Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: May 7, 2015 **CASE NO(S).:** PL140611

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

Referred by:	Mizrahi Development Group (1451 Wellington) Inc.
Subject:	Site Plan
Property Address/Description:	1445 & 1451 Wellington St. W.
Municipality:	City of Ottawa
OMB Case No.:	PL140611
OMB File No.:	PL140611

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant:	Mizrahi Development Group (1451 Wellington) Inc.
Subject:	Request to amend the Official Plan – Refusal of request by City of Ottawa
Existing Designation:	Traditional Mainstreet
Proposed Designation:	Traditional Mainstreet
Purpose:	To permit a 12-storey building on 1445 and 1451 Wellington Street West
Property Address/Description:	1445 and 1451 Wellington Street West
Municipality:	City of Ottawa
Approval Authority File No.:	D01-01-13-0019
OMB Case No.:	PL140611
OMB File No.:	PL140664

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant:	Mizrahi Development Group (1451 Wellington) Inc.
Subject:	Application to amend Zoning By-law No. 2008-250 – Refusal of application by City of Ottawa
Existing Zoning:	Traditional Mainstreet, Subzone 11 (TM11)
Proposed Zoning:	Traditional Mainstreet, Subzone 11 (TM11)
Purpose:	To permit a 12-storey building on 1445 and 1451 Wellington Street West
Property Address/Description:	1445 and 1451 Wellington Street West

Municipality:	City of Ottawa
Municipal File No.:	D02-02-13-0116
OMB Case No.:	PL140611
OMB File No.:	PL140665
Heard:	January 19, 2015 in Ottawa, Ontario

APPEARANCES:

Parties	**Counsel**
Mizrahi Development Group (1451 Wellington) Inc.	A. K. Cohen, J. L. Cohen
City of Ottawa	T. Marc

DECISION OF THE BOARD DELIVERED BY M. C. DENHEZ

1. INTRODUCTION

[1] This dispute, over a developer's proposal to amend Ottawa's Official Plan ("OP"), centered on the height of “landmark architecture” proposed at one of the most prominent intersections in the national capital.

[2] Island Park Drive was laid out in 1910, by what was then called the federal Ottawa Improvement Commission. It became what the OP now calls a "Scenic Entry Route", connecting to the Island Park Bridge, which crosses the Ottawa River between Québec and Ontario. The first commercial intersection, on crossing to the Ontario side of the river, is at Wellington Street West (Wellington runs east of Island Park; the same road, west of the corner, is called Richmond Road).

[3] Though Island Park Drive was a capital beautification project, Wellington Street/Richmond Road was different. Before World War II, it was a mix of two-storey commercial and residential buildings. Postwar, it became a "Highway Commercial" strip. This intersection had automotive uses on all four corners – and soil contaminated with fuel. A multi-million-dollar cleanup eventually followed, solving the problem for some corners, but not all, including the northeast corner – the subject property.

[4] Island Park Drive is still a Scenic Entry Route. As for Wellington Street West, the City of Ottawa (the “City") adopted new OP provisions, designating it a "Traditional Mainstreet" intended for six-storey redevelopment – occasionally rising to nine, under specified circumstances. On the opposite (west) side of the intersection, the OP designated those corners for four-six storeys.

[5] Mizrahi Development Group (1451 Wellington) Inc. (the “developer") proposed an upscale mixed-use project on the northeast corner. At least four developers previously considered projects there, but backed off, in light of decontamination costs. This developer similarly discussed a nine-storey project (in accordance with the OP), but had also been daunted by the decontamination.

[6] The developer then proposed a 12-storey building. The three extra storeys would require an Official Plan Amendment ("OPA"), as well as rezoning and Site Plan approval. There would also be financial arrangements in the form of:

a) benefits that the developer would provide to the City, under s. 37 of the *Planning Act* ("the Act"), for any extra density beyond six storeys, and

b) credits the City would provide to the developer, under its program to offset decontamination costs.

[7] However, City planning staff would not support more than nine storeys. Staff said the project was out of context with local "village" character, and contradicted the height philosophy of the OP. Council refused the proposed OPA, rezoning, and Site Plan. The developer appealed to the Ontario Municipal Board (the “Board").

[8] At the hearing, the developer was represented by counsel, with the support of planner Ted Fobert, architect Henry Burstyn, and environmental engineer Carlos DaSilva. The City was also represented by counsel, with the support of planner Don Herweyer. The Board also heard from 13 participants. Kathleen Fildes, John Tompkins, Elizabeth Marston, Gary Paul Romkey, John Newcomb, Derek Nzeribe, Douglas

Duncan, Mariano Giannuzzi, Alfredo Giannuzzi, Randy Kemp, and Adele Digirolomo supported the project. Jennifer Gillespie and Duff Mitchell opposed it, and the Board was advised of letters pro and con.

[9] The Board has carefully considered all the evidence, including two cubic feet of documents as well as the submissions of counsel, exemplary on both sides. Several findings ensue:

A. The Board agrees on the desirability of decontamination and redevelopment.

B. There was no major dispute about most of this project except its top. The debate over the upper floors pertained to

- not only the number of storeys foreseen in the OP,

- but also their "angular plane" (shape), under current zoning.

C. This project is not out of character with a local "village" context. However, the planning documents provided no authority for a highrise (not even in a brownfield context) – subject to one key exception below.

D. That exception was for "built form", calling not only for a "scenic" vista, but also a "landmark" – *defined* as a building whose “architectural form…is highly distinctive.” That overarching purpose was not only repeated; the documents called for “*incentives*” for that purpose.

E. The paper trail and testimony indicated no dispute that the lower floors met those standards.

F. But the lower nine floors were not the controversial part. If the developer hoped for an "incentive" allowing extra storeys on top, it was critical to

demonstrate that those extra storeys contributed recognizably to that overarching objective of "distinctive" architectural form.

[10] The City said the developer should delete the top three storeys, and tailor the massing of the remaining upper storeys, to fit the angular plane in the existing by-law. However, the Board finds that the developer has two options:

"Option A":

(i) to reduce the project to nine storeys; and

(ii) As for the angular plane, the Board agreed with some terracing, but was not persuaded that it was necessary to the full extent anticipated in the By-law.

"Option B":

(i) Since governing documents call for "incentives" for recognized improvements in “built form", it follows that if extra storeys at the top of the building were to make a recognizably "distinctive" contribution to built form, they could qualify for such an "incentive." The test, in short, is its contribution to “landmark” status.

(ii) Although angular planes are usually intended to mitigate shadow and bulk, they can also add architectural flourishes. A redesigned top for this project, which uses angles while maintaining a distinguished appearance, may potentially advance that overall "landmark" status significantly.

[11] The Board therefore expects that, for the project to proceed, the developer may elect either "Option A" or "Option B".

