Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: June 26, 2014 **CASE NO(S).:** PL130323

Appellant:	Friends of the Lundy's Lane Battlefield
Appellant:	Janice Wing
Subject:	By-law No. 2013-24
Legislative Authority:	Subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended
Municipality:	City of Niagara Falls
OMB Case No.:	PL130323
OMB File No.:	PL130323

Appellant:	Friends of the Lundy's Lane Battlefield
Appellant:	Janice Wing
Subject:	By-law No. 2013-26
Legislative Authority:	Subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended
Municipality:	City of Niagara Falls
OMB Case No.:	PL130323
OMB File No.:	PL130324

APPEARANCES:

Parties	**Counsel**
The City of Niagara Falls ("City")	Q. Annibale
Friends of the Lundy's Lane Battlefield ("Friends")	T. Richardson
Morse & Son Funeral Home ("Morse")	M. DiGirolamo
Janice Wing	

Participants

L. Campbell

L. Inkster
J. Garrett

D. Costello

G. Burke

J. Ainslie

HEARING EVENT INFORMATION:

Hearing:	Held in Niagara Falls, Ontario from May 5 to May 9, 2014 and May 12, 2014

DECISION OF THE BOARD DELIVERED BY BLAIR S. TAYLOR

INTRODUCTION

[1] The Friends of the Lundy's Lane Battlefield ("Friends") and Janice Wing appealed two City of Niagara Falls initiated zoning by-laws to the Ontario Municipal Board (the "Board"): the first being By-law No. 2013-24 to rezone a portion of a former elementary school known municipally as 6015 Barker Street (the "Subject Lands") to permit the conversion of an existing building to a 30 unit apartment building, and the second being By-law No. 2013-26, to rezone a portion of the Subject Lands to permit the expansion of an adjoining parking lot. The Board heard the appeals over the course of six days in Niagara Falls.

[2] The Subject Lands have frontage onto Barker Street of about 69 metres ("m"), a depth of about 180 m, and an area of about 1.6 hectares ("ha"). The Subject Lands are improved by a former elementary school building of about 2,800 square metres ("sq. m.") in size, paved parking in the front yard, some surrounding paved play areas, and a large grassed playground. The Subject Lands are generally flat, rising toward the north and west to Lundy's Lane and the Drummond Hill Cemetery.

[3] The Subject Lands are found generally in the midst of single detached dwellings on the north side of Barker Street, and on the south side, single detached and some low

rise apartment buildings in the two and three storey range. To the east of the Subject Lands are some single detached dwellings including two that are owned by Ms. Wing, and further east is Main Street with commercial uses, and the property of Morse & Son Funeral Home ("Morse"), whose rear yard abuts onto the Subject Lands. To the north of the Subject Lands are commercial uses, and to the north-west is the Drummond Hill Cemetery and Presbyterian Church.

DEVELOPMENT PROPOSAL

[4] The whole development proposal initiated by the City involves three (not two) zoning by-laws. By-law No. 2013-24 would rezone the former school building and some of the surrounding lands to "R5A" to permit the conversion to a 30 unit apartment building with a land area of about 6,800 sq. m. (shown as Part 2 on Attachment 1 hereto).

[5] By-law No. 2013-25 would rezone a walkway from Barker Street, and most of the former grassed playground area as "OS" (Open Space) for park purposes only, with a land area of about 7,600 sq. m. (shown as Parts 1 and 4 on Attachment 1).

[6] By-law No. 2013-26 would rezone a smaller portion of the former grassed playground area at the eastern portion of the Subject Lands as "GC" (General Commercial) with a land area of about 2,000 sq. m. (shown as Part 3 on Attachment 1).

[7] As noted above, Zoning By-law No. 2013-25 was not appealed, and it is in full force and effect.

[8] As the Subject Lands are unique in their context, the Board has attached a copy of Figure 3 dated November 2, 1965 from the Historic Sites and Monuments Board of Canada ("HSMBC") as Attachment 2. Attachment 2 depicts the Subject Lands in their 1965 context.

BACKGROUND

[9] There is a considerable background to this matter, and the Board will selectively

provide a brief overview as a precursor to the issues raised in the hearing and discussed below.

[10] To establish the contextual and geographic setting for this matter, the Board notes the following two paragraphs from Report Number: 2007-CED-SDC-37 of the HSMBC:

> Today, the area where the Battle of Lundy's Lane took place is covered by about four square blocks of residential development in the City of Niagara Falls, Ontario, straddling the street named Lundy's Lane and bounded by Summer Street on the north, Drummond Road on the west, Barker Street on the south, and Main Street on the east. Drummond Hill Cemetery is located within this area. Graves of several fallen soldiers from the battle can be found in the cemetery as well as an 1895 monument to the battle and the HSMBC plaque erected in 1968…
>
> In the summer of 1814, American forces crossed the Niagara River at Fort Erie to invade Upper Canada. Advancing northward along the Niagara River, they had initial success, defeating a British force at the Battle of Chippawa. The British under Sir Gordon Drummond regrouped and on the evening of 25 July, on Lundy's Lane almost within sight of Niagara Falls, the British regulars and Canadian fencibles and militia encountered the American forces. Throughout the evening the two armies attacked each other and the battle surged back and forth, especially around the field guns in what is now the Drummond Hill Cemetery. Both sides suffered heavy casualties but by midnight the Americans retired leaving the exhausted British and Canadians holding the field. The Battle of Lundy's Lane was the bloodiest and bitterest contest of the War of 1812 and it broke the American thrust in 1814 to take Upper Canada.

