

ISSUE DATE:

Feb. 26, 2009



PL060850

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

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: PROUD Port Dalhousie (Port Realizing Our Unique Distinction)
Appellant: John Bacher
Appellant: James and Marilyn Minards et al
Subject: By-law No. 2006-228
Municipality: City of St. Catharines
OMB Case No.: PL060850
OMB File No.: R060208

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: PROUD Port Dalhousie (Port Realizing Our Unique Distinction)
Appellant: John Bacher
Appellant: Barbara Chambers et al
Subject: Proposed Official Plan Amendment No. 31
Municipality: City of St. Catharines
OMB Case No.: PL060850
OMB File No.: O060218

IN THE MATTER OF subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Subject: Site Plan
Referred by: Port Dalhousie Vitalization Corp.
Property: 16,20,20A,22 Lock Street, 1 Hogan's Alley, 12 Lakeport Road, 11
Address/Description: Main Street
Municipality: City of St. Catharines
OMB Case No.: PL060850
OMB File No.: M070079

IN THE MATTER OF subsection 42(6) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Subject: Refusal of Heritage Permit
Referred by: Port Dalhousie Vitalization Corp.
Property: 16,20,20A,22 Lock Street, 1 Hogan's Alley, 12 Lakeport Road, 11
Address/Description: Main Street
Municipality: City of St. Catharines
OMB Case No.: PL060850
OMB File No.: M070073

APPEARANCES:

<u>Parties</u>	<u>Counsel*/Agent</u>
Port Dalhousie Vitalization Corporation	M. Noskiewicz* I. Andres*
PROUD (Port Recognizing Our Unique Heritage)	J. Pepino*
City of St. Catharines	A. Poulin*
Jeff Loucks et al	J. Loucks
Regional Municipality of Niagara	M. Kyne*
Hank Beekhuis	
Dorothy McKenzie	
Albert Berry	T. Hildebrand

DECISION DELIVERED BY SUSAN B. CAMPBELL AND ORDER OF THE BOARD

The subject site is comprised of a number of properties totalling .46 hectares in the commercial core of Port Dalhousie. Port Dalhousie is a heritage conservation district designated under Part V of the *Ontario Heritage Act, 1990* (the “Heritage Act”). The site is bordered by Main St., Lock St., Lakeport Rd. E., and a municipal road servicing Lakeside Park (known throughout this hearing as “the street with no name”). Hogan’s Alley, a municipal road, runs through the site and it is proposed that it be included in the development. The proposed development also includes an encroachment into a City road allowance.

The site is currently developed with a number of buildings: the Austin House hotel, Erskine’s Pharmacy and the Hydro Building on Lock St., the Rum Jungle and the Jail House on Main St. and the Port Mansion (McGrath and Union House Hotels) on

Lakeport Rd. E. The buildings and all the open spaces within the subject site are part of the Port Dalhousie Heritage Conservation District (the "PDHCD").

The development proposal which is before the Board includes a residential condominium building of 17 storeys, stepped down to 8 storeys and then 6 storeys, containing 80 units; a hotel with approximately 70 rooms; a 400+ seat theatre; redevelopment of existing commercial space to provide a variety of commercial uses, including retail, restaurant and office space within 3 to 4 storey buildings; an underground parking facility; and a publicly accessible, open-air plaza located in the interior of the site.

The proposal includes Hogan's Alley and a portion of a City road allowance, which are not owned by Port Dalhousie Vitalization Corporation ("PDVC"). PDVC seeks to acquire those lands, but the Board notes that regardless of its decision in this matter, it has no authority to order the City of St. Catharines (the "City"), the owner of the lands, to sell them to PDVC. PDVC has also put before the Board an alternative development proposal which contains most of the elements of the primary proposal, but which would not necessitate the acquisition of City-owned land.

The History of These Applications:

PDVC originally applied for amendments to the City's Official Plan (the "OP") and the City's Zoning By-law (the "ZBL") in September 2004. These applications were in respect of a development proposal (the "Diamond Scheme") which included a 30 storey condominium building. That proposal was reviewed by staff of the City and a heritage peer reviewer, and staff, in a report dated October 26, 2005 recommended that City Council deny the applications (Exhibit # 5e, TAB 3). These applications did not go to City Council for consideration as PDVC withdrew the applications (Letter from Sullivan Mahoney to Mayor Rigby and Council, Exhibit # 135). No planning report was publicly presented and no public meeting was held (Report to General Committee, October 31, 2005, Exhibit # 136). PDVC specifically requested that the Planning Report not be circulated (email Smart to Pihach, October 26, 2005, Exhibit # 134).

As was its legal right, PDVC revised its development proposal and submitted a new application to amend the City's OP and ZBL in February 2006. The Board heard evidence from a number of witnesses that this revised proposal came forward after Mayor Rigby formed a committee of citizens to attempt to work with PDVC on such a

proposal. The work of this group, and the fact that a new architect, Michael Kirkland, had been retained by PDVC was reported in the St. Catharines Standard on January 10, 2006. While there seemed to be a suggestion by some witnesses at this hearing that the Mayor's Committee and the revised proposal were evidence of secret, behind the scenes, machinations, the Board finds such a suggestion to be unproven and irrelevant. Interested citizens, who oppose a development proposal, have every right in this province to organize, seek resources and work through the system to defeat such a proposal. Equally, citizens who support a development have the right to organize, seek resources and work through the system for approval of such a development. Certainly, a Mayor, concerned about the future of his city, can bring citizens together to work on that future. This Board will therefore read nothing sinister into how the revised PDVC proposal came to fruition. Rather, it will focus on the merits of the proposal.

Having received the applications in February 2006, the City apparently focused on substance. As the subject property is in the PDHCD, the subject of heritage conservation was of critical significance. The City therefore retained an eminently qualified heritage architect, Michael McClelland, who specializes in heritage conservation, heritage planning and urban design to "conduct a peer review of urban design and architectural elements associated" with PDVC's new proposal. Mr. McClelland had peer reviewed the first proposal and found it wanting. Mr. McClelland prepared a peer review on the new proposal and provided it to City staff (Port Dalhousie Vitalization Corporation Peer Review, April 28, 2006, Exhibit # 5e, TAB 5).

City staff reviewed PDVC's new proposal and prepared what the Board characterized during the hearing, as the most thorough, comprehensive staff report it had ever seen (Exhibit # 5e, TAB 6). The staff report is 29 pages long and contains some 240 pages of appendices. These appendices include the McClelland Peer review, the Report of the St. Catharines Heritage Committee, April 2006, and the Report of the Port Dalhousie Heritage District Advisory Committee, March 16, 2006. It reports on the Information Meeting for the public which was held on March 21, 2006 and which was attended by approximately 800 members of the public and a number of PDVC consultants. The report details the concerns of objectors.

City Council then held public meetings on June 13, 14, 15, 20, 21 and 26, 2006. Council heard 65 people speak in opposition to the proposal and 53 people, including

PDVC representatives speak in favour of the proposal. After these public meetings a further staff report was prepared for Council's consideration (Exhibit # 5e, TAB 7).

Staff recommended approval, of the OPA and zoning by-law applications. Council voted to approve the applications (Exhibit # 5e, TAB 8). By-law No. 2006-227, adopting Official Plan Amendment No. 31 (OPA 31) and By-law No 2006-228 were enacted on July 31, 2006. These two instruments allow for the development of the PDVC proposal.

Council of the Regional Municipality of Niagara (the "Region") approved OPA 31 on October 25, 2006 (Exhibit 3 5f, TAB 18) despite the fact that it received a staff report recommending that OPA 31 not be approved.

Subsequently a number of parties appealed the adoption of OPA 31 and the enactment of the ZBLA. In November 2006 the membership of City Council changed, following a municipal election.

On March 5, 2007 City Council, newly constituted, considered a Report from the Planning Services Department, Concerning Appeals to the OMB of OPA 31 and By-law 228 (Exhibit #5f, TAB 19). To permit new Council members who had not attended the mandatory public meeting on the PDVC proposal to consider and vote on this report, Council voted as follows:" "that Section A5 of the Procedural By-law, entitled 'Suspension of Rules' be applied to suspend Section E5, entitled 'Where Member Not Present at a Mandatory Public Meeting' in order that all members shall be allowed to consider and vote on Item No. 130 of the General Committee Minutes, March 5, 2007".

The staff report reviews the reasons for appeal raised by various appellants and says "these concerns were raised as part of the planning review process and were considered prior to the original recommendation by staff to approve the applications. Staff continues to support approval of the applications, as approved by Council in its original decision dated July 31, 2006" (emphasis added).

Staff then gave Council options on how to proceed:

1. ask the OMB to dismiss the appeals; that is, support the original decision of Council;

2. recognize the appeals as valid and repeal By-laws 2006-227 and 2006-228. Staff noted that Council would be required to have a public meeting before repealing the by-laws (emphasis added);
3. direct staff to seek to have the appeals dismissed as they are “insufficient to justify a hearing”;
4. do nothing, direct staff to attend the hearing only under subpoena.

Staff recommended that Council direct staff to attend the hearing to defend Council’s position on OPA 31 and the zoning by-law and ask the Board to dismiss the appeals and direct that no changes be made to the by-laws.

Council moved *in camera* to consult with the City Solicitor and when it returned the following resolution was adopted: “that the City Solicitor be directed to attend the Ontario Municipal Board hearing to convey Council’s position that the majority of this Council does not support the decision of the previous Council; and that the City Solicitor be directed to indicate to the Board that the heritage application be commenced immediately in order that the Ontario Municipal Board may deal with both the rezoning and heritage applications simultaneously” (Exhibit # 5f, TAB 20).

The Board has reviewed the history of the municipal processing of these applications in such detail as Counsel for PROUD, in her opening statement asked “that the Board be cognizant of the flaws inherent in the previous Council’s approval of the Official Plan and Zoning Amendment Applications”. She maintained that a “flawed process” led to the approvals. On the other hand, she said that “the ‘public interest’ of St. Catharines was clearly expressed in the last election, resulting in a mandate given to Council. Council has exercised this mandate by opposing approval of this development. It is that most recent resolution of Council, currently in force, to which the Board should ‘have regard’ when determining whether this proposal is in the greater public interest”.

With respect to Counsel’s submission that the public interest to which the Board must have regard, is expressed through a vote in a municipal election, the Board finds that this is not the case. The public interest to which this Board must have regard is expressed through planning documents like the Provincial Policy Statement, the Growth Plan for the Greater Golden Horseshoe, municipal official plans and secondary plans and regional official plans. These documents result from a thoughtful and

comprehensive consideration of the long term health and viability of this Province and the municipality in question. Public opinion as expressed in the heat of municipal elections or passionately contested Board hearings is not necessarily synonymous with the public interest.

The allegation that the process leading to the approvals of the OPA and the zoning by-law was in some way flawed and that the process followed by the reconstituted Council was superior, must be given serious consideration by this Board as it discharges its responsibility under section 2.1 of the *Planning Act* (the "Act"). Section 2.1 provides that in making a decision under the Act, the Board shall have regard to the decision of municipal council and any supporting information and material that council considered in making its decision.

It is the position of PDVC that the Council which adopted OPA 31 and enacted By-law 2008-228 followed an "exemplary process". In his closing submissions Counsel for PDVC summarized that process: Council held a series of public meetings on the applications, including a seven day public meeting during which it heard from over 100 deputants, both for and against the proposal; Council considered the expert reports prepared in support of the applications; Council considered peer review reports prepared by heritage/urban design and traffic/parking experts retained by the City; Council considered advice from the St. Catharines Heritage Committee and the PDHCAC; and Council considered comprehensive reports and recommendations from City planning staff.

Counsel for PDVC contrasts this to the process followed by the new Council, which he described as "less than exemplary". Council, in deciding to reverse the decision of the previous Council and oppose its own by-laws, held no public meetings and considered no planning or peer review reports on the merits of the PDVC proposal. It did not repeal by-laws which it believed should no longer be supported; it directed the City Solicitor to attend the Board hearing and "convey Council's position that the majority of this Council does not support the decision of the previous Council".

With respect to the heritage permit and site plan applications, Council decided to request that PDVC submit these applications although staff had made no recommendation on the issue. The previous Council had received advice that such applications were not required to make a decision on the OPA and zoning by-law applications (Exhibit # 5e, p.508).

