Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: August 30, 2016 **CASE NO(S).:** PL130885

PROCEEDING COMMENCED UNDER subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	1026046 Ontario Limited
Subject:	Proposed Official Plan Amendment No. 197
Municipality:	City of Toronto
OMB Case No.:	PL130885
OMB File No.:	PL130885
OMB Case Name:	Shoreline Towers Incorporated v. Toronto (City)

Heard: November 6 – 27, 2015 and February 2 – 12, 2016 in Toronto, Ontario

APPEARANCES:

Parties	**Counsel/Representative***
Shoreline Towers Inc.	P. Patterson, P. Morley
City of Toronto	S. Haniford, L. Forder
Lakeshore Planning Council Corp.	Peggy Moulder*
Mimico Lakeshore Network Inc.	Dr. Martin Gerwin*
Participants	
Abbe Edelson	
Mary Bella	
South Beach Investments Limited	W. Friedman, A. Andrzejewska
Vinen Atlantic S.A.	R. Kanter

DECISION OF THE BOARD DELIVERED BY M. C. DENHEZ

1. INTRODUCTION

[1] This Official Plan (“OP”) dispute involved a new multi-billion-dollar vision for over a kilometre of Toronto’s urban waterfront.

[2] "Mimico-by-the-Lake" (the “Study Area"), so named by the City of Toronto ("the City"), faces a southward bend in Lake Ontario west of the Humber River and Mimico Creek. The shore, running north-south at that point, has a strip of reclaimed parkland crossed by the Martin Goodman Trail ("the trail"). The Study Area straddles Lake Shore Boulevard West, and extends to the trail. Its visually strategic location is southwest of an existing kilometre-long redevelopment – Humber Bay Shores (formerly part of "the Motel Strip" between Lake Ontario and the Gardiner Expressway), called the Study Area’s “fraternal twin” which is subject to its own vetted planning documents.

[3] The potential for this overall stretch of the former City of Etobicoke's waterfront was once called "the Jewel of Etobicoke." But today, in plain sight, the ambience of Mimico-by-the-Lake is still dominated by surface parking lots, at the rear of sixty-year-old walk-up apartment buildings facing Lake Shore Boulevard. In this proceeding, not a single positive word was said about their appearance.

[4] The City undertook a new planning vision – the Mimico-by-the-Lake Secondary Plan, or Official Plan Amendment No. 197 ("OPA 197"), adopted by Council. It is 54 pages long, supplemented by 70 pages of urban design guidelines. The Board refers to OPA 197, its underlying vision, and its anticipated implementation as “the enterprise”. Like the Motel Strip, OPA 197 envisioned massive redevelopment – here 1.2 kilometres long and 1½ football fields wide, in seven geographic “precincts”, with some 25 proposed new midrise and highrise buildings (8 storeys to 25 storeys), roads, and additional lakeside parkland.

[5] The City paper trail expressed no intent to pay for any of it.

[6] Developers are apparently expected to provide the new roads and parkland themselves – via compulsory parkland dedications, Development Charges (“DC’s”), and benefits expected under s. 37 of the *Planning Act* ("the Act").

[7] One community group, the Mimico Lakeshore Network Inc. (“MLNI”), was broadly supportive of OPA 197; another, the Lakeshore Planning Council Corp. (“LPCC”), said the proposed buildings were too big, and the parkland too small. Some owners and developers said the diametric opposite. Several appeals of OPA 197 were filed with the Ontario Municipal Board ("the Board"), with disagreement over many issues, notably roads, building size, parkland, and the format of the OPA itself.

[8] There were six Pre-Hearing Conferences (“PHC’s”), two mediations, and a Procedural Order. The PHC’s divided the Board hearing into successive “Phases”. The “Phase I Hearing” was before a different Panel, whose decision and order (March 31, 2015) modified parts of OPA 197 and approved others. Another PHC (October 21, 2015) directed that the current “Phase II” proceeding would address different questions (an eventual "Phase III” will address the appeal of 1026046 Ontario Limited in a different Precinct). The current Phase II would focus geographically on “Precinct B”, where one appellant, Shoreline Towers Inc. (“Shoreline”, owner of two substantial apartment blocks at 2313 – 2323 Lake Shore Boulevard West), challenged the City's vision in Precinct B. Shoreline had its own vision for a condominium tower on much of the *same* space that OPA 197 allotted to parkland and a waterfront street.

[9] Shoreline produced a 27-page counterproposal to OPA 197. Shoreline was represented by counsel, and its witnesses included planner Peter Swinton and engineers Richard Tranquada and Terry Wallace. The City defended OPA 197 and its broad allocation of parkland and roads. It was represented by counsel, with evidence from planners Kathryn Thom and Garvin Tom, and urban designer Emilia Floro. LPCC and MLNI were each represented by agents, Peggy Moulder and Dr. Martin Gerwin

respectively. There were also arrangements to hear from participants Abbe Edelson and Mary Bella, on behalf of the Ward 6 Community Action Team and Mimico Residents Association respectively. Ms. Moulder and LPCC were largely critical of OPA 197; the others were broadly supportive. On consent, two other corporate participants (South Beach Investments Ltd. and Vinen Atlantic S.A., owners of abutting property to the south and north of Shoreline's property respectively) were heard (each represented by counsel). On consent, the Board also heard from Vinen's planner, Martin Quarcoopome.

[10] For Phase II, the Board's Procedural Order's bulleted list of OPA provisions under appeal was two pages long, with 21 main issues. Witness Statements were over 200 pages. After initial procedural debate (described later), the hearing began with an alleged conundrum. Shoreline claimed that:

- most of the land which the developer would *have to develop*, so as to generate the land dedications/charges necessary for the City's land acquisition,
- was the *same* land that OPA 197 had allotted to the street and parkland.

[11] So the alleged conundrum was that:

- if the street were built, then there would be no space left to develop ("if there's a road, there's no development site");
- but if there were no development, then there would be no City money or land to build the street.

[12] Shoreline also said there should be a way for it to proceed with its own development (largely where the City wanted to put its street), and do so with fewer numerical restrictions on dimensions. However, the debate soon turned to many other topics. For example, the City objected to Shoreline's proposed site and access arrangements: "It's a building behind a building". Though Phase II would focus mainly on OPA 197, the parties called on the Board to resolve this access question as a corollary.

[13] Positions evolved. Though the initial positions of parties remained their preferred option, possible compromises were alluded to, e.g.:

- Shoreline indicated that the waterfront façade of its proposed project could be moved back, and the height could be 15 storeys, not 25; and
- the City indicated that space for its proposed waterfront street could be reduced.

[14] The Board has carefully considered all the evidence, including three cubic feet of documents, and the submissions of the parties. With their consent, the Board also conducted an unaccompanied site visit. The Board finds that this case involved fundamentals concerning the nature and function of the planning process, its level of specificity, and whether (to use the City's phrase) "it's serious".

[15] The Board is also mindful of Shoreline's assertion that its proposal, being the first of its kind on this substantial waterfront, will have what it called "precedential impact".

[16] Therein lies a core difficulty. Although Shoreline insisted that its project would be an "example" for others, the Board found no evidence of anything particularly exemplary, in terms of either built form or public vistas to the lake.

[17] More importantly, there was no distinctive call for same in the OPA. Although OPA 197 contained profuse references to the *importance* of built form and lakeshore views – and rightly so – it then did essentially nothing to pursue them. This was in marked contrast with what the planning process had called for in the Study Area's "fraternal twin".

[18] However, the parties recognized that further adjustments to OPA 197 would need to be made. Indeed, they recommended that the Board withhold its Order, pending those adjustments; that was one of the few areas where there was no disagreement.

[19] The Board agrees and outlines herein the 25 underlying principles on which changes should be based. The Board is confident that modifications to OPA 197 can further advance both the City's vision *and* Shoreline's development plans, while also addressing LPCC's concern about the erosion of planned greenspace.

[20] Beyond those generalities, the Board also makes specific findings. First, the Board supports a waterfront street, but the OPA need not require a travelled portion greater than 6.6 metres (“m”), or a parking lane. Its sidewalk and planting strip need not be in public title (they may be in private ownership, subject to an easement, depending on the circumstances).

[21] The Board does not support Shoreline's "temporary" east-west "street" – to be treated like an actual public street – on Shoreline's north driveway. However, subject to other considerations, that driveway might provide temporary private access to Shoreline's proposed development site, pending completion of the waterfront street.

[22] On review of LPCC's concern about de-designation of Open Space ("OS") lands, the Board was not persuaded to change any existing OS designations at this time.

[23] The Board reviewed the City's system for height limits (called Bands "A", "B" and "C"), applicable elsewhere in the Study Area. The Board found no compelling reason why the same “Band C” should not apply to Shoreline's property.

[24] As mentioned, the Board finds that the OPA should address the quality of built form, commensurate with its showcase waterfront location. For example, the OPA should make allowance for architectural flourishes and creative building shapes, offering good vistas to the lake. In that regard, the Board has concerns about the numerical specificity of the OPA,

- not because the Board objects to the volumetric total that the City assumed,

- nor because the Board questions the City's legal or policy right to be “prescriptive”,
- but because, in this case, those figures would likely produce the opposite of the built form that the City professes to want.

[25] Next, the Board encourages the City to revisit the separation distances between buildings. On the other hand, the Board was not persuaded to intervene in the question of frontage requirements and lot dimensions.

[26] It is nonetheless in the City's interest to be vigilant about the potential consequences of the specificity for its own paper burden. For example, the OPA should be more explicit on how the City proposes to use e.g. pre-consultation and other measures to prevent the application paperwork from spiraling, and to avoid duplication of studies.

[27] Finally, if OPA 197 purports to be predicated on owners and developers "moving in packs", then it should address how that will come about.

[28] The details and reasons are outlined below.

2. PROCEDURE

[29] The procedure for this matter was set out in PHC’s. In its decision of October 21, 2015, the Board reiterated that Phase II would not be predetermined by Phase I:

> 2(g) Determination of issues in the Phase I Hearing will be without prejudice to the site specific appeal by Shoreline Towers Inc. in the Phase II Hearing, including the site specific appeal relating to the issue of the appropriateness of the proposed Shoreline road within the properties comprising 2313 – 2323 Lake Shore Blvd. West, and will be without prejudice to a determination in the Phase II Hearing of the appropriateness of the proposed Shoreline road within Precinct B of the OPA 197.

[30] However, Ms. Moulder and LPCC disagreed with the Phase I decision (March 31, 2015). At the start of Phase II, Ms. Moulder and LPCC presented a Motion, calling on the current Board Panel to "set aside" the decision in Phase I, and to adjourn Phase II. She acknowledged being "somewhat late in providing this to the Board," but insisted that "the public has to have confidence" in these proceedings, and that her Motion raised serious questions. "These are not just minor issues."

[31] Counsel for the City and Shoreline objected. They said that they received an e-mail the previous business day, but did not see the Motion until the morning of the hearing, contrary to the Board's *Rules of Practice and Procedure*. Ms. Moulder and LPCC, said counsel for the City, "are well aware that the way to bring this Motion is not this."

[32] The Board dismissed the Motion – not for lack of eloquence, nor any dispute with the premise that the public must have confidence in Board proceedings. However, beyond the notice question, the Board found both procedural and substantive flaws.

[33] Procedurally, there were several ways to challenge the Board decision of March 31, 2015. One was to request a review, under s. 43 of the *Ontario Municipal Board Act*. Another was to seek leave to appeal to the Divisional Court. Both of those measures, however, were subject to statutory timelines; and despite the passage of 7½ months, Ms. Moulder and LPCC had done no such thing. Another recourse might have been to seek judicial review; but Ms. Moulder and LPCC had not done that either.

[34] On more substantive grounds, even if the decision of March 31, 2015, were found to be incorrect, the Board was not shown how this would justify an adjournment of Phase II, since the outcome of one was specifically without prejudice to the other.

[35] The Motion was therefore dismissed, and the Board proceeded with Phase II.

3. PHYSICAL CONTEXT

3.1 The General Environs

[36] Along the waterfront of the former City of Etobicoke. 1.2 kilometres are in Mimico-by-the-Lake, toward the south. Another kilometre, to the north and east, comprised much of the former Motel Strip, now called Humber Bay Shores, cited mainly for comparison.

[37] The ribbon of waterfront parkland here, with its trail, was made possible when the Toronto Region Conservation Authority (“TRCA”) acquired water lots (2005) and reclaimed land for the trail and parkland (2012-2013). With funding from three levels of government, $18 million was spent. At points along the waterfront, particularly in Precinct B, the trail splits, with small bridges crossing little inlets. A chain-link fence separates the parkland and trail from abutting parking lots.

[38] Toward the centre of this overall waterfront lies Humber Bay Park and Mimico Creek. Southwest of the creek, two large gated complexes separate the Study Area from that park. The first, immediately north of the Study Area, is Grand Harbour (up to 27 storeys); further northeast is Marina del Rey (up to 16 storeys). Both were built a generation ago, on what was once part of the Motel Strip. Despite easements for public access to the waterfront, there were no positive comments thereon; indeed, a previous Board decision nicknamed the two complexes "the fortresses."

[39] Northeast of Humber Bay Park, to the Humber River, lies Humber Bay Shores. Many redevelopment projects there exceed 50 storeys, near a new waterfront street named Marine Parade. The framework was a 178-page Board decision, issued in 1992, *Re Etobicoke Official Plan No. C-6586*, [1992] O.M.B.D. 656, 27 O.M.B.R. 129 (“the Motel Strip decision”). This waterfront area was considered so vital that the Province declared the matter to be of Provincial interest.

[40] That decision addressed the Motel Strip's own Secondary Plan. Ultimately, the latter's objective was "a harmonious composition of landmark building forms offering views to and vistas from Lake Ontario and downtown Toronto," with its own "direct relationship with the Toronto waterfront", and "distinctive architectural style."

[41] In Mimico's case, however, the City's urban designer said the City was working in a "different framework." It was said that one major distinction, between planning at Humber Bay Shores and Mimico-by-the-Lake, was that the former did not abut an existing residential neighbourhood, but the latter did. As a result, it was said that Humber Bay Shores could be allowed heights well above 25 storeys, which would be inappropriate beside an existing neighbourhood like Mimico. Another distinguishing factor was the direction of shadow, and potential shadow effects on the trail.

[42] The view eastward from Humber Bay Park, toward the downtown, is one of the finest urban viewscapes in Canada, for which the words "jewel" and "regional asset" are well-chosen. Indeed, in accordance with the earlier declaration of Provincial interest, one could argue that it is an asset for the entire Province. Several parking lots dot the park, for visitors "from all over".

[43] The view westward toward Mimico is a different matter. Parking lots and marinas in the park appear to have been laid out to avoid views in that direction. At the hearing, there was not a single positive comment about that perspective.

[44] That existing profile was said to be a product of the 1950s-1960s, when lakefront properties were redeveloped – mostly with nondescript walk-ups – producing "a solid wall of development running down to the lake." Two City experts referred to "the Great Wall of Mimico". The planning history was summarized in a staff report of January, 2007:

> Planning staff last studied the Mimico area in detail in 1983…. The report recommendations were not implemented by the former City of Etobicoke and little has occurred since then in terms of revitalization especially along an approximately 3 kilometre section of Lake Shore Boulevard

> West between Miles Road to the west and Luisa Street to the east. Many of the conditions identified in 1983 are still present today and will likely form the focus of any revitalization project. These include: blocked public access / view corridors to the waterfront; dilapidated appearance of the commercial strip and rental apartment housing stock; need for enhancement of local parklands; and the need for public infrastructure improvements.

[45] That is what OPA 197 proposed to change. It divided the waterfront of the Study Area into six precincts, with a seventh along Lake Shore Boulevard.

[46] The northernmost, closest to downtown, was “Precinct A”, 122 m wide. Five brick walk-up apartment buildings stretched in thin lines from Lake Shore Boulevard toward the water, with surface parking near the trail. There were 263 units spread among those five buildings, typically 3½ storeys tall. The Board was told of three owners there. The northernmost building, at 2301 Lake Shore Boulevard abutting Grand Harbour, was said to be owned by Portree Properties Ltd. The next two, to its south at 2303-2307 Lake Shore Boulevard, belonged to Floriri Village Investments Inc. (“Floriri”). There were finally two buildings at the southern limit of Precinct A, belonging to Vinen.

[47] Then came Precinct B, the focus of this hearing. The northernmost property was Shoreline's, with its two substantial 10-storey rental blocks ("the blocks"), separated from Vinen’s property by Shoreline's north driveway, with little setback on either side.

[48] The abutting property to the south belonged to South Beach, with a substantial eight-storey apartment block. Beyond South Beach, there were finally two walk-up buildings in Precinct B, called the Kilcooley Garden Co-op ("the co-ops").

[49] The Board was initially told that, in Precincts A and B, there was little room for pure infill: although surface parking near the trail may look immense, almost all of it is currently required to meet parking standards applicable to the existing buildings in the two Precincts. New construction would therefore need to be either in the form of:

- redevelopment of existing buildings, or

- infill construction *with* substantial parking, to assure that those parking standards continued to be met.

[50] The Study Area waterfront continues further south, through Precincts C, D, E and F. At the centre is Amos Waites Park, beside Superior Avenue. Finally, there is Precinct G, along the opposite (west) side of Lake Shore Boulevard.

[51] Next to Amos Waites Park, Superior Avenue separates Precincts C and D. South of Superior Ave., in Precincts D, E and F, several streets lead eastward from Lake Shore Boulevard almost to the waterfront. In contrast, north of Superior Avenue in Precincts C, B, A and northward, no streets lead eastward, until one reaches Humber Bay Park, a distance of about a kilometer north of Superior Avenue.

[52] OPA 197 anticipated that essentially every property in Precincts A, B and C would be redeveloped – with the sole exception of Shoreline's two 10-storey blocks, and South Beach's eight-storey building. Lake Shore Boulevard itself was expected to be redeveloped like other "Avenues" designated in the City's OP, with midrise (eight-storey) buildings, almost to the sidewalk.