[12] However, if the developer selects “Option B” and argues that the extra storeys will contribute to the project’s “scenic” and “landmark” status, and hence qualify for the

exceptional treatment, it must prove it. For those topmost storeys, the Board was not satisfied that it had done so – yet.

[13] Given the public interest in expediting a solution, notably one that favours both (i) decontamination and (ii) the century-old goal of a showcase project for this “scenic” location, the Board allows the parties six months to explore the above prospects. The Board would hope that those discussions will be assisted by a clearer outline of the planning objectives and parameters, which the Board herein addresses in detail. The Board also provides a roadmap for the matter to be concluded to the Board’s satisfaction. The details and reasons are set out below.

2. GEOGRAPHIC CONTEXT

[14] The subject property lies near – but not exactly abutting – the northeast corner of Island Park Drive and Wellington Street West. It is comprised of two adjoining lots:

- The westernmost lot, at 1451 Wellington, is separated from the corner (further west) by (i) an unopened road allowance (for Rockhurst Road) and (ii) a landscaped triangle belonging to the National Capital Commission. That western lot is occupied by a vacant one-storey building, which used to house Joe's Car & Radio ("Joe's"), and later a carwash.

- The second lot, at 1445 Wellington West, immediately to the east, has a two-storey building housing Bella's Restaurant ("Bella's").

[15] Regarding the road allowance to the west, it was agreed that if this project proceeded, the developer would contribute a "benefit" to the City, consisting at least of a "parkette”, which the developer would landscape. Section 37 of the Act specifically foresees arrangements to increase project density, in return for the developer contributing "benefits" to the municipality:

> 37(1) …A local municipality may, in a by-law…, 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.

[16] Across the street to the south is an Esso station. Its soil had been decontaminated; so had the soil under Wellington Street. However, the subject property itself had not been cleaned; contamination was said to extend to the bedrock at Joe's, and to have leached partway onto the lot at Bella's.

[17] The subject property is at the western tip of a twenty-block east-west corridor called the West Wellington Area. To the immediate east of the site is a six-storey building. The next block east, with the municipal address of 345 Carleton Avenue, has a Metro supermarket and its parking lot. The rest of the corridor along this arterial road is eclectic. To the north and south of this corridor are lowrise residential neighbourhoods.

[18] The corridor has many two-storey buildings, some of which were once residential, now largely converted to commercial uses. Along some stretches, the street has an unmistakable “village” feel; but along others, that aspect dissipates, particularly in the old “Highway Commercial” areas closer to the subject property.

[19] There are also several highrises from the 1960's and 1970's. The Board heard no testimony suggesting they made any positive contribution to that streetscape.

[20] In contrast, Island Park Drive, which runs north-south, has a very different feel. It is characterized by upscale detached homes with substantial landscaped greenspace. A number of foreign flags and crests denote diplomatic premises.

3. CITY DOCUMENTS

[21] As mentioned, Island Park Drive is designated as a Scenic Entry Route; but although the project would be mostly visible from Island Park Drive, and interface accordingly, the land itself is in the Wellington West corridor, governed by the Wellington Street West Secondary Plan ("Secondary Plan"), part of the OP.

[22] There was no suggestion that, in the past, this long corridor had enjoyed any unifying vision. The City had undertaken to change that. In May 2006, it launched a Community Design Plan process ("CDP"), involving several years of discussion and consultation, and resulting in a 101-page document, with 64 pages of "policies."

[23] The CDP was at times blunt: "There is a general void of architecturally-notable buildings and identifying features." It nonetheless insisted that "new development in the community needs to respect the ‘village character’ and retain the existing human scale, but also refresh the community character through inspiring physical design." It added that "new developments… will retain and reinforce the positive elements of its general low-rise, ‘mainstreet character’…. The ample opportunities for infill development will be designed to refresh the existing character of the community's physical form by adhering to the following key built form, public space and land use vision: to retain and to respect the street character that feels low-scale and open, or unimposing…."

[24] The CDP also addressed brownfields in the corridor:

> … There are potentially a number of properties with some significant contamination challenges. The City specifically encourages the redevelopment of such properties through the Ottawa Brownfields Community Improvement Plan (BCIP).…
>
> The BCIP places the highest priority for brownfield redevelopment in the Central Area, Mixed Use Centres, along Mainstreets and within 600 metres of existing or planned rapid transit stations.…
>
> The rehabilitation grant program component of the BCIP, for example, can provide funds to a maximum of 50% of eligible cleanup costs through a variety of grant options….
>
> This CDP encourages the use of the City's comprehensive Brownfields Program in conjunction with other development incentive mechanisms, such as Section 37 of the Planning Act, to make desirable redevelopment feasible and a reality.

[25] The CDP allusions to "incentives" were in three contexts – and three only. One was a reference to the BCIP above. The other two were its references to:

> development incentives at specifically identified locations to achieve better end results for
>
> - built form and

> - public spaces [formatting added].

[26] The CDP also identified "key challenges", including the statement that "there are no distinctive gateway features that distinguish the community." The CDP therefore addressed "gateways and nodes."

[27] Indeed, the CDP addressed this intersection specifically. It called for "landmarks" at the subject property and the Esso site across the street (though with "human-scale bases"). It called repeatedly for distinctive architecture, and described both locations as:

> frequently seen vista points formative in the first and last impressions for this area of the community mainstreet. Future redevelopment of these properties should incorporate their community significance. Buildings should introduce and exemplify the key built form values of the mainstreet and West Wellington village, notably:
>
> - broken down building massing and detail that maintains and complements the urban village character and adjacent residential buildings
> - low, human-scale building bases and façades that capture pedestrian interest and maintain sunlight to the street and sky exposure….
>
> The buildings should be landmarks that stand out from their background by virtue of their design, not location. Architecturally distinguishing attributes or features should provide a bold or new interpretation of the old built form values to provide a unique distinction regarding the neighbourhood that is being entered. Distinguishing, architectural details should continue on all facades that are visible from the street.…
>
> Additional building height increases may be considered to a maximum of 9 storeys for providing:
>
> - public open space; for example, small plaza and greater sidewalk width
> - cash contribution for affordable rental housing
> - community daycare
> - public art and/or extraordinary and innovative architectural feature(s).

[28] The CDP included the warning that "there is a real possibility that proposals seeking exception to the six-storey maximum building height limit will diminish both the village character and the functional and aesthetic pedestrian realm."

[29] However, that CDP was not a *Planning Act* document: legally, it had no stand-

alone binding authority.