Finally, when Council made its decision on the heritage permit application it decided that it did not want to receive a report from its planning staff. This was the uncontradicted evidence of Paul Chapman, Director of Planning Services for the City. Rather, it chose to receive a “flow-through report” from the Acting Chief Administrative Officer of the City (Exhibit # 5f, TAB 26). This report set out only the conclusions of the St. Catharines Heritage Committee and the PDHDAC, both of which recommended denying the application. Council refused the heritage permit.

Counsel for PDVC also noted the fact that when the new Council met to decide how to proceed on the appeals of OPA 31 and the zoning by-law, the first thing it did was waive the City’s Procedural By-law rule that requires Councillors who vote on a matter to have attended the mandatory public meeting on that matter. Mr. Chapman testified that the purpose of this procedural by-law is to ensure that elected officials hear all arguments and have access to all relevant materials before making a decision on an issue.

Under cross-examination, witnesses for both the City and PROUD agreed that the process followed by the new Council was not as thorough as that followed by the original Council. Kevin Blozowski, a planner with the City, with responsibility for heritage matters, said the new Council’s process was “inferior”. Wayne Morgan, a heritage planning consultant retained by PROUD, said the new Council “should have held a public meeting”, and Herb Stovel, a heritage expert retained by PROUD, said “the original process was certainly better”.

The Board finds that to give full effect to the words of section 2.1 of the Act, it need rarely explore the history behind how a municipal council reached its decision. However, when the Board is faced with the unusual circumstances of the case at hand, the Board finds that such a history is relevant. To be abundantly clear, the circumstances of this case which the Board can only describe as “unusual” include the fact that the new Council waived a provision of its Procedural By-law which requires that Council members who vote on a matter be present at the mandatory public meeting on the matter; the new Council which decided to reverse the City’s position and oppose its own by-laws decided not to repeal those by-laws; the new Council decided to hold no public meeting and consider no staff or peer reports before deciding on how to proceed.

During the course of the hearing the Board specifically asked Council for the City, the City Solicitor, why Council did not repeal the By-laws if it did not support the PDVC

proposal and agreed with the appellants. The City Solicitor displayed admirable candour when she replied “who can say why politicians do what they do”. Council for PROUD attempted to proffer reasons for Council’s actions, but the Board indicated that as she did not represent the City, her conjecture on this subject was irrelevant.

The Board finds that the decision of the original Council to adopt OPA 31 and enact By-law 2006-228 was the result of a scrupulous, transparent and fair process, a process mandated by the *Planning Act*. In having regard to that decision as required by section 2.1, the Board also has regard, as required by section 2.1(b), to “any supporting information and material that the municipal council...considered in making the decision described in clause (a)”. The Board finds the “supporting information and material” including the reports of experts retained by PDVC, reports of peer reviewers, the comprehensive staff report and the input of over 100 deputants at public meetings, to be demonstrative of a thorough process; a process envisioned by the Act.

The Board contrasts this to the process followed by the new Council. That Council, duly elected by the citizens of the City, had every right to view the PDVC proposal differently than the previous Council. It was entitled to decide that the PDVC proposal was not appropriate for Port Dalhousie. It was given options by staff on how to proceed, including the cost of each option. The Board finds that the option that would have allowed for a fair, transparent and thorough process was that involving the repeal of the by-laws. Such a process would have required a public meeting, and if followed properly would have required a comprehensive review of *inter alia* the City Staff Planning Report of May 15, 2006.

Instead, after waiving the provisions of what the Board finds to be a significant procedural by-law, members of Council who did not sit through days of public meetings, and who cannot, despite what Counsel for PROUD suggests, be assumed to have read hundreds of pages of relevant reports, met in camera and then emerged to direct the City Solicitor “to attend the (OMB) hearing to convey Council’s position that the majority of this Council does not support the decision of the previous Council”.

The Board finds that the process of the new Council does not bear scrutiny. Put colloquially, it does not pass the “smell test”. The waiver of the provisions of a procedural by-law which is undoubtedly intended to guarantee fairness is extremely troubling to this Board. A process which avoided a mandatory public meeting in which all voices could have been heard, and which would have required Council to consider

comprehensive reports, including that of its expert staff, is **not** a process in keeping with the intent of the *Planning Act*. It is not a process giving rise to a decision to which this Board will have much regard.

The Board cannot accept the submission of Counsel for PROUD that it is the most recent resolution of Counsel to which the Board must have regard. If such a resolution is the result of a process which the Board finds is not respectful of the intent of the Act, the fact that it is the most recent resolution is not relevant. Counsel for PROUD put the issue of a “flawed process” squarely before the Board. If any process of Council was “flawed”, it is that on which PROUD relies.

Port Dalhousie Heritage Conservation District – History of the Designation – Effect of the Designation

In 1999, pursuant to By-law 99-380, Council determined that the area of Port Dalhousie should be “examined for future designation as a heritage conservation district pursuant to the *Ontario Heritage Act*” (Exhibit # 5d, TAB 2). This followed a presentation made by PROUD to Council in which PROUD requested the designation. Council determined that a consultant should be retained to undertake a heritage conservation district study of Port Dalhousie and an ad hoc steering committee was struck “to move the process along once the study commences and provide a forum and focus for public consultation” (Exhibit # 5d, TAB 3). Members of PROUD and the Port Dalhousie Business Association were included in the committee.

Archaeological Services Inc. (David Cumming) was retained to do the district study in March 2000. In August he presented the “Port Dalhousie Heritage Conservation District Study” (the “District Study”) (Exhibit # 5d, TAB 4). In March 2001 he presented a more extensive document, the “Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change” (the “District Guidelines”) (Exhibit # 5d, TAB 5).

The District Guidelines, also referred to during this hearing as the “Port Dalhousie District Plan”, “follows on from the Port Dalhousie Heritage Conservation District Heritage Assessment Report that described the heritage characteristics of this Welland Canal port lakeside community in the City of St. Catharines. The report also provided a rationale for the boundary of the proposed district” (Exhibit # 5d, TAB 5, p 156).

The District Guidelines contain an explicit statement of purpose: “the purpose of this document...is to provide guidance in the care and protection of the heritage character of the Port Dalhousie Heritage Conservation District”. The document went on to state “it is worth emphasizing that these are ‘guidelines’. They are intended to provide an objective minimum level of appropriateness for physical change over the coming years” (Exhibit # 5d, TAB 5, p.156.).

In July 2001 Council held a public meeting pursuant to Part V of the *Heritage Act*, in pursuit of the heritage district designation. The District Study was received, and members of the public supporting and opposing the designation were heard. The Minutes of this Council meeting noted, *inter alia*, that the Port Dalhousie Business Association supported the designation, a number of public information meetings had been held and “the guidelines are meant to be flexible to recognize the diversity of the area” (Exhibit # 5d, TAB 6, p. 282).

Council then voted that the area shown on Map 3 of the Heritage Assessment Report Summary be designated by by-law as a heritage conservation district pursuant to section 41(1) of the *Heritage Act*. The policies and guidelines contained in sections 1-6 of the District Guidelines were “adopted”.

On May 21, 2003 City Council enacted By-law 2002-180. Council enacted as follows: “that the area shown on Schedule 2002-180 “A” attached hereto is hereby designated as a heritage conservation district” (Exhibit # 5d, TAB 7, p. 341). The by-law noted in its preamble that the District Guidelines have been adopted by Council. The District Guidelines were not adopted as part of the designating by-law.

The enactment of the designating by-law was appealed to the Board. In a decision issued December 12, 2003 the Board dismissed the appeals finding “the designation of the subject area as a Heritage Conservation District represents good planning and will not have any undue adverse impacts on any person or the environment” (Exhibit #5d, TAB 8, p.349).

The Board has reviewed the December 2003 decision of the Board carefully; there is no indication in this decision that the District Guidelines or “District Plan” was before the Board or that the Board in any way considered the merits of that document. The Board considered and made a decision only on By-law 2002-180 which designated a mapped area as a heritage conservation district.

The history of this designation of the PDHCD is germane as the legislature enacted significant changes to the *Heritage Act* in 2005 (the “New Heritage Act”).

Part V of the *Heritage Act*, which provided for the designation of heritage conservation districts, did not make reference to heritage conservation district plans; municipalities did not have to produce such a plan when seeking to designate a heritage district.

Part V of the new *Heritage Act* contains significant new requirements for the designation of a heritage conservation district. With these new requirements comes an attendant elevation in the legal status of a heritage conservation district plan. Section 41.2(1) of the new *Heritage Act* provides “despite any other general or specific Act, if a heritage conservation district plan is in effect in a municipality, the Council of the municipality shall not (a) carry out any public work in the district that is contrary to the objectives set out in the plan; or (b) pass a by-law for any purpose that is contrary to the objectives set out in the plan”. Section 41.2(2) provides “in the event of a conflict between a heritage conservation district plan and a municipal by-law that affects a designated district, the plan prevails to the extent of the conflict, but in all other respects the by-law remains in full force and effect”.

As a heritage conservation district plan has this determinative status for the purposes of the new *Heritage Act*, and clearly for the *Planning Act*, the new *Heritage Act* sets out in some detail the required content of such a plan, and, significantly, how such a plan shall be adopted by a municipal council.

It is the position of PDVC that the District Guidelines, created under the old *Heritage Act*, do not have the same status as a heritage conservation district plan as required by the new *Heritage Act*. Counsel for PDVC did not argue that district plans which predate the new *Heritage Act* by definition lack the elevated status. Rather he argues that as the new *Heritage Act* sets out a process by which a municipality may adopt such a district plan for the purposes of the new *Heritage Act*, that process must be followed by a municipality for the district plan to be afforded the elevated status. The City has not followed this process with respect to the District Guidelines; therefore the District guidelines do not constitute a district plan for the purposes of the new *Heritage Act*.

The process by which an existing district plan may become a district plan for the purposes of the new *Heritage Act* is set out in section 41.1 of that Act. Section 41.1(2) provides “if, on or before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, the council of a municipality had passed a by-law designating one or more heritage conservation districts, it may pass a by-law adopting a heritage conservation district plan for any of the designated districts”.

Section 41.1(3) provides “if the council of a municipality passes a by-law adopting a heritage conservation district plan under subsection (2), the council shall cause notice of the by-law, (a) to be served on each owner of property located in the heritage conservation district and on the Trust; and (b) to be published in a newspaper having general circulation in the municipality”.

It is noteworthy the Board finds, that section 41.1(4) provides that the same process for the adoption of a post-2005 district plan must be followed for the adoption of a pre-2005 district plan.

The content of a district plan, either pre-2005 or post-2005 is set out in section 41.1(5). A heritage conservation plan shall include,

- (a) a statement of the objectives to be achieved in designating the area as a heritage conservation district;
- (b) a statement explaining the cultural heritage value or interest of the heritage conservation district;
- (c) a description of the heritage attributes of the heritage conservation district;
- (d) policy statements, guidelines and procedures for achieving the stated objectives and managing change in the heritage conservation district ; and
- (e) a description of the alterations or classes of alteration that are minor in nature and that the owner of property in a heritage conservation district may carry out or permit to be carried out on any part of the property other than the interior of any structure or building on the property, without obtaining a permit under section 42.

Section 41.1(6) sets out a consultation process which must be followed before a by-law adopting a district plan; either pre-2005 or post-2005 is passed. Information relating to the proposed district plan must be made available to the public; a public meeting on the district plan must be held and the heritage committee must be consulted. Persons attending the public meeting may make oral submissions; written

submissions may also be made. The enactment of a by-law adopting a heritage conservation district plan is appealable to the Board.

There is no dispute among the parties that City Council, after the new *Heritage Act* came into effect, did not follow the process set out in section 41.1(2) of that Act. Counsel for PDVC argued that as the City did not follow the statutory process, the District Guidelines are not a district plan for the purposes of the new *Heritage Act*. As the process was not followed, no party had the opportunity to make submissions on whether the District guidelines meet the requirements of section 41.1(5), content, or whether they are appropriate for Port Dalhousie. PDVC submits: “as the City did not take the necessary steps to adopt the district guidelines as a district plan under the new *Heritage Act*, nobody was ever afforded the right of appeal in respect of the District Guidelines”.

It is the position of PDVC that as the City did not follow the process set out in the new *Heritage Act*, the District Guidelines are not a district plan for the purposes of section 41.2 of the new *Heritage Act*.