[11] The same report notes that in the 1960s, there was a flurry of federal government development activity in concerning Lundy's Lane. In 1964, the local Member of Parliament began a campaign to develop a national historic park on the site of the battle by buying up the property around Lundy's Lane. That year the HSMBC recommended that the responsible federal government Minister be advised to take steps to acquire, over a long period, the four block area shown on Figure 3 above and develop it as a national historic park.

[12] The report notes that as this was a considerably built up area, and despite detailed negotiations with local authorities and the Niagara Parks Commission, the development never materialized, and the attention of the federal government turned to Queenston Heights and Niagara-on-the-Lake.

[13] In 1968, the HSMBC reconciled itself to the situation noting that …"In view of the historical importance and availability of the battlefield of Queenston Heights, and the great difficulty of achieving a meaningful historical interpretation at Lundy's Lane, the Board recommends that Queenston Heights be substituted for Lundy's Lane as the main battlefield to be interpreted in the program for the commemoration of the War of 1812 in the Niagara Peninsula…"

[14] In 2007, the HSMBC observed that although it had been surmised that the Battle of Lundy's Lane had been designated in 1919 as it appeared at that time to have been "marked", the Board moved to confirm the designated place of the Battle of Lundy's Lane as being the four block area shown on Attachment 2 above.

[15] To complete the national picture, in the processing of this matter locally, communication was made to the Minister of the Environment with regard to the Subject Lands. The Minister responded on November 23, 2012 indicating that the Subject Lands were within the boundaries of the Lundy's Lane National Historic Site. The Minister added this comment:

> The designation of a national historic site by the Minister of the Environment does not constitute protection, as these matters are the responsibility of the provinces and territories under their respective heritage legislation.

[16] It would appear that there has been a school on the Subject Lands since about the late 1870s, then known as the Barker Street Public School (and now identified as the Battlefield Public School). Attachment 2 shows the location of the former school structure. In or about 1968, the old school structure was demolished and replaced with the current school building which is further set back from Barker Street. In or about 1969, the school yard was enlarged (and at some point levelled). In 2011, the school was closed and declared surplus by the Board of Education.

[17] City staff, by report dated February 14, 2012, recommended to City Council that the City acquire the school lands for $900,000 due to their historical significance. The staff report noted that attempts had been made to involve other levels of government to join the City in its attempt to acquire the school property but to no avail. Staff noted that

it had fallen to the City to look at innovative ways to acquire and preserve the historic battlefield property. In that regard, a local community organization was willing to acquire the school building for $450,000 and retrofit it for affordable housing to be rented to seniors if rezoned; a donor had agreed to contribute $250,000 to Council for the purchase; that an abutting funeral home would purchase about two acres for parking if rezoned; and the balance of the lands (most of the grassed playground) would be retained by the City and zoned as Open Space. As the Board of Education would not accept a conditional offer, staff noted that there was an inherent risk associated with the recommendation to proceed.

[18] The Friends had different plans for the Subject Lands. The Friends sought to raise funds to purchase the Subject Lands and demolish the school. The City deferred consideration of the matter to allow the Friends more time to seek funding, which ultimately did not occur. About nine months later, the matter came back to Council with a staff report laying out five options, all with financial considerations for the City. The options ranged from the initial three parts (which would result in 1.9 acres of parkland at a net cost to the City of $100,000 but with an estimated annual tax revenue of $25,000 to $30,000) to the final option being the purchase of the Subject Lands and demolition of the school and the creation of 4.1 acres of parkland at a net cost of $950,000.

[19] Appearing before City Council on January 22, 2013, was the lawyer for the Friends. The City Council minutes provide that the Friends' lawyer … "outlined the economic benefit of preservation of the entire parcel of property although they are not opposed to the accommodation of lands for Morse & Son Funeral Home, as this parcel is less historically significant."

[20] Council decided to approve the staff recommendation and the City initiated the rezoning of the Subject Lands in three areas. The first area was the rezoning of the former school building to R5A to permit the conversion of the existing school building to a 30 unit apartment building having an area of about 6,800 sq. m. and being By-law No. 2013-24. The second area was the rezoning of most of the former grassed playground to Open Space and a walkway, for park purposes only having an area of about 7,600

sq. m. and being By-law No. 2013-25, and the third area was the rezoning of an irregular shaped portion of the former school playground at the eastern extremity of the Subject Lands to General Commercial to permit the expansion of an adjoining parking lot having an area of about 2,000 sq. m. and being By-law No. 2013-26.

[21] Ms. Wing and the Friends have not appealed By-law No. 2013-25 (the rezoning of the majority of the school playground to Open Space); they have only appealed 2013-24 and 2013-26. Ideally, the Friends and Ms. Wing would seek to have both by-laws overturned, and the school building demolished. Ms. Wing, on her own, advanced further alternatives including matching the rear lot line of the adjacent former Holman property and removing a portion of the school, enabling the Friends to purchase the Subject Lands, extending the cemetery unto the Subject Lands, demolishing the school and using the lands as an active cemetery, and finally have a Minister's zoning order applied to the Subject Lands.

[22] At the time of acquisition by the City, the Subject Lands were mainly designated "Residential" with "Minor Commercial" in part, and zoned R2. This as-of-right zoning permitted single detached, semi-detached and duplex dwellings. All parties agree that no official plan amendment is required.

DECISION

[23] The Board will allow the appeals in part and direct the City to provide the Board with two revised zoning by-laws within three months of the issuance date of this decision. The first zoning by-law will "shrink wrap" the existing former school building so as to alleviate any concerns that the existing building may be increased in height or mass. This may be achieved either diagrammatically or by description. The second by-law will revise the permitted use for the lands to be conveyed to Morse, restricting that use to parking, and making a reservation for a pedestrian linkage to be finalized at site plan, all of which for By-law No. 2013-26 is contingent upon a Holding provision for a Stage 3 Archaeological Assessment to the satisfaction of the Minister of Tourism, Culture, and Sport.