[30] The CDP was therefore followed by the Secondary Plan (also called “OPA 93”). However, in sharp contrast to the CDP, this Secondary Plan (May, 2011) was much shorter – five pages, of which only two pages applied to the subject property. It reasserted the property's "gateway" location, notably pertaining to a six-storey maximum – expandable to nine, if s. 37 benefits were satisfactory:

> 11.1 … This Secondary Plan provides the legal framework that supports the Wellington Street West CDP…. The CDP includes detailed information on… the intent of policy direction that is important for interpreting and supplementing this Secondary Plan….
>
> 11.3.1 (2) The maximum building height for all new buildings… will be six (6) storeys or 20 m, except where identified by the specific area policies below.
>
> In those cases, the City may consider a zoning by-law amendment to those properties to increase the maximum building height to a maximum of nine (9) storeys pursuant to Section 37 of the Planning Act where community benefits, including but not limited to those identified in the Community Design Plan, are secured through agreement with the City and will be provided at the time of development.
>
> (3) New buildings over four (4) storeys… shall incorporate architectural articulation and details to form a two (2) to three (3) storey base….
>
> (4) … Proponents shall demonstrate how the key elements of scale and detail, from the traditional one (1) to three (3) storey buildings and the narrow lot sizes of the Wellington West corridor, have been incorporated into the building design.
>
> 11.3.2 (2) The City may consider a zoning by-law amendment to the properties at 345 Carleton Avenue (Metro), 1451 Wellington Street (the subject property) and 369 Island Park Drive (Esso) to increase the maximum building height pursuant to Section 37 of the Planning Act where one or more community benefits identified in the Community Design Plan are secured through agreement with the City and will be provided at the time of development.
>
> (4) Redevelopment at 1451 Wellington Street shall require the west façade of a new building to be integrated with a redesigned, City-owned public open space located at the northwest corner of Island Park Drive and Wellington Street, at the base of Rockhurst Avenue, to provide an animated place for people to meet and rest at the western gateway to the corridor.

[31] The above provisions applied to the two corners on the east side of this important intersection, i.e. the subject property (northeast corner) and the Esso station (southeast corner). These provisions also applied to the next block eastward (Metro supermarket and parking lot). It was already undisputed that the latter site would indeed be redeveloped to nine storeys, with the assistance of a contribution under s. 37.

[32] However, the above provisions did not apply to the west side of the Island Park intersection: the northwest and southwest corners are governed by a different Secondary Plan, named the Richmond Road/Westboro Secondary Plan (“OPA 70”, adopted earlier, in 2009). Its Schedule C listed the maximum height, for both the northwest and southwest corners, at four storeys. As for whether that envelope was expandable, it said:

- "This plan supports building heights generally in the range of 4 to 6 storeys. Greater building heights will be considered in any of the following circumstances.” It then specified a series of conditions (without any mention of s. 37).

- Elsewhere, for this "Sector 6" area, it alluded to a "maximum building height generally up to six storeys."

- However, it also called on the City to "promote a gateway feature, such as a prominent, well-designed building, at the Richmond Road Island Park Drive intersection."

[33] As one proceeds further west along Richmond Road, recent development is at varying heights. At a substantial distance from the subject property, there is a nine-storey building called The Exchange, in Westboro, with a height of 35 metres (“m”).

[34] The repeated references to nine-storey buildings are not haphazard. In this OP, nine storeys represent a demarcation point between categories of buildings. OP Policy 4.11.7 classifies buildings according to a fixed typology – “Low-Rise” (1-4 storeys), “Mid-

Rise” (5-9 storeys), and “High-Rise” (above 9 storeys).

4. THE PROJECT

[35] The Board was told that this developer had built a recent project, of similar scale and conception, in Toronto (Exhibit 6, p. 6-8), and had elicited particular praise for its quality design and materials. For the subject property, the developer's planner testified that when he was first retained in 2013, the anticipated proposal was for a nine-storey project. The Board was also told that at the time, the developer was aware of the contamination – but not the full extent, which reputedly became apparent only later.

[36] The developer then concluded that the economics of a nine-storey project were "no longer feasible": if it wanted the development to proceed, and also meet City expectations of a benefit under s. 37, it would need greater density.

[37] The Board was told that the developer then assigned its architects to redesign the project, in light of its new density target. The architects were divided into two groups. One group produced a 10-storey design; the other group produced a 12-storey design. Aside from the objective of greater density, there was no evidence about the rationale for specific targets of 10 or 12 storeys: those figures otherwise appeared arbitrary. The Board calls them the "fatter" and "thinner" options respectively.

[38] The developer then embarked on vigorous overtures to neighbours. Indeed, counsel for the City called this developer's consultation "exemplary." The developer concluded that the thinner option was more popular than the fatter option.

[39] Indeed, the Board was told that immediate neighbours expressed little concern about shadow or bulk. Many participants came forward during the hearing with the same opinion, undisputed by the City except for the number of storeys.

[40] The developer proposed this 12-storey option to the City, to consist of three parts – a podium (or "base"), a main upper part, and a topmost recessed two-storey portion.

In due course, it was proposed that these last two storeys be finished in glass, reputedly to blend in with the sky, and to be as unnoticeable as possible. There would be commercial uses near the ground and residential uses further up.

[41] Since the OP referred to buildings of only 6-9 storeys, the developer applied for an OPA, as well as rezoning and Site Plan approval.

[42] Some of the proposed changes to planning documents were less controversial than others. For example, in terms of rezoning:

- The developer proposed to reduce the required distance between the restaurant patio and residences. This proposed zoning change elicited no apparent objection, on the part of either City staff or neighbours.

- The developer proposed a rear ramp, with canopy, which would otherwise encroach on required setbacks and landscaping. This zoning change elicited no significant objection either.

[43] The Board calls the above the “uncontested zoning items.”

[44] The project also evolved. At the back, more space was created near residential neighbours; and large proposed bays, protruding from the building, were replaced by recessed balconies.

[45] Other proposed modifications would affect the height of the podium. On one hand, the Secondary Plan says that "new buildings over four (4) storeys… shall incorporate architectural articulation and details to form a two (2) to three (3) storey base to ensure compatibility with the existing low-rise, human-scale buildings…." On the other hand, the recent six-storey building next door has no podium. The developer initially proposed a six-storey podium; this was later reduced to four; and at the Board hearing, the developer offered a three-storey podium.

[46] The developer also rearranged the mezzanine area, and adjusted ceiling heights,

reducing the entire height of the building by a total of 17 feet:

- Twelve storeys would now fit into a height of 38.6 m, instead of the originally anticipated 44.3 m.

- The Board was told that this 12-storey mixed-use project would therefore have a comparable height to a typical nine-storey all-commercial building, whose ceiling heights would often produce a total height of 40.5 m.

[47] However, height remained controversial. The first issue was the number of storeys: the City would not support more than nine. A related question was the shape of the top: the zoning called for a 45 degree angular plane on upper storeys; this project did not fit, and the City insisted that it should.

[48] The resulting appeals addressed the proposed OPA, rezoning, and Site Plan. However, some points remained undisputed:

- There was no dispute that this was a "gateway" location.