PDVC introduced what the Board finds to be a persuasive piece of evidence to be considered on the issue of whether the District Guidelines constitute a district plan for the purposes of the new *Heritage Act*. The City’s Director of Planning contacted the Ministry of Culture, Heritage and Libraries Branch asking for advice on the issue of the status of pre-2005 district guidelines. Dan Schneider, Senior Policy Advisor, an individual who the Board can only assume has relevant knowledge of the issue, said: “with the passage of recent amendments to the *Ontario Heritage Act*, current Heritage Conservation District by-laws, plans and guidelines have the same status they have always had...New heritage conservation districts will have to follow specific procedures set out in the Act, including the mandatory adoption of a district plan. These districts will have certain ‘enhancements’: district plans will prevail over zoning and other by-laws to the extent of a conflict...while existing plans will not have the enhancements referred to above, they will represent the municipality’s stated objectives and policies with respect to development of the district and should be respected. In matters that come before the OMB...the OMB will look to those plans/policies in reviewing the matter” (emphasis added) (Exhibit # 5e, page 493).

Mr. Blozowski confirmed that the City was aware of section 41.2(1)(b) of the new *Heritage Act* when it passed the by-laws which are now the subject of appeal. He

confirmed that there is no record of Council having received any legal advice at the time of passage that the by-laws would offend that section of the new *Heritage Act*.

Therefore it is the position of PDVC that the District Guidelines are not a district plan for the purposes of the new *Heritage Act*. The District Guidelines do not prevail in the event of a conflict between a by-law and the Guidelines.

PDVC did not take the position at any time during the hearing that the District Guidelines lack all status and may be disregarded by the Board. On the contrary, Counsel for PDVC and its heritage witnesses acknowledged that the District Guidelines are a "district plan" as contemplated by policy 7.10.7 of the City's OP. That section provides, *inter alia*, "in reviewing proposals for the construction, demolition or removal of buildings and structures or the alteration of existing buildings, the City will be guided by the applicable heritage conservation district plan".

It is the position of the City and PROUD that the District Guidelines do constitute a district plan for the purposes of the new *Heritage Act*. The City Solicitor argued "the process of designating Port Dalhousie as a Heritage Conservation District underwent extensive public consultation. During the process the Study and the Guidelines were established as the cornerstone of a moral contract between the City and the residents of Port Dalhousie to assure the residents that the designation would be implemented pursuant to the terms and provisions contained in those Guidelines". The process set out in section 41.1(2) for adopting pre-2005 guidelines as a district plan is not mandatory and the City Solicitor submitted that it would be helpful for municipalities which had designated heritage conservation districts, without preparing guidelines, to follow the process. However, the City, through the District Guidelines, had already set out "how the district would be managed and how the character would be maintained through the implementation of the guidelines". It is the position of the City that as the District Guidelines have been used since their adoption "it would be unfair to all residents of the district to now say that the Guidelines are not a heritage plan and that the rules applied consistently since December 2003 were not really the rules of the game".

The City Solicitor argued that "evidence of the adoption of the guidelines as a district plan are (sic) found in the second recital of By-law 2002-180, and in the Minutes approved by Council". Further, she argued that the Board decision on the appeal of the

designating by-law was somehow evidence that the District Guidelines had been adopted as a district plan by the City.

It is the position of the City that the District Guidelines as adopted by City Council in 2003 meet the requirements of the new *Heritage Act* for a district plan. The evidence of all the relevant experts who testified in this hearing was that the content of the plan as set out in section 41.1(5) is “generally” found in the District Guidelines. The District guidelines were not found “wanting”, the City Solicitor submitted.

Counsel for PROUD argued that the goal of the Legislature in amending the *Heritage Act* was to strengthen protection afforded to heritage in this province, not to weaken the protection. The Board finds that there is no doubt that strengthening protection was the goal of the Legislature. Counsel further argued that both the Supreme Court of Canada and the Ontario Court of Appeal in *St. Peter’s Evangelical Lutheran Church v. Ottawa (City)*, [1982] 2 SCR 616 and *Re Toronto College Street Centre and the City of Toronto et al.* (1986), 31 DLR (4th) 402 (Ont.C.A.) have held that the interpretation of the *Ontario Heritage Act* must give full effect to the avowed purpose of the Act and that the *Heritage Act* should be construed purposively and liberally to allow municipalities to preserve Ontario’s heritage effectively. Clearly the Board finds that it must follow the direction of these Courts.

Counsel for PROUD submits that if the Board interprets the new *Heritage Act* “as not providing enforceable protections to existing conservation districts unless and until the Bill 60 amendments are adhered to (i.e., the Port Dalhousie Guidelines are ‘readopted’ by by-law) it fails to give the *Ontario Heritage Act* a ‘liberal and purposive’ interpretation in accordance with the *Legislation Act*. Such an interpretation is penal”.

Counsel for PROUD goes on to maintain that if the Board accepts PDVC’s argument “one must accept that heritage conservation district plans or guidelines only obtained legal status through the 2005 amendments to the *Ontario Heritage Act*. This interpretation has the potential to render ineffective and useless every heritage district plan or guideline adopted prior to Bill 60...”

Having reviewed Counsel’s submissions and the provisions of the new *Heritage Act* the Board finds that the District Guidelines do not constitute a district plan for the specific purposes of section 41.2(1) and (2). This does not mean that the alarmist claim of Counsel for PROUD that all pre-2005 heritage district plans or guidelines are

rendered “ineffective and useless” is correct. Specifically, in the City of St. Catharines, pursuant to policy 7.10.7 of the OP, in reviewing proposals for change in the Port Dalhousie Heritage Conservation District, the City “will be guided by the applicable heritage conservation district plan”. The District Guidelines are neither ineffective nor useless; they have a specific status under the City’s OP.

The District Guidelines do not lack status for the purposes of section 41.2(1) and (2) of the new *Heritage Act* because the Board is ignoring the direction of the Supreme Court of Canada and the Ontario Court of Appeal and interpreting that Act narrowly. They lack this status because the City did not follow the process, clearly set out in the statute, to assure the elevated status. The process is not mandatory; a municipality does not have to pass a by-law adopting a pre-2005 heritage conservation district plan. However if it does not pass such a by-law after following the requisite process set out in section 41.1, pre-2005 guidelines or district plans will not be district plans for the purpose of section 41.2(1). In the event of a conflict between a by-law and the guidelines, the guidelines do not necessarily prevail.

This finding is not based on either a liberal or illiberal construction of the words of the new *Heritage Act*. It is based on the only reasonable interpretation of the words of the statute. A process, involving the preparation of a plan with specific content, public consultation and the right of appeal has been set out in the statute. It would not be reasonable for this Board to find that the City can fail to follow a clear process for adopting the District Guidelines as a district plan, but that the District Guidelines can somehow be transformed into a district plan in any event. If it were the intent of the Legislature that this should be the case why would the section 41.1(2), (3), (4), (5), (6), (7), (8), (9), (10), (11), and (12) process have been included in the statute?

The Board finds that the process for adopting a pre-2005 district plan is not a mere technical procedure; it affords substantive rights to owners of property in a heritage conservation district. The preservation of built heritage is vitally important in this province. Because of that the new *Heritage Act*, allowing for district designation and the adoption of a district plan can result in the loss of property rights. That loss of rights is justifiable as the preservation of built heritage is of such consequence. However, the loss of such property rights can only happen after a transparent public process has taken place. Section 41.1 guarantees such a process. If a designated heritage conservation district is to be subject to a district plan which requires by-law

consistency and in fact makes a district plan determinative, the required fair public process must be followed. Otherwise district guidelines or a district plan retain the status afforded by the OP. In St. Catharines the District Guidelines are intended to “guide” City Council (and this Board) in reviewing proposals for change in the heritage district.

The City and PROUD submit that the District Guidelines were adopted by City Council after a thorough, fair and public process. In fact, the City Solicitor maintains that the District Guidelines constitute a “moral contract” between the City and its residents. The Board finds, based on the evidence, that the City at no time adopted the District Guidelines by by-law. By-law 2002-180 designates the boundaries of the heritage conservation district and repeals by-laws which individually designated certain properties. The by-law in no way enacts the adoption of the District Guidelines. The preamble refers to the policies and guidelines contained in sections 1 – 6 of the guidelines as being adopted by Council, but not by a by-law of Council.

Why is this significant? One must have regard to the decision of this Board, released on December 12, 2003 on the District designation to answer this question. It is clear on the face of the decision that the Board considered only the designating by-law (as it should). The District Guidelines were not part of the by-law; therefore they were not a matter of appeal. The only evidence the Board heard on the District Guidelines was that of Carlos Garcia on behalf of PROUD. He testified about a survey which showed “the respondents did not want the guidelines to be too restrictive”. The Board also heard from some residents who were “somewhat in favour (of the designation), provided the guidelines were not onerous”. The Board made no findings on the merits or the appropriateness of the District Guidelines as that issue was not before it.

This panel of the Board cannot find, on the evidence, that the District Guidelines were adopted by City Council following a public process like that contemplated by section 41.1 of the new *Heritage Act*.

The Board must note that if the City believed it had a “moral contract” with its citizens, reflected in the District Guidelines, the new *Heritage Act* gave it a mechanism to ensure that this “moral contract” was affirmed and in fact afforded superior legal status. This Board has been given no authority through any statute to enforce “moral contracts”. If the City believes that the District Guidelines constitute a “moral contract” it

should have followed the provisions of section 41.1 of the new *Heritage Act* and adopted the District Guidelines through a by-law.

The status of the District Guidelines for the purposes of the Board's determination of all matters before it, including the heritage permit, is as provided by policy 7.10.7 of the City's OP. The Board will be "guided by" the District Guidelines and the general principles set out in the policy. As the Board said in *Cambone v. Oakville O.M.B.D. No. 1293*, cited by Counsel for PDVC, "the (New Heritage) Act provides no guidance to the Board on what must be considered under subsection 42(6). The Board finds that in considering whether a heritage permit should be issued it must have regard to any relevant portions of the Town's OP and to the District Plan". In that case the Board noted that the Town's OP provided that Council, in reviewing proposals for change in a heritage district, "will be guided by the applicable Heritage Conservation District Plan". The Board found that it should be similarly guided. In the case at hand the Board will, in accordance with the provisions of the OP, be so guided and its decision will have regard to or be consistent with all relevant planning documents, provincial, regional and municipal.

The Relevant Planning Policy Regime

The *Planning Act*:

There is no dispute among the parties that the Board's decision on the *Planning Act* matters before it, OPA 31, Zoning By-law 2006-228 and the site plan appeal must be consistent with the Provincial Policy Statement (the "PPS"). Section 3(5) of the Act provides that a decision of this Board "in respect of the exercise of any authority that affects a planning matter (a) should be consistent with the policy statements that are in effect at the date of the decision". Further, the Board finds, the Board's decision with respect to the heritage permit appeal must be consistent with the PPS, as the heritage permit appeal affects a planning matter pursuant to section 3 of the Act. Counsel for PDVC cited the decision of the Board on this issue in *Birchgrove Estates Inc. v. Town of Oakville*, O.M.B.D. No 1592. In that case the Board said "...the appeals under the *Heritage Act* are matters consolidated with the overall planning applications leading to the final disposition of the land use of this area...In that regard, the Board finds that the heritage appeals affect a planning matter pursuant to section 3 of the *Planning Act* so as to make provincial, regional and local planning policies applicable". The Board

therefore finds that in a case involving *Planning Act* instruments and a *Heritage Act* permit, the matters are inextricably linked.

Section 2 of the Act requires the Board in carrying out its responsibilities under the Act to have regard to matters of provincial interest including (d) the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest; (h) the orderly development of safe and healthy communities; (n) the resolution of planning conflicts involving public and private interests; and (p) the appropriate location of growth and development.

The Provincial Policy Statement:

The PPS with which the Board's decision must be consistent addresses all these interests. The Board heard from a number of land use planners on the proposal's consistency with the PPS: Tom Smart for PDVC, Paul Chapman, the City's Director of Planning Services, under summons on behalf of PDVC, Robert Martindale, on behalf of the City, and Wayne Morgan, on behalf of PROUD. Having reviewed the evidence of the planners, the Board finds that certain provisions of the PPS are relevant to the Board's consideration of the planning appeals and the heritage permit appeal before it. In making this finding, the Board adopts the words of the Board in *Birchgrove Estates Inc .v. Town of Oakville*, O.M.B.D. No 0338: "while no one section of the PPS overrides others, the Board's decision must be consistent with the (PPS). Just as the Board cannot dismiss or disregard the direction to conserve significant heritage resources, the Board cannot dismiss or disregard the considerable emphasis and priority the Province has placed on intensification in built-up areas. The challenge before the Board is to determine if the provincial goal of intensification can be achieved while meeting the provincial goal of heritage conservation".