HEARING

[24] During the course of the hearing, the Board heard evidence from two historians and a land use planner on behalf of the Friends, and from Ms. Wing herself. The Board also heard from six participants, (four of whom are members of the City's Municipal Heritage Committee) all in support of the appeals against the City zoning by-laws. In support of the zoning by-laws, the Board heard evidence from a heritage planner and land use planner on behalf of the City, and Ernie Morgan, principal of Morse.

PARTIES

[25] The Friends is a not for profit Ontario corporation with its head office at 5993 Barker Street, Niagara Falls, Ontario. Its President is William Colclough who resides at 5993 Barker Street and is the spouse of Janice Wing. Darlena Costello (a participant in this hearing) is the Secretary of the Friends and a Director. Janice Wing (a party to this hearing) and who resides at 5993 Barker Street is a Director and Officer of the Friends, and her daughter Guenivere Dawn Wheeler-Wing is the Treasurer, and she resides at 6018 Barker Street.

[26] Janice Wing is a municipal councillor with the City and is the founder of the Friends of Lundy's Lane Battlefield and served as President from 1996 to 2001. Ms. Wing owns or has an ownership interest in three properties on Barker Street: 5993, 6007 and 6018. 6007 Barker Street abuts the Subject Lands to the east. 5993 Barker Street is an inverted "L" shaped property that abuts 6007 Barker Street to the east, and also abuts the Subject Lands at its northerly rear property line (paved play area), and due to the "L" configuration also abuts the Subject Lands on its westerly property line (another paved area). 5993 Barker Street is listed in the City's Heritage Register but is not designated nor is it within a Heritage Conservation District.

[27] Morse is a funeral home located at 5929 Main Street. Its lands abut the Subject Property's grassed playground at its rear property line. Morse has been located at this municipal address since about 1826 and promotes itself as Canada's first funeral home. Morse was purchased by Ernie Morgan's family in 1971.

HERITAGE

[28] Notwithstanding the HSMBC designation on the Lundy's Lane Battlefield, the only adjacent designation under the *Ontario Heritage Act* relates to a Copper Beech tree found within the Drummond Hill Cemetery. There are no other Part IV designated properties, nor is there a designated Conservation Heritage District.

[29] In 1997, after the City had been gifted with a number of properties (largely north and west of the Subject Lands) within the National Historic Site as shown on Attachment 2, the City commissioned a Master Plan for the Lundy's Lane Battlefield largely focused on those City owned properties. The Study notes that as an urban area, almost all traces of the battlefield are gone. Only the cemetery and the Holman property (Moose Lodge property on Attachment 2) retained any sense of what the site would have looked like in 1814. The Study does indicate that the adjacent school yard to the east of the cemetery provides a visual extension of the cemetery, providing open space that permits views down to the downtown core and the Niagara Falls viewing towers.

[30] In 2005, the City commissioned the Heritage Master Plan for the entire City. Among its recommendations were to focus on the War of 1812, use Lundy's Lane Battlefield as a pilot project: designate it as a Heritage Conservation District and implement the Battlefield Master Plan. The report also noted the following:

> On their own initiative, groups such as the Friends of Lundy's Lane Battlefield have been instrumental in securing key properties within the battlefield for public use. The Lundy's Lane Historical Society has not only organized events but has also produced publications and sponsored speakers.

[31] In 2006, the City commissioned the Community Improvement Plan for Historic Drummondville. This report recommended a substantially larger project area than the then existing Main and Ferry Community Improvement Area. The Subject Lands were outside the Main and Ferry Community Improvement Area but within the recommended new Community Improvement Area. With regard to Main Street, residential infill and seniors and affordable housing along and in proximity to Main Street were

recommended to facilitate a retail revival. With regard to the Lundy's Lane Battlefield, it was recommended that the Battle be celebrated in a manner that recognizes the national and local significance of the site and that the schoolyard was critical in building a cohesive precinct while maintaining pedestrian connections. Proposed official plan and zoning schedules (Figures 6.3 and 6.4) seem to illustrate an Open Space designation and zone that extended the rear residential property lines on the north side of Barker Street through the Subject Lands (and through a portion of the existing school building), although the Open Space Network clearly circumvents the existing school and proposed a linkage to Main Street (Figure 7.6). The Implementation Actions include the revision of the 1998 Battlefield Master Plan to acquire the school site should it become available, and to redesignate and rezone the Battlefield Public School to Open Space.

CITY OFFICIAL PLAN

[32] The Subject Lands are found within the Orchard Neighbourhood of the Drummondville Community, are located within the Drummondville Intensification Node, and the Official Plan identifies the Drummond Hill area of Lundy's Lane as a Special Policy Area. There is no specific boundary for this Special Policy Area, but the intent of the plan is to recognize that the area has historical significance and that the lands be protected and preserved. Section 3.14(a) of the Official Plan provides the objective that the Drummondville Node will become a focus for retail and commercial redevelopment and residential intensification, in 3.14(b) will promote development that builds on the heritage aspects of the Drummondville area and s. 3.14.1(e) development shall not impede views or vistas of the cultural heritage landscape. Section 3.2.21 also provides that City owned heritage properties shall be conserved and maintained, and where possible restored.

[33] With regard to the intensification policies, the Official Plan in s. 3.10 identifies intensification nodes as areas where the Official Plan promotes and encourages residential intensification to regenerate and increase the vitality of existing commercial areas, and having potential for medium and high residential intensification. For Drummondville s. 3.1 requires respect for the existing built form of four storeys.