2.2 Shoreline’s Property

[53] Shoreline's property is 80.7 m wide. The distance from the front property line (on Lake Shore Boulevard.) to the back (the trail) ranges from 152 m to 158 m, covering 1.05 hectares (“ha”) (2.6 acres) on the north side of Precinct B, between South Beach to the south and Vinen to the north (in Precinct A). With the fill, the distance from the water to the property's east boundary was said to be around 30-32 m, though with occasional "pinch points.”

[54] Shoreline has two long 10-storey apartment blocks centered on a courtyard and extending from Lake Shore Boulevard toward the water. They are 53 years old. Each block has 133 units, bringing the total for the complex to 266 units. Shoreline's planner said substantial repair work was anticipated for the façades; but generally, they were

considered well-maintained and "stable". Nothing in the evidence indicated that they would be removed and redeveloped anytime soon.

[55] On the Lake Shore Boulevard (west) side, those two apartment blocks have a street setback of about 20 m, occupied by a driveway, with ten visitor and car-share parking spaces, a drop-off, and ramps to underground parking. There are driveways along the north and south edges of the property. The wall of one of Vinen's buildings essentially abuts the north side of Shoreline's north driveway.

[56] Like other buildings in the Study Area, the back (east side) flanks the lake and trail, with surface parking, and more access to underground parking. There are 99 parking spaces at grade, and 143 underground. The surface parking is fenced off from the trail and parkland by the chain-link fence.

2.3 The Property's Existing Planning Framework

[57] On this east side, there is a shore hazard limit set by TRCA, with an accompanying 10 m setback. The PHC decision of October 21, 2015, determined that this hazard limit was not for debate in this proceeding. That hazard limit was said to be approximate: it would be plotted more precisely – along with the all-important setback – when the property was eventually rezoned for a particular development.

[58] According to the existing OP map, the property is mostly designated "Apartment Neighbourhood"; but part of the parking lot had also been designated Open Space ("OS"). Indeed, this OS label covered a significant part of the entire Study Area. The applicable Etobicoke zoning map similarly outlined a clear zoning boundary crossing Shoreline's parking lot, with much of it zoned Residential – but with a significant eastern tip zoned "O" (for "Temporary Open Space"). That mapping was repeated in the City's new Comprehensive Zoning By-law No. 569-2013, still under appeal, where this "O" zone is labeled "Open Space". The maps' boundaries, between the Residential and "O" zones, appear close to where the TRCA lakeside hazard line setback would be.

[59] The total “OS” and “O” space, throughout the Study Area, was estimated at about 3.9 acres. Ms. Moulder said this existing "OS" or "O" label appeared to be overlooked in OPA 197, which redesignated them for development without due attention.

[60] Shoreline’s planner ultimately replied that what the OP and zoning maps illustrated was not what the maps meant. The "OS" and "O" labels, he said, did not apply to his client's property after all, but stopped invisibly at the property line: it was preferable to assume that the entire property was really designated Apartment Neighbourhood (and zoned Residential), because that was its existing use, and conformed to the lot pattern. So the maps were just wrong. Out of a purported abundance of caution, Shoreline formally asked the Board to specify that the OS label did not apply to its property.

[61] Ms. Moulder countered that it was her understanding that the OS and O labels had originally been attached to reclaimed land and its setback.

[62] Another existing zoning aspect was mentioned only quickly in passing. Aside from the question of what uses were permitted at Shoreline’s site, there was the question of density. Even assuming that all the land was residentially zoned, Shoreline's property had already reached its maximum zoned density. In the uncontradicted words of one expert, development there was "pretty much maxed out" already. Indeed, its zoned development potential was in negative figures: Shoreline's planner finally acknowledged on cross-examination that the City’s adopted (but not yet in force) Zoning By-law No. 568-2013 imposed a height limit *lower* than the existing buildings.

3. THE CITY’S VISION FOR THE FUTURE

3.1 Introduction

[63] The overall purpose of OPA 197 is announced in its opening section:

> The goal… is to ensure that reinvestment and City-building initiatives over a 20-year time horizon achieve a built form and public realm that is desirable, rejuvenates the existing community and enhances the quality of life for area residents.

[64] The City's scenario, in the words of one City expert, "is a complete vision." "It was developed to provide the policy framework to guide investment, growth and change." The City said it started work on this vision a decade ago, with successive iterations, including explanatory documents like the *Mimico 20/20 Final Report* ("Final Report") and the *Mimico 20/20 Urban Design Guidelines*. They illustrate a scenario for 25 sizable new buildings in the Study Area:

- 16 midrise buildings, of up to some 8 storeys,
- 5 new highrise buildings (podium and tower), of up to some 15 storeys,
- And 4 other new highrise buildings (also with podium and tower), of up to some 25 storeys.

[65] OPA 197 itself covers 45 pages (single-spaced) plus 9 important maps, addressing many topics, some more controversial than others. Some proposed modifications to OPA 197 appeared undisputed, in three categories:

- **Housing:** There appeared to be agreement on changes to OPA 197's policies 4.3.3 and 4.3.12.
- **Transportation:** There was agreement on changes to OPA 197's policy 4.4.4.
- **Miscellaneous:** There was a range of changes identified at Exhibit 23 (November 27, 2015), to which no obvious objection was registered.

[66] The Board refers to the above is having been *apparently* resolved; but there was some uncertainty about LPCC's ultimate position. The other parties advised that a consensus had been reached, but LPCC's final written submissions suggested that it was still dissatisfied with the treatment of rentals. The Board, however, heard no evidence on that account, and is hence in no position to respond to those submissions.

[67] As for the uncontested topics, it was the common opinion of the expert planners that those revised OPA provisions were consistent with statutory criteria, and represented good planning. The Board attends to those modifications at the end of this decision.

[68] Other matters were more contentious. Though the parties produced a list of 21 issues, the Board summarizes them in six categories:

- **The waterfront street:** OPA 197 foresaw a waterfront street crossing Precinct B. MLNI was supportive; but Shoreline wanted that space for its development, while LPCC wanted it for parkland.
- **Height:** OPA 197 foresaw an 8-storey limit on Shoreline's property. Shoreline initially wanted up to 25 storeys, but would eventually accept 15; MLNI and LPCC wanted less.
- **Buildings vs. park:** OPA 197 presumed that City acquisition of land for new roads/parks would happen via redevelopment, entitling the City to parkland dedications, DC's, and s. 37 benefits. Shoreline and LPCC said the formula was wrong. Shoreline said it did not leave enough development space, whereas LPCC said OPA 197 did not leave enough park space, and would reduce the existing designated Open Space.
- **Shoreline's alternative:** Shoreline wanted to proceed with its own development, in its east parking lot. LPCC objected that this was where parkland should go, while the City said this was where its waterfront street should go, and that Shoreline's project would be a "building behind a building" with inadequate access.
- **Joint action:** The City acknowledged that the success of OPA 197 depended on collective action by owners/developers. Shoreline was skeptical, adding that, despite talk of incentives, the City was offering negligible support for projects.
- **Mechanics:** OPA 197 was specific about permissible dimensions, down to the centimeter. Shoreline objected that this would straightjacket

development and trigger the need for a profusion of future Amendments; so Shoreline countered with 27 pages of its own proposed OPA revisions.

4.2 The City's Overall Vision for Precinct B

[69] At policy 3.2.1, OPA 197 summarized its current expectations for Precinct B:

> Precinct B - is envisioned as a primarily stable residential Precinct with some potential for future infill development, primarily on the surface parking lots at the rear of the existing buildings fronting Lake Shore Boulevard West. Should intensive redevelopment activity in this Precinct occur, it shall be coordinated with the vision of Precincts A and C.

[70] The above perspective is illustrated in the Final Report, and the *Mimico 20/20 Urban Design Guidelines*. They both outline two defining characteristics. The first is that, unlike illustrations for other Precincts, projections for Precinct B display no new residential or commercial development whatever, whether via redevelopment or infill, e.g. at pages 19 and 27 of the *Mimico 20/20 Final Report,* and at Figures 5 and 40 of the *Mimico 20/20 Urban Design Guidelines.* This is confirmed in the text of the Final Report (s. 4.2), which posits that new residential development will be essentially zero, until the existing 10-storey blocks are destroyed "in the longer term":

> *Existing units: 498*
>
> *Potential units to be removed: 0*
>
> *Potential future total units: 498*
>
> *Potential net new proposed units: 0*
>
> … In the near term, Precinct B is anticipated to remain much as it is today. Minor infill development may occur… In the longer term, should the owners of the apartment buildings or co-op choose to redevelop, including the demolition of the existing structures, development in this Precinct should follow the pattern being introduced elsewhere….
> [Emphasis in original]

[71] The *Mimico 20/20 Urban Design Guidelines* say essentially the same (page 14), though it was not always thus. One earlier document, *Mimico 20/20 Workshop – May 29, 2012*, discussed "sample built form and height". It portrayed *both* a waterfront street and also new infill buildings, on the parking lots behind Shoreline, South Beach, and the

co-ops (page 14). However, it was then heavily annotated (page 15), with comments like "more green", and arrows to push the infill buildings further inland. By the time of the following public consultation, *Mimico 20/20 Open House – November 8, 2012*, infill buildings had disappeared from City illustrations.

[72] The other defining feature of the City vision for Precinct B is that every recent illustration portrays a substantial tree-lined waterfront street across it, as described below.

4.3 The Waterfront Street

[73] The City's waterfront street would start at Lake Shore Boulevard in the middle of Precinct A, and head east – then turn south paralleling the shore, to cross the properties of Floriri, Vinen, Shoreline, South Beach, and others further south. It would be outside the TRCA hazard area and setback, which would become parkland. The City would acquire the land for the road and parkland (via park dedications, DC's, and s. 37 benefits) when the respective owners undertook development.

[74] City documents argued that the street would be an incentive to investment: "The public street network should be incorporated into the Secondary Plan as key infrastructure elements to *support reinvestment* and revitalization" (Final Report, page 15; emphasis added). On the other hand, there was no mention of new roads in Precinct B, *unless* it was in the context of redevelopment projects. Indeed, the Final Report's *only* reference to new roads in Precinct B (page 26) was conditional on same:

> Should new development take place in Precinct B, either via redevelopment of the existing buildings or through sensitive infill on the existing properties, new streets would be required to provide access and address and provide connections to the lake.

[75] The *Mimico 20/20 Urban Design Guidelines* were equally conditional (page 14), if not more so:

> In the fullness of time, should new development be proposed, it must directly front onto a public street, either Lake Shore Boulevard West or a north-south waterfront street.

[76] In short, there was no hint that the waterfront street would actually occur, *unless* it was made possible through the private development projects.

[77] City experts called this continuous road a "fundamental component" of the vision; but it was not always thus. Waterfront access was initially portrayed as a series of crescents (“loop roads”) extending eastward from Lake Shore Boulevard, as opposed to a continuous waterfront street. Indeed, earlier iterations of the draft OPA had outlined a waterfront street in Precinct E, but none in Precinct B; it is only later that this situation was reversed. The Board was told the waterfront street was dropped from Precinct E because it would have meant going through buildings or parkland (access to the waterfront there would now be provided not by a waterfront street, but rather by a loop road extending from Lake Shore Boulevard).

[78] The City acknowledged that, in Precinct B, the main reason for the waterfront street was not traffic or parking ("It's not required for capacity or functionality"), but visual: the City said it would complement the trail, widen the view corridor, provide access to the trail area, and connect the waterfront to Lake Shore Boulevard Incidentally, said the City, the road would also be helpful to cyclists, “eyes on the street”, assistance for people with disabilities etc. The alternative, it said, would be a "gap in the road network". The City also pointed to OP s. 3.11.14(b) and its reference to streets "dividing larger sites." Finally, a continuous waterfront street would "demarcate the public and private realms;" without that road, there could be a juxtaposition of major new development with parkland, contrary to the City’s "vision", which included "framing the park".

[79] The main purpose, however, remained "larger City-building": it would "open up the area" and assist not only access, but also the "urban form" of the "city fabric."

[80] As for engineering, the City said its *Development Infrastructure Policy & Standards* ("DIPS") normally call for a 16.5 m right-of-way ("ROW") – two traveled lanes of 3 m, a parking lane of 2 m, plus curbs. There would also be a municipal boulevard on each side, complete with a 2 m sidewalk, separated from the roadway by a 1.8m planted strip. In this instance, however, the City concluded that since the street could be "single-loaded" (i.e. development on only one side), the total ROW could be reduced from 16.5 m to 13.5 m, by dispensing with the municipal boulevard on one side (including one sidewalk and planted strip) – because that area would be parkland (with trail) instead. Beyond the ROW, the city also wanted a 3m building setback.

[81] OPA s. 4.4.11 referred to DIPS, but added that officials could also consider some other standard which was "otherwise acceptable". Alternative standards do exist, such as the *Transportation Association of Canada Standards*, and the City *of Toronto Transportation Services Engineering Guidelines for Roadways*. Finally, the parking lane appeared to be taken for granted, simply because it was in DIPS. There was no parking study to suggest any particular need on the part of locals, or of visitors (who would have access to the ample parking lots in nearby Humber Bay Park).

[82] This ROW across the subject property appeared to be roughly 80.7 m long and 13.5 m wide, for a total of about 1190 square metres, or just over 11,700 square feet. Elsewhere, however, there were allusions to the City wanting a land dedication of 920 square metres. That question was never fully resolved.

[83] The Board asked about construction cost across Shoreline's property. It was told that it might cost around $225,000-$280,000. Across precinct B as a whole, it might be about $450,000-$560,000; and across the three precincts together, it might cost $1.4 – $1.5 million – not including land/ROW. The City stated that it had not considered the cost question until the Board asked. In any event, no public funds had been budgeted; OPA 197 focused exclusively on developers' land dedications, DC’s, and s. 37 benefits. Though OPA 197 referred to a "20-year time horizon", there were no illusions about this waterfront street materializing quickly. One City expert said it might occur "within 20

years, maybe", depending on when various owners chose the "time of development" of their respective properties. If Shoreline – *or* Vinen, *or* South Beach, *or* Floriri, *or* the co-ops, or their successors chose not to develop, then no continuous road could be built.

4.4 Height

[84] City experts summarized the proposed physical arrangement for built form as "a midrise neighbourhood with punctuation of taller buildings at key locations." Generally, across the Study Area, OPA 197 laid out the permitted building heights in "bands" parallel to the lakefrontas one looked toward the water from Lake Shore Boulevard,

[85] A first "band" of midrise development ("**Band A**"), up to roughly eight storeys, would face Lake Shore Boulevard The apparent rationale was that, City-wide, the City preferred the urban look of street-oriented midrises along its arterial corridors.

[86] Partway to the lake, a "**Band B**" of highrises would reach roughly 25 storeys, substantially lower than at Humber Bay Shores. The Board was told that, if a building were higher than 76.5 m, its shadow would have impacts on the neighbourhood; the City wanted a minimum of five hours of sunlight on Lake Shore Boulevard, and seven hours on the neighbourhood.

[87] Finally, closest to the water, there would be **"Band C",** up to roughly 15 storeys. Reputedly, if buildings were any higher, they would cast more shadow on the trail (in contrast, Band B could extend higher, because it was further away).

[88] City experts said these “bands” resulted from many studies, with the intent "to create a new urban structure." Unlike most other properties, however, OPA 197 had not divided Shoreline's into these three "bands". *All* of Shoreline's property was designated "Band A" – midrise, with a maximum of eight storeys. City spokespersons said the City might have considered extending these bands across Shoreline's property – to permit 15 and 25 storey buildings like elsewhere – but only if Shoreline agreed to the waterfront street.

4.5 Acquisition of ROW and Parkland

[89] The City said it wanted to attend to the "neglected public realm in Mimico"; but as mentioned, the City's commitment appeared conditional on development. The same could be said of the acquisition of the ROW for the waterfront street. The paper trail contained no hint of a future land acquisition budget (though the City said $18 million of public money had already been spent on the waterfront and trail).

[90] Aside from developers' parkland dedications and DC's, OPA 197 devoted a sizable section (5.6) to what the City would do with the benefits it would collect under s. 37 of the Act, which allows municipalities to demand benefits in return for upzoning:

> The council of a local municipality may… authorize increases in the height and density of development otherwise permitted by the by-law that will be permitted in return for the provision of such facilities, services or matters as are set out in the by-law.

[91] The apparent expectation was that, although the OPA would now foresee large-scale development, the zoning still would not: lower-scale zoning would remain in place until a specific project came forward. At that time, the proponent would therefore have to seek rezoning – whereupon the City would call for payment of s. 37 benefits.

[92] The prospect of a ROW on Shoreline's property – and/or supplementary parkland – therefore appeared dependent on a Shoreline commitment to undertake *enough* new development to generate the wherewithal for the City to acquire that ROW and parkland. Without a *sufficient* project, the City would be unable to proceed with the waterfront street or supplementary parkland on Shoreline's property – nor would it be able to connect the waterfront street in Precinct A to the street in Precinct C. From all outward appearances, the City's plan appeared to presuppose that:

- development on Shoreline's property would generate enough land dedications, DC's and s. 37 benefits…
- … for the City to obtain up to 12,000 square feet of free land,

- plus a quarter million dollars in free road construction funding,
- without ever asking *how much* development would be necessary for those purposes, what *kind* of development it expected, nor what it might actually *like*.

[93] On one hand, the Board was told that, eventually, there might be an “intensive” or "comprehensive” redevelopment – euphemisms for destruction of the two 10-storey blocks for purposes of redevelopment. For now, inversely, it appeared that the City expected no development at all. The *Mimico 20/20 Open House* had predicted that "Precinct B will likely remain as-is", and the City's urban designer said Shoreline's property, with its two existing apartment blocks, was already "fully developed" and "fully utilized".

[94] If the latter was indeed the City's view, then there was no hint of how the City expected *any* new road or parkland to be created on the property.

4.6 The Premise of Collective Development

[95] The City acknowledged that its vision presupposed collaboration among the various owners. Indeed, OPA 197 foresaw little alternative. One City planner said the strategy was to encourage cooperation "among the owners, as a united front."