The Board notes the direction of the PPS on how it is to be read: "the (PPS) is more than a set of individual policies. It is intended to be read in its entirety and the relevant policies are to be applied to each situation. A decision-maker should read all of the relevant policies as if they are specifically cross-referenced with each other. While specific policies sometimes refer to other policies for ease of use, these cross-references do not take away from the need to read the (PPS) as a whole".

Mr. Martindale on behalf of the City and Mr. Morgan on behalf of PROUD did not seem to read the PPS with this direction in mind. Exhibit # 20, Mr. Martindale's witness

statement and Exhibit # 225, Mr. Morgan's witness statement make reference only to one section of the PPS: Policy 2.6, Cultural Heritage and Archaeology. In his oral evidence, Mr. Martindale spoke to Policy 1.1.3.3, concerning intensification, but dismissed it as irrelevant as Port Dalhousie "has not been formally identified as an area of intensification".

After really only considering only one policy of the PPS, Messrs. Martindale and Morgan concluded that the proposed development is not consistent with the PPS.

Mr. Smart on behalf of PDVC, and Mr. Chapman, discharging his duties as Director of Planning Services for the City, explored the PPS in greater depth: Smart's Planning Report, Exhibit # 13, TAB 2 and Report from the Planning Services Department, May 15, 2006, Exhibit # 5e, TAB 6. Policies contained in section 1, Building Strong Communities are considered in addition to policies contained in section 2.6, Cultural Heritage and Archaeology. The Board finds that these two reports and the oral evidence of the witnesses, especially Mr. Chapman, deal more helpfully and persuasively with the issue of consistency with the PPS. These witnesses did as directed by the PPS; they read the document "as a whole". The Board therefore finds the following policies to be relevant to a determination of the matters before it in this case:

Policy 1.0 – Building Strong Communities

The preamble to this policy provides "Ontario's long-term prosperity, environmental and social well-being depend on wisely managing change and promoting efficient land use and development patterns". Policy 1.1.1 sets out how "healthy, liveable and safe communities are to be sustained". This includes "promoting efficient development and land use patterns which sustain financial well-being of the Province and municipalities over the long term".

Policy 1.1.2 provides "sufficient land shall be made available through intensification and redevelopment, and, if necessary, designated growth areas to accommodate an appropriate range and mix of employment opportunities, housing and other land uses to meet projected needs..."

Policy 1.1.3.1 provides "settlement areas shall be the focus of growth and their vitality and regeneration shall be promoted". "Settlement areas" are defined as "urban

areas...within municipalities that are (a) built up areas where development is concentrated and which have a mix of land uses". The Board finds that the subject property is located within a settlement area.

Policy 1.1.3.2 provides "land use patterns within settlement areas shall be based on (a) densities and a mix of land uses which efficiently use land and resources".

Policy 1.6.2 provides that the use of existing infrastructure should be optimized and policy 1.7.2 provides that the vitality of main streets should be enhanced.

Policy 2.6 – Cultural Heritage and Archaeology:

All planning witnesses agreed that policy 2.6, Cultural Heritage and Archaeology is relevant to the matters before the Board. Policy 2.6.1 provides "significant built heritage resources and significant cultural heritage landscapes shall be conserved". A number of key terms in this policy are defined in the PPS.

"Built heritage resources" means "one or more significant buildings, structures, monuments, installations or remains associated with architectural, cultural, social, political, economic or military history and identified as being important to a community. These resources may be identified through designation or heritage conservation easement under the *Ontario Heritage Act*..." "Conserved" means "the identification, protection, use and/or management of cultural heritage and archaeological resources in such a way that their heritage values, attribute and integrity are retained. This may be addressed through a conservation plan or heritage impact assessment". "Cultural heritage landscape" means a defined geographical area of heritage significance which has been modified by human activities and is valued by a community. It involves a grouping of individual heritage features such as structures, spaces, archaeological sites and natural elements, which together form a significant type of heritage form distinctive from that of its constituent elements or parts. Examples may include...heritage conservation districts designated under the *Ontario Heritage Act*...

"Significant" means "in regard to cultural heritage and archaeology, resources that are valued for the important contribution they make to our understanding of the history of a place, an event, or a people. Criteria for determining significance of resources...are recommended by the Province, but municipal approaches that achieve or exceed the same objectives may also be used".

All parties acknowledge that the Port Dalhousie Heritage Conservation District, as a district designated under the *Ontario Heritage Act* constitutes a cultural heritage landscape for the purposes of the PPS. Further, all parties agree that the Heritage District contains significant built heritage resources.

It is the position of PDVC, however, that the direction in policy 2.6.1 to conserve “significant built heritage resources” and “significant cultural landscapes” does not require the preservation of everything in the Heritage District. Counsel for PDVC argues “not everything must be retained; only heritage values, attributes and integrity need to be retained, and the heritage attributes of a district do not encompass all matters within the District, but only the principle matters that contribute to the cultural heritage significance of the District”. He cited *Birchgrove* in which the Board considered how “significance” is to be determined. The Board had regard to the *Ontario Heritage Toolkit* issued by the Ministry of Culture. One volume is entitled “Heritage Resources in the Land Use Planning Process”. A five-step process is set out to assess applications involving heritage resources: “the first step calls for historical research, site analysis and evaluation...The second step calls for an identification of the significance and heritage attributes of the cultural heritage resource. In other words, this step calls for refined identification and selection of attributes that are significant in heritage terms. The entire history of a resource and the listing of all its characteristics is part of step one; step two demands a winnowing down to identify those elements that are significant and stand out”.

The Board notes that in *Birchgrove* the Board was dealing with individual structures, designated under Part IV of the *Ontario Heritage Act*, not a Part V designated heritage district. However, the Board finds that the logic in that decision is applicable to the consideration of proposed alterations in a heritage district. As with a heritage structure, not every element of a heritage district is of equal significance. The significant attributes of the heritage district should be identified in the district plan or in the case at hand, the District Guidelines. The PPS in defining “significant” necessarily calls for judgment to be used in determining significance. In calling for the conservation of “significant built heritage resources” and “significant cultural heritage landscapes”, the PPS implicitly acknowledges that there may be built heritage resources and cultural heritage landscapes which are not significant and which do not warrant conservation. Such an interpretation allows for the balancing of a variety of provincial interests as mandated by the PPS.

Counsel for PROUD argues based on the evidence of Mr. Morgan that the Port Dalhousie Heritage District is a “significant cultural heritage landscape” in its entirety for the purposes of Policy 2.6.1. Therefore the entire district must be conserved. The only question to be asked is whether the PDVC proposal does “conserve” the District as required by the PPS.

The City Solicitor argues that policy 2.6.1 should be read to provide that no development will be permitted in a designated heritage conservation district. She takes this position on the basis that policy 2.6.3, which permits development on lands adjacent to protected heritage property is allowed only when it has been demonstrated that the “heritage attributes” of the protected heritage property will be conserved. Mitigative measures may be required.

It is the position of the City that as the PDVC proposal “is not adjacent but clearly within (the District) all components of the Heritage District must be conserved”.

The Board finds that this position is not supported by the words of the PPS. Policy 2.6 clearly provides that significant built heritage resources and significant cultural heritage landscapes are to be retained. “Significant” has a meaningful definition for the purposes of the PPS. The word “significant” is used as a modifier of the phrase “cultural heritage landscape”. This must mean that not all elements of a cultural heritage landscape included in a designated heritage conservation district are by definition significant.

The Board therefore finds that before it can determine whether the PDVC proposal is consistent with the PPS, in its entirety, the Board must understand what the heritage attributes of the district are, for the purposes of determining significance. Then the Board must determine whether the PDVC proposal “conserves” appropriately for the purposes of policy 2.6.1.

The Growth Plan for the Greater Golden Horseshoe:

The Growth Plan came into effect on July 31, 2006. Ontario Regulation 311/06 deals with transitional matters for the purposes of the Growth Plan. Section 2 sets out deemed day of commencement. If one is dealing with an application for an OPA or zoning by-law amendment, the deemed day of commencement for the purposes of conformity with the Growth Plan is the date of the application. If one is dealing with an

adopted OPA and an enacted by-law, the deemed day of commencement is the day the by-laws were enacted. In the case at hand the by-laws were enacted after the Growth Plan came into effect. Therefore the Board's decision on all matters before it must conform with the Growth Plan.

It was the evidence of Mr. Smart on behalf of PDVC that the Growth Plan builds on the PPS policies that call for intensification in built-up areas. In section 2.1 the Growth Plan provides "better use of land and infrastructure can be made by directing growth to existing urban areas. This Plan envisages increasing intensification of the existing built-up area, with a focus on urban growth centres, intensification corridors, major transit areas, brownfield sites and greyfields". The Board finds that there is no question that the subject property is located in a "built-up area", although it is certainly not in a designated growth centre.

Section 2.2.2 of the Growth Plan provides that population and employment growth will be accommodated by, *inter alia*, directing a significant portion of new growth to the built-up areas of the community through intensification.

The Growth Plan in section 4.1 speaks to "protecting what is valuable". "Valuable assets" like "irreplaceable cultural heritage sites" are to be "wisely protected and managed as part of planning for future growth". The Growth Plan "recognizes and supports the role of municipal policy in providing leadership and innovation in developing a culture of conservation". Section 4.2.4(1)(e) contains this conservation objective: "cultural heritage conservation, including conservation of cultural heritage and archaeological resources where feasible, as built up areas are intensified".

It was the opinion of Mr. Smart that the PDVC proposal for the commercial core of Port Dalhousie, a built-up area "is in line with the targets and direction provided by the Minister in the Places to Grow Plan".

Counsel for PDVC submitted that the Growth Plan "clearly directs a balanced approach to heritage conservation - within built-up area, significant heritage resources should be conserved, but intensification and further development in conjunction with such conservation is expected and encouraged".

It was the position of PROUD that the PDVC proposal is not subject to the Growth Plan as the applications were filed before the adoption of the Growth Plan.

However Counsel for PROUD and the City submitted that if the Board does consider the “policy thrust” of the Growth Plan to be relevant, it is important to note that Port Dalhousie is not designated an “urban growth centre”; the City’s downtown is so designated. Further as Mr. Chapman and Mr. Morgan testified, there are other intensification sites available throughout the City that are not subject to a heritage conservation district designation. Finally, Counsel submitted that, in keeping with the direction of the Growth Plan, the City has developed “official plan policies and other strategies in support of....conservation objectives”. Situating the PDVC proposal in a heritage conservation district may contribute to intensification, but it is the position of PROUD and the City that it is intensification in the wrong location; it is intensification which does not respect stated conservation objectives.

As noted above, the Board finds that the applications are subject to the Growth Plan. All provisions of the Growth Plan must be weighed in determining whether the proposal conforms with the Growth Plan. As with the PPS, one goal of the Growth Plan does not trump another goal. The Board, in determining conformity, must engage in a balancing exercise, considering the imperatives of growth and the culture of conservation.

The Niagara Region Policy Plan:

All planners testified that a number of policies in the Regional Plan are relevant to a consideration of these applications. Mr. Chapman, in his planning report discussed the Regional Plan and indicated that “staff consider the proposal to fall within the local mandate as defined in policy 5.5”.

The Board finds the following Regional policies to be relevant to its consideration of these applications.

Policy 5.5 of the Regional Plan provides “the primary responsibility for regulating the types of locations and densities of land uses within the defined urban area rests with the local municipalities through their official plans...” However, “several aspects of these local plans are considered to be of regional significance and interest”. These include “consideration of factors such as historic features...”

The Regional Plan contains a Regional Strategy for Development and Conservation, noting that the Region has a “rich cultural and historical heritage”.

Historic sites mentioned are Niagara-on-the-Lake and historic Fort Erie (not Port Dalhousie). The Regional Plan succinctly sets out the challenge faced by the Region, the City and this Board: “the challenge is to provide a balance between conservation and development. At the Regional scale, there is an opportunity to achieve such a balance, accommodating urban development while conserving resources and protecting the environment”.

