which are not yet built but have been approved by the City. The following is a summary of some of these recent and approved developments in the area of the Development:

- (i) 56 Blue Jays Way – 18 storeys
- (ii) 99 Blue Jays Way – 20 storeys
- (iii) 21-31 Widmer Street – 25 storeys
- (iv) 326-358 King Street West (TIFF Building) – 42 storeys

- (v) 430 King Street West (Hudson II) – 32 storeys.

The King-Spadina area is in very close proximity to the downtown financial core of the City, which has a large variety of very tall buildings.

All vehicular parking for the proposed development will be underground on-site parking, with sole access through the rear public lane, which now provides vehicular access for the Soho Met condominium on Wellington Street. The Applicant has agreed to transfer a strip of its land, abutting the public lane, to the City so that this part of the lane will have an increased width of 6 metres. The lane is irregular in shape with different widths between Spadina Avenue and Blue Jays Way. City planning policy provides for the lane to have a minimum width of 6 metres, with any shortfall of width to be obtained by dedication from adjoining properties through the development process.

- (b) Shadows, Skyview and Privacy

The issue of shadows, resulting from the proposed development is of major concern to the City. The Applicant presented two Shadow studies, one for a 34 storey building and one for a 20 storey building, and the City presented its own shadow study. These studies also show shadows from the “built-out” form of the buildings which are legal or approved but not yet built.

The Applicant and the City agree that the proposed building will cast more shadow on the north side of King Street than the existing zoning by-law’s as-of-right built-out form of buildings for the south side of King Street. The extent of the shadow coverage changes with the season of the year and the time of day.

Generally, during the summer months, the sidewalk on the north side of King Street will not experience shadow from the built-out form permitted under the zoning by-law.

However, during this same period, the shadowing from the proposed building will move across the sidewalk on the north side of King Street, moving from west to east, so that each part of the sidewalk from Spadina Avenue to Blue Jays Way will experience some shadowing, but also sunlight for much of the daylight hours.

The City's urban design witness, Mr. Parakh, submits that it is the City's policy to keep the sidewalk on the north side of King Street free of shadow for most of the period from March through September. He contends that the City's zoning by-law for this part of the south side of King Street West has built-form performance standards which restrict height in order to prevent shadowing on the north sidewalk of King Street West from March to September, having regard to the 20 metre width of King Street West. The existing by-law permits buildings on the south side of King Street West to be built up to King Street, with a height of 16 metres at the street lot line to the roof, with an angular plane of 44 degrees leading to a maximum height of 30 metres at the rear of the building. The by-law also permits erection of the building up to the side yard lot lines to a depth of 25 metres, from which point there is a requirement for a 7.5 metre setback from each side yard lot line.

During the winter months, the sidewalks on the north side of King Street West will be in shade from the as-of-right built-out form on the south side of King Street West. Mr. Parakh advises that the City's urban design policy accepts this shadowing during the winter time since winters are cold and dark and people are dressed accordingly. (Page 32 City Urban Design Handbook)

However, the City objects to shadowing on the north side of King Street during the summer months. What the Applicant regards as narrow fast moving shadows, the City's witness, J. Parakh, regards as wide slow moving shadows. Mr. Parakh acknowledges that these summer shadows from the proposed building are not as critical as the shadows during the "shoulder seasons" of spring and fall, when people seek to extend the outdoor period and welcome the warmth of sunlight. It is agreed that during September and March there will be a decrease in sunlight on the north sidewalk of King Street West, resulting from the proposed building, but there will still be sunlight for part of the day.

The City's position with regard to shadowing is set out in part in the City's Urban Design Handbook of September 1997 on page 32, as follows:

Among the simplest pleasures of urban life is the feeling of the spring or fall sun on our back or looking up and seeing the blue skies. As the City becomes more intense these are simple pleasures that can disappear from urban life, and council wishes to preserve them in Toronto. Our summers are hot and humid. At this time people will seek shade from the sun. Our winters are cold, dark and windy. People who are outside in this season are dressed for the weather. It is at the shoulder seasons of spring and fall that direct access to sunlight and shelter from the wind can extend the amount of time that people can be comfortable outside.

Mr. Parakh is also concerned that the proposed building will serve as a precedent and an incentive for more tall buildings on the south side of King Street West in the King-Spadina area. He submits that these tall buildings will diminish sunlight on the street during the summer months and "shoulder months" and decrease the skyview and privacy.

The Official Plan of the (former) City of Toronto was in force at the time of the Applicant's development application, and applies to the Development.

Mr. Parakh contends that the Official Plan of the (former) City of Toronto, in Sections 1, 2 and 3 provides for the improvement of Urban Life, the maintenance or improvement in public spaces, adequate sunlight, pedestrian comfort, skyview and comfortable wind conditions, by regulating the heights and massing of buildings through zoning by-laws which make provision for maximum height, setbacks from lot lines and setbacks for maintaining angular planes. Mr. Parakh submits that the City's zoning by-law for the south side of King Street West, in the King-Spadina area, results in there being afternoon sunlight on the north sidewalk of King Street West in the months of March and September.

However, the parties acknowledge that the in-force Official Plan did not mandate minimum sunlight hours for this part of King Street west, as it did for other parts of the City.

The parties also acknowledge that the in-force Official Plan does not ban tall buildings on the south side of King Street West.

Mr. Parakh also submits that Section 3 of the City's in-force Official Plan, under "Built Form", sets out the City's policy to enact by-laws for establishing setback from property lines and between building faces. He maintains that the purpose of such Official Plan provision and by-laws is to protect privacy, light and skyview for occupants of buildings and street pedestrians. He acknowledges that the proposed building does not present an immediate threat to privacy and skyview since there are no other tall buildings in close proximity to the proposal, but he contends that the Official Plan policy mandates that the City have regard to potential neighbouring proposals for development in evaluating the proposed development. In reply, the Applicant's urban designer, Ms McIlroy submits that each application must be reviewed on its merit and that it is not good planning to judge the proposed building on the basis of future possible developments, which may or may not evolve.

Mr. Parakh also reviewed provisions of the Official Plan for the new City of Toronto (which came into force after the Applicant's application was submitted) and which contains policies in Chapter 3, with respect to preserving light, view and privacy, and permitting new buildings which reflect the "planned street proportion".

Mr. Parakh submits that the zoning by-law for the south side of King Street West, (with its 16 metre height limit at the street line and its 44 degree angular plane to a maximum of 30 metres), seeks to carry out these Official Plan policies of the in-force Official Plan of the former City and the new Official Plan of the City, by restricting building heights on the south side of King Street West. However, Mr. Parakh states that he has no problem with allowing tall buildings on the north side of King Street West or on Blue Jays Way because they cast no shadow on King Street West and they are situated on larger lots, which permit the opportunity for greater distance between the towers. However, it is acknowledged that the City has approval of tall buildings in the King-Spadina area with tower separations which are less than the 25 metres which the City's Urban Design Guideline Handbook recommends.