[96] One technique would be for OPA 197 to force redevelopment-minded owners to come together, by manipulating permissible frontages. For example, a midrise project would require a minimum frontage of 30 m square (though 30 m x 40 m would be “ideal”); and the minimum size for a highrise site would be 50 m x 50 m. Those dimensions do not correspond to the current pattern of long narrow lots, so lot reorganization would usually be essential. "Consolidation is encouraged in the plan."

[97] Furthermore, since acquisition of the ROW depended on development projects, road connectivity could not be guaranteed until *all* the owners had agreed to develop:

- The City recommended a "cooperation agreement" among the owners. “There is some obligation on owners to come forward."
- This vision was also tied to the City's "Precinct" framework, with "Precinct plans" – whereby owners would have to work cooperatively with other owners in a given precinct, on a "phasing plan that will work."

[98] The City pointed to Humber Bay Shores. It said owners of the old Motel Strip originally had not had much cohesion either; the City therefore "provided the vision, and they (owners and developers) provided the implementation." It said it used a similar approach at e.g. Dundas Street West and Shorncliffe Road, Lower Yonge Street, the West Don Lands, Lawrence Avenue, and Scarborough.

[99] Under OPA 197's system, if one owner applied for a development project in a precinct, it would first have to study:

- how this would affect the other owners in the precinct,
- including impacts on roads and open space.

[100] This study's level of specificity would depend on the project. In particular, the City would want to learn whether the project might preclude redevelopment elsewhere. The City would expect pre-consultation, to discuss the level of specificity of this Precinct plan.

[101] Although the City cited a precedent (of sorts) at Humber Bay Shores, it was said that owners/developers there had been easier to organize, because their interests were more homogeneous than here. Another distinguishing factor was money. At Humber Bay Shores, parkland and roads had obtained up-front money, which was not visible here: the public sector acquired or expropriated the land for the road and park, and constructed both. Furthermore, there were density transfers. Finally, there was no significant number of rentals that a redevelopment would have to replace.

4.7 Numerical Specificity

[102] Aside from substantive questions, the very format and methodology of the OPA were controversial. OPA 197 was both prescriptive and precise in its measurements. For example, instead of saying a given height limit was “25 storeys”, the height limit was listed as “76.5 m”. The maximum tower floor plate was 750 square metres, with minimum separation distances between buildings: 25 m between highrise towers, and 20 m for midrise buildings. The City said measurements were this precise, as a guarantee of built form, because e.g. measurement in storeys could be manipulated.

[103] The City's vision, said one City expert, was "a built form plan, not a density plan":

> The height bands… and policies… work together to create a development framework of new streets and blocks and ensures a built form that allows for redevelopment that will achieve the objectives of the Mimico-by-the-Lake Secondary Plan, and in particular will achieve a built form and public realm that are desirable, rejuvenate the community and enhance the quality of life for residents. The policies are purposeful and deliberate with a clear intention. It is acknowledged that the specificity may, in some cases, necessitate amendments on redevelopment applications involving a zoning amendment... There is greater purpose to be achieved and respected… The policies of OPA 197 relating to built form contemplate development precisely and deliberately in response to context… To provide increased development and leave access to the waterfront to the chance development of site-specific applications is not good planning.

[104] This emphasis on specific numbers, said the City's urban designer, showed that "the City is serious". Shoreline replied that, if its project deviated from OPA 197s measurements by as little as a centimetre, it would then have to apply for a further OPA – which, according to OPA 197, would not only cost much time and money, but would also require a "comprehensive review" of the entire Precinct Plan. "Every project is going to require an Amendment." According to Shoreline's planner, "one shouldn't need an OPA for what should be a minor variance." He said the City should be encouraging the redevelopment process to “get started”, rather than "putting on layers and layers of process (which) does the complete opposite."

[105] He drafted proposed revisions to OPA 197. His list spanned 27 pages. He claimed it was founded on several objectives, including:

- phasing development so that "revitalization can get started";
- coordinating with adjacent development, but without “holding up an individual owner unduly”;
- confining detailed studies to one's own lands, not lands of third parties;
- recognizing the studies described at Exhibit 19, page 3;
- demanding a new Precinct plan only when a proposal digressed from previous Precinct plans.

4.8 Development Procedure

[106] Aside from the argument about a parade of OPA's, a second format question pertained to other alleged paper burden. The requirements for precinct plans and transportation plans were mentioned earlier. One of the City's experts summarized:

> A development application will include a precinct plan that will illustrate precinct-wide street and block plans, building massing and heights and parks and open spaces as well as addressing community services, housing, servicing and heritage matters. It is intended that precinct plans endorsed by Council will be appended to the *Mimico 20/20 Urban Design Guidelines* to aid in the review of future development applications.

[107] There would also be transportation studies:

> Transportation Impact Studies will be required in the context of development applications to demonstrate that traffic can be accommodated on the area road network including any necessary off-site improvements.

[108] In the case of future modifications to the OPA (including its numerical specifications), OPA 197's policy 5.7.7 spelled out requirements:

> Site-specific amendments to the Secondary Plan that alter provisions in terms of boundaries, land-use, height and built form will not be permitted without a comprehensive review of the Secondary Plan. Site specific amendments that could destabilize areas within or adjacent to the

> Secondary Plan area or that are not consistent with the intent of the vision and principles of the Secondary Plan will be discouraged.

[109] At policy 5.7.3, however, OPA 197 offers an exception for “boundary adjustments", where the "general intent" is maintained:

> Where the general intent of the Secondary Plan is maintained, minor adjustments to the boundaries… shown on the respective Secondary Plan maps will not require amendment (s) to the Secondary Plan.

[110] However, if Council failed to "endorse" revisions to a precinct plan, or if there was disagreement on whether the "general intent" was being maintained, there was no indication of what would happen next.

[111] Shoreline said it took particular exception to this prospective paper burden. Directions to produce studies “at every turn”, it said, imposed "duplicative requirements and may even thwart development." It said that OPA 197's policy 5.1, particularly policy 5.1.5 (calling for precinct plans etc.), would represent "burdensome tasks that are ill-defined, may duplicate Zoning By-law amendment application requirements, and may pose barriers to proceeding." In the words of Shoreline's counsel, "even a minor change to the precise numerical requirements for height and built form trigger not only an Official Plan Amendment, but also a comprehensive review of the entire Secondary Plan." The result, he argued, would "stifle creativity and create additional layers of expense and time for both the City and the developer."

[112] The City replied that precinct plans were intended to ensure "that orderly development could occur in the future and that any proposal did not preclude future properties from developing, and ensure the functional integrity and conductivity of the street network."

4.9 Startup

[113] In terms of galvanizing collective action, the City's experts called OPA 197 "a comprehensive planning framework to guide investment", providing "opportunities for

investment that support revitalization", and “a policy framework for revitalization and change”. Counsel for the City said: "We've set the table". On its opening page, the OPA called itself "a framework that supports reinvestment". Shoreline's planner called it the diametric opposite – adding that it "locks down redevelopment until everyone is ready to go." "We may have to wait a long time for the stars to align."

[114] He added that there were no meaningful incentives specifically for this area. Unlike Humber Bay Shores, where there had been a framework to "facilitate" large-scale redevelopment, here there was an "absence of any policy or financial stimulus." Indeed, "unlike the economic head start afforded to developers in the Motel Strip or Humber Bay Shores, OPA 197 does not implement any new or area-specific financial incentives."

[115] This had apparently been a much-discussed topic at the City. Council’s Executive Committee had asked staff for a further study of "parallel inducement measures",

> including coordinated capital investments, within the 10 year Capital Plan, in the Mimico-by-the-Lake Secondary Plan area that will act as a catalyst to attract private investment into the Secondary Plan area.

[116] The staff response was outlined in one of the City's witness statements:

> An interdisciplinary team was formed… There were five broad categories of actions the City could undertake to support the implementation of the new planning framework including: Financial Incentives; Tower Renewal; Housing; Parks and Open Space; and Section 37 of the *Planning Act*.

[117] Staff concluded that “these actions coupled with the policy objectives of the Secondary Plan provide the City with the ability to achieve the vision for the Mimico area.”

[118] However, the City was less explicit about what it would contribute to redevelopment than about what redevelopment would contribute to it. Indeed, the same Committee decision that had referred to attracting developers also specified that the

Committee expected to extract payments from those same developers, via s. 37 "benefits in accordance with the community benefit priorities outlined in the Secondary Plan". Similarly, the accompanying staff report contained no suggestions for support specific to the subject area; nor did it offer any such hint of “capital investment” by the City in anticipation of development. On the contrary, it said only that "strategic capital investment opportunities will be explored as new redevelopment occurs."

[119] In response, the Committee did ask for yet further information. The City was said to be "looking at other incentive programs tied to Mimico”; but the Board was given no details.

5. SHORELINE’S VISION

5.1 The Owner’s Proposal

[120] Shoreline wanted to build on what is today its back (east) parking lot, noticeably closer to the water than any other new building in the Study Area. Much was made about the proposition that a new project here would be an intensification, usually supported by the Provincial Policy Statement (PPS), the Growth Plan for the Greater Golden Horseshoe (“Growth Plan”), and the City's existing OP (“parent OP”).

[121] One estimate was that the site covered 0.53 ha, of which 0.33 ha was buildable. Shoreline’s Exhibit 18, page 1, illustrated a “site” covering about a third of Shoreline’s 2.6 acre property, though part was presumably within the 10m TRCA waterfront setback. This potential site was known to measure 80.7 m along its north-south axis; but east-west, all Shoreline’s planner said was that, if a road were built across it, the site would be “sterilized”.

[122] The north side of the site would be flanked – in part, though not fully – by 34.62 m of frontage along the road which Shoreline proposed there, though 15 m of that space was allotted to a separation distance from the existing apartment blocks. Beyond that road frontage, it portrayed more development (Exhibit 18, page 12); where the

proposed façade faced the lake, a rough estimate drawn from that exhibit would suggest a distance of perhaps 48 m from those blocks; and assuming a 2 m setback, this would suggest an existing vacant area of perhaps an acre. Not all of it, of course, would be buildable, because of setbacks, ramps, etc.

[123] Shoreline's current proposal was a four-storey podium surmounted by an 11-storey tower, at the east end of the courtyard separating the two apartment blocks. That proposal evolved before and during the hearing. Originally, Shoreline had filed an application for a Zoning By-law Amendment ("ZBA") anticipating 25 storeys, and no land dedication (preferring cash-in-lieu). However, the Board was told that this ZBA application was being temporarily "shelved" during these proceedings.

[124] Shoreline called itself "the first developer to step forward in an attempt to achieve the short term and long term goals of OPA 197". However, the project ran headlong into OPA 197 on a wide variety of fronts. Shoreline's planner said that, generally, much of the OPA "has merit, but those provisions need to be assessed in detail". The starting point, he said, was that the waterfront street would "sterilize the lands." "The implementation of the Precinct B waterfront street actually reduces the size of the lands east of the existing buildings… to such an extent that infill development is not actually feasible." He said the currently buildable site on the parking lot would be reduced from 0.33 ha to 0.21 ha, leaving "no room to build to the City's measurements".

[125] Shoreline emphasized that it wanted to proceed *immediately* with its proposed development, "to get the OPA's revitalization process started". However, aside from the pivotal competition for space (with the City's proposed road and parkland), there were several other questions in dispute. One was height. As mentioned, the City had not applied the "bands" to Shoreline's property: instead of dividing the property into three areas with up to 8, 15 and 25 storeys, OPA 197 pegged all of this property at eight storeys. Shoreline ultimately said it wanted the same bands applied to its property as elsewhere – about eight storeys for development along Lake Shore Boulevard, 25

storeys in the middle, and 15 storeys on the east side, where Shoreline's current project would be.

[126] The next question was access, and whether Shoreline's proposed infill development – in its back parking lot – would front on a street. Its planner insisted it would: the project, he said, would not be a "building behind a building", because it overlooked a courtyard between the two existing blocks, so it could be deemed to face Lake Shore Boulevard Though the distance across that courtyard was over 100 m from Lake Shore Boulevard, he compared it to Toronto City Hall, facing Queen Street across Nathan Phillips Square.

[127] More importantly, he proposed a two-step approach to bringing street access to the project:

- As an "interim" measure, his proposed "phase 1" access would be via the existing north driveway, beside Vinen's property, by turning that driveway into a partial street.
- The latter would be widened to a full street later ("phase 2") – when Vinen's property was redeveloped, whereupon 8½ - 9 m of the full ROW would be on what is today Vinen's property.

[128] Shoreline's planner said that when this temporary road was eventually expanded into a full "loop road", its own project would have 34 m of frontage along it.

[129] Another question was numerical specificity. As mentioned, he said OPA 197 prescribed such precise measurements that even the most modest adjustment would trigger the requirement for a further OPA. He added that "the policies need to ensure the flexibility to allow architects to bring forward the best possible solutions."

[130] Yet another question was that of other regulatory constraints, e.g. for rental units and parking. Shoreline and the City had apparently resolved their differences about rentals in advance of the Board hearing, and the Board heard essentially nothing on that

subject. On parking, however, Shoreline's planner said that the project would require 92-100 parking spaces to be replaced, simply to meet the requirements of existing tenants, let alone create new spaces for future occupants of the project. He added that, although Shoreline's project could perhaps accommodate three levels of underground parking, it could not do more, because soil conditions were "prohibitive." This question resurfaced when Shoreline's planner discounted alternative development scenarios, described later.

[131] As for the rest of the property, Shoreline's planner had prepared hypothetical scenarios of "intensive redevelopment", illustrating total destruction and replacement of the existing 10-storey blocks with yet bigger buildings. However, he added that "I don't see these (existing) buildings coming down anytime soon."

[132] On the west side, facing Lake Shore Boulevard, the potentially buildable area was thought to be around 20 m by 40 m. However, there had been no analysis for infill construction there, and it did not figure in Shoreline's current proposal.

[133] Shoreline's major recommendations were the following:

- There should be no waterfront street crossing Shoreline's property, and the ground where the road might have gone should be targeted for 15-storey residential development instead.
- The City's objections about a "building behind a building" (described later) should be disregarded. All OPA provisions to that effect should be deleted.
- The “bands" for permitted height should be extended across Shoreline's property, thereby permitting more height.
- Shoreline should be permitted to proceed with its plans for an interim road.
- The detailed numerical requirements for building and lot dimensions should be "softened".

[134] A parenthetical recommendation was added, namely that the Apartment Neighbourhood designation should apply to the entire property, and no Open Space designation should apply (it should be deemed to stop at the property line).

5.2 The City's Objections

[135] The City called Shoreline's project "a large-scale infill development, which adds significant density to a site currently fully developed and not underutilized, without providing the required public realm elements that were envisioned by the extensive planning process that resulted in OPA 197." The City raised several objections. The first was visual. It said Shoreline's proposed project would "impinge on the waterfront corridor."

[136] Next, as mentioned, it said Shoreline's project would have "no street presence", because development in Shoreline's east parking lot would be "a building behind a building" – contrary to several new provisions in OPA 197. Its "keyhole" or "flag" lot would have inadequate access, pending future neighbouring redevelopment – which might not occur for decades, if at all. Even if Shoreline's proposal for a full road were eventually implemented (after redevelopment of Vinen's property), the City would be under no legal obligation to assume that road. In short, said the City, this would not be "orderly development."

[137] Shoreline's planner replied that the project would indeed front on a street, albeit over 100 m away. He added that this was still "an appropriate relationship with Lake Shore Boulevard", and remained so, as long as "the pizza delivery man could find the front door."

[138] The City also denied (ultimately) that the waterfront street would pre-empt infill on Shoreline's property. It insisted that there would still be buildable space left over on both the east side (the parking lot) and the west (fronting Lake Shore Boulevard).

[139] Finally, the City objected to the juxtaposition of major development and parkland. It wanted a road in between, to demarcate “the public and private realms”. Shoreline's planner replied that the City's existing OP policy 3.1.1 gave equal credence to fronting on a park. He added that this project "can make a very nice edge to the park"; and "a nice building edge is a much better view than a street with cars."

6. THE VISION OF THE COMMUNITY ASSOCIATIONS

6.1 LPCC’s Vision

[140] OPA 197, said Ms. Moulder, "is going to ruin the neighbourhood." She accused it of being a giveaway to developers. In particular, she said that too little space had been foreseen for parkland. LPCC added that OPA 197 contained "no actual planning".

[141] There were interrelated criticisms pertaining to greenspace, height and density. The greenspace comments were prefaced by the observation that, for Mimico generally, the statistics for parkland (in proportion to population) were not favourable. Ms. Moulder and LPCC argued that this problem would get worse, for several reasons described below. As a counterproposal, they advanced a "Mimico Beach Secondary Plan Alternative", with different deployment and height limits (occasionally up to 14 storeys).

[142] One greenspace argument was that much of the land addressed by OPA 197 had been previously designated "Open Space" ("OS"), to which OPA 197 appeared oblivious. Ms. Moulder estimated that, in the Study Area, over three acres of formerly-labeled OS and O lands were now being redesignated Apartment Neighbourhood, i.e. for development. In the case of Shoreline's property, it appeared that some of the land mapped as OS would wind up under the City's proposed road.

[143] Shoreline's planner replied that the above argument reflected a misunderstanding of the parent OP and the City policy on "Privately Owned Publicly-Accessible Open Space" (“POPS”, as described in the *POPS Urban Design Guidelines*). Contrary to what Ms. Moulder and LPCC might have supposed, lands

designated Open Space, on private property, were not thereby protected indefinitely. On the contrary, the City's OP provided, at policy 4.3.7, that:

> Parks and Open Space Areas that are privately owned are not necessarily open to the general public, nor intended to be purchased by the City. If an application is made to develop such lands and the City or a public agency does not wish to purchase them to extend the public open space system, the application will be considered on the basis of its consistency with the policies of this Plan.

[144] In other words, an OS designation was no intrinsic guarantee that privately-owned greenspaces would remain green. If the public sector did not step forward to purchase them, at the time of a development proposal, then (all other matters being equal) they could be developed. The City did not dispute that interpretation.

[145] Next came the issue of the waterfront street. Ms. Moulder said that lands which could otherwise become parkland should not be redirected to cars. At most, there might be a "promenade", closed to all motorized traffic except emergency vehicles.