In section 3.2, the Regional Plan sets out a “strategic objective”: “to facilitate and maintain a pattern of distinctive and identifiable urban communities – recognition of historical features”. Another strategic objective is set out in section 3.5: long range economic development planning and economic diversification is to be achieved by various efforts including the creation of tourism development potential.

Section 4 of the Regional Plan speaks to Economic Development and Tourism. It says “tourism plays a very important role in Niagara’s economy, providing employment and generating business...it is an industry with significant growth potential...the policies of this plan are designed to support the continued growth and development of Niagara as a tourist destination while maintaining those special qualities that make the Region attractive to both tourists and residents”.

The Welland Canal corridor, which includes Port Dalhousie, is subject to a specific objective, 4.A.3: “to assist in the development of the Welland Canals Corridor as a linear corridor that blends historic, recreational and tourist-related uses with natural settings, while providing opportunities for compatible and appropriate residential development at key nodes”. The Board finds that these words mean that the Region does not just accept that development will come in the Welland Canal corridor; it wants to assist such development. Key nodes should see opportunities for compatible and appropriate commercial development.

Counsel for PROUD submitted that nowhere in the Region’s strategic objectives is economic revitalization given “priority status”. In its report to Regional Council, Regional planning staff acknowledged that revitalization or growth is not determinative. Staff acknowledged that balance is necessary: “while economic development is an important part of the framework, the purpose is to guide change by providing a balance that will preserve and enhance what is special about Niagara while accommodating growth and new development” (Exhibit # 5f, TAB 17).

It was the opinion of Regional staff that the proper balance was not achieved by the PDVC proposal and that alternatives should be considered. Regional Council did not agree; it approved OPA 31 (Exhibit # 5f, TAB 18). Mr. Cambray who was responsible for the report of Regional staff was Commissioner of Planning and Development at the time the report was prepared. He has retired from the Region and he testified on behalf of PROUD at the hearing. The Region continues to support the PDVC proposal.

It is the position of PDVC that the proposal conforms to the strategic objectives of the Region as set out in the Regional Plan. The proposal represents development and efficient use of lands within the existing urban boundary; it contributes to providing a variety of housing types; it creates tourism opportunities; and it provides for a mixture of employment and residential uses. Economic development and tourism objectives are met as commercial, recreational and tourist-related uses are included in the development.

City of St. Catharines Official Plan:

The planners testified at length about the OP policies which are relevant to these applications. Planners for PROUD and the City emphasized the policies which focus on the conservation of heritage in the City in general, and in Port Dalhousie in particular. In fact, in considering section 16 of the OP, the Port Dalhousie Neighbourhood Plan (the "Neighbourhood Plan"), Mr. Martindale, who testified on behalf of the City, neglected to address section 16.92, which the Board finds is essential to an understanding of how the City envisions the future of Port Dalhousie.

In determining whether a development proposal conforms to the provisions of an official plan the Board must consider all relevant policies. Counsel for PDVC cited a number of cases which the Board finds instructive on this point. In *Belle Himmell Investments Ltd. v. Mississauga (City)* (1982), 13 O.M.B.R. 17 (Ont. Div. Ct.) the Court said "official plans are not statutes and should not be construed as such...in such a document there will almost inevitably be inconsistencies and uncertainties when considered in the light of a specific proposal. It is the function of the Board in the course of considering whether to approve a by-law to make sure it conforms with the Official Plan. In doing so, the Board should give the Official Plan a broad liberal interpretation with a view to furthering its policy objectives". In *Friends of Eden Mills v. Eramosa (Township)*, [1998] O.J. No. 2604 (Ont. Div. Ct.) the Court considered the above words

of *Belle Himmell* and went on to say “the policy objectives of an official plan are not restricted to heritage concerns; thus the ‘broad liberal interpretation’ cuts both ways...there must be a weighing and balancing of interests where there is no detailed and specific direction in the OP. The Council in dealing with the OP must not only deal with the heritage aspects contained therein but with the other non-heritage aspects; this will involve considering the guidelines which are set out very generally, not only as to heritage matters, but the non-heritage ones as well – and where there are inconsistencies and uncertainties to harmonize and rationalize in a reasonable way” (emphasis added).

Having reviewed the evidence of all the planners, the Board finds that the most thorough and persuasive review of the City’s OP was conducted under the supervision of the City’s Director of Planning Services, Paul Chapman. The Planning Report signed by Mr. Chapman (Exhibit # 5e, TAB 6) contains an outline of relevant policies and articulates the impact of these policies. The Board finds that the following official plan policies are relevant to a consideration of the subject development proposal. Mr. Chapman set these policies in what the Board finds to be the correct context, saying in the Planning Report “the Official Plan recognizes that the more intensive use of land and buildings is inevitable in a maturing urban area. This is the context for a consideration of all planning applications in the City”.

Policy 1.2, Community Goal Statements contains, *inter alia*, the following statements:

1. quality of life: “create a physical, economic and social environment that gives the residents and employees...an ideal place for living, working and recreating and promoting a sense of history and identity”;
2. citizen participation: “provide opportunities for citizen participation in all aspects of planning and development within the municipality”;
3. economy: “create a community development pattern that fosters a vigorous and diverse local economy by supporting the existing business community and promoting new business opportunities”;
4. heritage: “preserve, promote and foster awareness that our heritage and diverse cultural institutions, man-made and otherwise, are vital to our community life and economic and social health”;
5. land use: “arrange land uses and organize urban growth so as to promote economy, efficiency, order, aesthetics, compatibility and flexibility for future change”.

The Board finds that these Community Goal Statements make it abundantly clear that it is the intention of the City to foster growth and embrace change while at the same time preserving the elements of the community which contribute to the quality of life for all citizens. By definition, in planning for the future, the City must engage in a balancing exercise.

The subject site is located in a commercial land use designation; more specifically, in the Port Dalhousie Commercial Core. Policy 4.2.1 of the OP allows for a variety of commercial, residential and public uses in such an area. Policy 4.2.1.2 allows for residential uses if (a) the residential uses are located above, below or behind the commercial space to prevent the interruption of business frontage continuity; (b) amenity space is provided for the exclusive use of the residential component; and (c) design and development measures are incorporated to minimize possible negative environmental impacts.

Although the proposed development is not located in a residential area, Mr. Chapman was of the opinion that the location, site and form guidelines for residential development found in policy 3.3 could be applied. This policy provides that it is “important that new development be integrated into neighbourhoods in a manner that is sensitive to the existing context and maximizes compatibility. As such, new development should respect and improve the physical character of existing areas”.

Policy 4.2 of the OP, Commerce, provides “this Plan recognizes that the health and vitality of the commercial sector is dependent on factors such as:

- (a) the continued growth, expansion and revitalization of a diversified commercial land use mix;
- (b) appropriate access to and through commercial areas for pedestrians, cyclists, and automobiles and transit vehicles; and
- (c) adequate and appropriately located parking facilities”.

This policy goes on to say “it is also an objective of this Plan to increase tourism opportunities throughout the City to provide greater economic and social benefit to the community”.

Policy 4.2.5.1, Design Criteria, provides “in order to conserve and strengthen the special identity and character of the historic commercial areas (including) Port Dalhousie, the zoning by-laws are to reflect the built form in those areas to ensure new construction within these areas will be compatible to the existing built environment in terms of height, bulk and building materials”. Proposals for commercial development are to be evaluated in terms of factors like adequacy of site size and shape; availability of municipal services; adequacy of public transit; adequacy of parking; compatibility; and the rehabilitation and preservation of existing buildings of historical or architectural significance.

Policy 7 of the OP, Urban Design, Amenity and Heritage Conservation, contains policies of general application and those which apply specifically to heritage conservation. Policy 7.9, Lending Shape to Built Form, is intended to provide “a framework of urban design principles for day-to-day planning decisions. The fundamental guiding principle is sensitivity to context...new development should ‘fit in’ in terms of form and function. In situations where there is no established streetscape pattern, new development should be designed to create a precedent and create a positive point of reference for future development”.

Policy 7.9.1 emphasizes compatibility and sets out certain matters as a basis for evaluating compatibility and “achieving design excellence”. The matters include proportions of front or primary façades; overall building height; roof form and pitch; placement, number and type of doors and windows on primary facades; spacing of buildings; level and visibility of the ground floor; and “the overall scale of the development as it relates to the surrounding area. In this regard, compatibility may be achieved by avoiding long, unbroken expanses of walls; additive massing; creating relief in walls; the use of varied colours, textures, types, qualities and patterns of finished materials; roofline articulation”.

Policy 7.9.2 speaks specifically to areas where “the streetscape pattern is relatively weak or there is no established pattern”. Design is to create “a more attractive urban form”. Certain criteria should be followed: overall massing should be broken up and if it cannot be, methods to achieve design articulation should be used. These include using materials, textures and colours which do not contrast with the surrounding landscape; avoiding single continuous rooflines; and breaking up continuous expanses of façade walls visually and physically.

Policy 7.10, Heritage Conservation is especially germane to development in the Port Dalhousie Heritage Conservation District. Section 7.10.1 provides that “cultural heritage resources” include buildings of historical, architectural, and contextual value and “human-made...urban districts or landscapes of historic and scenic interest”. Policy 7.10.4 allows for the designation under the *Ontario Heritage Act* of heritage conservation districts. Policy 7.10.6 provides “within a designated district it is the intent of Council to conserve and enhance the unique heritage character of the area”. In reviewing proposals for the construction, demolition or removal of buildings and structures or the alteration of existing buildings, Policy 7.10.7 provide “the City will be guided by the applicable heritage conservation district plan and the following general principles:

- (a) heritage buildings, associated landscape features and archaeological sites including their surroundings should be protected from any adverse effects of change;
- (b) original building fabric and architectural features such as doors, windows, mouldings, vergeboards, walling materials and roofs should be retained and repaired rather than replaced wherever possible;
- (c) new additions and features should generally be no higher than the existing building and wherever possible be placed to the rear of the building or set back substantially from the principle façade;
- (d) new construction and/or infilling should be compatible with surrounding buildings and streetscape by: being generally of the same height, width and orientation as adjacent buildings; being of similar setback; and using similarly proportioned windows, doors and roof shapes;
- (e) design, style, materials and colours for new construction will be considered on an individual basis on the premise that contemporary styles can be more appropriate in certain cases than using design styles and motifs from previous periods”.

Policy 16 of the OP sets out the Neighbourhood Plan. It provides that the purpose of the Neighbourhood Plan is “to provide a framework for the development and redevelopment of the Port Dalhousie Neighbourhood”. Obviously, the Board finds,

change and development are contemplated for Port Dalhousie. However, the policy establishes objectives in support of the goal of “the development of an orderly and attractive urban patten”, which seek to protect the character of Port Dalhousie. These objectives include to ensure that the character of the Commercial Core is maintained and protected at the same time, to ensure that the Commercial Core does not encroach on the adjacent residential areas; to maintain and reinforce the atmosphere and character which has developed in the Commercial Core; to enhance the streetscapes and the pedestrian amenities of the Commercial Core; to increase the supply of recreational facilities; to maintain a safe and orderly flow of traffic on the major arterial roads; to maintain the privacy and amenity of residential areas; to provide adequate parking facilities; to conserve individual buildings of historic or architectural value; and to protect areas of historic or architectural interest.

Policy 16.1 differentiates between “low-rise residential areas, a unique commercial area which was formerly the Central Business District for the Town of Port Dalhousie, a city-wide park (Lakeside Park) and the Port Dalhousie Harbour”. It is the policy of Council “to recognize this diversity of land uses and to encourage and improve the compatibility of each”.

Policy 16.2 recognizes that the “Port Dalhousie Neighbourhood is a community with areas of historic and architectural significance. It is the policy of this plan to conserve this character and improve the environment of Port Dalhousie through the enhancement of particular streetscapes and promotion of certain building types...neighbourhoods adjacent to the Commercial Core shall be protected from the negative effects of traffic and parking...”

Policy 16.4 calls for “regional retail uses” to be concentrated in the Commercial Core. Policy 16.23 follows on this, directing commercial uses which serve a “city-wide function” for the Commercial Core. It is to be regarded as a “primarily commercial core characterized by retail and service commercial uses located at grade with a minimum setback from the lot line, and with a limited number of apartments located above (Policy 16.25). Residential uses are permitted in the commercial core “provided there is a commercial component and that such residential uses are located above or behind commercial establishments” (Policy 16.28.1). Policy 16.29 requires the provision of off-street parking for new development in the Commercial Core.