(c) Space Between Tall Buildings

Mr. Parakh referred to the "H.O.K. Study" of June 2006 which the City adopted on a one-year trial basis on September 2006, to act as a guideline for evaluating proposals for tall buildings in the City. He contends that the H.O.K. Study references the policies of the Official Plan for the new City of Toronto with respect to the importance of improving and maintaining privacy and light by establishing criteria for the minimum spacial separation between the towers of tall buildings. One of these criteria states that the space between towers is to be at least equal to the width of the widest side of the tower but no less than 25 metres, with a minimum property line setback of 12.5 metres on compact sites.

Mr. Parakh maintains that the tower of the proposed Development, which is on a compact 30 metre wide site, only has a 5.5 metre side yard setback and that the widest part of the building is 37 metres. In Mr. Parakh's opinion the tower should be a minimum of 37 metres from any other tower.

Although there are no other towers in close proximity to the proposal, Mr. Parakh contends that there may be future tall building development proposals for neighbouring properties which may result in the towers being too close to each other and thereby depriving occupants and pedestrians of light, skyview and privacy. With regard to future as-of-right adjacent buildings on the south side of King Street West, he maintains that some of the occupants of the Development and the adjacent as-of-right buildings will be in close proximity and deprived of an adequate quantity of light, view and privacy.

The Applicant submits that the H.O.K. Study is only a guideline for use in reviewing tall building applications and has only been approved of on a trial basis for one year to September 2007, and has not been adopted as Official Plan policy. The Applicant contends that there are no other tall buildings in close proximity and that the Development presents no conflict with Official Plan policies with respect to light, skyview and privacy; also, any future tall building proposals should be evaluated on their merits when and if such applications are made.

Mr. Parakh has appreciation for the design of the Development, including the strong street wall presented by the podium, the physical and visual connection between the interior of the podium and the street, the on-site commercial activity, the interior underground parking, the closing of the vehicular access onto King Street West, the provisions of vehicular and service access by the rear public lane, and the good reputation of the Applicant as a quality builder. His main objection to the proposed Development relates to building too large a building on too small a site and thereby creating adverse shadows and depriving people who use the public realm and future buildings from adequate light, view and privacy.

Mr. Parakh also referred to the King-Spadina Official Plan Part II, which is the in-force Part II plan for the Development. The Part II plan for King-Spadina represents a departure from official plans which contain density numbers. This policy driven approach does not specify height and allows for flexibility in establishing the building mass and height, provided the building conforms with Part II policies such as those dealing with building context.

Mr. Parakh maintains that King Street West is designated as a “Special” and “Significant” street in the Part II plan and as such its public open space is to be protected and maintained by zoning by-law and urban design guidelines. In his opinion, the proposed Development will erode the unique qualities of the street, such as sunlight and skyview.

The Applicant contends that the Part II plan identifies the King-Spadina area as a “Reinvestment Area” and identifies King Street as a “Significant” street linking the financial core of the City to its western parts. As such, the Applicant submits that the Part II plan is implemented by the proposed Development, by placing a significant and high quality building in close proximity to the financial core. It promotes a good quality working and living environment in this area, in close proximity to public transit, parks and within a context of other tall buildings, while respecting historic buildings in the area.

(d) Comparison with other Tall Buildings

Mr. Parakh acknowledges that there are recently built tall buildings and approved plans for other tall buildings in the immediate vicinity of the Development. He acknowledges that the planning policies of the City encourage redevelopment of the King-Spadina area and that these other tall building proposals have been encouraged by the City on a site-specific basis, with all such proposals requiring amendments for extra height and density to the relevant zoning by-laws.

However, he justifies these other projects as good urban design since they are located on the north side of King Street West, or occupy larger land sites, or occupy a corner site, or have a small portion of their overall area in their towers, and as a result he submits that they do not erode the quality and unique character of King Street West.

The Applicant contends that the City has no logical fair and consistent rationale for distinguishing between the proposed Development and the other tall building projects. The Applicant contends that the City is stuck on the irrational concept of having tall buildings on the north side of King Street West and short buildings on the south side. The Applicant submits that the City amends its by-laws to permit tall buildings on the north side of King Street, Blue Jays Way and other streets, yet shows no such flexibility on the south side of King Street West.

The Applicant argues that the City is attempting to create and carry out a policy of short buildings on the south side of King Street West, through its zoning by-law, in contravention of the City's in-force Official Plans which encourage redevelopment in this area with no distinction between the north and south side of King Street West in relation to building height.

(e) Board Decision on Urban Design

With regard to built form and urban design, the Board finds that the proposed development is aesthetically pleasing and in keeping with the context of other tall buildings in the area and other approved tall buildings not yet built. The proposal will also co-exist in harmony with historic buildings in the area, with an eight storey podium up to the street line and masonry exterior walls on the east and west sides of the podium.

The Board also finds that the site is an appropriate site for the proposed development as it is located within an area which the in-force Official Plans designate for redevelopment and intensification. The site is presently underutilized, but located on a system of good roads and infrastructure and serviced by major public transit on King Street West and Spadina Avenue with subway connections in close proximity. The site is also benefited by its close proximity to theatres, restaurants, shops, festivals and other urban amenities.

The Board finds that the proposed development conforms to a great extent with policies in the Provincial Policy Statement, Metro Plan, the in-force Official Plan of the former City of Toronto and the Official Plan of the new City of Toronto which promote intensification of underutilized sites in urban areas in order to make more efficient use of existing infrastructure and to help reduce urban sprawl. The other benefits include the reduced use of the automobile and a reduction in commuting into the downtown core.

The Board finds that the height and mass of the building permits sunlight penetration onto King Street West during a reasonable amount of time from spring to fall and provides some welcome shadowing for part of the day during the warm months. There is no suggestion of increased winds. Accordingly, pedestrian comfort on King Street West is preserved, along with skyview and there is no loss of privacy inconsistent with living in the downtown core of the City.

Much of the City's evidence at the hearing related to prohibiting the erection of tall buildings on the south side of King Street West because of the City's assumption that these created problems in relation to shadowing, loss of skyview, loss of privacy and impairing potential future neighbouring development.

The Board finds that the impacts in relation to these matters are acceptable, especially when balanced against the benefits provided from the proposed development. Potential future development must be assessed on its merits when and if there is such an application.

Much of the City's evidence also related to the distance between towers as set out in the City's Urban Design Handbook. The proposed development is located on a compact site and does not meet the minimum guideline for a setback from the lot lines. However, it was pointed out in evidence that the City has permitted other tall buildings in the area with separation distances between towers which do not comply with these separation guidelines. These were not presented as bad precedents, but as examples of reasonable judgment used to create opportunities to promote redevelopment and benefit the City.

The Board finds that the guidelines do not have the force of policies set out in an Official Plan. They are used for guidance and are subject to the exercise of reasonable judgment in applying them. This position is set out in Chedoke Terrace Inc. v. City of Hamilton before the Board in the Decision of N.M. Katary, dated July 30, 1993 on page 465, lines F to G, which states in part: "A guideline is therefore nothing more than a preferred position by an authority under appropriate circumstances" and at line G to H, in part: "Quantitative standards, after all, are means to an end and not ends in themselves."

The Board finds that the tower setback from the lot lines as shown in the proposed development is acceptable and appropriate in the context of the site.

In conclusion, the Board finds that the proposed development, in its present form before the Board, represents good urban design.