[146] Yet another greenspace argument was that, if any development were to proceed at Shoreline's property – even infill development on only a corner of the property, away from the existing apartment blocks – then the parkland dedication should be computed on the *entire* property, not just the part being developed. The City replied that the computation should be only on what was "planned to be developed".

[147] On a different topic, Ms. Moulder and LPCC addressed population density – but there was still a connection with greenspace. LPCC predicted that there would be a mathematical disconnect between the population density of the anticipated new buildings, and the new parkland at the disposal of these new residents. Again, the conclusion was that the existing statistical imbalance would be made worse, not better. LPCC added that overall density throughout the Study Area would be too high, generating various problems, including traffic. "People visit the waterfront parks to get away from traffic." "Further over-intensification is a problem that needs to be avoided."

[148] This led to the question of height. LPCC said: "There is no need for highrises. Opening up the area is equivalent to opening a Pandora's box, where there will be constant and continuous challenges to the arbitrary 25-storey height limit". Ms. Moulder agreed that "we don't want the highrises"; but that position was nuanced by two factors.

[149] One was that, although LPCC proposed "a maximum height of eight storeys", it said it would agree to "allow for greater height up to 12 storeys at particular locations for proposals that offer exceptional design and benefit to the community". Ms. Moulder's portrayal (Exhibit 24) was generally confined to eight storeys along Lake Shore Boulevard, but with two 10-storey buildings in Precinct C, one in Precinct A, and a 14-storey building in each of Precincts C and A.

[150] However, her scenario did not depict any new development in Precinct B; nor did she share the enthusiasm over redevelopment generally. "What happens if nothing changes? The public would be quite happy." It was unclear whether that comment was confined to Precinct B, or addressed the entire Study Area.

[151] LPCC also raised other concerns. As mentioned, one was about rentals; but there was no testimony to address that question. Another was about public consultation; but that issue was already addressed at length in the Board's Phase I hearing and decision.

[152] LPCC's submissions also challenged whether OPA 197 represented a "complete community" – with a balance of residential, employment and institutional uses – as demanded by various governing documents. LPCC argued that OPA 197 was essentially blank on that account. LPCC flagged a number of problems allegedly stemming from this and related shortcomings. However, the technical difficulty with those arguments was that they were not flagged sooner: according to the Board's Procedural Order, which was said to reflect the consensus of the parties at the time, LPCC's "issues" for this Phase II hearing were summarized only as follows:

> Should OPA 197 policies 3.1.2 b) (public access to the waterfront), 4.1.1 c) (public lakeside street), 4.4.3 g) & j) (street beside parks, and parking) and 4.4.6 (street width) apply to a Shoreline road located within Precinct B, and, if so, should it be as currently identified on Maps 33-2 to 33-7?

[153] The above gave no indication that other topics, like "complete communities", would be an issue at this hearing. The Board will return to this point later.

[154] Ultimately, Ms. Moulder withdrew from the hearing altogether, though not before making comments about the other parties, and about the process. For its part, however, LPCC advised the Board in writing that it wished to remain a party, and LPCC did provide detailed written submissions at the conclusion of the hearing.

6.2 MLNI's Vision

[155] MLNI generally supported the City's position, but with some nuances.

[156] At the opening of the hearing, MLNI said height should be limited to 12 storeys (8 storeys nearer the Lake). It also referred to units being targeted to families, and retained as rentals, though the latter topics were not pursued in evidence at the hearing. However, as the hearing unfolded, the Board ultimately heard no MLNI digressions from the City's position.

[157] As for the comparisons with Humber Bay Shores, Dr. Gerwin called that nearby area overdeveloped. He complained that developers there had been originally authorized to build over 40 storeys – and still used the variance process to "go back for more". He also supported the specificity of the dimensions in OPA 197; without specific numbers in the OPA, he said, there would be a parade of owners calling for site-specific exceptions.

6.3 The Vision of Other Community Participants

[158] The Board heard from participant Abbe Edelson, doctoral candidate in urban geography. She said she spoke on behalf of an unincorporated group called Ward 6

Community Action Team (“CAT”). Their focus had been on rentals, which were already addressed; now it turned to parkland, and waterfront access. "Ward 6 CAT supports the Plan, while still recognizing its deficiencies." She supported the waterfront street.

[159] Another participant was Mary Bella, a director of the Mimico Residents Association (“MRA”). The MRA, she said, also supported the waterfront street, which would provide "an important delineation between the public and private realm.” She did not want the parkland to have "a building smack up against it."

[160] She also supported a process "ensuring that neighbouring property owners work together to achieve the overall vision of the City's Secondary Plan." As for height, she said "the City has managed to strike a fair balance between the needs and concerns of area residents and the wishes of local property owners and developers."

7. THE VISION OF ABUTTING OWNERS

[161] On consent, South Beach and Vinen presented their own views to the Board. They were represented by counsel, with (in Vinen’s case) the support of an expert planner.

[162] Counsel for South Beach presented a view very similar to Shoreline's:

> The Waterfront Road would have negative planning impacts on the future development on the Property because it will prevent South Beach from being able to further develop Property in a manner that would complement the trail and waterfront view. If the road was built as proposed by the OPA 197, it would leave only 16.5 m of space between the edge of the existing building on the Property and the Waterfront Road.

[163] Vinen took a different view. Although Vinen owned two buildings, it had only 30 m of frontage – too small for it to do almost any redevelopment according to OPA 197’s dimensions, unless it had the cooperation of another owner, to reconfigure lots. This was so, even *before* any land were deducted for construction of Shoreline's eventual full “loop road” straddling the property line with Vinen.

[164] Vinen's planner did not support putting half of that east-west road on Vinen's property. He would support a road further north – on *Floriri's* property (to align with Alexander Street) – but his recommendation was that it should then connect to the waterfront street, i.e. no loop road crossing Precinct A.

[165] Like Shoreline's planner, he too believed it was a mistake for OPA 197 to assign specific numerical values to prospective dimensions, notably frontage.

8. ALTERNATIVE VISIONS

8.1 Alternative Visions for a New Building

[166] Suggestions came forward during the hearing, from the City and others, for alternate development scenarios on Shoreline's property, other than that of Shoreline's planner. Counsel for the City insisted: "You (the Board) don't have any evidence that you can't have *any* building; you just have evidence that you can't have *this* building."

[167] For example, at Exhibit 67A, the City depicted what it called infill potential with a gross floor area of 12,800 square metres. Since today's existing development potential is zero (the zoning being "maxed out"), this was called a significant new opportunity.

[168] Shoreline's planner disagreed, dismissing those alternatives one after another, as inefficient/unprofitable (not enough room for underground parking; or ramp requirements might be too "tight"; or there might be a "long thin floorplate", a single-loaded corridor, an inconvenient elevator location etc.). "There were too many problems to resolve."

[169] Another alternative, which the City pointed to, was lowrise. Within plain sight, Grand Harbour includes townhouse-type buildings. However, Shoreline's planner denied any interest, on the simple assertion that "I don't see a typology for townhouses." Later, he added that a project any smaller than his recommended scenario would not be "big enough to justify replacement of the parking." And so it went.

[170] On another front, the City's urban designer suggested that, on the opposite (west) side of the property, there could be midrise streetfront development along LakeShore Boulevard – eight storeys, with a 3 m setback and a buildable area 18 m deep. Shoreline's planner discounted that idea as well, saying there might not be enough room for parking.

[171] He also expressed no interest in working with Vinen. "We can proceed on our own. There's nothing we can offer him (the manager of Vinen) to incite him to develop. He needs to work with the owners to the north (of him – Floriri)."

[172] Nonetheless, by the end of the hearing, changes in position did occur: Shoreline acknowledged that its proposal might be moved some metres back from where it had been illustrated earlier.

8.2 Alternative Visions for the Street

[173] Although both Shoreline and the City appeared to start the hearing with all-or-nothing positions on the waterfront street, those positions also changed.

[174] One of Shoreline's engineers, Mr. Wallace, pointed to Market Street, which has a 6.0 m one-way roadway with parking. He added that the City similarly applies a 6 m minimum to private roads at highrises. This would meet fire route standards and the Ontario Building Code. “DIPS is not the be-all and end-all… I don't believe DIPS is the answer for that." In his opinion, "6 m would be very sufficient." It could also have curbs but no parking, sidewalk, or landscaped area in the municipal ROW. If Shoreline's project were moved "slightly over", he concluded that "a 6 m corridor could work through there."

[175] If a sidewalk/landscaped area were desired on the west side, he suggested that it be installed on private property (via an easement), to allow parking underneath. This would produce an ROW with a 6.0 m traveled portion plus curbs, a landscaped portion of 1.8 m, and a sidewalk of 1.7 m (both of the latter on private land – POPS).

[176] A slightly wider scenario (6.6 m traveled portion) was exemplified (Exhibit 58) by a new street in Liberty Village, between Dufferin Street and Strachan Avenue. The City had approved that arrangement, on the rationale that it abutted parkland and a “multi-purpose trail”.

[177] Although Shoreline preferred no waterfront street at all, it ultimately acknowledged that a sufficiently narrow street – with private sidewalk and planted strip – might be feasible. If so, it added two further conditions. One was the minimum distance, separating its new building from the sidewalk and planted strip, should be variously fixed at 0.0 m or 2.0 m (depending on where one measured from), whereas the City had expected 3.0 m. Second, it said the street should be constructed within the TRCA lake hazard setback (which Shoreline would not have been able to develop anyway).

[178] For its part, the City ultimately agreed that the parking was not crucial; but it expressed little interest in a private sidewalk. “The publicness of the public realm is very important in the Secondary Plan." The City's urban designer said the City might allow underground parking under the street setback area, so long as there was enough depth for planting; but counsel for the City appeared to take a different course when she said she did not want significant vegetation – like trees – to be "dug up for garage repairs."

9. CRITERIA

[179] In Ontario, planning cases are decided on the basis of predetermined criteria.

[180] That principle runs counter to the view, still fashionable in some circles, that they are determined on subjective interpretations of "the public interest" invented *ad hoc*. The latter view makes it easier to scapegoat developers, councils, and the Board; but it is fallacious. At law, this kind of appeal involves objective factors, notably whether the Secondary Plan complies with the Act, the PPS, logical coherence with the parent OP and related planning documents, and planning fundamentals – what s. 1.1(b) of the Act

and the PPS call a "policy-led system", and what others call a "top-down" system of established priorities.

[181] Some such policies may be controversial. For example, the Province's intensification policies, imposed by a previous government in 1996, may have had conceptual public support on a macro level (being vital to containing urban sprawl), but indiscriminate application on a micro level has often been intensely controversial. The Board must nonetheless apply those policies if and when the system so directs (though not per the equally fashionable but erroneous notion that intensification is this Province's singular overriding policy, in preference to – or exclusion of – other policies; it is one of many).

[182] However, a policy-led system comes at a cost: it is only as good as its criteria.

[183] If there are shortcomings in the criteria, or if there has never been a public buy-in to those criteria, then the system will be flawed, regardless of the good intentions of those involved. For example, there was a longstanding notion that the Province had banned the consideration of aesthetics in Ontario's planning system, and that any municipality which even addressed its corporate mind to this "illegal" criterion, to improve its visual surroundings, thereby offended Provincial policy. A criterion like that could have singular effects on the face of Ontario. Fortunately, the authenticity of this so-called "right to be ugly" was questioned by the Board in the Motel Strip decision, albeit obliquely; and the Board put that misconception definitively to rest in *Ottawa (City) By-law No. 2012-147 (Re)* (2013), 9 M.P.L.R. (5th) 132 ("Ottawa Infill Case").

[184] Even where the criteria are controversial, however, a system where pre-established policies of elected governments could be ignored – simply as a matter of temporary convenience – could no longer be called "policy-led". The Board takes notice that the leading international treaty on good governance,[1] to which Canada is a signatory, specifies that decision-making, including land-use planning and infrastructure,

[1] *United Nations Convention against Corruption* ("UNCAC"), 2003.

should not only make provision for appeals/remedies[2], but also should be based on "predetermined criteria".[3]

[185] That is consistent with the very nature of "planning". Though Ontario's *Planning Act* does not actually define the word “planning”, the overall context was described in the Ottawa Infill Case, which also addressed the evolution of the relevant decision-making in Ontario, from a discretionary to a non-discretionary system – including certain corollaries:

> The *Concise Oxford Dictionary* defines "to plan" as "to arrange beforehand". That arrangement occurs within a legal/policy framework of guiding principles. Since its inception, urban civilization has sought to apply such principles to its own development... Methodology, however, changed over time; governing principles were first applied by fiat, but with the growth of the rule of law, they were applied via a progressively more sophisticated legal framework.
>
> Some jurisdictions embraced the planning process reluctantly. In Houston, it was said that zoning was a "Gestapo" intrusion into property rights. In contrast, Canada’s first "town plan" was issued in 1636 (Québec), and first zoning in 1721 (Louisbourg, though short-lived). Ontario's history was more mixed, as planning documents were influenced by the prevailing political thinking of their time. The *Planning Act* was adopted relatively late (1949), and the apprehensiveness of the government of the day was reflected in the caveat that, municipal democracy notwithstanding, no zoning took effect unless approved by this Board, appointed by that same Provincial government. The Act, however, provided no checklist for such approvals. This perceived policy vacuum led to the supposition that Board decisions were discretionary.
>
> However, that framework later changed dramatically. The Act dropped Board pre-approval of zoning. The perceived policy vacuum was also filled – vigorously. Successive amendments elucidated statutory criteria and powers, e.g. in 1983. Then, on May 22, 1996, the Provincial Policy Statement (PPS) was issued (modified in 1997 and 2005) – the government of the day’s revolutionary intervention into local planning policy. In 2005, the Province further introduced the *Places to Grow Act*, authorizing it to issue "Growth Plans" binding on municipal policy…
>
> The problem with conventional wisdom is usually oversimplification and/or outdated information. Today’s *Planning Act* shows that the supposed discretionary framework is now far from the truth. The Act specifies, at s. 2, a list of topics which "the Council of a municipality... and the Municipal Board… shall have regard to". Section 3(5)(a) requires

[2] “Each State Party shall… address: an effective system of appeal, to ensure legal recourse and remedies.” UNCAC, Art 9(d).

[3] “Each State Party shall… address: the use of objective and predetermined criteria.” UNCAC, Art. 9(c).

> further that instruments be “consistent” with the PPS. Section 24(1) says By-laws must also “conform with” applicable OPs. It is the Board's task to ascertain that land-use decisions are anchored in existing policy documents, at the Provincial and/or municipal level. This fits the definition of planning (i.e. to act on what was “arranged beforehand”). One textbook also theorized that, on the principle of shooting the messenger, another "unspoken benefit" was to deflect public opprobrium for unpopular policies away from officials responsible for them: "The Board could be used as a lightning rod for especially controversial decisions, diverting public attention on local issues away from the political sphere.[4]

[186] The challenges implicit in this “policy-led” system are described later. The Board is also mindful that this is not the first time that it has considered criteria for this waterfront: they were addressed in the Motel Strip decision, also described later.

10. ANALYSIS

10.1 Introduction

[187] City witnesses referred repeatedly to this enterprise as "city-building".

[188] The Board agrees. It is not every day that a major city rewrites the future of fully 1.2 kilometres of its urban waterfront. It was said that the similar Motel Strip Secondary Plan took 20 years to come to fruition.

[189] A city's view to the water is one of its most iconic features. It defines the face of many Canadian cities, and indeed many world cities. If one cannot plan for such a visible piece of Ontario's urban fabric, then one cannot plan for anything.

[190] But here, the City's vision was disputed. Shoreline said it wanted to "start the revitalization process" here immediately – but not via the City's approach. Indeed, the Board was presented with at least three distinct visions – the City's, Shoreline's, and that of LPCC and Ms. Moulder. Substantiating the intrinsic merits of those visions was

[4] *A Practical Guide to the Ontario Municipal Board*, by Bruce Krushelnicki. Lexis Nexis Butterworths, Toronto, 2003, p. 11.

challenging – particularly when the parties devoted so much attention to criticizing opponents' scenarios.

[191] The Board finds that, among the various scenarios, the least plausible was retention of the status quo, posited by Ms. Moulder, though only as a back-up: “If nothing changes, the public would be quite happy”. In contrast, the City's expert Ms. Thom said "the pressure to redevelop these walk-ups is inevitable".

[192] The Board agrees, but not principally for economic reasons: more importantly, Lake Ontario is too important an asset to be devoted to the rear of a string of walk-ups. The PPS declares that the Great Lakes “provide important environmental, economic and social benefits”. Just as in the Motel Strip, that makes this a showcase location, worthy of showcase treatment, if anywhere is.

[193] There was also a proliferation of more discrete issues, itemized in the Board's Procedural Order. On review, the Board finds that they involved six main categories:

- the waterfront street – its existence and characteristics;
- the volume and character of development;
- parkland, and how it would be obtained;
- Shoreline's supposed "building behind a building";
- the red that overall feasibility of the vision; and
- the mechanics of the OPA.

[194] For example, the first focus of this debate was on whether land immediately uphill from the TRCA lake hazard limit and/or setback should be:

- a road,
- a residential development project,
- parkland,
- a "promenade", or
- a combination of any of the above.

[195] The Board is mindful, further, that the current decision is part of a larger picture. This Phase II hearing may have only limited *direct* effect on what was expeditiously approved in the Phase I decision (March 31, 2015), by the then Board Member who presided; but indirect effects are another matter. Though the Board was told that this appeal – and Phase II generally – pertained “only to Precinct B”, removal of the waterfront street would have unavoidable impacts on the City's vision for connectivity (and hence deployment) at least in Precincts A and C. Furthermore, many arguments in this hearing – notably on methodology, numerical specificity, and lotting – might apply generically to the Study Area as a whole. The parties – including the City – certainly appeared to debate them on that basis.