The significance of the historic character of the Commercial Core is highlighted in Policy 16.30: “in order to conserve and strengthen the special identity and character of the Commercial Core, encouragement shall be given to the protection and enhancement of those properties, buildings and features of architectural, historic and/or landscape value which are located in the Commercial Core. Any new construction, particularly infill development, within the Commercial Core should be sympathetic to the existing built environment in terms of height, mass, colour and materials”.

The vital importance of the heritage character of Port Dalhousie is reflected in Policies 16.86 through 16.90. These policies mandate the development of a Heritage Conservation District Plan and the seeking of a heritage conservation district designation under the *Ontario Heritage Act*. Policy 16.89 sets out the objectives of the heritage Conservation District Plan:

- (a) improve the environment by the elimination of congestion, decay, noise and the retention of positive attributes of the environment such as buildings of architectural significance, pleasing scale or material, public open spaces and landscape features such as trees, walkways, fences, etc.;
- (b) maintain the character of the townscape and building groups within the area;
- (c) direct growth in a manner compatible with the existing scale and character of the area;
- (d) prevent the incursion of elements which would detract from the character of the area and prevent unsympathetic alterations to buildings that would detract from the area's character;
- (e) ensure that attention is given to the details of the design of new buildings so that those buildings are harmonious with the historic character of the district; and
- (f) ensure that the renovation and restoration of older buildings within Heritage Conservation Districts carefully preserve the character and the interest of the original building.

Policy 16.90 sets out general principles to be considered in the designation of the Heritage Conservation District:

- (a) The Heritage Conservation District designation shall not be considered to be a freeze on development in the designated area. The Heritage Conservation District designation shall be considered to be a statement made by the municipality, that a special effort will be made within the chosen area to conserve and enhance the built character of that area;
- (b) The features within a designated district which give the area its distinctive character and, as such, contribute to the area's merit as a Heritage Conservation District shall be

conserved. These features may include the placement and relationship of buildings; the scale and character of the townscape and building groups; the architectural details of the buildings; the height and density of buildings; vistas, views and streetscapes. These features should be identified for Port Dalhousie and included in the Heritage Conservation District Plan.

Finally, Policy 16.92, which Mr. Martindale, the planner who testified on behalf of the City, ignored, provides:

Notwithstanding that a Heritage Conservation District Plan shall be undertaken to help assure the sensitive development of Old Port Dalhousie, the municipality shall support the revitalization of this historically significant area by, *inter alia*:

- (d) Encouraging the development of the commercial core for regional (tourism) oriented facilities in order to enhance the economic vitality of this historic area.

Mr. Morgan, the planner who testified on behalf of PROUD, did address this policy. It was Mr. Morgan's opinion that "the support for regional (tourism) oriented facilities in the commercial core is not intended to override other policies in the Official Plan that require new development in the commercial core of Port Dalhousie to be sympathetic to the heritage character of the area". Counsel for PROUD submitted that "the enhancement of the economic viability of Port Dalhousie's commercial core is accorded no greater status than the heritage preservation policies of the Neighbourhood plan". The Board finds that Mr. Morgan's opinion and Counsel's submission are correct. There is nothing in the City's OP which provides that the revitalization of Port Dalhousie takes priority over the conservation of its heritage.

The Board, being cognizant of the Courts' direction in *Belle Himmell* and *Eden Mills*, must "weigh and balance" interests or policy imperatives as set out in an official plan. The City's OP, and more specifically, the Neighbourhood Plan, does not direct Council or this Board to give priority to heritage concerns over appropriate revitalization. The language of Policy 16.92 is telling; "notwithstanding" the fact that a Heritage District Plan should be undertaken "to help assure sensitive development", the municipality "shall support the revitalization of this historically significant area". The precise type of revitalization is envisioned; it is to be through the "development of the commercial core for regional (tourism) oriented facilities in order to enhance the economic viability of this historic area".

The revitalization or economic viability imperative is focused, through this policy, on the Commercial Core. Therefore, for development proposals for lands situated in the

Commercial Core of Port Dalhousie, this Board must do as it was directed in *Eden Mills*: it must “weigh and balance interests”. Further, “where there are inconsistencies and uncertainties”, the Board must “harmonize and rationalize (them) in a reasonable way”.

Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change:

In making its decision on the appeals before it the Board must, as Policy 7.10.7 of the City’s OP provides “be guided by the applicable heritage conservation plan” and certain general principles. There was no dispute among the parties that the District Guidelines constitute such a “district plan”. Therefore the Board will review in detail the provisions of the District Guidelines which are relevant in this matter. A consideration of the Guidelines is also informed by the provisions of the Port Dalhousie Heritage Conservation District Study – Heritage Assessment Report (the “District Study”) (Exhibit # 5d, TAB 4). The District Guidelines say that the District Study “described the heritage characteristics” of Port Dalhousie.

The District Study describes Port Dalhousie as “a compact settlement perched on the table lands of a small peninsula that separates Lake Ontario, to the North, from Martindale Pond to the South”. A number of “distinctive areas” and “key elements” are set out, including the Commercial Core. This area is described as follows:

Inherently associated with the fortunes of the port, canal, local industry and residents the commercial core area centred on Lakeport Road. Hogan’s Alley and Lock Street is distinguished by its nineteenth and early twentieth century architecture of two- and three-storey terrace blocks and individual hotels (former ‘Wellington Hotel’ 1877, ‘Lakeport Hotel’ 1896, the ‘Union House’ and ‘Murray House’). These are built primarily of red and buff brick in the Italianate style. Other buildings include the former Sterling Bank of Canada, the Port Dalhousie jail and several 1920’s structures.

The Board must note that this district character description makes no mention of one-storey, mid-twentieth century buildings like Erskine’s Pharmacy and the Hydro Building on Lock Street, nor the open area behind Lock Street, currently occupied by the Rum Jungle and associated “drinking terraces.”

A conservation intent is set out in the District Plan:

The conservation intent within the proposed Port Dalhousie Heritage Conservation District is to maintain the existing stock of residential, commercial and industrial buildings whether of high style architectural design or of a vernacular construction. It is recognized that the heritage building stock is in various stages of repair and maintenance. It is not the intent within the (District) to force property owners to restore their property. On the contrary the (District) seeks to ensure that when change is

considered heritage buildings and their defining features and/or materials are protected as part of a process of change and development.

Conservation priorities are also set out:

1. protect all remnants of the Welland Canal as significant elements of industrial archaeology in the landscape;
2. encourage the current vitality of the Commercial area by promoting its unique architecture and contemporary adaptive reuse as well as continuing to protect its distinct heritage fabric;
3. maintaining the low profile, compact building forms of the cottage and residential areas; and
4. maintaining and enhancing open space areas in a manner consistent with protecting distinguishing heritage features.

The Board finds, having regard to the evidence of the relevant experts, and having read the District Study in detail, that the conservation intent and conservation priorities set out in the Study encompass more than just individual buildings. The “distinctive heritage fabric” is to be protected by the heritage conservation district designation. A district designation under Part V of the *Heritage Act*, by definition, involves more than individual heritage buildings. Such a designation may include streetscapes, landscape features, views and vistas and open spaces. However clarity about this “heritage fabric” is necessary if such fabric is to be preserved. It is for that reason that section 41.1(5)(b) of the new *Heritage Act* requires that a heritage conservation district plan contain “a statement explaining the cultural heritage value or interest of the heritage district” and section 41.1(5)(c) requires that the district plan contain “a description of the heritage attributes” of the district and the properties. Witnesses for PROUD consistently testified that the District Study and Guidelines contain this requisite description and statement. The Board is satisfied that the significant heritage attributes of Port Dalhousie are those set out in these two documents.

The Board finds that there is nothing in the District Study or Guidelines which indicates that the one-storey, mid-twentieth century Erskine’s Pharmacy and Hydro Building form part of the “heritage fabric” of the Commercial Core. That fabric is explicitly described as being comprised of nineteenth and early twentieth century two- and three-storey terrace blocks and individual hotels, of red and buff brick in the Italianate style. This type of building forms the streetscape. The “open space” behind

the Lock and Lakeport frontages is not included in any description of the heritage or cultural fabric.

The evidence of Mr. Goldsmith, the well-qualified heritage architect, who testified on behalf of PROUD about the “villageness” of Port Dalhousie, was extremely interesting. However such “villageness” for the purposes of this hearing is as set out in the District Study or Guidelines. It cannot be imported from the testimony of witnesses in a hearing about a specific development proposal. This is especially the case as PROUD took the position that the heritage character and attributes of Port Dalhousie are comprehensively set out in the Study and Guidelines.

Further, the evidence of David Cuming, the author of the District Study and Guidelines on his “intent” as the author of these documents is not particularly probative. If studies and guidelines are to be relied upon to “guide” change or development in Port Dalhousie, they must speak for themselves, not through their author who is testifying for one party in a hearing, unless they contain some irresolvable ambiguity.

The report (Exhibit # 223) that Mr. Cuming prepared at the request of the Port Dalhousie Heritage District Advisory Committee (a committee comprised of a number of members of PROUD) after PROUD launched its *Planning Act* appeals in this matter will be given very little weight by this Board. “Clarification” of the Study and Guidelines by the author is unnecessary and irrelevant. The evidence of Mr. Cuming in this hearing is certainly not “determinative on questions regarding how each of these documents should be read or interpreted” as Counsel for PROUD submitted. The Board accepts the submission of Counsel for PDVC that “it is in nobody’s best interest and would indeed be inappropriate to expect stakeholders to contact the authors of the Guidelines every time an interpretation issue were to arise. As such, opinion evidence from one author of the Guidelines is not helpful or persuasive if that opinion is not supported by the text of the Guidelines”.

The Board must consider the relevant text of the District Guidelines (Exhibit # 5d, TAB 5). The purpose of the Guidelines is clearly set out: they are “to provide guidance in the care and protection of the heritage character of the (District)”. The text provides “it is worth emphasizing that these are ‘guidelines’. They are intended to provide an objective minimum level of appropriateness for physical change over the coming years. The guidelines are not prescriptive in determining specific design solutions for each

building or lot. Importantly, the guidelines steer away from matters of 'architectural taste' which is often subjective in nature".

The description of District Character in the Guidelines closely matches that contained in the District Study. Again, various elements of the character of the District are described, including those of the Commercial Core. The description of the Commercial Core follows that in the District Study. The "boundary edges" of the entire District are "emphasized by the significant height of table land and steep banks that separate land from water". The Conservation Intent is as set out in the Study.

Section 3 contains the District's Conservation Principles and says "inevitably situations may arise that have not been anticipated by this document...Accordingly, it is useful to provide the following principles of conservation and change to assist in setting the tone and context for the future of Port Dalhousie. They should always be consulted if the more detailed guidelines do not appear to specifically address an issue or problem".

Section 3.2 contains the District Priorities, providing "the designation of the (District) seeks to ensure the wise care and management of the heritage character of the area. Physical change and development are to be managed in a way that the component buildings, streets, beach and open spaces are either protected or enhanced". The Conservation Priorities are as set out in the District Study, with one notable addition. A sixth priority has been added "encouraging new development, construction and any public works where it is clearly demonstrated that such changes will have no adverse effects upon the heritage attributes of the district and will positively contribute to the character of the area". The Board accepts the evidence of Mr. Cuming and the submission of Counsel for PROUD that this priority is comprised of two separate imperatives: do no harm and leave it better than you found it. The Board also finds that the "do no harm" or have "no adverse effects" is in respect of the heritage attributes of the District as set out in the Guidelines.

Mr. Cuming gave what the Board finds to be interesting evidence on why this sixth conservation priority was included in the District Guidelines while it was not in the District Study. He testified that it was included as it was necessary to spell out the test of "no adverse impact". There was to be no adverse impact on heritage attributes as well as heritage buildings. The Board finds that a straightforward reading of the sixth priority demonstrates that it does more than set out a test for "no adverse impact". It

explicitly states that new development and construction are encouraged so long as there is no adverse impact on heritage attributes and the development will positively contribute to the character of the area. This demonstrates why the Board prefers to rely on the words of the Guidelines in seeking guidance on how to consider the applications, rather than on the testimony of the “author” of the Guidelines. The District Guidelines include, as a conservation priority, encouragement of new development and construction in appropriate circumstances. The Board does not accept Mr. Cuming’s evidence on why the sixth guideline was added to the District Guidelines.