5. PLANNING EVIDENCE AND ISSUES (A NUMBER OF ISSUES WERE RESOLVED PRIOR TO THE HEARING)

- 5.1 Issue No. 1 - Regard to Matters of Provincial Interest. Does the Proposed Development and Zoning By-law Amendment have adequate regard to Provincial Policy Interest in Section 2 of the *Planning Act*, in particular subsections (H), (L), (N) and (P)?

Section 2 of the *Planning Act* deals with the development of safe and healthy communities in an orderly manner and the financial and economic well-being of the Province and its municipalities.

The Board finds that the Applicant's proposed development provides for residential intensification in an underutilized area that is well served by public transit, (both street car and connecting subway) and other existing infrastructure. In addition, the proposed development fits into the existing physical context of recently constructed and approved tall buildings in an area with a mixed variety of uses and redevelopment.

The proposed development provides new commercial uses and jobs and complements the existing area economy and contributes to the financial and economic well-being of the Province and the City. The proposed development respects historic buildings in the area and will be in harmony with the existing physical context. Safe pedestrian activity will be encouraged by an overview of the street and accessible retail and other commercial facilities in the development.

The Board Finds that the answer to Issue 1 is, yes.

- 5.2 Issue No. 2 – Regard to Provincial Policy Statement. Are the Proposed Development and Zoning By-law consistent with matters of Provincial interest set forth in the Provincial Policy Statement (2005)?

Part IV of the Provincial Policy Statement focuses growth within urban areas. It encourages increased density of development of underutilized lands and public service facilities, with a mix of housing, employment, parks, and pedestrian mobility.

The Board Finds that the Development focuses growth within a settlement area on an underutilized site and provides for future housing needs in an area served by existing public transit and parks. The Development provides for commercial development and employment and adds to the variety of housing inventory.

The Board Finds that the answer to Issue 2 is, yes.

- 5.3 Issue No. 3 – Metropolitan Toronto Official Plan. Does the proposed development and Zoning By-law Amendment comply with and maintain the intent and purpose of the Official Plan of (Former) Metropolitan Toronto (“Metro Plan”)?

The Development is located within the King-Spadina area which is identified as a “Central Area” in Metro Plan. The general policy is to accommodate population growth in a compact urban form supporting public transit, walking and cycling. Metro Plan promotes reurbanization in the “Central Area”, that uses existing infrastructure and service provided by the Municipality in an efficient manner and encourages living close to work, while creating a safe, comfortable and accessible public realm. It encourages a mix of uses in the “Central Area” which are compatible, where feasible, and encourages intensification of underutilized sites.

The Plan also encourages a reduction in automobile use, a decrease in the length of trips and reduced trips during peak hours. The Plan also encourages an adequate supply and mix of housing. These policies are set out in Sections 2 and 3 of Metro Plan.

The Board Finds that the proposed development provides reurbanization with intensification of land use on an underutilized site which is serviced by public transit with connections to the subway, a good road system and other public services and parks. The proposed development provides an opportunity for the location of residence close to work, and for walking to entertainment facilities and restaurants and the support of existing businesses in this area.

The proposal also provides for street-level retail businesses with direct street access.

The Board Finds that the proposed development satisfies these policies in Metro Plan.

The Board Finds that the answer to Issue 3 is, yes.

- 5.4 Issue No. 4 – The Official Plan of the (former) City of Toronto. Does the Proposed Development and Zoning By-law Amendment Comply With and Maintain the Intent and Purpose of the Official Plan of the former City of Toronto?

This Official Plan was in force at the time that the Applicant filed its application with the City on December 16, 2005, and its policies apply to the Development. The following constitute the Board's analysis and findings with respect to the issue:

A. RESIDENTIAL INTENSIFICATION AND TRANSPORTATION

The City Council's general goal in Section 1.2 is

to reduce the rate of urban development of agricultural lands and natural areas, curb urban sprawl, reduce dependency on the use of the automobile, improve energy efficiency and make better use of existing public infrastructure ---- to promote subject to due consideration of neighbourhood compatibility the more intensive development of the existing urban area, particularly through the process of residential intensification in the City.

Section 1.4 provides for the goal of improving urban life especially when planning new neighbourhoods. Council is to regulate development, with an emphasis on built form, urban design and environmental objectives such as sunlight and wind.

In the “Central Area”, where the subject development site is located, under Section 1.7, the City goal is to strengthen the vitality of this area and to promote “the maintenance and upgrading of existing buildings and the achievement of high quality in new development in terms of public appearance.”

Under Section 1.8, the City policy seeks to obtain a balance of growth of residential and employment uses and to minimize increases in commuting into and out of the Central Area. In order to achieve this the City will support intensification of residential development in underutilized areas and where compatible, with infill and redevelopment.

Section 1.10 provides that the principal objective of residential intensification is the creation of a quality urban neighbourhood with a full range of services.

Section 1.11 provides for the City to promote public transit and improve conditions for pedestrians and cyclists.

Under the City’s Transportation Policies, found in Section 8, the City seeks to integrate development and public transportation and thereby reduce reliance on the use of automobiles and reduce the need to build expensive additions to its transportation system.

The Board’s Findings with Regard to In-force Official Plan Policies on Residential Intensification and Transportation are as follows:

The Board Finds that the proposed development provides increased residential intensification within the Central Area by providing a tall building of high quality architectural design which will harmonize well with the existing and approved, but not yet built, tall buildings within the King-Spadina area. The Development is close to the T.T.C., with street-car line on Spadina Avenue, and the King Street West street-car line which connects to the subway at University Avenue and Yonge Street. This highly serviced site is one which cries out for intensification. To pass over an opportunity such as this is in effect to gloss over the importance of transit.

The Board Finds that the Development helps to reduce reliance on automobiles by providing residential units close to downtown employment, entertainment and restaurants. The Development's close proximity to east-west and north-south public transit helps to reduce reliance on automobiles and provides more customers and revenue in support of public transit.

B. BUILT FORM POLICIES AND THE PUBLIC REALM

Under Section 3.1 the City seeks to preserve and enhance the public realm and to encourage development which enhances the public streets and publicly accessible open spaces.

Under Section 3.13 the City's Built Form policy requires high quality urban design which harmonizes with the surrounding buildings.

Section 3.14 provides for the “continuity and enclosure to the street spaces that are framed by the building”, and the provision of “adequate sunlight access, skyviews, comfortable wind conditions and public safety”. The Official Plan states that in order to achieve these objectives the City Council may establish setbacks from property lines, maximum desirable building heights at the street edge, and massing of upper portions of buildings (step-backs) to ensure comfortable street conditions.

Section 3.15 provides for buildings to have direct access onto the street for reasons of access and safety.

Section 3.17 provides that “Council shall seek to ensure adequate privacy for dwelling units”, by “providing for appropriate setbacks from property lines and building faces, so that important windows and walls are adequately separated”.

Section 3.18 provides for Council to ensure that service facilities into new developments are integrated in order to minimize disruption and maximize safety and attractiveness of the public realm. In order to achieve this, the use of public lanes are encouraged for automobiles and service access to buildings, along with the elimination of driveways which conflict with pedestrian movement.