[196] Indeed, much of the evidence involved issues extending far beyond the Study Area, to the very underpinnings of Ontario’s planning system. Not all the debate, however, was about lofty planning fundamentals. Some was squarely about profitability. The Board approaches that topic with circumspection; it is not among the criteria specified by statute or jurisprudence. For example, the Board was not persuaded that development should be moved closer to Lake Ontario, simply because the developer wanted a double-loaded corridor. Though it is in the City's interest to attract the development it envisions, it is not the City's job – nor that of Ontario's planning system – to ensure that e.g. the developer's parking and elevator deployment produce a sufficient return.

[197] Nor is it the Board's.

[198] For purposes of transparency, the Board also notes another matter that it excludes from its consideration. That is the scenario euphemistically called "intensive” or “comprehensive" redevelopment, involving the total destruction of the existing large and (according to the undisputed evidence) entirely viable buildings. The Board has not attached particular weight to that scenario, for two reasons.

[199] The first is evidentiary. There was no suggestion, either in OPA 197 or from Shoreline's witnesses, that these buildings were ripe for demolition anywhere in the foreseeable future.

[200] The second reason is policy-based. The Board does not start with the premise that all existing functional buildings are expendable. The Board has noted before that this is a province which believes in the reuse of items as small as pop bottles, tin cans and grocery bags; the question is whether it does likewise for items as big as 10-storey apartment blocks. The Board takes notice that almost one fifth of all Canadian landfill deposits is comprised of what Statistics Canada calls "used construction material". There is something flawed about a Plan which presupposes that, in order for the public to get the full benefit of the anticipated parkland dedication, the owner must take that large a functional complex, reduce it to rubble, and deposit it in the City's landfill.

10.2 The Antecedent: the Board Decision in the Motel Strip

[201] This was not the first hearing of its kind. The Board's original Motel Strip decision, the "fraternal twin", resulted from a substantial decision over two decades ago, by the then Board Chair and two Vice-Chairs. It is not binding on the current Panel, but is of interest despite the passage of time, not only because it pertains to the proximate antecedent to the current enterprise; moreover, some of the context and issues have remained largely unchanged. For example, that decision contained findings arising inexorably from the location facing Lake Ontario, almost identical to here. The decision also outlined findings on e.g. waterfront streets, the character of development, and galvanizing redevelopment.

[202] Arguably the most important finding was about criteria. As mentioned, Ontario's planning system is not discretionary, but policy-led. There was an era, however, when the Board was said to have more discretion – notably at the time of the Motel Strip decision – *before* the PPS, and statutes requiring Board compliance with Provincial Plans. Yet even then, with more statutory leeway, the Board nonetheless sought to be

anchored in applicable policy documents. That, at its core, is what "planning" has always been about.

[203] There, the Board Panel looked to the *Royal Commission on the Future of the Toronto Waterfront,* headed by the Hon. David Crombie. The Panel cited the Commission's report entitled *Watershed* – and agreed with *its* criteria:

> (The Commission) enunciated general principles for the entire waterfront under its mandate… The development principles established in the watershed report are embodied in the following words:
>
> • clean
> • green
> • usable
> • diverse
> • open
> • accessible
> • connected
> • affordable; and
> • attractive.

[204] Though the Board is now bound by further criteria (in the Act, the PPS, and other Provincial documents like the Growth Plan), the current Panel was shown no reason why the above considerations would be any less relevant today.

[205] The previous Panel also focused on the waterfront location, and the latter's local and provincial significance. In terms of local policies,

> It commands a spectacular view across Lake Ontario of downtown Toronto… Its redevelopment as a highly urbanized mixed-use community on the waterfront, the City hopes, will result in "the jewel of Etobicoke".

[206] Meanwhile the Province, said the Panel, was looking for "a real improvement in the waterfront ambience". Again, that is a criterion which the current Panel finds as pertinent today as it was then.

[207] The then Panel went on to make other findings on issues similar to todays. For example, one community group objected to the waterfront street proposed there. The Panel replied: "That waterfront road is not essential from a traffic point of view" – but the

Panel further found that traffic was not the only possible rationale for roads. The Panel went on to support a waterfront road, despite the absence of a traffic basis.

[208] On another front, the Panel concluded that development should be "attractive". Indeed, the Panel devoted substantial attention to architecture – again based on established policy: its starting point was the 1986 Study that had launched the entire Motel Strip initiative. The Panel agreed with that study on "the need for an urban form of development sensitive to a public waterfront." The Panel was unequivocal:

> There has been considerable divergence of opinion over the years on whether and to what extent a plan should "legislate" aesthetics… However where, as a part of the planning process, it is determined essential by the elected council for sound reasons that a community or a development proposal achieve a certain character or ambience, then it is appropriate and desirable for the planning document to lay out an approach using a process and standards to guide the achievement of that stated ambience or character.

[209] In contrast, that decision referred repeatedly to Grand Harbour and Marina del Rey (both of which had once been part of the Motel Strip) as "fortresses" – a format of development which the Panel did not wish to see repeated. The Panel insisted that "planning authorities" devote themselves to design, and it had no reticence in slamming some architectural designs for "prison-like regularity and barrenness… Hopefully, no responsible planning authority here would permit that result."

[210] Next, the Panel addressed three interrelated issues, namely (i) density, (ii) acquisition of land from developers (for roads and greenspace), and (iii) galvanizing redevelopment. The Panel started by noting that the various governments all professed that this waterfront was of dramatic public significance – but were unwilling to contribute to it. It called that position "anomalous":

> When the Board raised the anomalous position taken by the three levels of government that this waterfront amenity area is to be a regional if not provincial resource to be acquired and developed for the benefit of the greater public and yet its funding was to be based solely on capital levies against redevelopment projects in the Motel Strip, the silence was deafening.

[211] In response to that "silence" the Panel chose to pursue two approaches. One was to repeat the call, from the 1986 Study, for outright government expenditure on infrastructure – partly on principle, and partly to galvanize private investment:

> The 1986 Study concluded that another essential ingredient to achieve the focused successful waterfront community was the infusion of public funding and participation up front to act as a catalyst to redevelopment…

[212] The second approach was density. The Panel tied (a) public acquisition of private land via dedications, to (b) a *quid pro quo* in the form of increased density:

> Where private property rights are taken for the greater public good, then compensation follows. The full utilization of gross density on that site is a form of compensation to achieve the desired public elements, where it can be allowed within necessary design and performance standards.

[213] The Panel also addressed numerical specificity in "design and performance standards". It disagreed with the numerical requirements in the Motel Strip Secondary Plan – though mainly for lack of corroboration, rather than theoretical principle. The Board substituted other requirements instead:

> The numerical standards were developed within a very short period of time. There was, because of time constraints, no opportunity to fully test them… While most of the numeric standards should be removed…, they should be replaced with stronger policies or performance standards that articulate the principles behind the standards and that require a heavy onus… To have regard to the detailed guidelines in Appendix B of the plan.… This plan's design section should articulate the principles and intent contained in the guidelines.

[214] Next, the Panel did indeed anticipate project proposals which might later digress from the Motel Strip Secondary Plan, hence requiring their own OPA. The Panel proposed a procedural framework, including analyses of effects on surrounding properties:

> Amendments to this Secondary Plan will only be adopted where certain factors are met, such as
>
> - the need by the applicant and by the larger community for the amendment,
> - and how, if approved, the amendment would uphold

- the fundamental intent and purpose of the plan
- and the design guidelines appended thereto in use, form, scale, density, development pattern, services and effect on the natural environment.

Such amendments require a general review

- in light of the whole Secondary Plan and service network,
- not simply a site-specific review. [Formatting added]

[215] However, the Panel's final overall conclusion about the municipality's Secondary Plan process at the time was uncharitable: it called it "a soup that was under-cooked and over-seasoned." The Panel therefore:

- provided a list of topics (though not the wording) for expected modifications,
- then directed the municipality to draft same.

[216] The latter ultimately led to the current Motel Strip Secondary Plan. As will be seen, the Board adopts essentially the same approach in the current decision.

10.3 Overview of this Phase II Planning Evidence

[217] As mentioned, the dictionary definition of planning is "to arrange beforehand", which occurs within a legal/policy framework of guiding principles. Expert planning witnesses alert the Board to the applicable documents and criteria.

[218] Like countless other Board hearings, most of the current proceeding heard the opposed opinions of professionals in the field. The role of expert witnesses has been one of the most controversial topics in the realm of adjudication. Courts have underscored the vigilance to be exercised, notably concerning impartiality of opinion evidence. Adjudicators have been reminded of their "gatekeeper" role, and expert witnesses sign a form attesting that their evidence will be "fair, objective and non-partisan", beyond swearing to provide "the whole truth". This leads the Board to two observations.

[219] First, in such a context, it should be unnecessary e.g. to have to drag planning documents out of a planning witness – and then only under protest that they don't mean what they say. The Board returns to that question later.

[220] Second, it has become fashionable, in some circles, to posit that:

- an otherwise-qualified expert, who *volunteers* to testify out of a supposed commitment to the public interest, cannot be trusted to be impartial,
- at least not when compared to one who is paid by one of the litigants.

[221] The former witness is routinely suspected of "advocacy" – and hence bias – whereas the latter supposedly is not. In Phase I, an LPCC witness was denied expert status by the then Board Member, citing that argument. In the current Phase II hearing, the Board was told that Mr. Swinton could offer appropriate opinion evidence, but not Ms. Edelson – despite being a doctoral candidate in this very subject-matter – because she was there as a volunteer, whereas he was being paid.

[222] Parenthetically, this approach is the reverse of e.g. the treatment of conflict of interest on a board of directors or municipal council. The *realpolitik*, however, is that the adjudicative process would grind to a halt, if it could not be fueled by the input of such experts, who in turn expect compensation for that input. Nonetheless, the notion that paid experts are invariably more impartial than volunteers (or anyone else) – thanks to initials after their name, the filing of a form, or previous experience – can only be described as quaint. Sometimes, these witnesses can appear more possessive of "their" project than their clients do. Some planners and architects, intimately involved in every step of a project, can appear more defensive about their brainchild than a mother bear about her cubs. It is difficult to be "fair, objective and non-partisan" when the stakes involve not only one's livelihood, but one’s professional pride.

[223] Fortunately, in disputes about planning, the above problem is not always as critical as elsewhere, e.g. with medical or engineering opinions. That is because planning is more document-oriented than many other realms of adjudication.

Sometimes, the Board's only real interest in a given witness is to be alerted to provisions in the governing documents – which the Board is then at liberty to read and interpret for itself. That, at least, is supposed to be the Board's specialty, as often recognized by the Courts.

[224] Unfortunately, there were difficulties in the current case. For example, a planning analysis typically starts with what the *current* governing documents say, notably the existing OP designation and zoning. Shoreline's planner, however, omitted doing so. He did not explain, for example, that in fifty years, his proposed site had *never before been classed as buildable*. There was no overt reference, in his Witness Statement or examination in chief, to:

- the partial existing OS designation,
- the partial O zoning,
- or the existing Residential zoning whose density was already "maxed out".

[225] In short, although he insisted that the City's approach was "not commensurate with the effect that these requirements would have on the developability of the lands", he omitted mentioning that, under the existing governing documents, these lands had no "developability" in the first place. Nor was there an overt reference to existing OP mapping or zoning mapping. Indeed, when that topic was raised by others, he insisted that this mapping did not mean what it said, but was "diagrammatic" only. There were other twists to his testimony – like the insistence that Shoreline's site had proper legal "access" to Lake Shore Boulevard when it was more than a football field away. The Board could go on.

[226] The City's experts, for their part, said the City had not commented in detail on the OS designation, the O zoning, or the "maxed-out density", because those existing labels made little difference to the City's own vision, which was new. It therefore fell to the lay community group and Ms. Moulder to point the Board to what the existing planning documents had said. That is not typical.

[227] Indeed, Shoreline's planner defended what he called "our project" with a generalized level of advocacy to which the Board is unaccustomed. There were also difficulties in the City's case; but they related more to its planning process than to the professional detachment of its witnesses. Those planning shortcomings will be addressed later.

10.4 The Waterfront Street

[228] The parties treated street issues as the most immediate. The one point they had in common was that they all wanted roads to go on someone else's land. It was suggested, for example, that it was entirely inappropriate to impose an unwanted road on Shoreline, but entirely appropriate to impose it on Vinen. There were two main street issues:

- One pertained to the waterfront street (north-south), which the City supported and Shoreline opposed, whereas Ms. Moulder and LPCC called for greenspace or a non-motorized "promenade".
- The other pertained to Shoreline's proposed street (east-west), to be created in two stages along its boundary with Vinen, providing access to its so-called "building behind a building".

[229] Starting with the waterfront street, Shoreline insisted it was not required for traffic. The City never said it was. As for a "promenade", the Board was not persuaded that a second path should duplicate the existing trail; that would be redundant.

[230] The waterfront street is different. The Board agrees with that street, but not its parking lane, for the reasons below.

[231] Although traffic was not the main rationale for the waterfront street, streets do perform other functions – not only practical ones (like emergency access and location of below-ground infrastructure), but broader planning purposes, like vistas and

neighbourhood parking. The parent OP's policy 3.1.1.5 confirms those functions – including “view corridors”:

> City streets are a significant public open space that serve pedestrians and vehicles, provide space for public utilities and services, trees and landscaping, building access, amenities such as view corridors, sky view and sunlight, and public gathering places.

[232] Here, the City cited many functions (not traffic), but devoted the most attention to two:

- to foster these views, and a sense of openness along the Lake, and
- to a lesser degree, to provide parking for this regional asset.

[233] The first rationale, primarily visual, has no shortage of planning authority in the parent OP. Policy 3.1.1.6 specifies the importance of "visual access" along the waterfront

> The natural features of the City such as the Lake Ontario shoreline… will be connected to the surrounding City by improving physical and visual access from adjacent public spaces.

[234] Indeed, as mentioned, policy 3.1.1.7 adds that view corridors are an integral part of the OP's objectives for streets. If this existing OP policy were to apply anywhere, it should be on the shores of Lake Ontario. The Board finds no sufficient grounds to interfere with the City's pursuit of this view corridor here.

[235] As for the second rationale, parking, the City's transportation planner said: "It's not essential parking, it's beneficial parking." Indeed, there was no data at the hearing indicating a significant need for local parking. Furthermore, people who use their cars to reach the waterfront already have several convenient parking lots to choose from, in nearby Humber Bay Park.

[236] If the City's main purpose was visual, and there was no urgent demand for parking, then a string of cars would be counterproductive – unless one presupposed

that no scenic vista was complete without a line of parked cars. The Board was not persuaded. The Board therefore agrees with both Mr. Wallace and the City's fall-back position, to the effect that a parking lane is inappropriate.

[237] The next question pertains to the dimensions of that waterfront street, notably the ROW to accommodate the road (traveled portion), sidewalk, planting strip and boulevard. The City said it relied on DIPS, but only to a point:

- It could have relied on that standard *verbatim* – a 16.5 m ROW (54 feet),
- but it said it was content with 13.5 m (44 feet).

[238] Later, it said 11.5 m (38 feet) was conceivable, if one dispensed with a parking lane.

[239] As mentioned, Shoreline wanted no waterfront street at all; but its expert Mr. Wallace added that, if a waterfront street was inevitable, the traveled portion of its ROW might be as narrow as 6.0 m (16½ feet).

[240] Though there are other standards than DIPS (e.g. those of the Transportation Association of Canada), the Board has no intention of producing a treatise on street dimensions. The Board simply observes the dictum of Louis Sullivan, "form follows function." Standards for infrastructure should usually be predicated on intended use – not the other way around. Inversely, the Board sees no advantage in either conjecture, or unanticipated scenarios. The Liberty Village example, with a traveled portion of 6.6 m (21½ feet) is neither: it is an actual public roadway, built *with* City approval, in circumstances strikingly similar to here: it parallels a trail and greenery. The Board was shown no engineering or planning reason why that example could not be followed here.

[241] The next question pertains to the west side of the street, and the space between the curb and the building façade:

- OPA 197's ROW of 13.5 m (or the City's 11.5 m, if the parking lane were dropped) would all be public land, for a planting strip, sidewalk, and City boulevard, plus 3 m of private setback (the City was not entirely clear on permitting an underground garage under that private setback).
- The Board is satisfied with the DIPS standard of 2.0 m and 1.8 m for the sidewalk and planted strip respectively.

[242] However, that left three issues, pertaining to the building setback from the property line, title to the sidewalk and landscaped strip, and the street location in relation to the TRCA hazard setback.

[243] First, whereas the City foresaw a 3.0 m private setback, Shoreline variously called for 2.0 m or 0.0 m. The Board found little corroborating evidence for those other figures. Although the Board was shown other instances of 3 m setbacks in the Study Area, the Board's attention was not drawn to any comparable instances of 2.0 m or 0.0 m setbacks, nor any planning reasons therefor, except the convenience of Shoreline. In short, the Board heard no compelling reason why the City was unentitled to make that determination of 3.0 m.

[244] As for whether Shoreline could install garage space under that private setback, the Board is confident that it is technologically feasible to do so, without compromising the landscaping above. The Board found no need to preclude that possibility in the OPA. The specifics could best be left to the site plan process.

[245] The question of title to the sidewalk and planting strip is more complex. Under OPA 197, the City's only visible method of acquiring title to these lands was via land dedications, DC's and s. 37 – all contingent on the quantum of development. The City may acquire title this way – but it comes at a cost: the more land the City acquires, the more development it must authorize. Extra development is required to generate every extra square metre of ROW or public greenspace.

[246] The Board would hope the City had factored this into its thinking; but if so, the Board was not told. All the Board was told was that the City might have two objections to title remaining in private hands. One was that, on principle, the City believed in the "publicness" of this space; the other was that plantings might be jeopardized, if there were a garage underneath, e.g. undergoing repairs.

[247] Although those concerns are duly noted, the Board does not believe they warrant an OPA provision making the dimensions of public title obligatory. The Board was shown no compelling reason why the City would want to tie its own hands, and force itself to acquire title, when alternatives could produce the same visual effect, but require less development. A well-landscaped private planting strip may have the same visual qualities as a public one; and the quality of planting – and its long-term protection – can be addressed contractually in the easement agreement. The City can be left to decide, on a case-by-case basis, whether it wishes to use this easement recourse, or whether to proceed via acquisition of full title. This will have mathematical consequences for the negotiation of ultimate density during the eventual zoning process:

- the City should not feel driven to increase density,
- just because it feels the need to tie greenspace to a particular tenure. That would be a constraint on its negotiating ability, which is not in the City's interest, and in the Board's view, is not in the public interest.