- There was no debate about the reality of contamination, or the necessity of a cleanup. As part of the excavation, the developer would be expected to conduct the remediation in accordance with the guidelines of the Ministry of Environment and Climate Change.

- There was no dispute over traffic: the developer's plans would not rely on neighbouring residential streets for access.

- There was no dispute that the design and materials of the project looked distinguished – as they should, in keeping with the upscale character and function of Island Park Drive itself.

- As mentioned, it was fully expected that the developer would have to provide s. 37 benefits.

[49] As for the architecture, the developer's witnesses insisted that this would indeed be a "landmark.” The City's expert agreed that the project represented high quality, though his testimony was more tepid on its "landmark" status, described later.

5. APPLICABLE CRITERIA

[50] This kind of appeal engages several factors, notably whether the proposal complies with the Act, the Provincial Policy Statement (PPS), the applicable official plan(s), and the fundamentals of good planning. The Board assesses proposals, and the positions of parties from the perspective of applicable legislation, provincial and municipal policies, and the public interest.

6. ANALYSIS

6(a) Introduction

[51] The Board will focus on contested parts of these appeals. For uncontested parts, e.g. zoning setbacks, the Board agrees that the expert planning testimony was supportive and undisputed. The Board is prepared to endorse those provisions accordingly.

[52] There were other uncontested aspects. Indeed, one area resident after another was invited to the stand to tell the Board about:

- the exemplary consultation undertaken by this developer,
- the importance of brownfield decontamination,
- the advantages of a parkette, and
- the merits of a "gateway" project at this visually strategic location.

[53] The merits of those prospective features are undisputed. The PPS, for example,

specifies at Policy 1.7.1(e) that “long-term economic prosperity should be supported by… promoting the redevelopment of brownfield sites.”

[54] The PPS also supports intensification. However, the new PPS (2014) qualifies that support, with phrases like "in appropriate locations", and "where this can be accommodated." The PPS adds that Ontario has a "policy-led” planning system which must be viewed as a whole. In that light, the Board must also consider the other policy principles in play in this dispute.

[55] The irony is that all parties – and almost all participants – want redevelopment to proceed. They want this soil decontaminated, the parkette landscaped, and a "landmark" building to replace Joe's, along this “Scenic Entry Route." Although the OP does not define "scenic", it defines "landmark" emphatically in terms of "distinctiveness":

> Landmarks are urban design elements that create distinct visual orientation points. Landmarks provide a sense of location to the observer within the larger urban pattern, such as that created… by an *architectural form which is highly distinctive* relative to its surrounding environment. [Emphasis added]

[56] The controversy was specifically about the top of this building – the number of storeys, and the shape of the roofline.

[57] The developer maintained that it could not afford this development without that extra density. The City replied that project economics are not a determinant in Board proceedings. On the latter point, the City is correct. When municipalities – or this Board – address built form, it should be on the basis of public policy, not on what a given entrepreneur can afford. The latter question is not normally within the Board's purview.

[58] However, that does not entirely end the matter. The economic feasibility here is affected not only by density, but also by two other relevant factors, namely

(i) any support from the Brownfields Community Improvement Plan (BCIP), and

(ii) the cost of s. 37 benefits on the table.

[59] The Board will return to those questions later.

6(b) Whether to Amend the Official Plan, etc.

[60] The basic question is whether the OP and zoning should be amended, on the grounds cited by the developer. The developer argued that, thanks to the proposed decontamination (which would cost over two million dollars), and prospective landmark status, the project was worth a few extra storeys, particularly if the actual number of extra metres was modest (compared, say, to a commercial project, or to buildings some blocks away). Most importantly, the developer argued that the project represented good development, in terms of both the parkette and the building itself.

[61] The key, both sides agreed, was the decisive phrase "good planning."

[62] The City acknowledged the project's positive features, but insisted that these were not sufficient grounds to override the OP height limit.

[63] By definition, every private application for an OPA, and every appeal which calls on the Board to impose an OPA, involves a digression from existing planning documents. Counsel for the City said that, for these cases, there was a paucity of jurisprudence providing clear direction on when the Board should or should not intervene. However, he quoted at length from the Board's recent decision in *Re: Ottawa (City) By-law No. 2011-463,* [2014] CarswellOnt 2270 ("the Westboro Case"):

> At law, planning decisions in Ontario must be led by policy. That is clear from both the Act and the PPS. It is also consistent with the repeated assertions of the Courts and of this Board, that when interpreting these planning documents, the focus must be on their underlying purpose….
>
> The PPS calls for plans to be "integrated"; OP's and OPA's are expected to exhibit some logical consistency.

[64] The City drew particular attention to the following passage:

> Official Plans do not need to specify the exact number of storeys; but if they insist on doing so, then one might expect a coherent policy rationale (as with anything else in an OP), and a consistency of message…. There was no doubt about the OP intent concerning the overall midrise character, as opposed to highrise.
>
> If the City were now to embark upon a different direction, the above is what it would be digressing from. In weighing the merits of charting a new course, the above is what a planning analysis could be expected to address and, if necessary, put aside.

[65] The Board agrees that if the planning system is to be called “policy-led”, in accordance with the PPS, then it is always fair to ask:

- what policy is leading a planning decision, and
- whether it is doing so consistently and coherently.
- It is also fair to ask how a proposed shift in planning positions is underpinned by a corresponding shift in policy.

[66] In all planning matters, the logic of any position deserves explanation. The developer replied, however, that a sound policy rationale did indeed exist for putting aside the OP's existing six-nine storey limit. Part of that argument was economic; and part was planning-based. The Board will address those propositions in turn.

6(c) Project Economics

[67] There was no disputing the City's assertion that a project’s economic "feasibility" is not normally a determinant in Board proceedings. However, the contention here was that the current situation was an exception, because of (i) the uncontested desirability of redeveloping this property, and (ii) the brownfield dimension, which is indeed a proper planning consideration, referenced in the PPS.

[68] The Board agrees with the absolute desirability of redeveloping this property – and cleaning it in the process. There is a manifest public interest in doing so. The question here is not whether this should be encouraged, but how.

[69] Normally, the economics of such a project would be addressed through mechanisms *other* than forcing changes on the OP. Indeed, in this case, there are at least two other mechanisms at hand:

- the BCIP, and
- the developer's contribution of benefits to the City, under s. 37.

[70] The Board was shown no grounds on which it could or should intervene on the former, namely the BCIP. On the other hand, concerning the latter (s. 37 benefits), there have been numerous other cases where the Board has been asked to intervene from time to time, to address the "nexus" between extra density and the quantum of s. 37 benefits. If the developer had chosen to dispute the level of s. 37 benefits to be contributed, that topic would have been within the Board's jurisdiction to address.