Part 4 of the Guidelines begins to expand on the Study. Section 4.1 provides “just as change has occurred in the past, change will obviously occur in the future. The intent in guiding and managing future change is to try and (sic) ensure that alterations and additions do not detrimentally affect the character of the district and its component building stock”. It is evident that the Guidelines do not focus solely on buildings; they intend to protect the “character of the district”.

The Guidelines give clear guidance in this section on what constitutes a “heritage building” for the purposes of the guidelines: “a heritage building is considered to be any structure built prior to 1950”. The Board finds that post-1950 buildings may form part of the District character or heritage fabric, but only if the Guidelines address them as such.

Section 4.2 sets out “guiding principles” for alterations to heritage buildings and sites: historical, architectural and landscape features and building materials should be maintained and enhanced; changes should be based on an understanding of the particular problem with the building or site; and work should be limited. Section 4.2.1 speaks to the features and spaces around heritage buildings and sites. These are important “in providing context for a setting of a heritage property”. Therefore traditional views of properties are to be maintained by avoiding hiding prominent building features and historic means of access are to be used.

“Heritage building fabric” is addressed in section 4.2.2. This section says that the conservation principles set out in international charters provide context for the Guidelines.

The Guidelines acknowledge in section 4.3.1 that commercial structures in heritage districts “present different conservation issues” and therefore certain guidelines directed at commercial structures are set out in section 4.3.2. This section focuses on

Lock Street and Lakeport Road, with no mention made of Main Street or the street with no name. The Board can only take this to mean that the significant heritage resources of the Commercial Core are located primarily on the referenced streets. In fact, the Board notes, the only heritage building located on those other two streets is the Jail House.

Lakeport and Lock are “distinguished by a number of important nineteenth century commercial structures”, the “traditional façades” of which are divided into an upper and lower façade. Erskine’s Pharmacy and the Hydro Building do not have such façades. The upper and lower façades are described in terms of window openings, cornices, vertical bays and storefronts. This section provides “the conservation of commercial structures requires a balance between the needs of changing commercial uses and prevailing retail styles within the storefront area and the overall architectural heritage of the building”. The Guidelines unmistakably envision “balance”.

To “resolve the conflict between the modern needs of a commercial enterprise and the conservation of overall architectural character of a structure” certain conservation principles are established. They include:

1. fully inspecting the façade to note proportions, materials, details and cumulative changes;
2. maintaining and repairing rather than replacing existing storefronts, which are physically sound and compatible with the overall façade, even if they are later additions;
3. maintaining the character of a storefront by removing extraneous additions unless they are restoration work based on historical evidence;
4. consider replacing an existing storefront which does not fit the historical character of the structure;
5. retaining and repairing the original architectural detailing of the upper façades; and
6. restoring a storefront to an earlier appearance using existing materials, building archaeology and archival photographs.

In Part 5, Design Guidelines for New Construction are set out. These Guidelines are divided into five relevant parts: section 5.2, additions to heritage buildings and sites; section 5.3, additions and alterations to non-heritage buildings; section 5.5, new construction; section 5.6, design consideration in new residential construction; and section 5.7, design considerations in new non-residential construction. Twelve case study illustrations are found throughout these sections, only one of which involves a commercial building. However, the Board notes the introductory words of section 5.7: “general factors governing design consideration for new commercial...construction either as additions or free standing buildings are similar to those for residences. The significant difference is one of size...Issues of multi-storeys, long continuous façades, setbacks, roof shapes, numerous bays and a variety of materials are of key concern here”.

Design considerations relevant to both residential and commercial buildings are found in sections 5.2.1, 5.2.2, 5.3, and 5.5. Exterior additions are “encouraged” to be located at the rear or on an “inconspicuous side” of a building, “limited in size and scale to complement the existing building and neighbouring properties”. Rear additions should be lower than the existing roof line, and stepped in at the sides to avoid dominating the heritage building and the view from the street. New additions “are best designed in a manner that distinguishes between new and old and that avoids duplicating the exact style of the existing heritage building”. Contemporary design is appropriate if it does not “destroy significant architectural, historical or cultural material and when the design is compatible with mass, ratio of solids to voids, colour, material and character of the property, neighbourhood or environment”.

New construction should “avoid replication of any single style, type or appearance whether of heritage or contemporary design...(it) should also appear to be ‘new’ and not pretend to be historical or simply old by copying historic details...”

Section 5.7 speaks specifically to design considerations in new non-residential construction. “General guidance” is as follows:

1. Placement of building mass on the street and setbacks should place emphasis on pedestrian rather than vehicular approaches and access. Parking and loading spaces should be located to the rear wherever possible;
2. Signage should be sympathetic in size, shape, materials, placement and lighting to traditional motifs;

3. In multi-storey buildings contrasts between street level...and upper second and third floor facades should be emphasized through design treatments such as fenestration, floor to floor height and material selection;
4. Flat or low slope roof forms with parapets are preferable to the predominantly pitched roof forms of residential structures; and
5. Required mechanical equipment should be ideally placed well out of public view, either set back on roofs or at the rear of buildings, and suitably screened.

The case study included in this section depicts a building very similar to the Austin House on Lock Street. An addition of a similar height at the streetwall is shown. The Board finds that this case study would only be possible by the removal of an element like Erskine's Pharmacy from the streetscape.

The Guidelines conclude with a number of recommendations. Of particular relevance is that found in section 7.4, Height. There is a reference to the District Study, or Heritage Assessment Report which reviewed the height of the "majority of the dwellings" in Port Dalhousie and concluded "the overall character of Port Dalhousie is one of low profile development on a relatively prominent and visible height land. The Guidelines discuss the fact that the zoning by-law permits a maximum building height of 11m in Port Dalhousie and concludes "this appears excessive in relation to the existing character of development, especially so given the prominent peninsula and height of land. The permitted building height in the zoning provisions has the potential to create tall buildings, such as the construction of a flat-roofed, three-storey building that would be out of keeping with many of the smaller dwellings". Therefore, the Guidelines recommended that City Council amend the zoning bylaw as it applies to the Port Dalhousie Heritage Conservation District, to restrict building height to 9m (7.5m in the cottage zone). City Council did not follow this recommendation.

The Board finds that the characterization of the Heritage District in this part of the Guidelines is based exclusively on a consideration of the residential component of the District and completely disregards the existence of the Commercial Core. The Commercial Core is characterized, as the Guidelines earlier indicated, by two- and three-storey terrace blocks and hotels. These buildings, on the evidence, can reach to a little in excess of the 11m, which the recommendation finds unacceptable.

The fact that the Guidelines include this particular restricted characterization of the District, the recommendation that the height permission be reduced to 9m, and such

a limited discussion of the Commercial Core causes the Board to conclude that the primary focus of the Guidelines is the residential area. This is not necessarily in keeping with the policy imperative of the Port Dalhousie Neighbourhood Plan which does speak to the crucial role the Commercial Core plays in Neighbourhood.

As a result of the Guidelines' focus on the residential component of Port Dalhousie the description of the Commercial Core's heritage attribute or heritage character is not as detailed and fulsome as the descriptions given by some of the witnesses for PROUD and the City in this hearing. The evidence of these witnesses seems to counter their evidence that the Study and Guidelines contain all detail required by section 41.1(5) of the new *Heritage Act*.

Board's Findings:

The Board finds that to answer the questions set out in the Issues List (Exhibit # 5f, TAB 29) and determine whether the PDVC proposal has regard for matters of provincial interest; is consistent with the PPS and Growth Plan; addresses the relevant policies of the Regional Plan and the City's OP; is appropriately guided by the District Guidelines; and constitutes good planning and is in the public interest, the Board must answer one fundamental question. Does the PDVC proposal appropriately balance the Provincial, Regional and Municipal policy imperatives of conserving significant heritage resources and fostering growth? The Board, in making its decision focuses on the words of the PPS: "the long-term prosperity and social well-being of Ontarians depend on maintaining strong communities, a clean healthy environment and a strong economy" (PPS, Part V: Vision for Ontario's Land Use Planning System).

Does the PDVC proposal contribute to attaining policy objectives of growth and regeneration, more particularly the OP intent of supporting the revitalization of Port Dalhousie through, *inter alia*, "encouraging the development of the commercial core for regional (tourism) oriented facilities in order to enhance the economic viability of this historic area"?

The Board heard evidence from witnesses who both support and oppose the PDVC proposal about the current condition of the Commercial Core. The Board accepts the evidence that the Core has become a centre for the consumption of alcohol, especially between Victoria Day and Labour Day. On the subject site alone, there are over 2700 licensed bar seats. The Board heard evidence that the "bar scene" brings

with it attendant problems of noise, public drunkenness, parking conflicts and destruction of private property.

Both the St. Catharines-Thorold Chamber of Commerce and the Port Dalhousie Business Improvement Association (the "BIA") had representatives testify at the hearing about the current state of the Commercial Core and their support for the PDVC proposal. The Board accepts the evidence of Chris Alderson who appeared on behalf of the BIA that business owners face many challenges arising from the seasonal nature of the operation of the Commercial Core. Businesses have a difficult task surviving through the "off-season".

While witnesses who supported the PDVC proposal agreed that some "incremental revitalization" had occurred over the years in the Commercial Core, they did not agree that such "incrementalism" had been successful. They testified that the Commercial Core remains a seasonal destination with an excessive reliance on the "bar scene".

In his staff report, Mr. Chapman discussed the vitality of the Commercial Core in the context of work which had been done by the City on a Comprehensive Development Strategy for a number of City areas, including Port Dalhousie. Mr. Chapman noted that expanded tourism was considered essential for Port Dalhousie with a focus on attracting an "upscale clientele"; redeveloping the Commercial Core while preserving the character of Port Dalhousie; and linking the community to the City. It was Mr. Chapman's opinion that the PDVC proposal, a "multi-use development proposal is in keeping with many of the themes of the Comprehensive Development Strategy. The expanded tourism role is supported by the proposal through the introduction of a hotel, various retail and restaurant uses and a theatre venue. The target market for these uses is more upscale and it is anticipated to replace the current student oriented clientele".

Mr. Chapman also noted "the economic climate in Port Dalhousie is volatile because the vast majority of businesses are not sustainable over the long term. There is not a reliable customer base to provide stability to businesses from one year to the next. Without an improvement in the critical mass of commercial space, the area is expected to continue to suffer economically". These concerns of Mr. Chapman were echoed by the Chamber of Commerce, the BIA, and a number of participants who support the proposal.

Mr. Chapman opined that “continuing economic decline will inevitably threaten the existing heritage resources. Without a viable economic environment, the objectives of the Comprehensive Development Strategy regarding community renewal will be difficult, if not impossible to achieve”.

The Board accepts the evidence of a variety of witnesses that the Port Dalhousie Commercial Core faces challenges to its economic viability. The Board finds that the Core is currently based on seasonal businesses and excessively focused on the “bar scene”. As such, the Commercial Core is not sustainable and certainly does not meet the enunciated policy objectives of the City for Port Dalhousie. Further, the Board finds that if the Commercial Core is not economically viable, valuable heritage resources or attributes may be threatened.

It was the position of PDVC, and the evidence of witnesses like Messrs. Chapman, Smart, Kirkland and Chapman, that the PDVC proposal will do exactly what Policy 16.92 and the Comprehensive Development Strategy demand: it will enhance the Commercial Core’s status as a regional tourism centre. The proposal includes a boutique hotel, retail and restaurant space, a theatre and a large, publicly accessible open air plaza. All this will be provided while significant heritage attributes are appropriately conserved. Such elements are intended to bring year round vitality, to attract a more “upscale clientele” and to reduce the bar seating substantially.

In his report Mr. Chapman succinctly summarized how the PDVC proposal meets the goals of Policy 16.92:

The proposal is for a mixed use project with a theatre, hotel and associated restaurant, office, retail spaces and a residential component. The proposed mix of commercial uses is required to provide the opportunity to meet the needs of the tourist market. The theatre, for example, would attract potential clients for the hotel and for the retail stores and restaurants and vice versa. The addition of the hotel component was identified in the Comprehensive Development Strategy as an important step to attract a more upscale tourist to the area. One of the current problems identified by the Port Dalhousie BIA and the applicant is that there is not a critical mass to draw tourists to the area. The proposal for a mix of new uses plus the existing businesses in the area provides the opportunity to achieve this goal.