PROVINCIAL POLICY STATEMENT ("PPS")

[34] In deciding land use planning matters, the Board (and City Council before it) is required to make decisions that are consistent with the PPS. The PPS (2014) provides a vision for Ontario's land use planning system that includes policies for building strong healthy communities, long-term economic prosperity, and cultural heritage and archaeology. The interpretation section of the PPS provides that it is to be read in its entirety and, when more than one policy is relevant, to consider all the relevant policies. There is no implied priority in the order in which the policies appear nor does one policy trump another.

[35] For the Subject Lands, which are found within a cultural heritage landscape, and also found within an intensification node, the Board finds that the development proposal by the City must be considered as a whole and not just the impugned by-laws. An archaeological resource study and a heritage impact study have been completed for the hearing, both supportive of the City decision (but contingent upon a Stage 3 archaeological assessment for the eastern portion of the Subject Lands i.e. Part 3). The City development proposal would result in the creation/conservation of some 7,600 sq. m. of additional open space lands that are contiguous to the Drummond Hill Cemetery and the former Holman property, with proposed linkages to both Barker Street and Main Street, and are proposed for heritage designation by the City.

[36] As Attachment 2 depicts, Part 4 is adjacent to the area of the heaviest fighting. The development proposal would also implement the intensification policies of the PPS, in an intensification node with all municipal services, proximate to commercial uses, and with transit available. It would provide for affordable housing for seniors, be in the form of the adaptive re-use of the existing school building, and be in an area of the Subject Lands that the Board finds has been disturbed and used for a school for over 100 years. The provision for commercial parking on a portion of the lands identified to City Council by the Friends as being less historically significant is appropriate to the Board in light of the policy direction in 1.7(c) to support maintaining and where possible enhancing the vitality and viability of downtowns and mainstreets, but contingent on the Stage 3

archaeological assessment.

[37] The Board finds that the development proposal as a whole is consistent with the PPS.

GROWTH PLAN

[38] Like the PPS, the Growth Plan has policies related to building compact vibrant and complete communities which optimize the use of existing infrastructure and direct municipalities through their official plans to implement conservation objectives of s. 4.2.4(e) cultural heritage conservation, including conservation of cultural heritage and archaeological resources **where feasible**, as built up areas are intensified.

[39] As noted above, the Subject Lands do fall within a designated intensification area. The record shows that the City had sought financial assistance from other levels of government for the purchase of the Subject Lands. With no other governmental funding, the City assessed its position, reviewed a number of options, and acquired the Subject Lands. The City development proposal as a whole provides for the conservation of 7,600 sq. m. of open space lands adjacent to the area of heaviest fighting, while also providing affordable housing proposed for seniors through the adaptive re-use of the existing school building. The Board finds that the development proposal conforms to the Growth Plan as: cultural heritage conservation has been achieved; intensification in a designated intensification area has been achieved through the provision for affordable rental housing for seniors; and the development as a whole will contribute to a diverse and compatible mix of land uses including residential and employment to support a vibrant neighbourhood.

REGIONAL OFFICIAL PLAN

[40] The Board would first note that the circulation comments from the Region of Niagara had no objection from the Region but that an archaeological assessment should be done, and a holding zone applied. As noted above, the study has now been done, and the Stage 3 assessment is to be done for Part 3.

[41] The strategic policy objectives of the Regional Official Plan include efficient use of land, a variety of housing, recognition of historical features, creation of tourism development opportunities, and the importance of affordable housing.

[42] The City's development proposal would provide affordable housing in the adaptive re-use of the existing school building within a locally designated intensification area, while recognizing and conserving 7,600 sq. m. of open space land adjacent to the area of heaviest fighting.

[43] The Board finds that the City's development proposal as a whole conforms to the Regional Official Plan.

CITY OF NIAGARA OFFICIAL PLAN

[44] Reference has already been made above to a number of local official plan policies and designations: i.e. existing land use designations, the Drummondville Intensification Node, Special Policy Area 10, etc.

[45] In support of the notion that the existing school building should be demolished, the Friends have referenced s. 3.2.21 of the Official Plan which states the following:

> City-owned heritage properties and buildings shall be conserved, maintained and, where possible, **restored** in accordance with the policies of this Plan.
>
> In addition, the City and other public agencies may acquire heritage property on a selective basis, where preservation under private ownership is not possible, and where appropriate. (Emphasis added)

[46] The Friends place emphasis on City owned heritage properties being restored. The submission being that once the City acquires a heritage property the City is obliged to "restore" that property, which in this case they suggest is the demolition of the school building so as to "restore" a portion of the Lundy's Lane battlefield.

[47] The Board does not agree. The wording of the policy speaks firstly to conserve and maintain, and then "where possible" restore. In the circumstances at hand, the Board finds that the City has moved to acquire a heritage property in conformity with the second paragraph of s. 3.2.21, has set aside 7,600 sq. m. of the former playground for

open space and linkages, and through the archaeological and heritage impact study conserved the most proximate and a large portion of the Subject Lands. The Board does not find any policy obligation imposed by the Official Plan on the City to “restore” by demolishing the existing school.

[48] With regard to the Official Plan, the Board finds that the City’s development proposal as a whole appropriately conserves a portion of the Subject Lands, appropriately intensifies a portion of the Subject lands through the adaptive re-use of the school building that has been on site and in the neighbourhood for over 40 years, and appropriately supports the existing commercial use on Main Street in the Drummondville commercial area. The eastern area will be zoned to permit parking only and will provide a pedestrian linkage to Main Street.