[71] But no economic evidence was offered by either side. The City offered no evidence on why it assumed, in the CDP, that a nine-storey project would indeed be feasible, if decontamination were assisted only by credits under the BCIP. Inversely, the developer offered no evidence on why a nine-storey project was "not feasible", nor did the developer specify why it wanted 12 storeys (or any other figure). The Board was certainly not told whether the project might become more "feasible" under altered monetary arrangements, let alone whether the developer could expect any BCIP credits to be either capitalized or monetized up front (i.e. "made into paper"), to reduce initial capital costs. There was not even any evidence on whether the developer was expected to make cash contributions under s. 37 (beyond commitments to the parkette), let alone whether such contributions might be reduced.

[72] The Board is therefore in no position to make any findings based on economic feasibility arguments, except to repeat that it is in the City's interest to encourage the redevelopment of this property by whatever means reasonably at its disposal.

6(d) The Planning Documents and the Two-Track System

[73] As explained, it is the Board's duty to apply the overall planning framework. The City argued that a vision for the site had been outlined in the CDP and the Secondary Plan. The City emphasized that the Secondary Plan was a recent document (2011), reflective of the most updated thinking about planning.

[74] The Board agrees that it is the binding policy document most specifically tailored for this area, and is therefore the most relevant. Indeed, the Secondary Plan states that it applies "notwithstanding the (generic) policies of the Official Plan." However, this short document – with less than two relevant pages – did not purport to offer a detailed vision. On the critical subject of height, it simply prescribed two tracks:

- On one track (which the Board calls "track 1"), one kind of development – up to six storeys – could proceed as of right, subject to zoning.

- On the second ("track 2"), more intensive development – up to nine storeys – could proceed if the City were satisfied with the benefits offered under s. 37, as "identified in the Community Design Plan."

[75] So the "default setting" was up to six storeys, but s. 37 benefits (*per* the CDP) could increase it to nine, like the nearby Metro site. Indeed, the *only* specified distinction, between eligibility for six storeys and eligibility for nine, was provision of those s. 37 benefits.

[76] The developer inferred that if the Secondary Plan already allowed nine storeys (conditional on benefits), then nine storeys became essentially a new default setting. By that reasoning:

- since the developer was already confident that it could satisfy s. 37 and obtain its nine storeys,

- then *further* attractive features (notably decontamination and quality

architecture for this gateway location) should entitle it to yet further incremental density – beyond nine storeys.

[77] The developer added that this incremental density would not add *too* much to the actual height of the building, measured in metres.

[78] The City replied that the default setting remained six storeys (track 1). The OP had *already* anticipated upward adjustments, but those adjustments – for whatever reason, including but not restricted to s. 37 – would stop at nine (track 2).

[79] The Board has sympathy for both parties in this dispute. Not only did the developer engage in "exemplary" consultation; the Board can understand the developer's frustration at being limited to the same nine storeys as the nearby Metro site – despite major *additional* obligations being imposed upon it, notably decontamination. On the other hand, the Board also understands the City's apprehension that if nine storeys became the "default setting", then it could spell the end of its vision for a "village" feel along the corridor, before that vision had barely started.

[80] The Board's duty, however, is to consider and interpret that Secondary Plan, and its intent.

[81] At first glance, this two-track system itself could look crass. A casual observer might assume that the City laid down one set of rules for what it considered "normal" development – and a second set for entrepreneurs who showed the colour of their money. Elsewhere in Ontario, cynics have argued that some municipalities sell upzoning because they are more interested in cash than in the credibility and enforcement of their planning documents. The Act, however, had legalized such arrangements since 1983, under what is today s. 37.

[82] Some other Ontarians take the ideological position that it is entirely appropriate to "make developers pay" for intensification (as if it were developers who paid, not consumers). As mentioned at the hearing, one Board case in another municipality heard

a senior municipal official (retired) who 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." That opinion is shared by a number of municipalities and developers alike.

[83] Parenthetically, the above view, sometimes labeled "Let's Make a Deal Planning", is not shared by this Board. At the current hearing, the Board alluded to its decision in *Sterling Silver Development Corp. v. Toronto,* [2005] O.M.B.D. 3032:

> The *Planning Act* is not a bazaar. Statements in an Official Plan are supposed to articulate a vision for the municipality, not just to be "triggers" for the opening of negotiations. And those discussions do not proceed in a vacuum: urban form should depend on planning principles, not on who can haggle the longest and best.

[84] As mentioned, a superficial reading of the Secondary Plan's two-track system might suggest that it set the stage for precisely the kind of haggling that the Board complained of above. On closer analysis, however, the Board finds that the Secondary Plan is not as crass as one might first think. The Board reaches that conclusion, not only on the ground that such documents deserve a purposive and benevolent interpretation, but also on close scrutiny of the CDP, as explained below.

6(e) The Crux of the Planning Documents

[85] Although the Secondary Plan does not incorporate the CDP into the OP in its entirety, it does instruct that the CDP be used to "interpret" the Secondary Plan itself.

[86] Though some observers might jump to the conclusion that the Secondary Plan is an overt grab for s. 37 benefits – notably money for a parkette – the Board is not so quick to infer strictly mercenary motives. That is because the CDP spells out what those "benefits" are – and links them to five specific objectives. The first four are:

- "public open space",
- "art",

- "affordable rental housing", and

- "daycare."

[87] The fifth listed “benefit”, explicitly equated with s. 37, was “*extraordinary and innovative architectural features*.” In other words, what the City was seeking under this "benefit" was not cash at all, but a high-visibility improvement in built form.

[88] No other purposes are listed beyond the above five. However, there are other references to the pivotal importance of architecture:

- One is in the enumeration of demands by community public opinion. The CDP said the community called for "incentives" – for the specified purpose of "better quality building results.”

- That was not the only CDP reference to what should be supported by "incentives." Elsewhere, the CDP recommended incentives for two recurring purposes:

> Use development incentives at specifically identified locations to achieve better end results for *built form* and *public spaces*. [Emphasis added]

[89] The word "incentive" does not appear anywhere else in the CDP, except in reference to the BCIP. The inescapable conclusion is that where the CDP proposed to *encourage* extra development – development which might not otherwise occur, e.g. beyond the "default setting" – it was with the stated intent of improving:

- “built form” and

- “public spaces.”

[90] The Board concludes that those objectives are clearly integral to the thrust, intent and purpose of the CDP’s approach and, by extension, the Secondary Plan’s. They are also consistent with and complementary to the "scenic" function of Island Park Drive.

6(f) The Debate over the Extra Storeys

[91] Although the above "benefits" and their purposes were evident from the planning documents, the hearing heard little discussion about "incentives" for "built form". Other architectural aspects were addressed in more depth. As mentioned:

- the City acknowledged the project's general architectural quality, but maintained its reservations concerning the upper floors.