[248] The next question is the location of the waterfront street, in relation to the TRCA hazard setback. Shoreline argued that, if there were a street, it should be entirely within that setback. The Board's attention was not drawn to any precedents pertaining to this kind of arrangement – one way or the other.

[249] In the near-total absence of conclusive evidence, and unless there are predetermined policies which dictate whether roads can be inside or outside the TRCA hazard setback, the Board defers this question to the time when a redrafted OPA will be

submitted to the Board, some six months hence – assuming that the parties still wish it to be addressed.

10.5 The East-West Street

[250] The Board now turns to Shoreline's proposal for a temporary east-west street along its north driveway, to access its new building, pending *completion* of that street (when Vinen's property is redeveloped). Shoreline wanted to build a 15-storey building

- on a temporary half-road,
- which would not be completed unless and until a neighbouring third party redeveloped its own property;
- in the meantime, normal street traffic would be centimeters from the residential windows of Vinen's tenants;
- but in terms of the project meeting the requirement to "front" on a real public street, the project would be a football field away.

[251] Shoreline's engineering evidence persuaded the Board that its temporary half-road would be technically buildable. However, from a planning perspective, the Board was not shown any recent precedent for such an arrangement that was labeled "good planning". Indeed, the Board was offered no significant planning rationale for these exceptional measures – except that Shoreline was in a hurry.

[252] Parenthetically, if the waterfront street solved nothing else, it would at least provide legal access to Shoreline's proposed project. Counsel for Shoreline acknowledged that, "should this decreased waterfront road segment be ordered by the Board, this could provide an alternative address for the infill development." It would also provide access to the eastern side of South Beach's property. The Board was not persuaded that Shoreline offered a better solution than the City.

[253] On the other hand, the question of whether Shoreline's half road was inappropriate as a future City street is not the same as being inappropriate as a private

driveway. The Board was shown many examples of substantial projects – highrises larger than Shoreline's proposal here – with driveways only 6.0 m wide, but still in compliance with the Ontario Building Code. If Shoreline were in search of "temporary access", one approach would be to explore using one of Shoreline's existing driveways – as private driveways – pending completion of the waterfront street with definitive access.

[254] The Board does not thereby suggest this would necessarily be a solution. This concept was not outlined at the hearing, let alone explained. For present purposes, the Board merely notes that the evidence did not convince it that approval of the waterfront street, and rejection of Shoreline's proposed east-west street, necessarily sounded the death knell for infill on this property.

10.6 Official Plan Land-Use Designations

[255] With the possible exception of TRCA-defined lands, Shoreline's planner called for all the land on Shoreline's property to be redesignated – away from OS in favour of a Residential designation. The Board was told that this would allow the new mapping for the OP (and eventual zoning) to align neatly and conveniently with Shoreline's property line. The Board heard no other compelling reason.

[256] Any changes which the City might have made to the OS mapping were not explained to the Board either; nor did the Board hear evidence of any significant event to explain why any of the existing OS designation should now change.

[257] However, Shoreline's planner said the OS (and O zoning) labels, which *crossed* the property, were ill-conceived in the first place, since the parent OP's policy 5.6.5 recommended basing OP boundaries on "fixed distinguishable features." Ms. Moulder replied that these boundaries bore a striking resemblance to the TRCA hazard line and setback – which are indeed "distinguishable features".

[258] The Board was unconvinced that the maps had not meant what they said. At law, there is no presumption of municipal error, and the Board does not start from the premise that municipal documents are mistaken on their face. If someone wishes to hypothesize unintentional shortcomings – in something as critical as, say, an OP or zoning map – then the Board would expect persuasive evidence. The Board found none.

[259] In short, the Board was shown no compelling evidentiary grounds to tamper with any of the parent OP's OS designations at this time.

10.7 Issues Pertaining to Building Proportions

[260] Several interrelated issues pertained to building size, ranging from the theoretical to the practical. On the theoretical side, there was debate over the ideal "built form" for the Study Area. Though OPA 197 was remarkably detailed about the *quantity* of proposed construction (down to the last centimeter), it said essentially nothing about quality.

[261] On the practical side, there was the question of how much development was needed, to galvanize the redevelopment process – and to generate the wherewithal for City acquisition of lands intended for the ROW and nearby greenspace.

[262] A further question was whether the OPA should specify dimensions in such detail anyway. The Board addresses those questions next.

10.8 Height Categorization and "the Bands"

[263] OPA 197 opens with a commitment to "built form". The Board's findings start with broad categorizations.

[264] As mentioned, Shoreline was now proposing 15 storeys. In the Study Area and elsewhere in the City, that is categorized as "highrise", though not at the largest scale,

which (in this Study Area) would be up to 25 storeys. OPA 197 had usually divided these precincts into "Band A", "Band B" and "Band C", at about 8 storeys ("midrise"), 25 storeys ("highrise") and 15 storeys (also "highrise") respectively. However, it had uniformly designated Shoreline's property for 8 storeys – unlike its neighbours – though the City added that it would consider 15 storeys at Shoreline's infill site, if only Shoreline agreed to the waterfront street.

[265] Ms. Moulder and LPCC supported their "Mimico Beach Secondary Plan Alternative", with midrise buildings of 8 storeys, though with a few exceptions reaching 14.

[266] The Board has three preliminary observations. First, height limitations should not be a mere bargaining chip in road negotiations. In a policy-led planning system, the height of Shoreline's proposal should be determined on planning merits, not gamesmanship.

[267] Second, the Board is mindful of the comments, by both Shoreline and the City, to the effect that the existing 10-storey apartment blocks represent today's functional and appropriate use of the property. There was no suggestion that anyone expected "Band B" (25 storeys) to be of any immediate use here.

[268] Finally, the debate over "midrise versus highrise" is potentially misleading. Though height is significant, the larger factor is usually density. "Midrise versus highrise" often overlooks the fact that, for a given density, the question remains whether that density should be deployed tall and thin, or short(er) and fat.

[269] In Canada, the practice has been to think of "midrises" in the latter category. They are obviously not as short as "lowrise" – often equated (in construction circles) not only with a given height, but a given technology (wood frame, under a specific Part of the National Building Code). This used to apply to buildings of up to four storeys; it has now been increased to six for Code purposes, though not generally for zoning purposes.

[270] "Midrise" has been typically equated with the next (taller) category, under a different Part of the Code. The upper limit in the "midrise" category varies from one municipality's OP to another, though often in the range of 8 to 10 storeys. In Toronto, the parent OP also tended to equate midrise with major Mixed-Use roads. A street like Lake Shore Boulevard might have a height limit around 8 storeys – but a footprint extending almost to the sidewalk. In some circles, this is thought to contribute to the "vibrancy" of the street, based on theories purportedly attributed to Jane Jacobs.

[271] "Highrises" follow a different model. On one hand, they are obviously higher. Grand Harbour, which is plainly visible from almost everywhere around Precinct B, is 27 storeys. Humber Bay Shores has many buildings about twice that figure. On the other hand, Modernist architectural doctrine had theorized that there should be space at grade, to better behold the "architectural statement" – usually translated into an obligatory windswept plaza, as one finds facing many of Toronto's taller buildings.

[272] So the traditional feature distinguishing midrises from highrises was not necessarily density, but shape, with a trade-off. Some writers referred to buildings being "squished" – upward or downward – such that they were either tall and thin, or “short” and fat. In the developed world, many cities are lowrise and midrise (like Paris) – but with higher densities than some highrise cities (like Dubai); it depends on policy and planning.

[273] For OPA 197, the above traditional distinction between midrise and highrise is not so straightforward. That is because highrises here were expected to include a podium – a fat lower element, surmounted by a thinner “tower” element. Loosely speaking, these buildings would be pear-shaped, on the supposition that this would lend more “vibrancy” to nearby streets than non-podium configurations popular in previous decades (like the “tower-in-the-park” configuration; it appears that trees are no longer considered “vibrant”). The Board returns to that question later.

[274] The City said midrise "Band A" fit the frontage along Lake Shore Boulevard, which the parent OP designated an "Avenue", appropriate for this kind of development. Elsewhere, OPA 197 designated areas closer to the Lake for highrises – though divided into two "bands", said to be for shadow reasons.

[275] The Board heard no planning rationale why Shoreline's property should be uniformly in "Band A", contrary to its neighbours. In the absence of such evidence, the Board cannot support that approach.

[276] Shoreline asked the Board to "extend the bands" across Shoreline's property including "Band B" (25 storeys) where the existing blocks now stand, and "Band C" (15 storeys) across its proposed infill site. The Board agrees that "Band C" is appropriate, since it is consistent with the treatment of neighbouring owners and shadow studies.

[277] In the case of "Band B", however, the Board was not persuaded that there should be a new 25-storey authorization across an area that no one is anxious to redevelop. If the common expectation is that the existing large blocks are functional components of the urban fabric, and would normally be expected to remain so for years to come, then the Board was shown no particular purpose in designating them for destruction and redevelopment as a theoretical exercise.

[278] Although the Board is therefore prepared to "extend Band C" across the property, it is not prepared to "extend Band B". That does not mean the blocks should remain within "Band A": they had already outgrown "Band A" over 50 years ago. Strictly for the sake of consistency, and by process of elimination, the Board finds that, in the course of "extending the bands" across the property, the portion of the property that would *otherwise* be labeled "Band B" should be labeled "Band C".

[279] That leaves the question of the actual height in each band, notably "highrise" Band C. Ms. Moulder argued that the entire enterprise was a "giveaway to developers", particularly highrises.

[280] The Board will first consider the argument at face value. If the areas closer to the Lake were “midrise”, then under conventional theory, buildings there would have a larger footprint – reducing the sense of openness near the Lake. That was exactly what the City said it most wanted to avoid. Similarly, the *Humber Bay Shores Urban Design Guidelines Update and Public Realm Plan* (Exhibit 25) argued that "narrow towers with smaller floor plates maximize views to the Lake." Ms. Thom added, in contrast, that "midrises do create a wall of shadow." The Board was not persuaded that midrises would be an appropriate choice beside the trail.

[281] However, the matter does not end there. If the City's priority is "openness" and views to the Lake, then regardless of contemporary fashion and Policy 3.1.3 of the parent OP, the podium-and-tower format is an equally counterintuitive choice for built form in this specific location. A fat podium would obstruct views of the lake to passersby at grade, essentially as much as midrises would. If those views are indeed the priority, then the Board was not persuaded of the OPA's logical consistency in that regard. The Board will return to the question of built form later.

[282] In any event, height itself may not have been LPCC’s main point. Sometimes, when a community group criticizes height, the complaint is actually centered more on density. Ms. Moulder, who has a real estate background, pointedly spent less time on height itself than on overall density, arguing that the entire enterprise was an overdevelopment. The next question is therefore whether the proposed density is itself inappropriate, independent of height and shape.

[283] The difficulty with that argument was straightforward. Ms. Moulder's scenario, of an expanse of new public greenspace on what is today Shoreline's property, presupposed some method of acquiring it. In the absence of outright purchase from Shoreline (of which there was no hint in OPA 197, or anywhere else in the paper trail), the only apparent way to transfer that property into public use was via park dedications, DC's and s. 37 benefits – all dependent on the quantum of development. With no visible support from public funds, Ms. Moulder's greenspace scenario could not materialize,

unless there was *enough* of that development to generate the necessary land dedications/transfers.

[284] It appears that, in advance of the hearing, no one asked *how much* development would be necessary to generate the scale of land transfer envisaged by LPCC. What is more baffling is that no such analysis was apparently done by City planners either. Indeed,

- While the City stated in one breath that Precinct B was "stable", and OPA 197's illustrations did not show a single new development there,
- OPA 197 also illustrated a sizable land transfer, for a ROW and greenspace, *as if* substantial development there were proceeding apace.

[285] The Board was offered no explanation for this apparent contradiction, at the very core of the current litigation. Nor was the Board told how this had gone unnoticed at the City – right up to the hearing itself.

[286] Very late in the hearing, the City did produce rough sketches of what *might* be buildable (Exhibits 67, 68 and 73). At no point, however, did the City explain what it would actually *like*. That is a peculiar way to "arrange beforehand." The Board will return to that question later.

[287] To summarize, Shoreline proposed 15 storeys, equal to Band C. The City approved Band C for equivalent locations among Shoreline's neighbours; the only stated reason why it did not do likewise for Shoreline was because Shoreline would not agree to the waterfront street. Meanwhile, although Ms. Moulder and LPCC supported a lower height and/or density, there was no evidence that the latter would generate the land dedications which were key to the road and/or park plans. The bands, said to be in accordance with the City's shadow studies, are already in effect in other precincts. On that evidentiary basis, the Board declines to intervene in the City’s rough allocation of storeys to the bands.

[288] However, although the OPA refers loosely to bands at 8, 25 and 15 storeys, the next question is whether there should be adjustments for purely architectural factors.

10.9 Qualitative Planning Objectives

[289] Although OPA 197 contained profuse references to the proposed quantity of development, its quality was a different matter.

[290] "Built form" figures prominently in both the parent OP and OPA 197. The Motel Strip decision had also listed "attractiveness" as one of its key criteria, calling for an “urban form of development sensitive to a public waterfront”. Policy 6.1 of the Motel Strip Secondary Plan had unequivocally linked this waterfront with distinct "landmark" architecture:

> A harmonious composition of landmark building forms offering views to *and vistas from* Lake Ontario and Downtown Toronto... Because of its unique attributes, central location and crucial urban role within the Motel Strip, the opportunity for landmark buildings… has been recognized. [Emphasis added]

[291] That message was reinforced at its policy 8.1:

> The form, height, bulk and coverage of new development will be controlled in order to provide and encourage the emergence of a distinctive and street-related urban area having a direct relationship with the Toronto Waterfront… (and) a distinctive architectural style related to this highly visible waterfront location.

[292] In marked contrast, OPA 197 avoids the subject. Though its policy 4.2.8 says development should be "characterized by a high standard of design", and policy 4.1 refers to providing "the setting to create a distinctive identity for the community", those statements are indistinguishable from what the parent OP prescribes for the City as a whole (the OP's pages 1 and 2 call for design excellence everywhere). Unlike either the Motel Strip decision or the Motel Strip Secondary Plan, OPA 197 calls for nothing distinct; and although this is a showcase location, OPA 197 makes no provision

whatever for showcase projects. Indeed, unlike the Motel Strip Secondary Plan, there is not a single word about views *to* the proposed new waterfront development.

[293] The Board was offered no reason. The most the City would say was that it was reticent to mention “landmarks" or the like. The Motel Strip Secondary Plan had specifically referred to creating "landmarks" – a term which appears in OP’s of other Ontario cities to denote showcase projects in showcase locations (sometimes with incentives for "extraordinary" architecture under s. 37); the Board has elsewhere summarized such OP clauses as calling for “an element of ‘wow’”. However, Toronto’s urban designer said here that words like "landmark" were interpreted by local developers as a mere euphemism for greater density – distinct in quantity, but without any apparent interest in distinct quality.

[294] Indeed, despite all the talk of "attractiveness" and "distinctiveness" in the planning for Humber Bay Shores, the hearing heard not a single enthusiastic word about the collective architectural outcome. Though no one used the word "banal", the description from the local associations was, if anything, less charitable. Though the "jewel of Etobicoke" was supposed to become a source of civic pride, no one, on any side of the current debate, appeared ready to say it had succeeded.

[295] That raised two questions. The first was whether there should be formal calls for architectural quality and distinctiveness in Mimico-by-the-Lake – similar to (or greater than) in the Motel Strip. If so, the second was how to do so.

[296] On the first question, the evidence supported an affirmative answer. The assertion of architectural objectives had support not only in the planning documents, alluded to earlier, but also in the testimony. It would be consistent with what the Board had held earlier in the Motel Strip decision; it would also be the logical extension of the planning documents' emphasis on built form. Furthermore, the City's urban designer confirmed that the City was looking for a "character that complements the Mimico waterfront linear park and trail". Although "the views along the lake were not identified",

she called them "an important consideration". For example, she said "there should be additional views in a north-south direction identified on the Plan." Counsel for the City also acknowledged that OPA 197 had not mentioned the quality or distinctiveness of views toward the new waterfront development, but "perhaps it should".

[297] The Board agrees. If "attractiveness" and "distinctiveness" have been longstanding criteria for planning along this waterfront, the Board was offered no reason why they should be abandoned now. If previous attempts at attractiveness did not live up to expectations, then the response should be to invigorate those efforts, not abdicate.

[298] Implementation, however, may be more difficult. Indeed, the first hurdle is that OPA 197 appears – inadvertently – to do the diametric opposite. As mentioned, OPA 197 does not regulate density, but dimensions – specifically length, width, and height. In this specific case, it comes at a cost.

[299] If land-use controls are formulated exclusively in volumetric terms – length, width, and height – then any developer who wishes to *fill* that buildable envelope will likely build a cube. Notwithstanding the effort that went into documents like the *Mimico 20/20 Urban Design Guidelines,* one cannot “sculpt” the building envelope without sacrificing buildable density – which most developers are distinctly loath to do.

[300] Not only does OPA 197 contain no provision for any architectural flourish: it essentially guarantees that the outcome will be shaped like a box (or, more accurately for a podium-and-tower configuration, like a box on top of a box). Planners may argue over where to put the box, or how big it will be, or whether a squat box is better than a tall box; and they will argue over parking and money (some people believe that is all planners do); but the physical profile is already a foregone conclusion. That is not what the Motel Strip decision said was appropriate for this waterfront; and the Board was shown no reason why it would be any more appropriate now.

[301] The hearing heard comparisons with acclaimed modern architecture that was not boxy, like Dubai's Burj Al Arab ("the sail building") – and how this OPA would make it unbuildable. Essentially none of the memorable new architecture (big or small), celebrated in the world's textbooks over the last 30 years, would have any likelihood of being buildable here. That situation is compounded by the issue below.