ZONING BY-LAW

[49] The Friends submit that By-law No. 2013-24 as presently worded would allow the expansion of the existing school structure, and thus further impair the views and viewshed of the battlefield. The City staff report indicates the clear intent to simply adapt the existing building for the affordable rental accommodation for seniors, and the City submits that there was and is no intent to enable expansion of the building in the zoning by-law. The City states that if approved in principle, it will provide to the Board a revised by-law that “shrink wraps” the existing building to overcome any concerns with regard to possible expansion.

[50] The Friends similarly submit that By-law No. 2013-26 as presently worded would not restrict the use of the Part 3 lands to parking only, but rather would enable the use of the Part 3 lands for General Commercial purposes including the construction of a building which if constructed would further inhibit the views and impair the viewshed.

[51] The City in response states that it is prepared to revise the by-law to limit the use to parking, and Morse states that it is agreeable to same, and also to the extension of the pedestrian linkage across Part 3. Morse entered a draft site plan (Exhibit 23) illustrating the conceptual parking arrangement and pedestrian linkage to Main Street.

[52] One final zoning issue was raised by the parties, and it related to the conformity of the parking provisions found in By-law No. 2013-24 and that of the City's Comprehensive Zoning By-law No. 79-200. The Board notes the evidence of both land use planners was that the reduced parking provision for the affordable seniors' housing was appropriate in light of the use of the building and its proximity to transit.

THE *PLANNING ACT*

[53] Section 2.1 of the *Planning Act* requires the Board in the consideration of a planning matter to have regard to the decision by the municipal council and the information and materials that council considered in making its decision.

[54] The Board has reviewed all the staff reports to City Council, the public submissions, the circulated agency comments, and the decisions of Council for the whole of the City's development proposal. For the reasons set out above, the Board has found that City Council decisions are consistent with the PPS, and conform to the Growth Plan, the Regional Official Plan and implement the City's Official Plan, and represent good planning. The evidence before the Board is that the City Council had sought, without success, financial assistance from other levels of government, and notwithstanding that chose to proceed and acquire the Subject Lands before the Subject Lands was put on the open market, knowing the as-of-right land use standards that were in place. The Board finds that the City Council's whole development proposal appropriately balanced the policy directives of the PPS and Growth Plan enabling the conservation of a large portion of the grassed playground for Open Space, the adaptive re-use of the school building for affordable housing for seniors and the support for a commercial use on Main Street within a community improvement area.

ISSUES

Issue 1: *Should the property known municipally as 6015 Baker Street ("Subject Lands") be classified as a significant cultural heritage landscape as described under the Provincial Policy Statement?*

[55] The Board for the reasons noted above, finds that a portion of the Subject Lands (Parts 3 and 4) are significant cultural heritage landscape.

> Issue 2: *If the Subject Lands are classified as a significant cultural heritage landscape, are the Subject Lands being properly "conserved" within the meaning of the Provincial Policy Statement by rezoning the Subject Lands to a site specific residential apartment 5A density (R5A) zone to permit a 30 unit apartment building under By-law No. 2013-24, and a site specific general commercial (GC(H)) zone to permit an expanded parking lot under By-law No. 2013-26?*

[56] The consideration of this issue requires reference to the definition of conserved which is set out below:

> **Conserved:** means the identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained under the *Ontario Heritage Act*. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment. Mitigative measures and/or alternative development approaches can be included in these plans and assessments.

[57] As noted above an archaeological assessment and a heritage impact assessment have been prepared in support of the City's case. No other such reports were provided in evidence.

[58] The Board finds that the City's development proposal as a whole appropriately conserves the Subject Lands, through the rezoning to Open Space of the majority of the former grassed playground, through the rezoning and adaptive re-use of the existing school building, and through the provision of pedestrian walkways and viewing opportunities, and contingent upon a Stage 3 archaeological assessment the provision of additional parking for an existing use. (The Board would note that in the approximately 50 years since Attachment 2 was prepared, it would appear that five or six other properties within the National Historic Site have been converted to a parking use.)

Issue 3: *Do the proposed zoning by-law amendments conform with the Growth Plan for the Greater Golden Horseshoe in terms of conservation of cultural heritage and archaeological resources? Is the property a valuable asset and irreplaceable cultural heritage site as described under the Growth Plan?*

[59] The City's development proposal as a whole conforms to the Growth Plan. The retention of the majority of the grassed playground as open space adjacent to the area of heaviest fighting conforms to the intent of this policy. The intensification of the former school building also conforms to the intent of the Growth Plan.

[60] The actual quote from the Growth Plan is that the GGH … "is blessed with a broad array of …irreplaceable cultural heritage sites" which are to be wisely protected and managed. The Board finds that this directive has been met through the actions of the City.

Issue 4: *Do the proposed zoning by-law amendments conform to the Niagara Regional Policy Plan as conserving, enhancing, restoring a cultural heritage resource or providing for an adaptive re-use that is compatible with the cultural heritage resources?*

[61] For the reasons stated above, the Board has found that the City's whole development proposal conforms to the Regional Official Plan. There were no objections by the Region upon circulation. An archaeological assessment has been prepared as well as a heritage impact statement.

Issue 5: *Do the proposed zoning by-law amendments conform to the City of Niagara Falls' Official Plan in the following ways:*

a. *Whether the proposed development conserves, maintains and restores City-owned Heritage properties and whether it provides for the recognition of the lands as a significant Heritage resource?*

b. *By avoiding undue concentrations of any particular housing type, and achieving compatibility and sensitivity with the surrounding area?*

c. *By enhancing the Lundy's Lane Battlefield site and retaining it as a historically important open space, and providing opportunities for cultural heritage preservation and historically-*

related tourism opportunities in the Lundy's Lane satellite tourist district?

d. By protecting and preserving the lands in Special Policy Area "10" to commemorate the battle of Lundy's Lane?