- The same could be said of the Minutes of the Urban Design Review Panel (UDRP), discussed later.

[92] The Board attributes the debate over the upper storeys to three factors:

- height (measured in storeys and/or metres),

- angular plane, and

- the purported incompatibility between the project and the neighbourhood.

[93] The Board will address the above in reverse order.

[94] The City argued that the local "community character" and "village feel" would be compromised by a move from nine storeys to twelve. The Board was not persuaded by that objection at this specific site. Though character and compatibility are normally important in principle – and important here, notably for the pedestrian experience at street level – the Board is mindful of two factors. First, the podium will indeed be at a village scale of three storeys (which is more than can be said for the relatively recent six-storey building next door, which has no podium at all).

[95] Second, the City had endorsed redevelopment of up to nine storeys – already a dramatic digression from the area’s traditional scale. The Board was shown no evidence demonstrating why further digressions from that height would represent striking

incremental erosions of that existing street character.

[96] There are, however, other factors which call for particular caution:

- One is the longstanding planning emphasis on this location's "scenic" function along Island Park Drive.

- Another is the planning vision elsewhere around this intersection – and the total lack of any reference to highrises, at heights over nine storeys.

[97] Subject to one key exception, described later, the Board found no authority for the proposition that buildings here could exceed nine storeys.

6(g) The Measure for Height

[98] The developer countered that the increase in height was modest, and was justified by positive planning features, notably decontamination, and a "landmark" at this gateway. The City replied that at 12 storeys, the project was not only physically and visually taller than the OP anticipated, but was also in a different planning *category* (“High-rise”) than what the OP anticipated (“Mid-rise”).

[99] The developer argued that this focus on the number of storeys suggested that the Secondary Plan was intrinsically flawed. It is "bad planning", said the developer's planner and counsel, for an OP to specify actual numbers, e.g. for permitted height or otherwise. They said that such specificity, like performance standards, belonged rightfully in a zoning by-law, not an OP. The Board heard the same argument in the Westboro case; it discounted that opinion then, and it does no differently now. There is no binding rule against such specificity in an OP.

[100] Furthermore, this OP not only addresses height in terms of storeys; the latter are also integral to the methodology of how this OP distinguishes between midrise and highrise structures, predicated on the number of storeys, not the metres of altitude.

6(h) The Argument about Trade-Offs

[101] As mentioned, the developer essentially argued that it was reasonable – and "good planning" – to compromise on the Secondary Plan's height limit, in return for (a) decontamination, and (b) a "landmark".

[102] As for brownfield remediation, the Board does not dispute the positive features of this project. However, the fact that a project involves brownfield remediation does not, by itself, give it automatic carte blanche *vis-à-vis* the OP. The question remains whether the overall policy framework would support the proposed OP change.

[103] Counsel for the City replied that:

- The CDP had *already* addressed brownfields in detail. If one wanted "incentives", to encourage redevelopment in brownfields, the *BCIP* was the named mechanism, not an increase in density.

- So it was clear, even from a cursory reading of the CDP, that brownfields had already been *factored in*, when the CDP and Secondary Plan set the maximum number of storeys at nine.

[104] The Board is compelled to agree on both counts. In the above planning context, the attractiveness of decontamination, by itself, is not a sufficient ground for the Board to intervene on the subject of height/density.

[105] The proposed trade-off for a "landmark", however, engaged more complex issues, described below.

6(i) "Landmark" Architecture

[106] The other major planning ground was the CDP's call for a "landmark". Indeed, the governing documents border on repetition, in emphasizing "landmark" status, "scenic" function etc. This was clearly a longstanding and overarching priority of the

governing documents. The developer argued that its project answered that description, and that allowances should be made for it accordingly. That raised three questions:

- what was meant by "landmark";
- whether, like brownfields, "landmark" status was already factored into the nine-storey limit specified in the CDP and the Secondary Plan; and
- whether the current project entirely met the definition of "landmark."

[107] The Board addresses those questions in turn. First, as mentioned, the OP refers specifically to both "landmarks" (with "highly distinctive" architecture), and routes that are "scenic." The developer argued that one way to make a project "stand out" was size. The Board was not persuaded that this was countenanced by the OP glossary definition of "landmark", which focused not on scale, but on architecture/design.

[108] The Board notes parenthetically that there have been hazards in drafting planning documents which allude to architecture, let alone scenery. Saying that a project's architecture has "landmark" status is arguably an aesthetic judgment. One view, fashionable in some quarters until recently, was that this was even illegal, on the assumption that "architectural" and/or "scenic" considerations had no place in Ontario's planning process. However, the Board discounted that opinion in its decision in *Greater Ottawa Home Builders Association et al. v. City of Ottawa*, issued on March 8, 2013. Architectural objectives and assessments are not a forbidden topic.

[109] However, they are open to concern from time to time, on the ground of subjectivity. That includes concern expressed by the Board itself, e.g. in *Re Ottawa (City) By-law No. 2013-110,* [2014] CarswellOnt 1330 (“the George Street Case”):

> The longstanding objective of the planning process, in Ontario, has been to make the terms for development less subjective and more predictable – for the benefit of municipalities, developers, and the public alike. At the core of that approach lies the conviction that the evolution of Ontario's built environment should not depend on subjectivity, personal taste, or whim, but rather (in the language of the PPS) on a framework that is

> "policy-led." If a project fits poorly within a municipality's approved policy framework, it is an inadequate response simply to invoke some officials' aesthetic opinion about "excellence of design", no matter how well-intentioned.

[110] However, there is a key distinction. In the George Street Case, the Board found that subjective judgments by officials were being invoked to compromise established OP principles. It is a different matter where an OP, duly adopted and in force, specifically directs exactly such an assessment. If planning documents clearly call for "landmarks" of "highly distinctive architectural form" (and potentially with "architectural features" of a given status), let alone a “scenic” function, then any decision-maker – including this Board – would be remiss in *not* considering that instruction.

[111] Indeed, the language of this City’s planning provisions appears to allude to three distinct categories of architectural significance:

- At a first level, there are projects which display quality design. The difficulty there, as the City observed, is that OP s. 2 says *all* projects must be "well-designed.” The OP calls that attribute "critical" everywhere, not just for "landmarks." There is nothing remotely “distinctive” about that, at least from an OP perspective.

- There is a second or intermediate level. To be called a "landmark", says the OP glossary, a project must also display "architectural form which is highly distinctive relative to its surrounding environment.” That would suggest a standard significantly more demanding than good quality. Furthermore, it specifies that the project cannot be merely "distinctive", but must be "*highly* distinctive."

- The topmost level is for projects displaying "extraordinary and innovative architectural features." Such a project here would not only be a "landmark", but would also qualify for treatment equivalent to a s. 37 contribution.