10.10 Planning Objectives and Numerical Standards

[302] "This is not a Plan", said Ms. Moulder. By her reasoning, OPA 197 fell far short of what a Plan should contain. Shoreline's planner Mr. Swinton said the reverse, i.e. that OPA 197 – with its numerical dimensions – went far beyond what a Plan should contain. The City said OPA 197 was just right.

[303] However, the OPA appeared to anticipate enough development to trigger substantial land dedications – with no hint of the project the City actually *wanted*. That all raised the question of what an OPA is *supposed* to do – or the "planning system" generally.

[304] That question was partly addressed in *Goldlist Properties Inc. v. Toronto (City),* [2003] 232 D.L.R. (4th) 298. The Ontario Court of Appeal pointed to s. 16(1)(a) of the Act, which says that an OP must contain goals for change management, notably:

> goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic and natural environment of the municipality or part of it…

[305] The Court concluded, however, that the above was only a "minimum"; an OP could extend to "all matters that the legislature deems relevant for planning purposes":

> The *Planning Act* contains no other statements relating to the contents of an official plan, nor does it contain any other specific provisions defining or limiting what can or must be contained in an official plan…
>
> Section 16(1)(a) does not say that the official plan shall *only* deal with physical change. A second and related point is that s. 16(1)(a) is framed in mandatory terms and specifies what an official plan "shall contain". Section16(1)(a) is cast in terms of the *minimum* requirements for an

> official plan, not the outside limits. It does not list heads of power or the subjects that may be addressed by the official plan. There are unquestionably limits to what a municipality may include within its official plan, but the wording and scope of s. 16(1)(a) indicate that those limits cannot be determined solely by a literal application of its terms. To determine what *may* be included in an official plan, as distinct from what *must* be included by virtue of s. 16(1)(a), reference must be had to the *Planning Act* as a whole.
>
> In this regard, it is important to bear in mind that the purpose of an official plan is to set out a framework of "goals, objectives and policies" to shape and discipline specific operative planning decisions. An official plan rises above the level of detailed regulation and establishes the broad principles that are to govern the municipality's land use planning generally. As explained by Saunders J. In *Bele Himmell Investments Ltd. v. Mississauga (City)* (1982), 13 O.M.B.R. 17 (Ont. Div. Ct.), at 27:
>
> > Official plans are not statutes and should not be construed as such. In growing municipalities such as Mississauga, official plans set out the present policy of the community concerning its future physical, social and economic development.
>
> In our view, it is essential to bear in mind this legislative purpose when interpreting scope of authority to adopt an official plan. The permissible scope for an official plan must be sufficient to embrace all matters that the legislature deems relevant for planning purposes. [Emphasis in original]

[306] Interestingly, after the Court of Appeal rendered the above decision about *not* "setting outside limits" on OP's, it became fashionable in some circles to theorize that the Court did the exact opposite – i.e. set outside limits. By their reasoning, when the Court referred to "broad principles", it thereby implied that an OP should be limited to motherhood statements: if a Council wanted more specificity, then it should resort to its zoning or site plan process, in separate silos. To use its OP, by this theory, was (a) contrary to legislative intent, and (b) "bad planning".

[307] That theory was put to rest in the recent Divisional Court decision for Ottawa's Centretown district, *Ottawa (City) v. 267 O'Connor Ltd.,* [2016] ONSC 565 (Ont. Div. Ct.) ("Centretown Case"), described later. In the current case, City experts said they felt compelled to prescribe dimensions in the OP – to the last centimetre – because they had a specific scenario in mind, and this time, "*we mean it*!" They used those words not once, but twice – adding that "*we're serious*".

[308] The significance of those phrases bears explanation. The Board takes notice of the historical background, including the theory on why numerical specificity in official plans has been so controversial. It goes to the very nature of the enterprise currently before the Board. The Board emphasizes that it outlines this theory, not because it endorses it (on the contrary), but because this background explains not only the City's assertions about "being serious", but also the positioning of many important players in such disputes.

[309] Prescriptive numerical requirements for buildings have been part of Canadian legislation since New France. Canada's first building code was issued in 1727, and the government of the day "meant it". However, government intervention in development was neither universal nor consistent. By the 1940s, Ontario was one of last provinces to adopt planning legislation – and even then, the government of the day did so with such apprehension that it insisted that zoning by-laws be vetted by its own appointees, municipal democracy notwithstanding. One view is that this apprehension was based on an ideological preoccupation with property rights; another is that, pragmatically, successive governments have been loath to interfere with an industry (construction) often labeled Canada's largest single industry, vital to Ontario's Gross Domestic Product. Be that as it may, by the mid-20th century, an underlying pattern had already been set, which can best be understood by observing the dictum attributed to Cicero: "Follow the money".

[310] The assumption – ultimately confirmed by Ontario government policy, law, and the courts – was that land-use controls were *not* definitive. On the contrary, the "highest and best use" of land (on which to base its all-important "market value") was:

- not defined by what these controls *actually said*,
- but rather by what was "*reasonably probable" under a hypothetical upzoning or OPA*.

[311] Over forty years ago, that premise was already black-letter law in jurisprudence; and conventional wisdom to that effect, in the marketplace, dates from even earlier. Its entrenchment was not the private sector's doing; the public sector was at least as responsible. It was the public sector which enacted the provisions, at s. 17 and s. 34 of the Act, entitling an owner to demand an OPA or rezoning at any time – and providing an appeal to the Board if the municipality refused, or failed to render a decision within a specified timeframe.

[312] This upward flexibility also suited some elements of the public sector directly; for example, a golf course might be subjected to property tax assessment, *not* based on its existing land-use controls (foreseeing fairways and greens), but instead *as if* it had a subdivision on top.

[313] The above view was not universal. In both the public and private sectors, there were geographic differences in corporate culture: in some parts of Ontario, the above view never fully took hold – to this day. In the Greater Toronto Area ("GTA"), however, both the public and private sectors became accustomed to the notion that upward adjustment to permissible development was not only possible, but expected (via variances, rezoning, OPA's, or a combination thereof). Even before the current generation of developers, councillors and planners was born, the broad supposition was that land-use controls were like speed limits: they had moral suasion, but no knowledgeable person expected the industry to be *held* to that limit, any more than they expected to be ticketed for driving 101 kilometres per hour on Highway 401.

[314] Rightly or wrongly, this view had profound effects on the market. Few builders can afford land banking, i.e. setting aside expanses of real estate for years, waiting for the right development conditions; so most builders are in an ongoing search for properties to develop. Educated sellers, however, are as familiar with "highest and best use" as buyers; so the potential for upzoning is *factored into the asking price*. The broadly-held view is that a developer who confines projects to as-of-right development will inevitably overpay for land acquisition, and be out of business in six months.

[315] The supposed corollary was that the first business objective was therefore to outwit the planning documents. One needed to upzone to something *more* than what the seller had already factored into the land price. To some observers, this explains why, in the GTA, the overwhelming majority of significant development involves an OPA and/or rezoning.

[316] Some observers might assume that municipalities would consider this parade of planning applications problematic, or at least tedious. The reverse is supposedly true, again for monetary reasons. A half-century ago, municipal revenues relied overwhelmingly on one source – property tax, a sensitive point with local voters. Over the intervening decades, councils successfully shifted much of that burden onto DC's and s. 37. This not only permitted them to claim to "hold the line" on taxes; it meant that much of that burden could be transferred from existing owners (who vote) toward future entrants into the market (who might not even live in the community yet). That is how, in some locations, over 40% of the cost of a new dwelling is attributable to government taxes and charges. Among basic human needs, shelter is now by far the most heavily taxed in Canada.

[317] Section 37 is part of that cost. Though its rationale was originally to provide municipalities with a *quid pro quo* for increases in density, it soon became equated with "selling upzoning." Some cynics said municipalities were more interested in cash than in the credibility/enforcement of their planning. The Act, in any event, legalized such arrangements as of 1983. One argument was that it was right to "make developers pay" for intensification (as if it were developers who paid, not consumers). At another hearing, one senior municipal official (retired) testified:

> When the OP says the (development) maximum is "X", and the zoning by-law says the maximum is "X", that does not mean the maximum is "X". "X" merely marks the spot where negotiations begin.

[318] That opinion is today shared by many municipalities and developers alike, spawning what some writers call "Let's-Make-a-Deal Planning". A number of developers came to the view that, when a council adopted a given OP or zoning by-law,

- the rationale might not be that it represented council's *actual* vision for the area,
- but rather a systematically *downscaled* vision, so that council could position itself to negotiate maximum s. 37 benefits, on widescale site-specific upzoning later.

[319] In other words, the assumption was that the council adopted a development limit, but "*didn't mean it*". Upzoning remained for sale.

[320] Again according to that supposition, and aside from occasional misunderstandings (which went to this Board), the 1990s witnessed the GTA settle into a comfortable symbiotic relationship between developers and municipalities. Councils would adopt land-use controls, purportedly inspired by a planning vision, but these would be routinely finessed (in the words of one prominent real estate spokesman) by "smearing some money around."

[321] A related view is that 1996 represented a decisive vindication – when the government of the day first published the PPS, with its emphasis on intensification. Lest anyone miss the point, the PPS called for intensification 19 times. Though the official rationale was to control urban sprawl, one view is that it reinforced upward pressure on land-use controls – and elevated that pressure from a business imperative to the status of a virtue. For their own reasons, municipalities reputedly did not object.

[322] However, like the Act, the PPS also insisted that planning be "policy-led". That was a supposed contradiction, or at least an inconvenience. If both major protagonists – the development side and the municipal side – preferred to treat "policy" merely as a pretext secondary to other considerations, then a "policy-led" system would be awkward. The "solution" would be to dumb down these leading policies – and “Plans” generally – to an itemization of platitudes. The latter might even prove useful to planners, in identifying convenient rationalizations for what their clients wanted to do anyway.

[323] In such a system, not only would "planning" become a far cry from "arranging beforehand"; the best way to guarantee that a given vision would never materialize would be to entrench it in the planning documents.

[324] The resulting system might perhaps be capable of addressing reputed trivia like parking (supposedly an unavoidable fixation of the planning apparatus), but certainly not the implementation of a “vision”, let alone "city-building". By that theory, when archaeologists of the future unearthed the planning archives of the early 21st century, they would exclaim: "Despite the poetry, this was a civilization that did little but eat burgers and have their mufflers fixed; but they sure knew how to park."

[325] The above theory is *not* the operating philosophy of this Board; nor does the Board start from the premise that the entirety of the planning system is venal. This Board is mandated by statute to apply the policies established by the Province and the municipalities themselves, irrespective of the political convenience of the day. In so doing, the Board takes the Act and PPS at face value, when they state that the planning system is to be policy-led. That is their declared purpose, and the Board’s inference is that it was intended to be meaningful.

[326] The Board is aware, nonetheless, that a sizable body of opinion holds that Ontario’s "planning" has nothing to do with "arranging beforehand". Indeed, there was an unsuccessful attempt to entrench the above contrary view in jurisprudence. One application to the Divisional Court, for Leave to Appeal of a Board decision, disputed that *Oxford* definition, asserting that, in Ontario, the proper definition of "planning" was:

- not about "arranging beforehand", but, on the contrary,
- systematically processing authorizations for what had *not* been arranged beforehand.

[327] The applicants there were nothing if not brutally honest in their own convictions. That application was dismissed on other grounds, but the premise is still prevalent in some circles. It explains the surprise – even consternation – which would greet a

declaration that a GTA municipality adopted an OP prescribing specifics – "*and meant it*". The more prescriptive an OP was, the more awkward it would be to outflank or sell out. To many observers, that is simply not how the game has been played.

[328] Nor, they said, should it have been. The Act, they said, laid out three silos for municipal intervention – OP's, zoning, and site plan control – with no intention of overlap. By that reasoning, since numerical specificity usually characterized zoning by-laws, it *ipso facto* had no place in OP's. A second argument was that, since both developers and municipalities had an interest in periodically exceeding the numerical limits, those numbers should be confined to zoning by-laws – from which variances could later be negotiated – rather than OP's, which would entail OPA's (more cumbersome).

[329] Those arguments were all duly heard in the current case. They were also heard by the Divisional Court in the Centretown Case, which was in two stages. First came the Board Panel's decision, reported at [2015] CarswellOnt 6428.

[330] That case addressed three classic visions for Centretown in general, and one developer's "landmark" site in particular:

- the developer's vision (which posited that the highrise limits were too small),
- that of a former Councillor (who said those limits, on both highrises and lowrises, were too big), and
- the municipality's vision, whose OPA said they were just right – to the point of prescribing numerical limits on both.

[331] Those numbers, said the developer's planner, were "not appropriate in an official plan." He recommended that the Panel "remove prescriptive language". In response, the municipality's evidence equivocated: one of the municipality's own planners was said to agree that "rigid performance standards are inappropriate". In a passage strikingly similar to the current case, another municipal expert said he wanted *enough*

development to generate land dedications (for public space) of 40% of the developer's site – but there was some question whether that could be generated under that OPA's own terms.

[332] The Board Panel made a number of findings. Concerning the developer's highrise site, the Panel found that, according to this evidence, the municipality's approach was:

> overly restrictive and works against the intent to which the policy was directed, by rendering an otherwise appropriate landmark site non-developable…
>
> Bearing in mind the Board's conclusions in relation to the objections to the use of prescriptive language in an official plan, the Board finds that this section should be modified... Where the Plan provides for a maximum height, it is unable to address minor deviations that may be the result of design or construction considerations. The Board agrees that this is not good planning, will not result in better urban form but rather it will place undue hardship on applicants by forcing them to amend their plans or obtain relief by applying for an official plan amendment in order to meet a somewhat arbitrary standard that cannot respond to individual circumstances and context...
>
> Official plans should be flexible documents setting out general policy and are not intended to be prescriptive in their application.

[333] Inversely, concerning lowrises, the Board Panel upheld the OPA's limit (which the former Councillor criticized as too tall) at exactly 14.5 m.

[334] The second stage of the case occurred when the municipality applied to the Divisional Court for Leave to Appeal the first finding concerning highrises. The municipality's assumption was that the Panel had posited a sweeping generalization that all numerical provisions in all OP's were untoward, and perhaps illegal. The question, as the municipality put it, was:

> Did the Board err in law in failing to properly interpret section 16 of the *Planning Act,* in concluding that an Official Plan cannot be specific with respect to performance standards for a development, including but not limited to the height of such development in storeys or metres or both?

[335] The municipality pursued the same theme in argument:

> Is an Official Plan permitted to be prescriptive with respect to performance standards, in particular height, in light of the language of the *Planning Act,* section 16?
>
> Is it a relevant consideration in determining whether an Official Plan can be prescriptive with respect to performance standards that a minor variance can only be granted with respect to a zoning by-law?
>
> Does case law provide that an Official Plan cannot be prescriptive with respect to performance standards, such as height?

[336] The Court found that, when reviewed in context, the premise of these questions was faulty. The Board Panel had *not* concluded that, as a generalization, an OP/OPA could never be that specific. The Court observed pointedly that if that had been the Board's intent, the Panel would never have upheld the lowrise height limit at precisely 14.5 m:

> I do not agree with the City that the Board concluded that section 16 of the *Planning Act* prohibits a municipality from prescribing height limits in an Official Plan. To the contrary, the Board actually did prescribe height limits in its decision… (For highrises), the Board removed the height limits in meters but allowed the prescriptive height limits in terms of the maximum number of storeys. Further, when considering the (former Councillor's) appeal, the Board approved the 14.5 m height limit in "Low-Rise" areas. I am unable to conclude that the Board's decision has the effect of preventing height limits in an Official Plan, where appropriate…

[337] As for the availability of variances for zoning adjustments but not OP adjustments, the Court added that this may be a "practical reason" for a municipality to prefer the zoning mechanism (as opposed to the OP mechanism), but not a legal reason compelling municipalities to pick one over the other:

> The Board's analysis… demonstrates that it based its decision on what it deemed to be good land use planning: the inclusion of non-prescriptive wording would allow for minor deviations from official plan policies. It was open to the Board to accept the evidence of the respondent's land-use planner and remove the prescriptive wording in certain policies. In other policies… the Board agreed with the City and maintained the more prescriptive wording as had been adopted by City Council…
>
> The Board's reference to the minor variance process not being available for official plans was not an error but simply a further practical justification for avoiding prescriptive wording in an Official Plan.

[338] The current Panel takes direction from the Court, and draws conclusions, jurisdictional and pragmatic. First, nothing in the Act dictates that OP's should be

confined to philosophical abstractions, or prevents a municipality from incorporating provisions which are prescriptive. The fact that the latter are not subject to variances is cautionary, but not determinative of their legal status. Jurisdictionally, the Court's findings signal that municipalities *can* introduce such OP provisions.

[339] Whether they *should* is a different question, depending on the circumstances. In Centretown, both the Board and the Court found that, in some circumstances (like that OPA's treatment of lowrise), there was no difficulty.

[340] It is also pertinent to consider context, notably (a) the municipality's ambition to acquire land for public space, via land dedications attached to *sufficient* development, and (b) a recognized "landmark" location. The Panel perceived a disconnect between those factors and the numerical provisions in that particular OPA. The pragmatic question was whether the mechanisms were likely to achieve the stated objectives of the governing documents.

[341] The current Panel agrees with that approach. A system to "arrange beforehand" implies forethought on whether its mechanisms will produce the intended results. Otherwise, it is not "planning".

[342] In Centretown, the Board found that some of that evidence was present, and some not. The municipality had focused on its s. 37 receivables more than on the coherence of its own vision. In particular, the Board addressed whether the numerical provisions there would "*result in better urban form*" – and concluded that they would not.

[343] The Board has the same concern here. It is not mainly because OPA 197, like the Centretown OPA, portrayed expansive land dedications without any apparent calculation of how they were to be acquired; nor is it because OPA 197 appeared to devote more attention to s. 37 than to the visual quality of the enterprise. The main reason is "built form" – a key criterion not only in the City's own planning/design documents, but also in multiple waterfront planning provisions.