Under Section 3.20 Council is to promote safety on the street by encouraging new buildings which have “visual overlook and easy physical access to adjacent streets”.

Under Sections 3.26 and 3.27 the City shall seek to protect pedestrians from the negative effect of winds induced by buildings and shall seek to ensure that new development does not detract from sunlight available on parks and important pedestrian streets and may regulate height, siting and massing for this purpose.

Section 3.27 also provides that Council may regulate “sunlight standards” on certain streets by these regulations. (However, the subject site is not within one of the areas which the Official Plan makes subject to sunlight standards.)

The Board's Findings with regard to In-force Official Plan Policies on Built Form and Urban Design Part II Plan are as follows:

The Board Finds:

- (i) In response to Section 3.13, the development provides a high quality of urban design and will harmonize with existing and approved (but not yet built) tall buildings in the King-Spadina area. The height of the podium of the building and the masonry construction of the exterior sides of the podium will be reflective of the height and exterior of historic buildings in this area and harmonize with these buildings.
- (ii) In response to Section 3.14, the podium of the building is to be built up to the street line and provides a degree of continuity and enclosure of the street along the whole of the approximately 30 metre wide podium.

The shadow studies show that during the summer months the north sidewalk of King Street will be subject to a moving shadow created by the Development, but each part of the north sidewalk will receive some hours of sunlight. The amount of sunlight on the north sidewalk will be reduced during the months of September and March, but there will still be a reasonable amount of sunlight penetration.

When balancing the benefits from the Development, in response to the Official Plan, against the reduction in sunlight, the Board Finds that the Built Form is appropriate and in compliance with Sections 3.13 and 3.14. The increased reduction in sunlight in the winter months is accepted and is not an issue.

- (iii) The Development is in keeping with Section 3.15, as the building entrances to the condominium suites and the commercial businesses are to be located at street level and will be clearly visible from the street. Also the design of the entrances and visibility of the commercial interiors from the street enhance the public realm.
- (iv) The privacy standards set out in Section 3.17 will not be violated by the Development. At present, there are no other tall buildings in close proximity to the proposed development. The City planners are concerned about other possible proposed tall building projects adjacent to the Development, as there may be the potential for land assembly of sufficient size to contain a tall building. There has been no evidence that this is a reasonable expectation, and the building lots are quite narrow.

The Board Finds that if there is another proposal for a tall building, in close proximity to the Development, it should be evaluated at the time of the proposal on its merits. It is not reasonable and fair to now deny the Applicant's proposal in light of hypothetical future development proposals for tall buildings. To do so, may result in no new tall building on this block on the south side of King Street West.

With respect to future potential as-of-right neighbouring buildings, there may be some conflict on the issue of privacy for some units of the Development and other buildings. However, when redeveloping in the downtown core, there are practical restrictions on design options because of the smaller development parcels available and the high cost of land, which may increase privacy conflicts. When balancing the benefits from the Development against potential limited reductions of privacy, sky view and light, the Board Finds that the built form is appropriate and in compliance with Sections 3.14 and 3.17.

- (v) The Development is in compliance with Sections 3.18 and 3.20, as the automobile and service entrances are integrated into the rear of the building with access limited through the public lane, and automobile parking restricted to an underground parking lot.

The public realm and pedestrian safety will be further enhanced by the closure of the driveway from the site onto King Street West, thereby reducing conflicts between automobiles and pedestrians.

- (vi) The Official Plan of the (former) City of Toronto was amended by a Part II Plan for the King-Spadina area. The area is generally bound by Front Street West, Queen Street West, Bathurst Street and Simcoe Street. The Part II Plan contains many of the policies found in the Official Plan.

Under Section 2, a major objective of the Part II Plan is to attract new investment with a wide mixture of compatible uses including residential, industrial and commercial, especially in the entertainment, design and clothing fields.

The Plan encourages creativity in development design by providing that there shall be no density limits in the Plan.

Section 9 of the Plan designates the King-Spadina area as the “King-Spadina Reinvestment Area” and emphasises its mixed use character. It recognizes that the introduction of new residential uses is complementary to the business and entertainment uses of this area.

With regard to the residential use, the Plan provides that the residential uses shall provide a “satisfactory living environment” with proper regard to light, view and privacy, separation of motor vehicles from pedestrian areas, and protection of residents and workers from unsatisfactory noise. All of this may be regulated by by-law.

Under Section 3, dealing with Built Form policies, buildings are to be built up to the street lines in order to define the street edge, with the lower levels of the buildings to enhance the public nature of the street and provide facilities to the public directly accessible from the street.

Vehicular access and servicing are to be over rear lanes with parking arranged so as to avoid conflict with pedestrians.

Section 3 recognizes King Street West as one of the “Special” streets, and also as a “Significant” street linking the financial core of the City to the western part of the City. Section 3 also provides that Council shall seek to preserve and enhance the Special streets through urban design guidelines and zoning regulation. New buildings are to be designed to minimize wind and shadowing impacts on these streets and to provide high quality open space for residents and visitors.

The Board Finds that the proposed development is in compliance with the Part II Plan policies, including the provision of the following public benefits: a high quality of design building defining a strong street edge and in harmony with the existing and approved built form context, the removal of the private driveway onto King Street West and the provision of underground parking and rear lane access for vehicles and servicing, the provision of uses which are complementary to existing restaurants, theatres and other commercial uses, a setback tower which permits a reasonable amount of sunlight on the north sidewalk of King Street West while casting a relatively narrow shadow moving across King Street West, a podium which houses commercial activities which are visible and inviting to pedestrians with direct access from and at street level, and an overview from the interior of the building of the street.

In conclusion, the Board Finds that the Development maintains the intent and purpose of and complies with the Official Plan (including the Part II Plan) of the former City of Toronto, which is the in-force Official Plan for the purpose of the Applicant's development.

5.5 Issue No. 5 – The (New) Official Plan for the City of Toronto.

Does the proposed Development and Zoning By-law Amendment comply with and maintain the intent and purpose of the New Official Plan for the City of Toronto ("New Plan")?

City Council adopted New Plan in November 2002, but New Plan was not approved of by the Ontario Municipal Board until July 2006, except for certain provisions such as the policy on Section 37 of the *Planning Act* which was subsequently approved. The application for the Development was submitted to the City on December 16, 2005. The City also adopted a Secondary Plan for the King-Spadina area as part of the New Plan.

Many of the policies of New Plan reflect policies of the in-force Official Plan and the Metropolitan Official Plan. The King-Spadina area is designated as a "Regeneration Area" in New Plan. Policies for this area request the redevelopment of underutilized space with a mix of uses and with structures which fit into the existing and approved building context and respect the existing historic structures of this former manufacturing area. The policies direct a more efficient use of land and existing infrastructure with a reduction in motor vehicle use and commuting into downtown Toronto.

In Chapter 2, growth opportunity is identified in the Downtown area, where the proposed development is located, where public transit and existing roads can serve residential and employment uses.

There is a direction to create a mix of residential and employment uses and reduce the demand for commuting into Downtown. The Financial District, immediately to the east of the proposed development, is identified as the prime location “for landmark buildings which shape the skyline”. There is the requirement for improvement in the linkages between Downtown streets, the public realm and the need for the support and enhancement of the specialty retail and entertainment districts, where the proposed development is located.