[112] In short, in this City's policy framework, a "landmark's" architecture represents a level which is more "highly distinctive" than good quality buildings generally, though not necessarily to the point of being "extraordinary." The Board finds nothing improper in a municipality actually *planning* for same – and formally setting the bar accordingly, assuming that the mechanics can be arranged as methodically and objectively as possible. The intent of those provisions was to foresee a project with what, in the vernacular, the Board would call an element of "wow."

[113] The next question was whether "landmark" status had already been factored into the Secondary Plan's nine-storey height limit, like brownfields. At first glance, one might surmise that it necessarily had. The CDP had devoted as much attention to "landmarks" as to brownfields. Furthermore, since any project here was *already* expected to be a "landmark", then one might assume that by necessary implication, the planning documents anticipated no exception to the nine-storey limit on that account either.

[114] On closer analysis, however, there are difficulties with that position. In the case of both brownfields and "built form", the CDP had recommended "incentives." In Ontario, one of the most common forms of "incentives" for development is an increase in density. On that point, however, the CDP appeared to make a crucial distinction:

- For brownfields, the CDP appeared to specify exactly what mechanism should be used for that purpose – namely the BCIP, not other mechanisms (like an increase in density).

- In contrast, if one wanted "incentives" for "built form", no exact mechanism had been specified. Unlike brownfields, the question remained: if an increase in density was *not* intended, then what other "incentive" did the planning documents anticipate? The Board found no satisfactory answer.

[115] And "built form" is pivotal here, on this "Scenic Entry Route" – which has been a beautification priority for a century. This site had been intended as a showcase location since 1910 – for which one would similarly expect a showcase project.

[116] The Board attaches weight to that “landmark” objective. The clear thrust of the planning documents was to produce architecture which was "highly distinctive" from surrounding projects (not to mention "scenic"), to the point of recommending "incentives" to assist "built form". On the other hand, since those documents had not already tied those "incentives" to any one predetermined mechanism, then the planning documents appeared to provide leeway as to what that "incentive" mechanism might be.

[117] In short, distinctive and scenic built form was an overarching objective, for which incentives were not only acceptable (without restriction as to format), but recommended.

[118] This theme of "built form" and "landmarks" should not be considered in isolation from the planning documents' interest in angular planes at the top of the building. Granted, their best-known purposes were to limit shadow at street level, and mitigate the effect of a building's bulk "looming" over the streetscape. However, there was little evidence that those aspects would play a major role at this specific location, and the overwhelming majority of neighbour witnesses discounted them overtly.

[119] However, the above are hardly the only possible planning purposes for angles at the top of buildings. For years, they have also been used as an architectural flourish. This is so, even when they are high atop the street, with little effect on overall shadow or bulk. Indeed, several well-known projects have used angles, near the top of buildings, to dramatic architectural effect. Arguably the most high-visibility examples are projects like the TD tower of Brookfield Place in Toronto, 1 Detroit Center in Detroit, and two well-known highrises in Montreal, at 1501 McGill College Avenue, and 1000 de la Gauchetière. Those are all projects where the symmetrical angles at the roofline contributed unmistakably to its "landmark" status, though the angles were usually closer to 60 degrees than 45.

[120] In short, planning objectives for angular planes can be entirely complementary to "landmark" and "built form" objectives. The Board will return to that question later.

[121] The next pivotal question was whether this project met the definition of a

"landmark." That question was a recurring theme in the paper trail. The staff report duly noted the competing views:

- It remarked that some people considered the project "a landmark building for Westboro and Ottawa",

- whereas others said "the design is not considered exceptional to garner consideration of these applications."

[122] The City's "staff response" offered no comment. The Board infers that if the project had been noticeably ineligible for "landmark" status, because of shortcomings in design, staff would presumably have said so. However, staff simply observed that "the proposal is subject to the City's Urban Design Review Panel Process."

[123] The UDRP Minutes, for their part, contained two pages of comments, from a meeting on November 7, 2013. "The project has a number of positive initiatives, such as the proposed remediation of the site, the redesign of (the parkette area)… for which the Panel applauds the proponent's efforts." Again according to the Minutes:

- The Panel nonetheless objected to the 12-storey height.

- It said that "because Island Park Drive is a Scenic Route, additional studies should be dedicated to the north-west corner and the entire west façade of the building."

- Otherwise, there was no suggestion that the UDRP had any major disagreement with the architectural approach.

[124] Again, the Board infers that if this expert body raised no objection to "landmark" status, it was because it had none – *except* on two recorded questions. The one about the northwest corner and west façade was subsequently addressed.

[125] The other, about the upper storeys, was not. The UDRP clearly viewed the upper

storeys as a negative, and the Board heard no evidence to suggest that this opinion would be any different today.

[126] At the Board hearing, counsel for the developer pressed the City's expert to call the *entire* project a "landmark"; but although there was noticeable enthusiasm about the base/podium and its interface with the pedestrian realm and neighbours, there was no positive comment about the top. Indeed, the best that could be said about it was that if it were finished in glass, then hopefully, people might not notice that it was there (at least in daytime).

[127] The Board offers no comment on whether that is a way to make architecture “highly distinctive."

[128] In fairness, the Board is compelled to note contradictory signals in the planning documents. On one hand, they call for “landmark” architecture that "stands out”; on the other, they call for “village” architecture (or the like) that blends in. For example, at the top of the project, there was clear uncertainty as to whether the architecture should draw attention to the upper floors, or have them "disappear into the sky." The Board finds that it is one thing to ask for street-related parts of the building to integrate with their “village” surroundings; it is another to ask for a tower portion, high above that streetscape, to both "stand out" and "blend in" simultaneously.

[129] The developer's witnesses nonetheless argued that, as a whole, the project was sufficiently distinctive to meet the OP definition of a "landmark", including the design of its top. Nothing in the City's materials or testimony agreed that the top was "highly distinctive", or agreed that the extra storeys made any positive contribution at all.

[130] More importantly, the Minutes of the UDRP did not do so either. Not one word.

[131] That is problematic. It is the extra storeys at the top for which an incentive is being sought, under the rubric of complementing overarching planning objectives. The Board would have expected more substantial evidence, to confirm that the extra storeys

contributed to its "landmark" or “scenic” character, and hence *qualify* for the desired exceptional treatment.

[132] On those evidentiary grounds, the Board could not reach that conclusion, concerning the extra storeys at the top. The Board therefore cannot allow the appeal at this time – though subject to the caveat below.

7. RECAPITULATION, OPTIONS, AND CAVEAT

[133] This is a showcase location. Indeed, far from representing a possible new "default setting" for development along the corridor, its planning features are unique. Its location is at the convergence of a dying "Highway Commercial" area with a Scenic Entry Route including elements of an embassy row. It is a site for which "incentives" were specifically foreseen. Indeed, its future is planned to be not only "scenic", but a "gateway" and "landmark" – plus a brownfield remediation site. That is a combination which would be difficult to replicate anywhere else in Canada.