[62] The zoning by-laws as part of the City's whole development proposal conform to the City's Official Plan, such that a majority of the grassed playground is conserved as open space, and proposed for designation under the *Ontario Heritage Act*. The Board does not find there to be any obligation imposed on the City to "restore" the Subject Lands by demolishing the existing school building. The Board finds that the adaptive re-use of the school building is consistent with the PPS.

[63] Issue 5(b) is redundant as it references a now deleted policy of the Official Plan.

[64] The Lundy's Lane Satellite Tourist District referenced in Issue 5(c) is located north and west of the cemetery lands and the Subject Lands do not fall within that area. Nonetheless the provision of the open space area and the proposed future designation under the *Ontario Heritage Act* will contribute to the enhancement the Lundy's Lane Battlefield site and provide opportunities for tourism, but at a scale that is appropriate for the urban setting within which it is found.

[65] Special Policy Area "10" provides that the lands in the area be protected and preserved to commemorate the Battle of Lundy's Lane. The Board finds that the conservation of the majority of the grassed playground meets this policy, and the Board notes that there is no provision that requires the demolition of existing structures.

<u>Issue 6:</u> *Considering development is proposed adjacent to lands, structures or buildings i.e. Drummond Hill Cemetery, 5993 Barker Street, 5997 Barker Street listed on an approved heritage resource inventory, is a Heritage Impact Analysis required prior to an approval, by the Regional Policy Plan and the City's Official Plan?*

[66] A heritage impact statement has been completed indicating no adverse impacts. The Region provided its comments and had no objections. Furthermore there is no requirement that such an analysis be prepared. The wording of the official plan policy is

permissive, not mandatory.

Issue 7: *Are the proposed zoning by-law amendments required to comply with and if so, do they comply with the Historic Drummondville Community Improvement Plan, particularly with regard to:*

a. *Section 6.1.3 Battlefield Precinct, Heritage Resources including "Battlefield view corridor"?*

b. *Implementation Actions, particularly Targeted Improvements-Specific Projects?*

c. *Land use plan?*

[67] The Board finds that there is no statutory requirement for a zoning by-law to conform to a community improvement plan.

[68] The Board also finds that the City's whole development proposal does in fact implement the Community Improvement Plan by providing for a range and mix of housing types, affordable housing, and in proximity to Main Street (6.1.2), it will preserve the largest portion of the school yard in an open space format to assist in building a cohesive precinct and provision has been made for pedestrian connections to Main Street. The evidence of the City and Mr. Morgan is that the City will require an easement connection across Part 3 as part of its proposed conveyance to Morse, and this is acceptable to Mr. Morgan.

Issue 8: *Are the proposed zoning by-law amendments required to implement and if so, do they appropriately implement the City of Niagara Falls Heritage Master Plan and the Lundy's Lane Battlefield Master Plan, particularly:*

a. *Regarding views and encroachment of views, and communicating the contribution of the topography and cultural landscape to the events and outcome of the Battle of Lundy's Lane*

b. *The Master Plan's specific recommendations for the Subject Lands in its recommendation for a Battlefield heritage conservation district under Part V of the Ontario Heritage Act?*

[69] There is no statutory requirement for a zoning by-law to conform to either the 1998 Lundy's Lane Battlefield Master Plan or the 2005 Heritage Master Plan. Notwithstanding this, the Board has found that the City's development proposal as a whole meets the intent of both documents through the conservation of the 7,600 sq. m. of open space lands and walkway abutting the Drummond Hill Cemetery.

[70] The Heritage Master Plan recommended that consideration be given to a conservation heritage district, which would be much broader than just the Subject Lands, and may still be an objective that the City may choose to pursue.

Issue 9: *Was the application required to be circulated to the City's Municipal Heritage Committee ("MHC") particularly under the Niagara Regional Policy Plan, the City of Niagara Falls Official Plan, and/or the Ontario Heritage Act, and should the Ontario Municipal Board give consideration to a motion passed during the MHC meeting on February 4, 2013 that recommended the Subject Lands be designated under part IV of the Ontario Heritage Act as a cultural heritage landscape due to its associative value with the Battle of Lundy's Lane during the war of 1812-1814?*

[71] There is no specific statutory obligation to circulate to MHC, which provides advice and recommendations to City Council. The recommendation of the MHC was part of the staff report to Council. The Board has had regard for the decision of Council and for the material and information before it including the recommendation of the MHC

Issue 10: *Should a cultural heritage study of the Lundy's Lane Battlefield area comprising of municipally-owned and related publicly-owned lands be required prior to the consideration of the proposed zoning by-law amendments?*

Issue 11: *Should an archaeological assessment have been required to be undertaken and submitted as part of the application for the proposed zoning by-law amendments?*

[72] An archaeological assessment and a heritage impact statement have both been prepared for the City and form part of the record before the Board. The official plan language with regard to studies in support of an application provides a list of studies that may be required. The language is permissive and not mandatory.

Issue 12: *Do the proposed zoning by-law amendments conform with the intent of the cultural and heritage policies of the Region of Niagara Sustainable Community Policies of the Regional Official Plan?*

[73] It has been noted above that the Region had no objections to the City's development proposal as a whole with the comment that an archaeological assessment be obtained, that such an assessment has been obtained, and a further stage 3 archaeological assessment is required. The Board prefers the evidence in this regard by the City's heritage planner that the whole development proposal conforms to the Region's Official Plan.