In Chapter 3, dealing with Built Form, there is recognition of the importance of parks, pedestrian friendly streets, buildings of high visual quality and a comfortable environment. New buildings are to “frame” streets and to fit within the existing and planned building context. New buildings are to have clearly visible entrances with access from the street and ground floor commercial uses which are visible from the public sidewalk. New development is to provide for adequate light and privacy with limited shadowing and building massing along the street edge. Each multi-unit residential building is to provide for indoor and outdoor amenity space. Tall buildings are to be well designed and situated with a defined base, middle (shaft) and top as a well-integrated whole.

In Chapter 5, there is a provision for implementing Zoning By-laws to require the provision of community benefits from developers in exchange for allowing greater height and/or density than permitted in the Zoning By-law. This section of the Official Plan was not enacted at the time of the application for the proposed development.

The Secondary Plan has similar policies to the Part II Plan of the in-force Official Plan and promotes the attraction of investment to the area with a mix of uses, pedestrian friendly streets, attractive buildings, and other policies set out in “New Plan”.

The Applicant submits that the proposed development satisfies the planning policies of intensification, use of existing public infrastructure, providing a mix of housing and employment uses, provision of rear lane access for automobiles and servicing, street-level and accessible retail and commercial activity, underground parking and the closing of the existing driveway onto King Street West.

The proposed development also provides interior amenity space and exterior amenity space. Generally, the City does not dispute the above attributes of the proposed development, but contends that the building is too large for the size of the lot, and casts excessive shadowing on the north side of King Street West, with a loss of sky view and future privacy. The City argues that the building should comply with the existing Zoning By-law, with a maximum 16 metre high front, and a 44 degree angular roof plane leading to a maximum height of 30 metres. The City argues that the height and massing provisions of the By-law reflect compliance with the policies of New Plan and represent good planning.

The Board Finds that the proposed Development complies substantially with New Plan since it provides for an intensification of residential and commercial uses in an underutilized area where reinvestment and regeneration are proposed, using existing infrastructure such as high level public transit.

The proposal also provides additional customers for existing entertainment, restaurant and other commercial uses and provides its own mix of uses without need for in-bound commuting. The proposal also supports a reduction in motor vehicle use and the opportunity for individuals to work and reside in the same area.

With respect to the Built Form policies, the Board Finds that the proposed development is a visually attractive development, featuring a tall building with a well integrated podium, middle and top. The proposed development will create acceptable shadowing and permit the penetration of a reasonable amount of sunlight on the north sidewalk of King Street West from March to September. The reduction in sunlight is acceptable when balanced against the public benefits provided by the proposed development.

In conclusion, the Board Finds that were the policies of the New Official Plan to apply, the proposed development does substantially comply with New Plan's intent as to regeneration and is generally consistent with its Built Form policies.

- 5.6 Issue No. 6 – Proposed King-Spadina Plan and Zoning By-law. Does the Proposed Zoning By-law Amendment and Development Comply with the intent and purpose of the policy direction of the Council enacted, but not yet in force (currently the subject of appeals) amendments to the “King-Spadina Secondary Plan” and Zoning By-law, and what weight should be given to such policy direction and amendment?

By-law 921-2006 enacted an amendment to the King-Spadina Secondary Plan, intended in part to put some restraint on the granting of building heights significantly in excess of the existing zoning height regulations for the south side of King Street West. This By-law was enacted on September 27, 2006, and is under appeal. This By-law was adopted by the City after the applicant's application for the proposed development, and is not in force with respect to the subject property.

The changes to the Secondary Plan include the addition of policy 3.7 which provides in part that proposals for building heights significantly in excess of the existing zoning regulations may be considered, “specifically on the north side of King Street West---“. There is no reference to such consideration for tall buildings on the south side of King Street West.

This amendment to the Secondary Plan followed the City's approval of a consultant's report (King Spadina Plan Review Study) which dealt with applications for tall buildings in the King-Spadina area and recommended standards for tall buildings which would reduce the opportunity for tall buildings in the southeast quadrant of King-Spadina, including the south side of King Street West.

The Board finds that the Application to the City for the proposed development pre-dates the City's adoption of amendments to the King-Spadina Secondary Plan and Zoning By-law. These amendments seek to place additional restraints on the development of tall buildings on the south side of King Street West and would, if in force, likely reduce the development potential of the subject site.

The Board finds that the in-force policies and guidelines are paramount and will be given greater weight than the more recent amendments.

5.7 Issue No. 7 – (Former) City of Toronto Zoning By-law 438-86

- A. Does the Proposed Development and Zoning By-law Amendment Maintain the Intent and Purpose of the In-force Zoning By-law (No. 438-86)?
- B. (Applicant's Issue) Is that the Appropriate Test on an application for rezoning?

In the existing Zoning By-law the subject site is designated as Reinvestment Zone (RA), which permits a variety of uses which are consistent with the existing uses in the area, such as retail stores, restaurants, offices and residential uses, including apartment use. The Board finds that with respect to use, re-investment and the general intents and purposes, the proposed development does not violate these said objectives.

There is no density limits, but the By-law relies on built form provisions such as height, setbacks, and angular plane provisions. The maximum height is 30 metres with a maximum height of 16 metres at the front lot line and an angular plane of 44 degrees above the 16 metres, leading to the 30 metre maximum height. There is no side yard setback up to a depth of 25 metres from the public street, with side and rear yard setbacks of 7.5 metres beyond the 25 metres.

The proposed development requires By-law amendments in relation to the following matters:

(i) Height

The Development provides for a roof-line height of 109.5 metres, plus an additional 10 metres for that part of the mechanical equipment on the roof. The By-law height is limited to 30 metres.

The Applicant submits that the existing By-law height restriction is not appropriate, given the existing and approved tall buildings in close proximity to the proposed development, its location in the downtown core close to the financial district and the policies of the Provincial Policy Statement (2005) directing residential growth within settlement areas together with more intensification and efficient use of existing infrastructure including sewers and public transit and roads.

The City contends that the height restriction in the By-law is appropriate and reflects the in-force Official Plan and Part II Plan policies for improved public amenities, the maintenance of sunlight on public streets, skyview, privacy and respecting the historic buildings in the King-Spadina area.

The City argues that tall buildings are to be excluded from the south side of King Street West since they cast a shadow over King Street. The City also contends that the small size of the lots will result in tall buildings being too close to each other, thereby eliminating skyview, privacy and presenting an unattractive sky-line.

The Board finds that the tower of the proposed development is consistent with other tall buildings within close proximity to the Development. The podium of 8 storeys with masonry exterior sidewalls reflect the character of existing older warehousing and manufacturing buildings in this area.

The proposed development provides a building of high quality design and intensified residential redevelopment on an underutilized site serviced by a broad assortment of well developed infrastructure. The development satisfies the Provincial policies and municipal policies providing for greater intensification, redevelopment of urban areas, stopping urban sprawl, making better use of existing infrastructure, reducing the use of the automobile, and promoting a healthy economy.