[134] As a general principle, the Secondary Plan takes a consistent approach to midrise development throughout the Wellington corridor – and the planning vision across the intersection, to the west, is for even lower midrise development (up to only six storeys). Subject to the exception below, there is nothing in the governing documents to suggest otherwise. The Board found no compelling reason why a project beyond nine storeys would normally fit any of those parameters.

[135] There is one key exception, which reappears persistently in the governing documents. Not only was this location planned to be "scenic"; there was also supposed to be "landmark" architecture, with the support of "incentives" for "built form."

[136] There was no dispute that *most* of the project qualifies. It looks distinguished, in accordance with the character and function of Island Park Drive. It is distinctive, without being eccentric.

[137] However, the Board was not satisfied that the evidence of distinctive "landmark" status noticeably extended to the top of the building – the very part for which exceptional treatment was being sought. There was nothing to prove that the extra storeys qualified.

[138] The Board was therefore not persuaded that the extra storeys were sufficiently aligned with the planning framework, and the underlying principles of good planning, to warrant the Board's intervention at this time. That leaves the developer with two options:

[139] **"Option A"** is to abide by the OP, i.e. for the developer to reduce its project to nine storeys – the existing project, minus the top three storeys.

[140] In that truncated version, there was no apparent dispute that *some* terracing at the top would complement the overall architectural vision. That is akin to the terracing displayed in the current 12-storey proposal, though three storeys shorter. However, that terracing falls short of the 45-degree angular plane which the City is calling for.

[141] The Board was not convinced that the 45-degree figure should be applied rigidly here. Though the Board expects the top of the building to be consistent with "landmark status", the rationale for the 45-degree plane is less relevant here than elsewhere in the corridor: in the absence of significant concerns by neighbours about shadow and bulk, and in the absence of a dramatic need for an architectural flourish for the top storeys (because they are being eliminated), the Board was not persuaded that a rigid angular plane, *per* the Zoning By-law, was particularly useful here.

[142] **"Option B"** is to continue seeking a project higher than nine storeys. As explained, this would not normally be feasible; but at this location, the governing documents outline an exceptional planning priority, namely creation of a "landmark" which is also "scenic", potentially with the help of "incentives" for its "built form."

[143] To qualify for "landmark" treatment here, the architecture must exhibit the *following:*

A. If the developer claims that the extra storeys qualify for exceptional treatment, because they contribute to "landmark" status, then it must prove it. The focus here is not the landmark features of the rest of the building, but specifically the landmark contributions of the top.

B. The Board takes no position on the ideal number of storeys. Although the hearing focused on the number twelve, the Board was not shown why that figure would be any more or less significant than any other figure above nine. The test of *contributing to landmark status*, at the top, is the same, regardless of the number of storeys involved.

C. It is not sufficient for the project to be "well-designed." Landmarks must additionally be "*very* distinctive." Granted, they need not be "extraordinary" (though if they were, they would be akin to a s. 37 contribution here). They must nonetheless "stand out" from the background "by virtue of their design." The Board has referred to this aspect as "an element of wow."

D. This project is also on a "Scenic Entry Route." Though the OP does not define "scenic", the Concise Oxford Dictionary does, and refers to "picturesque in (a) grouping." That is consistent with common parlance.

E. The Board deduces that it is not sufficient for a project to "stand out" merely on the basis of eccentricity, or adherence to some doctrinal theory, of interest only to textbook writers. At this high-visibility location, the top should contribute to the ambience being "picturesque".

F. That is consistent with the elegant and distinguished approach to the rest of the building (on which there was no dispute), and the character and function of Island Park Drive.

G. The Board expresses no opinion about the parties' previous discussions about the top "disappearing into the sky." The Board only observes that, at

best, such an objective would apply to only certain hours of the day, and that in any event, the upper floors must still display that "element of wow."

H. The Board takes no position on the ultimate shape of the topmost floors, and how it could meet the above criteria. The Board would nonetheless expect that a design which digressed the least from the planning documents would be one with an architectural flourish, involving roof angles in the vicinity of 40-60 degrees, similar in concept to the examples cited earlier.

I. The Board continues to assume that the two lots on the site will be developed together.

[144] The Board is not thereby suggesting that the above description of a "landmark" here is exhaustive.

[145] As mentioned, the redevelopment of the site is in the City's interest, and in the public interest. The Board is also mindful that the developer had undertaken "exemplary" initiatives. The Board finds that it would be appropriate, in principle, for the parties to make one last attempt at identifying a solution that was consistent with the thrust of the planning documents, and to satisfy the Board in that regard.

[146] The Board is vested with relevant powers under the *Ontario Municipal Board Act*. In particular, the Board has the authority to withhold its Order, and/or to suspend its proceedings pending new evidence. Here, the Board is prepared to give the parties six months to consider one or more revised designs, whether for "Option A" or "Option B", and to provide the Board with evidence of same.

[147] The process will be as follows. If the developer chooses to proceed with the project at this time, it will pursue Option A or Option B, though nothing prevents it from pursuing both, in the alternative.

[148] Under the terms of his Acknowledgment of Expert's Duty, the developer's architect, Mr. Burstyn, undertook to provide the Board with not only opinion evidence that was "fair, objective and non-partisan", but also "such additional assistance as the Board may reasonably require, to determine (the) matter in issue." If the developer wishes the Board to consider a revised proposal – whether under Option A or Option B (or both, in the alternative) – then the Board would expect it to be advised of his expert opinion on how the top of any new proposed design(s) would objectively meet criteria “A” – “I” outlined on the previous pages of this decision.

[149] Under exactly the same terms, the Board would expect to be advised of the expert opinion of the City's planner, Mr. Herweyer.

[150] Under s. 34(24.3) ff. of the Act, the above is new information which could have materially affected Council's decision. It thereby triggers s. 34(24.5), which affords Council the opportunity to make a written recommendation to the Board, to which the Board shall have regard.

[151] The Board would expect the timing, for the above events, to be addressed by agreement of counsel. If there are difficulties, the Board may be spoken to.

[152] The Board expects to be advised of the outcome of the above, at a date up to six months from the issue of this decision. At that point, the Board will arrange to reconvene this hearing, or take such other measures as it considers appropriate.

8. CONCLUSION

[153] The Board adjourns these proceedings, pending receipt of further written evidence, from the developer and the City, of one or more revised proposals in accordance with "Option A" and/or "Option B” described herein.

[154] That written evidence, also described herein, shall be submitted to the Board within six months of the date of issue of this decision. If there are difficulties, the Board

may be spoken to.

[155] At that time, the Board will make such further arrangements or dispositions as are necessary.

"M. C. Denhez"

M. C. DENHEZ
MEMBER