Issue 13: *Was a Financial Impact Study required given:*

a. *The concern of the Provincial Policy Statements with Building Strong Communities, and the Wise Use and Management of Resources;*

b. *The concern of the Growth Plan for the Greater Golden Horseshoe with Protecting What Is Valuable?*

c. *The concern of the Niagara Region Policy Plan directives with conservation as it relates to creation of tourism development opportunities?*

d. *The City of Niagara Falls Official Plan policies regarding tourist commercial development in the Lundy's Lane Satellite District, specifically its provisions for enhancement of the Lundy's Lane Battlefield site and its retention as a historically important open space, and generally its provisions for upgrading and renewal of internationally significant tourism destination physical plant to create a high quality public realm?*

[74] The Board has noted that the language of the Official Plan with regard to required studies is permissive and not mandatory. The Board has noted in the agreed statement of facts that the land use planner for the Friends takes no position on this issue.

Issue 14: *Should the purpose and intent of the O.P.A. 94 which had been adopted by the City of Niagara Falls prior to the passage of the proposed zoning by-law amendments be considered by the Board? If so, are the proposed zoning by-law amendments in conformity*

with O.P.A. 94, particularly with regard to the policies on Intensification Nodes, Heritage, Property Consolidation, Drummondville, and Urban design strategy?

[75] The provisions of O.P.A. 94 were addressed by both land use planners in the evidence before the Board, and the Board has preferred the evidence of the City's land use planner.

Issue 15: *Is proposed Zoning By-law No. 2013-24 in conformity with the parking area requirements of City of Niagara Falls Zoning By-law No. 79-200?*

[76] A site specific parking provision has been made in By-law No. 2013-24 for the reduction of the required parking, which due to the intended use of the building for seniors' rental accommodation and its location in proximity to public transit and commercial uses, the Board has found appropriate.

Issue 16: *a. Have resources ever been made available, offered or committed by a level of government or private organization (including the Friends of Lundy's Lane Battlefield) for the purchase, dedication, or development for heritage purposes of the Subject Lands to commemorate the Battle of Lundy's Lane?*

b. If the answer to (a) is NO, are the cultural heritage and/or archaeological purposes of the City adequately served by the City acquiring the Subject Lands and financing the dedication or a portion of the subject by selling the remainder of the Subject Lands for affordable housing and parking lot purposes?

[77] The Board does not as a rule venture into financial considerations in land use planning. As a reflection only of the evidence, there was no evidence presented of any resources committed by any other level of government for the Subject Lands.

[78] However the Board has found on other land use planning grounds that the City's development proposal as a whole is consistent with the PPS, conforms to the Growth Plan, the Regional Official Plan and the City's Official Plan.

Issue 17: *Is there any obligation on the City to finance the acquisition, development, and dedication of the Subject Lands for historical or archaeological purposes?*

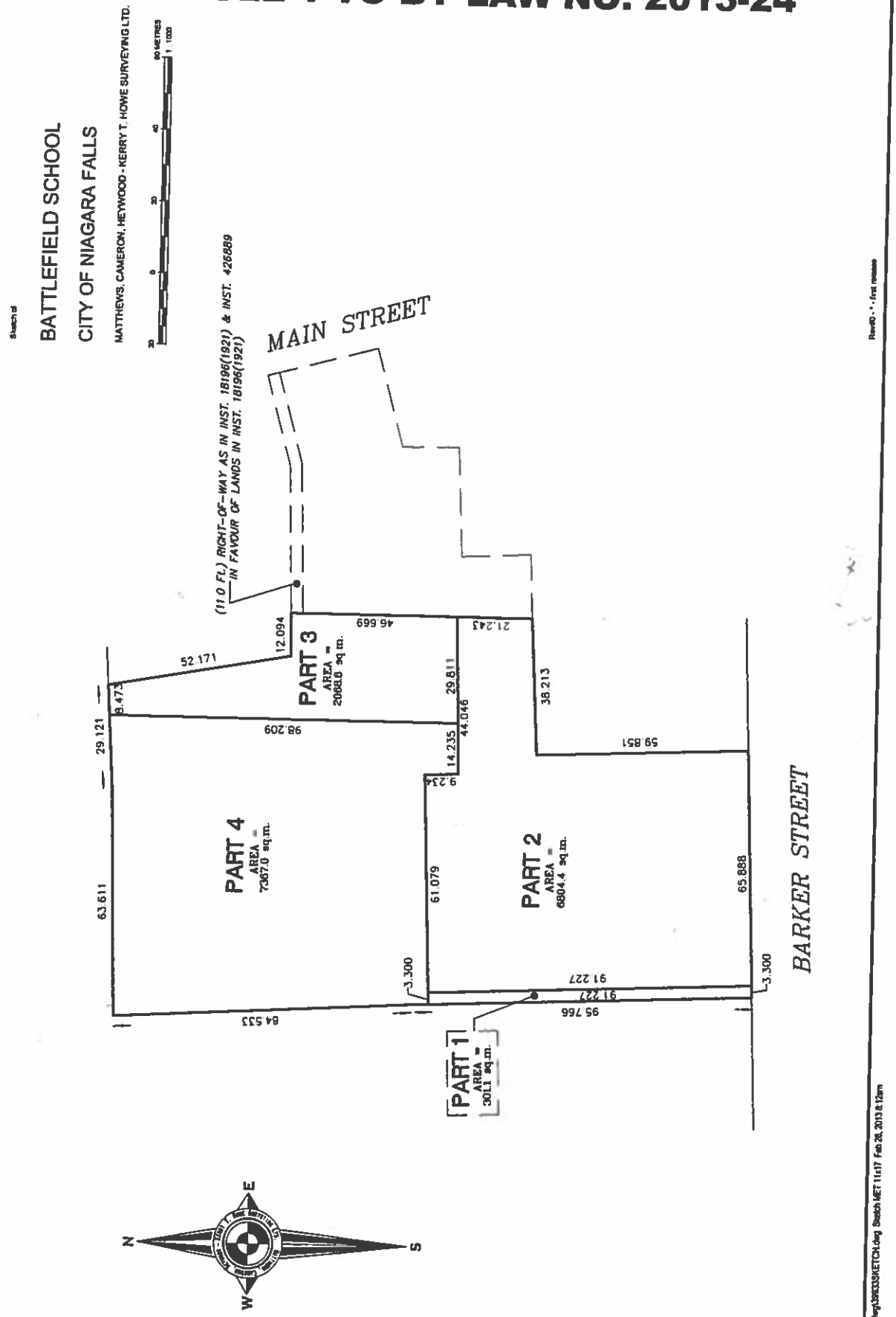
[79] The City of Niagara's Official Plan does not have any policies that would obligate the City in the fashion described above.