The Board finds that the moving shadow cast by the Development permits a reasonable amount of sunlight on King Street West from March to September and provides some relief from the hot sun in the summer. The existing street comfort is not reduced by the proposed development. The proposed development will provide visible commercial retail uses on lower levels of the podium which will help to increase pedestrian interest and activity.

The Board finds that the Zoning By-law regulating the north side of King Street West provides height restrictions which are considerably lower than the existing heights of tall buildings, and those approved by the City but not yet built. The City has permitted towers in tall buildings to be closer to each other than the limits shown in its design guidelines for tall buildings. The City has shown flexibility in permitting tall buildings, taking into account the municipality's interest in fostering redevelopment in the King-Spadina area and space restrictions associated with downtown building sites.

The Board finds that the flexibility and accommodation granted by the City for tall building properties on the north side of King Street West must be afforded to the proposed development on the south side of King Street West. The By-law must not be used as a planning tool to exclude tall buildings on the south side of King Street West in the existing absence of such a specific policy in the in-force Official Plan of the City of Toronto and Metro Plan. Such a severe exclusionary policy must be clearly set out in these planning policy documents since development cannot take place in the absence of clear direction. Developers cannot be asked to comply to Official Plan policies which are not clearly set out in the Official Plan.

(ii) Sideyard Setbacks - Rear Yards Setback

The Board finds that the Zoning By-law requirement for 7.5 metre sideyard setbacks, beyond 25 metres from the street lot-line, results in underutilized space that serves no important apparent purpose. Since parking, garbage storage and other services are accommodated inside of the building, the sideyard setbacks should be eliminated so that there is no side yard setback for the whole of the property.

For the same reasons, the Board finds that the requested rear yard setback of about 3 metres from the centre-line of the rear lane is appropriate.

(iii) Step-Backs

The Board finds that the step-backs requested in the proposed Zoning By-law Amendment, with the agreed to improvements set out in the Mediation Report Delivered by D.R. Granger on April 26, 2007 is appropriate and permits adequate skyview and sunlight onto King Street West.

The Board also finds for the same reasons that these step-backs satisfy the intent of the required 44 degree angular plane and that the requirement for such angular plane be eliminated.

(iv) Amenity Space

The Zoning By-Law provides for the provision of two square metres of both indoor and outdoor residential amenity space for buildings with more than 20 dwelling units.

With regard to indoor residential amenity space, the proposed development provides 505 square metres which satisfies the Zoning By-law.

With regard to outdoor residential amenity space, the proposed development does not meet the 504 square metre requirement of the Zoning By-law, but does provide 175 square metres situated on two outdoor amenity terraces. The Applicant submits that this amount of outdoor amenity space is appropriate because of the provision of large balconies and terraces to individual units and the amount of parkland in the area. The Applicant also submits that the 175 square metres of outdoor amenity space is of a high quality.

The Board appreciates that it is often difficult to design adequate outdoor amenity space in the confined space provided with in-fill development in the downtown core. The Board agrees with the Applicant's submission on this issue. In addition, the residential occupants will have access to a large variety of theatres, restaurants, shops, art galleries, museums, festivals and other downtown events, within walking distance or by short public transit trips.

The Board finds that the reduced outdoor amenity space requested by the Applicant is appropriate. The Board finds that the proposed Zoning By-law Amendments satisfy the general intent and purpose of the in-force Zoning By-Law.

The Board finds on the subject Appeal the in-force Zoning By-law is not an appropriate test on an application for rezoning with respect to the height, scale, setbacks, step-backs and massing of the building.

5.8 Issue No. 8 – Built Form

Is the proposed form and in particular the height, setbacks, lack of step-back, massing, bulk, scale and siting, appropriate on the site and in the area and does it represent good planning and good urban design?

The Board finds that the answer to this question is, yes.

The Board finds that the height, massing, scale, siting and agreed to step-backs are in harmony with the built and approved (but not yet built) tall buildings and the historic buildings in the area. The building is of a high quality design and built form and makes efficient use of this underutilized site; providing residential intensification within the downtown core along with a mix of retail and other commercial uses, with direct street access and an overview of the street. The associated shadowing permits reasonable sunlight penetration onto the north side of the street and is consistent with the shadowing created by other buildings in the area.

5.9 Issue No. 9 – Design Guidelines

Does the proposed development and Zoning By-law Amendment meet or maintain the intent of the City's urban design guidelines?

The King-Spadina Urban Design Guidelines are the City's in-force guidelines since June 2004.

The guidelines do not have the weight or force of Official Plan policies or of a Zoning By-law. They are just guidelines and not predetermined mandatory performance standards. Each proposal must be examined on its merits against the context of the planning background and the context of the physical character of the surrounding area. The guidelines are one tool for assisting in the evaluation of whether the proposal constitutes good urban design. This matter has been reviewed in the section dealing with urban design.

In summary, the proposed development is in harmony with the existing and approved (but not yet built) tall buildings and the existing historic buildings. The height of the podium, its masonry side walls and the step-back of the tower respect the character of the historic buildings in the area and their massing along the street line. The proposal also reflects the street level retail and commercial activities associated with the older buildings in the area.

The Board Finds that the answer to issue 8 is, yes.

5.10 Issue 10 – Residential Amenity Space

Does the proposed development and Zoning By-law Amendment provide the appropriate amount and configuration of indoor and outdoor amenity Space?

For the reasons set out in the section of this decision dealing with Issue 8, the Board finds that the answer to this issue is, yes.

In order to avoid any misunderstanding, the Board orders that the Zoning By-law Amendment is to include the requirement for the indoor residential amenity space, which is to be equipped with kitchen and washroom facilities for this space as required by the in-force Zoning By-law and the Applicant's plans are to show such facilities.

5.11 Issue 11 – Parking, Loading, Driveway Requirements (Effect on Soho Met Access)

Does the proposed development and Zoning By-law Amendment appropriately address parking, loading and driveway width/access requirements?

Issue 19 – Functionality of Laneway

Has the Applicant sufficiently demonstrated that the lane can accommodate the proposed traffic from the subject site and neighbouring land uses and permit full and appropriate manoeuvring of service and other vehicles in the lane?

Vehicular and service access to the development is confined to the rear of the building over a rear public lane. The City requires such access with redevelopment where there is access from a rear lane, in order to reduce conflicts between vehicles and pedestrians. City policy to this effect is set out in Sections 3 and 8 of the Official Plan of the former City of Toronto and Section 3 of the Part II Plan for King-Spadina. Also, in keeping with Official Plan policy to avoid such conflicts, the existing driveway onto King Street West will be closed.

The City presented no expert evidence on this issue and stated that it is satisfied with the Applicant's plans for parking, automobile access, service access and loading, subject to some technical matters to be worked out if the Applicant's proposal is approved by the Board.

The Applicant's proposal also involves the conveyance of a strip of its land to the City for the widening of the lane. The width of the conveyed land is 0.56 to 0.747 metres. The width of the lane as widened will be six metres. The lane varies in its width from Blue Jays Way to Spadina Avenue, with some bends along its course. The objective of the City is to widen the lane and reduce the bends through the development process of land dedications, in order to improve the operation of the lane.