[344] As explained, the overwhelming likelihood is that OPA 197 will produce buildings that look like boxes. The strict numerical figures, and their failure to provide for any "sculpting", accentuate that risk.

[345] That does not mean the City should never adopt prescriptive OPA's with numerical provisions. There may be many circumstances in which they are entirely appropriate. In Ontario, some OP's include numerical provisions for e.g. angular planes (which, parenthetically, have sometimes been recognized as serving architectural/aesthetic functions on buildings as well as massing functions). There may even be good reason to refer to numerical standards in other parts of OPA 197 itself. On the main question of built form, however, the Board concludes that, unless the numerical provisions here are recast, the Study Area is unlikely to ever enjoy a built form commensurate with the ambitions expressed for it.

[346] That is not to suggest the City must dilute those ambitions. On the contrary, though the City disclaimed planning for density, OPA 197 is so mathematically precise that one could calculate the volume limit, on anticipated development, down to the last cubic centimetre. As explained earlier, the Board was not persuaded to intervene, concerning the City's expectations in that regard. The issue instead was that this volume of development would likely come out looking like ice cubes from an ice tray.

[347] That is not what any of the City's own documents said the City wanted. If the City had hoped for anything better, those OPA provisions, including their numeric specificity, have inadvertently made that hope largely illusory. The solution is for the City to recast them:

- not to increase the mass,
- but to allow it to be redeployed – "sculpted" (or perhaps “squished”),
- more in keeping with the City's own ambitions for built form. The Board will return to that subject later.

10.11 Lotting and Separation Distances

[348] The Board has discussed "vertical" issues (height), but there were also two “horizontal" issues – lot dimensions, and separation distances.

[349] Shoreline's planner took issue with OPA 197's minimum lot size for highrises, 50 m x 50 m, or about 5/8 of an acre. However, the Board was not persuaded to intervene, for the following reason.

[350] At Humber Bay Shores, the Panel there directed comparable lotting provisions. The Board was not shown that they were inappropriate there, or that the strategy in the Study Area should be significantly different here. The Board agrees with the City that the current prevalence of long thin lots is not conducive to the kind of redevelopment that the OPA envisions. Indeed, it is difficult to visualize how the existing lotting could be redeveloped into anything but a collection of narrow slabs.

[351] The next question was the separation distances between buildings. The City’s Ms. Thom acknowledged that the OPA's separation distances provided "very little opportunity to put a separate building on the site."

[352] The minimum separation distance between towers, according to the citywide *Tall Buildings Design Guidelines* (“Tall Guidelines”) is usually 25 m (82 feet). OPA 197 entrenches that 25 m figure. Shoreline’s planner countered, however, that there was leeway: “The tower separation distance could be reduced to 18.0 - 20.0 m while still meeting Tall Building Guidelines. This could allow the tower to ‘slide’ 5.0-7.0 m west toward the existing buildings." A separation distance of 18 m (59 feet) would represent a reduction of 23 feet, compared to the figure in OPA 197.

[353] Unfortunately, the Board was not shown where, in the Tall Guidelines, that leeway is provided. If any such leeway does indeed exist, then it should be given consideration, because of the locational peculiarities of “Band C” of the Study Area. Although separation distances are often vital in preventing a thicket of highrises from

crowding each other, the situation is different for a linear string of buildings flanked only by Lake Ontario. Furthermore, this interstitial space is not at eye level, but several floors up, visible primarily to seagulls, but not the public. The Board was not shown how it would improve public perception of "open character" – let alone the view of the Lake for anyone at street level.

[354] In short, although the Board does not have enough evidence to expound on this supposed exception to the Tall Guidelines, the Board does invite the City to address its mind to whether an exception here would be in its own interest.

[355] Matters are different for separation distances at the podium level, particularly at grade or close to grade. That is where the public vistas to the Lake are, and where the sense of "openness" would be the most valuable.

10.12 Galvanizing Collective Action

[356] City witness statements referred repeatedly to OPA 197 as "a guide to growth and change". Shoreline said the opposite – that it would paralyze change, not encourage it. In particular, though City experts said landowners should proceed in a way that was "all united", the OPA did not outline how this coordination was supposed to be galvanized, economically or otherwise.

[357] There was also a note of irony. The Board was told repeatedly that this area represented a “regional asset” (one reason that parking was first suggested on the waterfront street was to accommodate all those people driving to it from some distance); but the paper trail said nothing about regional ratepayers providing so much as a nickel for its improvement. That would all be left to the owners/developers.

[358] For the Motel Strip, the Board criticized a similar "deafening silence" concerning government support. However, the current Panel was told that several factors distinguished the planning for Mimico-by-the-Lake from the Motel Strip, e.g.:

- The motels were at the end of their lifespan; the rental units at e.g. Shoreline and South Beach are not.
- The Motel Strip did not abut an existing residential area.
- The Motel Strip had a system to transfer density to owners, from their water lots which were being acquired by the TRCA.
- Ultimately, in the Motel Strip, almost all the major players were developers, whereas in the Study Area, they are not.

[359] However, Shoreline's counsel posited that the defining strategy difference, between Humber Bay Shores and Mimico-by-the-Lake – was that in the former, the public sector front-ended infrastructure. The desired redevelopment did not occur spontaneously: it was overtly encouraged. Indeed, for the Motel Strip, the Board decision specified that roads (and the monetary commitments therefor) should come *first.*

[360] The City urban designer's only comment was that here, "the City chose to take a different route." It was indeed different. Like Centretown, the paper trail here contained profuse references to receivables which the City anticipated from redevelopment (dedications, DC's or s. 37) – but not a word about what it might commit. It is unclear to the Board why the OPA did not devote more attention to the explicit position of the Executive Committee of Council, when it said that the City should consider "parallel inducement measures… including coordinated capital investments."

[361] Counsel for the City made a valiant attempt to offer reassurance without offering commitment. "It is a false premise that the City's only contribution is what the City has contributed so far". "If the money has to come from the City, then that is where it *can* come from." The City "might contribute" in the future: "There's no evidence that it won't." She concluded rhetorically: "Are there initiatives the City can bring forward? Yes… and pursue a full array of opportunities" – adding that "I'm happy for you (the Board) to refer to that in your decision."

[362] It is not the Board's intent to dictate budgetary matters to the City. However, in the Motel Strip decision, the Panel there concluded that the public impetus for developer action should not be a blank slate. The current Panel was shown no reason why the redevelopment of the Study Area should be any different.

[363] There was essentially no evidence on that point – one way or the other. Hypothetically, one might speculate that the City might not *need* to do much more, to attract developer interest: perhaps the increases in density alone would be sufficient impetus to attract the redevelopment sought by the City. Indeed, Ms. Moulder suggested that the City had already gone far beyond what was necessary. The difficulty is that there was no evidence that the City had even done the calculation. The Board does not insist on a pro forma balance sheet; but the Board would expect some hint that the City had at least considered the matter.

[364] One could add that, for purposes of the current hearing, it is particularly in the City's interest to assure that the *first* waterfront project – whatever it is, and by whatever proponent – sets an example for what the City wants all entrepreneurs to do.

10.13 Paper Burden

[365] As mentioned, OPA 197 outlines how every development application will require a precinct plan and transportation plan (though presumably with some overlap). Beyond that, any change to the OPA's numerical provisions would also require not only its own OPA, but a "comprehensive review" of the entire Secondary Plan.

[366] Since the City has as much interest in avoiding paper burden as developers do, counsel for the City insisted that the City would administer the above so as to be manageable. City experts said pre-consultation would identify the scope of studies to be done; depending on the project, some studies might even be relatively perfunctory. Furthermore, the City said that a new precinct plan would be required only if the proposal differed from that anticipated by the City, and impacted lands outside the applicant's control.

[367] The Board's response is guarded. Granted, the Motel Strip decision had also foreseen a range of studies, in comparable circumstances; however, there is an ongoing dilemma at three levels.

[368] First and most obviously, the above reassurances are not noticeably reflected in the language of OPA 197.

[369] Next, *even if* the substance of those required studies were modest, the optics are not. There is a risk that potential applicants would assume a procedural maze, i.e. a deterrent. It is in the City's interest to pre-empt that perception.

[370] The final risk is that, inversely, if a given developer concludes:

- that its project will unavoidably require an OPA application *anyway*,
- and that such an OPA application will likely make its way to the Board,
- then it may be tempted to “test its luck”, and presume that it has nothing to lose by proposing even more profound digressions from the City's vision than it might otherwise have done.

[371] The Board concludes that, on this topic as well, the City should be given a further opportunity to refine its approach now (via clarification of its procedural intentions), in order to pre-empt potential problems later.

10.14 Miscellaneous

[372] As mentioned, LPCC also raised the question of whether Mimico-by-the-Lake would ultimately represent a "complete community", with a reasonable balance of employment and residential uses, as expected by various governing documents under the Act. Although there were procedural difficulties with that topic, the Board has a residual responsibility to enquire whether the proposals before it represent compliance with the Act.

[373] In that capacity, the Board is compelled to take notice that OPA 197's language on that point is sparse.

[374] The Board would expect the OPA, as modified, to reflect more evidence that the City had considered this issue.

11. CONCLUSION

11.1 General

[375] Although the Board found significant shortcomings in the visions of all the parties, the Board also considers those shortcomings largely manageable.

[376] The City itself asked that the Board "allow the appeals in part", and withhold its Order while the City attended to various modifications to the OPA. Both Shoreline and LPCC also asked that further work be invested in the OPA. Like the decision in the Motel Strip, the Board agrees to withhold its Order, so that this may be done.

[377] The modifications to OPA 197 should proceed within a policy framework and direction in this regard is spelled out later in this decision.

[378] The Board was told that some of the proposed modifications were essentially uncontested: a substantial body of revisions were now undisputed as between the City, Shoreline and MLNI. As for LPCC, the latter's final written submissions on topics like "housing mix" suggested that there might not be complete consensus – but it was unclear whether that position had been overtaken by the City's agreed revisions to the policies in question. The Board heard no evidence on that point.

[379] The Board therefore takes note of the above modifications in the next section of this decision, 11.2. The following section, 11.3, summarizes the Board's findings on the modifications it proposes, pertaining to the topics that had been more problematic and the subject of the evidence at the hearing.

11.2 The Framework for OPA Modifications “on Consent”

[380] The list of OPA modifications, which the Board was asked to approve "on consent", was substantial. It included changes to housing policies 4.3.3 and 4.3.12, as set out in “Appendix A” to the City's written submission, entitled Relief Requested by the City of Toronto. There were also modifications to transportation policy 4.4.4, and to the transportation sidebar at page 22 of Exhibit 19, as set out in “Appendix B” to that same written submission.

[381] There were also miscellaneous references to Exhibit 23 and other exhibits, and to typos to be corrected, e.g. changing a reference to policy 4.2.4(e) to 4.2.4(d).

[382] The Board approves those modifications; however, the Order is withheld until all modifications to OPA 197, as directed in this disposition, are complete.

[383] The list of more controversial modifications to OPA 197, generally outlined in the next section 11.3, is detailed. The Board finds that the City should be given the opportunity to satisfy itself that the eventual language of OPA 197 is entirely consistent, among both the uncontested modifications and the modifications directed by the Board, as described below. Thereafter, OPA 197, as modified can be filed and the Board’s order can issue.

11.3 The Framework for Other Topics

[384] As in the Motel Strip decision, the Board outlines the topic areas for OPA modifications to be addressed. The main items are: first, that the Board agrees with a waterfront street, though it prefers the dimensions which Shoreline's engineer cited for Liberty Village; and second, the Board agrees with Ms. Moulder that there is insufficient evidence to change existing OS designations as proposed by either Shoreline or in OPA 197.

[385] As for the current iteration of Shoreline's proposed project, the Board was unconvinced of its merits. The Board finds that it was asked:

- To endorse major development, a football field away from the closest real street, based on a driveway (to be later expanded – supposedly – depending on the intentions of a non-party);
- To locate its development closer to Lake Ontario than anyone else there;
- To remove the "Open Space" designation on lands,
- To locate a full-fledged street inches from the existing residential windows on Vinen’s property,
- or, if a waterfront street does become unavoidable, to locate it within the TRCA's hazard setback,
- all for no better reason than because the proponent is in a hurry.

[386] That does *not* mean that infill is unbuildable on Shoreline’s property. The Board fully expects that, with revised dimensions for the waterfront street and other considerations, a more appropriate building envelope can be defined.

[387] The Board agrees that ultimate redevelopment of the Study Area is in the City's interest, and the public interest. It would be appropriate, in principle, for the parties to make one further attempt at identifying a solution that is more consistent with the thrust of the planning documents, as modified on consent and through this decision.

[388] The Board is vested with relevant powers under the *Ontario Municipal Board Act*. In particular, the Board has the authority to withhold its Order, which was the outcome requested by the parties.

[389] In addition to the modifications “on consent”, the Board finds that OPA 197 should be further modified (or remain unchanged, as the case may be) to reflect the items set out below:

1. The Waterfront Street

a) The Board supports a waterfront street, to cross Precinct B.

b) The OPA does not need to require that the street's travelled portion exceed 6.6 m, nor that it would require a parking lane.

c) The OPA does not need to require that the width of the street's single-loaded combined sidewalk and planted strip would exceed DIPS.

d) The OPA does not need to require that the sidewalk and planting strip must be in public ownership (they may be in private ownership, subject to an easement, depending on the circumstances in various locations).

e) Subject to subparagraph 1(f) below and paragraph 6 below, the Board does not intervene in the City's anticipated private front yard setback of 3.0 m facing the waterfront street.

f) The OPA does not need to prohibit all subsurface use of that front yard setback. It does not need to prohibit e.g. garage use, though on condition that the surface can accommodate landscaping satisfactory to the City.

2. The Proposed East-West Street on the Existing Driveway

a) The Board does not support Shoreline's proposal for a "temporary" east-west "street" – ultimately to be treated as an actual conventional street – on Shoreline's north driveway.

b) The Board takes no position, at this time, on whether that driveway and/or the south driveway could serve as an interim private driveway for an infill project on the east side of the property, *pending* construction of the waterfront street. The Board would expect that question to be determined in accordance with the Ontario Building Code and other currently-applicable governing documents.

3. Land Acquisition for Public Purposes

a) The City should verify that there is congruence between:

- The scale of development that it anticipates,
- The likely receivables for the City,
- The objective of improving Mimico's ratio of parkland to population (which is about to expand), in light of City-wide target ratios, and
- Its budgetary commitments to land acquisition and infrastructure.

b) If further budgetary commitments or "coordinated capital investments" are necessary for same, the City should prepare itself accordingly.

4. Open Space Designation

a) The Board was not persuaded to change any OS designations at this time.

5. Height

a) The OPA should apply the same bands "A" and "C" to Shoreline's property as it applies to neighbouring properties, and in the same approximate locations in relation to the Lake.

b) The Board does not support extending "Band B" to Shoreline's property. The area which would otherwise be labeled "Band B", *if* that band had been extended to Shoreline's property on the same locational basis as neighbouring properties, should instead be labeled "Band C". This does not signal, however, any intention to destroy the existing apartment blocks in the immediate future.

c) The Board does not intervene in the City's proposed allocation of storeys to bands "A" and "C".

6. The Quality of Built Form

a) The OPA should address the quality of built form, commensurate with its showcase waterfront location. The Board repeats that the Motel Strip decision supported quality architecture, particularly as opposed to “prison-like regularity and barrenness”.

b) Although the routine podium-and-tower configuration remains a prospect, it should not be an unwavering requirement, particularly if the podium element obstructs views of the Lake.

c) The OPA should make allowance for architectural flourishes and imaginative shapes, not just cubes, particularly if they complement views of the lake.

7. Numerical Specificity

a) OPA 197 prescribes dimensions with such specificity that one could calculate maximum building volume in a given "band" to the last cubic centimeter. The City has the legal right to do so. The Board was not persuaded to intervene in the City's determination of the maximum volume for buildings in a given "band".

b) The Board nonetheless repeats that allowance should be made for architectural flourishes and imaginative shapes, not just cubes. If the City insists on numerical specificity, it should demonstrate how the resulting built form will add to architectural interest, not detract from it.

8. Horizontal Distances

a) The Board was not persuaded to intervene in the question of frontage requirements and lot dimensions.

b) The City should give particular consideration to whether separation distances at eye level are smaller than they should be, and whether separation distances other than that at eye level are greater than they need to be.

9. Galvanizing Collective Action

a) If the OPA purports to be predicated on "united action" by owners and developers, then it should address how that will come about, and contain provisions to encourage same.

10. Paper Burden

a) The OPA should be more explicit on how the City proposes to use e.g. pre-consultation and other measures to prevent the application paperwork from spiralling, and to avoid duplication of studies.

b) In particular, the City should take all available measures to mitigate the risk that owners and developers will assume that multiple consequential OPA's – and accompanying appeals to this Board – are a matter of course.

11. Miscellaneous

a) The OPA should elaborate on how the Study Area is intended to contribute to a complete community, with a reasonable balance of employment and residential uses.

[390] In accordance with traditional principles of professionalism, the Board expects the parties – and their experts – to use their best efforts to proceed by consensus wherever possible.

[391] It is in the interest of the City to assure that the parties and participants have been properly consulted.

[392] The Board adds a final word. The Board has no reproach concerning the City's desire for its Plan to be "serious". One might say the same for the entirety of the planning system. Periodically, like clockwork, there are reminders that there is a malaise in Ontario’s planning system, which is of concern to observers in the public and private sectors alike; but seldom is the opportunity presented, to go beyond cosmetic aspects and address not only the fundamentals, but alternatives. The Board can only hope that the Mimico-by-the-Lake experience may be helpful in that regard.

13. DECISION

[393] For all of the reasons given, the appeals are allowed in part. OPA 197 shall be modified by the City in accordance with the direction contained herein and filed with the Board (after circulation to the parties) within four (4) months of the date of this decision. Thereafter, the Board’s Order will issue.

[394] Board Rule 107 states:

> **107. Effective Date of Board Decision** A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

[395] Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

"M. C. Denhez"

M. C. DENHEZ
MEMBER