[80] In conclusion, as per paragraph 23 above, the Board will allow the appeals in part, and will withhold its final Order pending receipt of the two revised zoning by-laws from the City.

"Blair S. Taylor"

BLAIR S. TAYLOR
MEMBER

SCHEDULE 1 TO BY-LAW NO. 2013-24



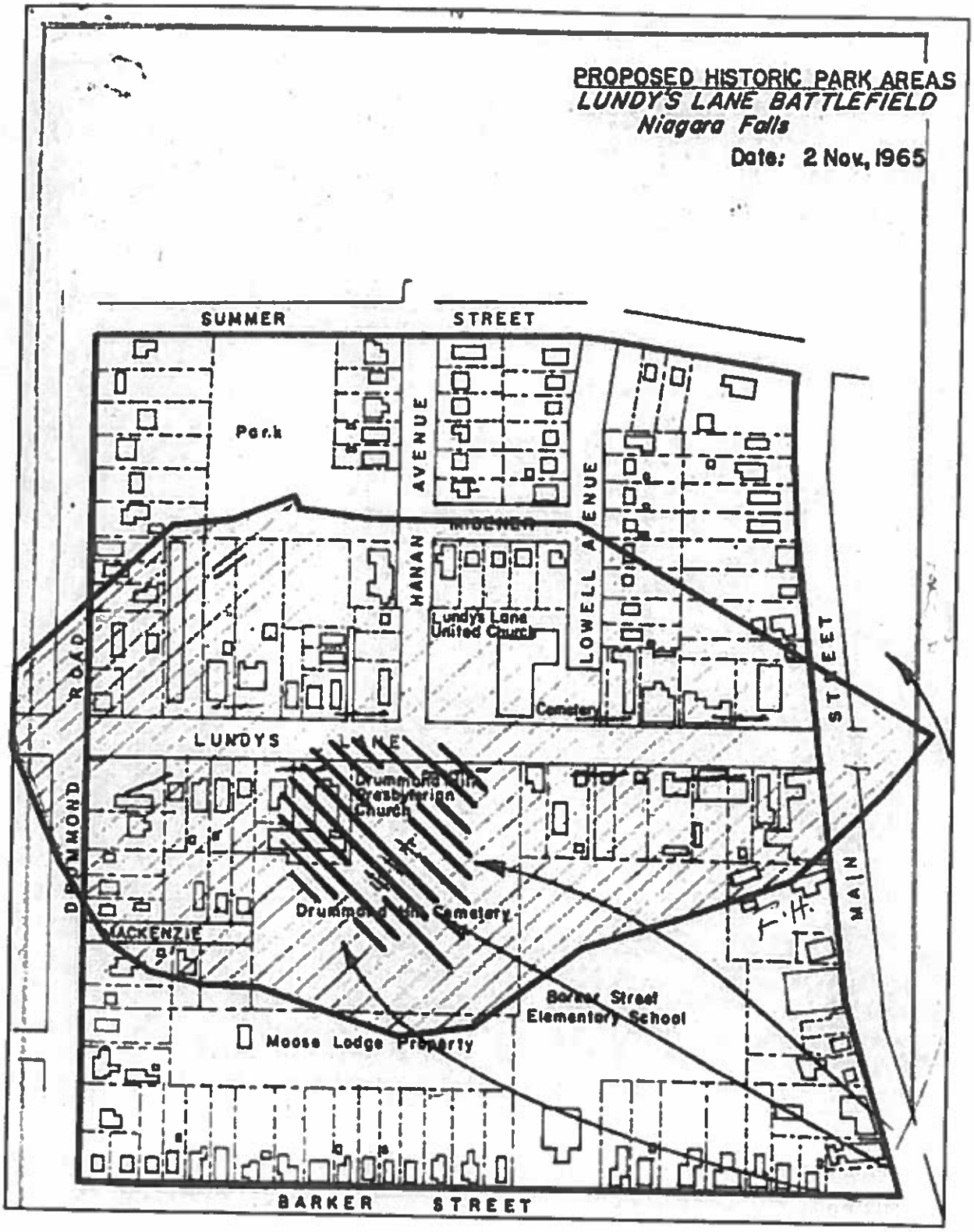


Figure 3. Option 2 proposed for designated place, the area endorsed by the Board for a national historic park is outlined in red. The general area of the battle is indicated by the light hatched lines. (identified by blue polygon). Drummond Hill Cemetery, the area of heaviest fighting is indicated by the heavy dark hatching. (*Central Registry, C8400/157, Battlefield of Lundys [sic] Lane – Niagara Falls, Ont., Vol. 1, attached to Laing to Keighen, 30 Nov. 1966. Modified by David McConnell*)