A condominium-hotel development known as Soho Met objects to the traffic which the proposed development will generate. Soho Met is a large building located at the northwest corner of Blue Jays Way and Wellington Street West. It is occupied as a condominium, hotel and commercial facilities. Vehicular and service access is over the rear lane which is common to the proposed development and Soho Met. Soho Met is concerned that the increased traffic will decrease the efficiency of the operation of the lane and interfere with access to Soho Met.

It is acknowledged that the bends in the lane and its narrow width in parts of the lane result in the minor slowing of traffic, and that this will likely get worse with the increased traffic from the development and the approved development at 56 Blue Jays Way.

The evidence of the Applicant's transportation Planner and Engineer, Mr. A. Mihalj, is that the increased traffic volume and its effect on the operation of the lane will be small because the adjacent public transit and the downtown location of these buildings in close proximity to restaurants, entertainment, services and employment will encourage the use of public transportation, walking and bicycles. In Mr. Mihalj's opinion, based on traffic studies of projected traffic volume to 2010, the traffic from the development will have very little impact on the operation of the roads in the area. He is also of the opinion that the development will have very little impact on the operation of the lane and will not interfere with the operation of the driveway and service loading area of Soho Met and with service trucks accessing Soho Met.

Mr. Ray Bacquie, the traffic consultant for Soho Met, submitted that there will be a queuing of traffic in the lane due to a queuing of traffic on the street adjacent to the lane during peak traffic periods. In his opinion, the traffic problem in the lane and on the adjacent streets will get worse as intensity of development increases. In his opinion, ideally, there should be no further development adjacent to the lane until the lane is widened throughout and bends reduced, or the increase in lane traffic will negatively affect access to Soho Met.

The Board is more impressed with the evidence of the Applicant's witness than that of Mr. Bacquie, since Mr. Bacquie is trying to protect the status quo position of Soho Met until the entire laneway is widened which is unreasonable as it prevents future development along the lane without major expense to the City.

The Board finds the following:

- (i) The lane will be able to satisfactorily accommodate the small volume of traffic generated by the proposed development and permit appropriate manoeuvring of service and other vehicles in the lane.
- (ii) The traffic generated by the proposed development will not unreasonably interfere with the operation of the Soho Met driveway and service area and access to Soho Met. The functioning of the access driveways for both developments may not be perfect at all times, but they should operate at acceptable levels.
- (iii) The Applicant's proposal adequately addresses parking, loading, driveway width and access requirements of the City.

In conclusion, the Board finds that the answers to issues 11 and 19 are, yes.

5.12 Issue No. 12 – Precedent Effect

Would the proposed development and Zoning By-law Amendment comprise an inappropriate precedent for that portion of King-Spadina located east of Spadina Avenue?

The proposal satisfies the goal and intent of the Official Plan of the former City of Toronto and the Part II Plan for King-Spadina with regard to fostering the physical, environmental, social and economical well-being of the City. It satisfies the policies of reducing urban sprawl to protect agricultural land, reduces the dependence on the use of motor vehicles, makes more efficient use of existing infrastructure, increases residential intensity, and provides a building of high quality design in harmony with the existing tall building and historic buildings in the area.

The proposal also satisfies the policies of the in-force Official Plan with regard to improving the public amenities by preserving a reasonable amount of sunlight on the north side of King Street West while also providing some shade which is welcomed by pedestrians on hot summer days. The narrow tower preserves ample skyview and there are no tall buildings in close proximity to create privacy issues. The proposal provides a mix of residential and commercial uses and supports the existing mixed uses in the area.

The proposal satisfies the Province's policy of sustainable economic development as outlined in the *Planning Act*, and greater intensification of development in settlement areas as set out in the Provincial Policy Statement (2005).

The Board finds that the proposal does not comprise an inappropriate precedent. Each development must be tested on its own merits against the relevant planning context. The Applicant's proposal has been tested and is found to be an appropriate development which satisfies the policies and requirements of the *Planning Act*, Provincial Policy Statement (2005) and other planning documents.

5.13 Issue No. 13 – *Planning Act*, Section 1.1

Are the proposed development and Zoning By-law Amendment consistent with the purposes of the *Planning Act* as set forth in Section 1.1 of that *Act*?

Section 1.1 of the *Planning Act* sets out the purposes of the *Act* under six sub-clauses.

Section 1.1(a) Provides for the promotion of sustainable economic development in a healthy natural environment.

Section 1.1(b) Provides for a land use planning system led by provincial policy. Section 3 states that the Minister may issue Provincial Policy Statements and that decisions of municipalities and other bodies shall be consistent with these policy statements.

Under Issues 1 and 2 and other issues, the Board has found that the proposal is consistent with provincial policies and has regard to the matters of provincial interest. In conclusion, the proposal is consistent with and supportive of the Province's policy to prevent urban sprawl and preserve agricultural land while directing more efficient development in urban areas in order to make better use of existing urban land, and infrastructure, including residential intensification, less reliance on motor vehicles and a mix of compatible uses.

Section 1.1(d) Provides for a fair, open, accessible, timely and efficient planning process.

Section 1.1(e) Encourages cooperation between the parties.

The evidence shows that the consultation, design and planning process has been actively ongoing, including a long series of meetings between the Applicant's representatives and the City to discuss the proposal, issues, plans and alteration. There has also been community consultations, consultant's reports, and City reports. There has been revisions to plans based on the City's recommendations and the parties have resolved many issues prior to this hearing.

The Board finds that the answer to this issue is, yes.

5.14 Issue No. 14 – Section 37

If the development and/or variation of such is permitted, is it appropriate to require a contribution pursuant to Section 37 of the *Planning Act*? If so, what are the nature and extent of appropriate facilities, services and matters to be secured through Section 37 of the *Planning Act*?

Section 37 of the *Planning Act* authorizes a municipal council in a by-law under Section 34 to increase the height and density of a development from that permitted by the by-law, "in return for the provision of facilities, services or matters as may be set out in the by-law."

However, the Section 34 by-law to increase height and density, must be authorized in an Official Plan that, "contains provisions relating to the authorization of increases in height and density of development".

Under Section 37, the use of the proposed development must be permitted under the by-law. The subject site is zoned, Reinvestment Zone (RA), which permits a mix of uses, including residential and non-residential and includes the uses contemplated in the proposed development.

The Official Plan of the former City of Toronto (the in-force Official Plan) provides, in Section 16.21, policies which authorize the use of Section 37 of the *Planning Act*, and authorizes the City to, “enter into legal agreements under that section in order to secure the positive features of the development proposal including as appropriate, but not limited to, the realization of the objectives of this plan respecting social housing, non-profit community, cultural and institutional facilities, heritage preservation and parks.”

However, before the City passes a by-law to permit an increase in height and density, Section 16.21(a) of the in-force Official Plan requires that, “Council will ensure that the density and/or height increase is consistent with the objectives of this plan regarding built form and the physical environment, and in such instances, may also authorize the use of Section 37 of the *Planning Act*.”

The Board has found in this decision that the proposed development is consistent with the objectives of the Official Plan with regard to built form.

The Official Plan sets out that a municipal council may or may not use Section 37 of the *Planning Act*, in its discretion.

If the Applicant is successful with its appeal to the Board, the City requests the Board to order the Applicant to provide the City’s selected Section 37 benefits, which are comprised in part of the following:

- Payment of \$400,000 to the City for park improvements to neighbouring parks.

- Public art equal to 1% of the gross construction cost of the development for display in public areas.
- The use of exterior materials in the building to the satisfaction of the City.
- The use of measures and material in the building to mitigate sound in the residential part of the building.

In the matter of the appeal to the Board by Minto BYG Incorporated, Decision/Order 1585 issued October 27, 2000 with respect to 1252-1260 Bay Street and 61-63 Yorkville Avenue; the issue of Section 37 payments and dedications is analyzed in detail. The Board found that the proposed site-specific amendments to the Official Plan and Zoning By-law were appropriate without contributions of further public benefits.

In the Minto case, the City requested a Section 37 payment of \$1,200,000.00.

Finding No. 9 on page 21 of that Decision provides:

- (a) Given the significance and the potential of the authority granted to municipalities under Section 37 of the *Planning Act*, and the objective of the legislation to require municipalities to spell out the exercise of that authority for clear, equal and consistent application without arbitrariness, including where and when contributions are required, the Board finds that the latitude exercised by staff to require contributions beyond what is obvious from policy is not supportable.

This Decision was referred to and followed in Board Decision 1547 of May 25, 2006; the appeal by Sunny Hill Gardens Inc. with regard to site-specific amendments to the Official Plan and Zoning By-law.

The Board allowed the appeal in part and with regard to Section 37 cash contributions for improvements to parks and street improvements on an adjacent street, the Decision states:

The question here is the degree of specificity regarding the matters to be funded that an applicant ought reasonably expect to be in the governing official plan.

The Board adopts the analysis in Decision/Order 1585, issued October 27, 2000 (Minto). The use of Section 37 must be grounded in fair, clear, transparent, predictable specific requirements that are set out in the Official Plan and are not arbitrary in their application. An applicant should know what will be expected by way of s. 37 benefits if increases in height and density are approved.

The Sunny Hill Decision found that the requested Section 37 benefits were not identified in the Official Plan and amounted to a “wish list prepared on an ad hoc basis”. The Board rejected the City’s request for section 37 benefits.

In this Appeal, The Board finds that the Section 37 benefits requested by the City are not set out in the in-force Official Plan or Part II Plan.

From a review of the Official Plan, the Applicant could not reasonably be expected to know the benefits expected of it as a result of the granting of additional height and density. There is no reasonable way for the Applicant to know the rationale for the City selecting the subject matter of the contributions or the rationale for determining the amount of the contributions under each heading.

In the Minto Decision, the Board also found that there must be beneficial effects of such contributions to the proposed development before the Board may require section 37 contributions, and the onus is on the City to show this connection between the proposed development and the requested benefits.

In paragraph number 8, on page 21 of the Minto Decision it states:

The Board finds that there is no need to require contributions from Minto because there are no benefits to the development project, as prescribed under the City’s Official Plan policies in Section 16.21(a).

Section 6.21(a) of the Official Plan of the former City of Toronto, in the Minto case, is the same Section 16.21(a) in the case now under appeal in which the City requests a \$400,000.00 contribution for park improvement and one percent of the gross cost of construction as an art contribution. In the Board's opinion, the City has not demonstrated that these payments were benefits to the development project.

Based on the above analysis, the Board finds that the City's request for Section 37 contributions is inappropriate and should be denied.

It should be pointed out that the Applicant's planner, Mr. P. Walker, advised that the Applicant agrees to provide proper glazing and measures in order to improve sound mitigation to residential units, provided these are to a reasonable standard and not in the sole discretion of City staff. In addition, the Applicant is willing to provide private art for public view in or about the proposed development. These are matters which should be worked out by site-plan agreement.

5.15 (a) Issue No. 15 – question of Good Planning

Does the proposed Zoning By-law Amendment represent good planning?

(b) Issue No. 16 – Question of Public Interest

Is the proposed Zoning By-law Amendment in the public interest?

(c) Issue No. 17 – Draft Zoning By-law Amendment

Is the form and content of the draft by-law appropriate?

The proposed development conforms to a high degree with the policies of the Provincial Policy Statement, Metro Official Plan, the in-force Official Plan and Part II Plan and the new City of Toronto Official Plan, which promote residential intensification, better use of existing infrastructure (such as public transit, sewers, watermains and streets), reduced commuting into the downtown, a reduction in urban sprawl, reduced use of motor vehicles and an increase in the range of housing choices in the downtown area.

In conformity with the Provinces and City's planning policies, the proposed development provides for the redevelopment of underutilized land with a built form of high quality design and appropriate massing and height which fits well and in harmony with the existing historic and tall buildings in the King-Spadina area east of Spadina Avenue.

The proposed development allows reasonable sunlight penetration, skyview and does not impair privacy. The limited shadowing is not unusual in a highly urbanized area and will likely be welcome in the hot summer months.

The proposed development will enhance the streetscape, encourage safe pedestrian activity and will provide visible and accessible street level retail activity in the building. The shared laneway will be widened by land dedication and its functioning will improve. The development will offer a mix of residential and commercial uses which will benefit existing residential and commercial uses in the area.

Based on the foregoing, the Board finds that the proposed development is in the public interest and represents good planning.

6. THE POSITION OF THE ADJACENT LAND OWNER, MATAR HOLDINGS LTD. (MATAR), A PARTICIPANT AT THIS HEARING.

Mr. Karl Matar, a director of Matar, gave evidence on behalf of this company, which is the owner of 369 King Street West. The Matar property is an older three storey building, adjacent to the subject site, with a restaurant on the first floor and residential use on the second and third floors.

Matar wants to develop its property in the future with the maximum density, massing and height permitted by the then in-force Zoning By-law. The Matar property has a width of 20 feet and a depth of 120 feet.

Mr. Matar submits that the Applicant's proposed building is too high – he would prefer a height of about 20 storeys – and will cause more congestion in the lane. He submits that the lane is congested from time to time. He is concerned that the proposed development will create privacy issues between the proposed development and his potential as-of-right development. He wants purchasers of the condominium units in the proposed development to be advised of the potential future privacy issues.

The Board has noted and herein set out the concerns of Mr. Matar.

Matar and Soho Met are the only companies or persons who raised any (form of) objection to the proposed development at the Board hearing.

7. CONCLUSION

(a) The Board will allow the appeal to the Zoning By-law and will amend the City zoning by-law in the manner of the draft by-law presented by the appellant at these proceedings. The proposed by-law is in a draft form and has been amended prior to these proceedings as a result of the successful mediation effort held by Board Member Granger.

- (b) The City is directed to work in conjunction with the appellant to produce a final by-law in accordance with the findings of this decision. The final by-law is to be furnished to the Board within 30 days after the issuance of this decision.
- (c) Within 45 days of the issuance of this decision, the City shall prepare, finalize and furnish to the Applicant an implementing site-plan agreement.
- (d) This Member is to remain seized of site plan approval matters.
- (e) The Board determines that there shall not be any Section 37 contributions other than those agreed to by the Applicant.

The Board may be spoken to with regard to any mechanical matters.

The Board so orders.

"H. Goldkind"

H. GOLDKIND
MEMBER