The Board must note that these are not the words of the proponent or a consultant for the proponent; these are the words of the City’s Director of Planning Services.

It was the position of PROUD and the City, in the hearing, that PDVC had not adduced evidence about the economic viability of the revitalization proposal and “the entirety of PDVC’s evidence with respect to the potential economic stimulus this proposal may provide is based on conjecture”. Counsel for PROUD cross-examined a number of witnesses for PDVC on whether they had reviewed pro forma financial statements to satisfy themselves on the economic viability of the project, particularly the theatre component. PROUD called Janis Barlow, a theatre consultant, who testified about what she believes is the lack of viability of the theatre.

Mr. Chapman addressed in testimony and in his report to Council of June 26, 2006 (Exhibit # 5e, TAB 7) the issue of whether a proponent must demonstrate economic feasibility of proposed projects to the City’s satisfaction. In his report Mr. Chapman said “many persons suggested that it would be desirable to have feasibility studies to ensure that the project is built as proposed, particularly the theatre and retail components...a fiscal impact statement from the City’s perspective was also suggested by the public”. In response to these requests, Mr. Chapman said “the City does not require feasibility studies as a part of the normal approval process. It has been the City’s practice to allow the private sector to make their own investment decisions...” He noted that in cases where the planned function of an area was proposed for change, market studies have been required, but in the case at hand, the PDVC lands are designated Commercial and “the Secondary Plan also identifies the potential shift of the area to a more tourism oriented focus. There is no requirement for a market study. The proposed project is designed to implement Policy 16.92”. Again the Board must note: these are the words of the City’s Director of Planning Services, not the words of the proponent.

In the face of PROUD’s argument that the economic feasibility of the theatre must be demonstrated, Counsel for PDVC submitted that there is no onus on his client to demonstrate economic feasibility and further “it is inappropriate for an approval authority to concern itself with the economic feasibility of a private project, as the subject matter is beyond its jurisdiction and area of expertise”. Counsel cited *Jannock Properties Limited v. The City of Mississauga*, O.M.B.D. No. 0363 in which the Board was asked to consider pro forma financial statements. The Board noted “that it is unusual for either a municipality or this Board to receive evidence regarding the financial viability of a development proposal...Decisions regarding the timing and implementation of development proposals are traditionally left in the hands of private landowners, acting in

the free market". The Board went on to say "the issue of the economic viability of developing this site solely for employment uses...is not a valid basis upon which to determine the planning issue before the Board...The Board makes decisions about what type of use should be planned for over the long term, in accordance with the principles of good planning which reflect the public interest".

Having reviewed the evidence and the submissions of Counsel, the Board finds that the PDVC proposal meets the policy goals of growth, or revitalization for Port Dalhousie. Regardless of the heritage district designation, the Commercial Core of Port Dalhousie is located in a "settlement area" for the purposes of the PPS and a "built-up area" for the purposes of the Growth Plan. Growth is directed to such an area. The OP encourages "growth, expansion and revitalization" of commercial areas and the Commercial Core is so designated. Finally, the Port Dalhousie Neighbourhood Plan provides in policy 16.92 that the City shall support the revitalization of the historically significant area by encouraging the development of the core for regional tourism facilities as a way to enhance the economic viability of this historic area.

The Board finds that PDVC has demonstrated that the goal of revitalization and growth can be furthered by its proposal. PDVC need not demonstrate, through the production of pro forma financial statements, that any component of the development will necessarily be successful. This panel of the Board adopts the reasoning of the Board in *Jannock*; it must determine a planning issue, in this case whether the proposal furthers the policy goal of growth and revitalization. The proposed theatre use is permitted in a commercial area and can be a regional tourism facility which will enhance the economic viability of this historic area.

The Board finds the evidence of Mr. Chapman very persuasive on this issue. He has a long-term, in depth understanding of the City's policy regime and the realities on the ground in the City in general, and in Port Dalhousie in particular. His reports to City Council of May 15 and June 26, 2006 conclusively convince the Board that the PDVC proposal for a "mix of new uses plus the existing businesses in this area provides the opportunity to achieve" the goal of having a viable Commercial Core in Port Dalhousie.

However the matter does not end here; the Board must determine whether the PDVC proposal correctly balances the above goal of growth and revitalization with the goal of conserving significant built heritage resources and significant cultural heritage landscapes.

The first step in determining whether this balance has been achieved is for the Board to make findings on what constitute the “significant built heritage resources” and “significant cultural heritage landscapes” of the Port Dalhousie Commercial Core. As the Board indicated above, it cannot find that the fact of the heritage conservation district designation renders all elements of the district equally significant and requiring conservation at the same level. The Board finds that the District Guidelines, together with the District Study, provide, as Counsel for PROUD submitted, “a clear summary of the ‘District Character’ of Port Dalhousie”. The Conservation Priorities for the District are set out definitively in section 3.2 of the District Guidelines. Section 5.2 of the District Study provides, according to PROUD’s witnesses “a summary of Port Dalhousie’s heritage attributes and historical associations”.

It was the position of PROUD that together, the District Study and the District Guidelines are so comprehensive that they meet the requirements of the new *Heritage Act*, section 41.1(5) for the content of a district plan which would be determinative for the purposes of section 41.2(1) of that Act.

The Board finds this submission to be extremely significant to its task of determining what the significant heritage resources or attributes of Port Dalhousie are. PROUD’s position means that the District Study and Guidelines set out objectives to be achieved in designating the District, and include a statement explaining the cultural heritage value or interest of the District, a description of the heritage attributes of the District and policy statements, guidelines and procedures for achieving stated objectives and managing change in the District. The Board accepts this submission of PROUD, and finds that there is sufficient detail in the District Guidelines and Study to determine what constitutes the significant heritage attributes and resources of Port Dalhousie. Witnesses for PROUD were consistent in their evidence; the Guidelines and the Study contain the content required by section 41.1(5) of the new *Heritage Act*.

As a corollary of this finding the Board is unable at the same time to accept PROUD’s submission that “in describing the character of the Commercial Core, the District Study opted to mention a few examples in an effort to capture the ‘essence’ of what constitutes the commercial core”. Either the Study and the Guidelines contain the content required by section 41.1(5) or they “capture an essence”; the Board finds that they cannot do both. If the Board accepted this submission, the significant heritage attributes would not be as set out in the Study and the Guidelines; they would be a

moving target. Counsel for PROUD attempted to buttress PROUD's position on this point by using an example cited by Mr. Cuming during testimony. He pointed out that the McGrath Hotel was not mentioned by name in the Study or Guidelines, but it is significant to the character of the Commercial Core. The Board finds this evidence and any argument based on it to be disingenuous.

While the District Guidelines do not specifically mention the McGrath Hotel, its value is clearly envisaged in the Guidelines' description of the Commercial Core as being "distinguished by nineteenth and early twentieth century architecture of two-and three-storey terrace blocks and individual hotels..." This is very different, the Board finds, from the Hydro Building and Erskine's Pharmacy, one-storey, mid twentieth century buildings of which there is not a hint in either the Study or the Guidelines.

Policy 16.90(b) of the Neighbourhood Plan also envisions some certainty in the District Guidelines or Plan about what gives Port Dalhousie its "distinctive character". Features may include placement and relationship of buildings; scale and character of the townscape; height and density of buildings; and vistas, views and landscapes. The policy says "these features should be identified for Port Dalhousie and included in the Heritage Conservation District Plan."

During the course of the hearing the Board was told by witnesses on behalf of PROUD that the following were, *inter alia*, significant heritage attributes of Port Dalhousie's Commercial Core:

1. the Hydro Building;
2. Erskine's Pharmacy;
3. the low-rise element that the Hydro Building and Erskine's Pharmacy brings to Lock Street;
4. the drinking terraces of the Rum Jungle;
5. the open nature of the drinking terrace area;
6. Hogan's Alley;
7. the lack of streetscape on Main Street;
8. the 1980's renovation of Port Mansion; and
9. a variety of views and vistas into and out of the Commercial Core.

Of these nine alleged heritage attributes, only Hogan's Alley is mentioned in the Study or Guidelines. It is part of a locational reference: the Commercial Core area is centred on Lakeport Road, Lock Street and Hogan's Alley.

The Board finds that the significant heritage attributes of both the Port Dalhousie Conservation District, in general, and the Commercial Core, in particular are as set out in the District Guidelines. PROUD and the City argued that PDVC attempted to substitute the analysis of Mr. Higgins, its expert in architectural conservation, of the District's heritage attributes, for that of the Guidelines. The Board has thoroughly reviewed the work of Mr. Higgins and all the heritage experts who testified in the hearing and cannot conclude that PDVC attempted any such substitution. Rather, the Board finds that Mr. Higgins prepared a conservation plan as directed by the PPS. He comprehensively reviewed in his Heritage Assessment Report, February 2006 (Exhibit # 13, TAB 5) the significant heritage attributes of the Commercial Core and the impact of the proposed development on these attributes.

The Board notes that Mr. Higgins has been responsible for completing heritage impact assessments and conservation work on Canadian built heritage jewels like the Library of Parliament. He is eminently qualified to have undertaken the work he did on the PDVC proposal.

Mr. Higgins' work on the PDVC proposal and his opinions do not stand in isolation. The City retained Michael McClelland to "peer review the urban design and architectural elements" associated with PDVC's proposal. Mr. McClelland is an extremely well qualified heritage architect with expertise in heritage planning and urban design. He reviewed Mr. Higgins' work and concluded that the Higgins report "draws further connections between the existing form of the commercial core and specific zones in order to better understand the existing relationships between these elements".

What then are the significant heritage attributes of Port Dalhousie, particularly its Commercial Core which must be conserved? These attributes are as set out in Part 2 of the Guidelines, District Character, specifically "The Commercial Core". They include the Lock and Lakeport streetscapes of nineteenth and early twentieth century two- and three-storey terrace blocks and individual hotels. The Austin House is vital to this streetscape, the Board finds. The Port Dalhousie Jail, perhaps the oldest jail in Ontario, is a significant built heritage resource.

Main Street in the Commercial Core and the unnamed road are not mentioned in the District Study or Guidelines. The evidence was that these streets have historically been the backside of the Commercial Core, providing a service area. On the evidence, they do not have a distinguishable streetscape. The open area bounded by these

streets contains the Rum Jungle and associated drinking areas. This area is not mentioned in the Study or Guidelines and even some witnesses for PROUD agreed that the Rum Jungle has no heritage value. To suggest that it does, strains credulity.

PROUD adduced evidence that Erskine's Pharmacy and the Hydro Building are of heritage significance despite the fact as both were constructed after 1950, neither is, by definition a "heritage building" for the purposes of the Guidelines. These buildings are not mentioned in the Guidelines; they are not two- or three-storey nineteenth or early twentieth century terrace blocks or hotels. The Board cannot conclude that they constitute significant heritage resources.

Some witnesses for PROUD suggested that the view from the Lake and the Harbour of the rear of Lock Street is a significant heritage attribute of the Commercial Core. Again, no mention is made in the Study or Guidelines of this view. The Board cannot conclude that the view is a significant heritage attribute.

The Board heard evidence from witnesses for the City and PROUD that Hogan's Alley, as it exists today, is a significant heritage attribute. As noted above, it is mentioned in the Guidelines only as a geographical reference. PROUD's witnesses asserted that Hogan's Alley is significant for its views and direct access to Lakeside Park and the beach. Again, no such significance is attributed to Hogan's Alley by the Study or Guidelines. The Board cannot conclude that Hogan's Alley, a service lane for the Commercial Core's businesses is a significant heritage attribute.

The Board heard considerable evidence about Port Mansion, located where the Union House and McGrath Hotel were originally situated. The Union House is specifically mentioned in the Guidelines' description of the Commercial Core, and both buildings were two or three storey nineteenth or early twentieth century hotels. All witnesses acknowledged that the Port Mansion, as it exists today, is the result of an extensive renovation undertaken in the 1980's. Mr. Higgins, the only witness who has systematically reviewed the interior and exterior renovations, testified that the two original buildings were entirely "gutted" in that renovation. Roof lines were changed, windows were replaced, and, most importantly, the Board finds, a nineteenth century façade was imported from Pennsylvania and iron railings were ordered from an American catalogue. It was the opinion of both Mr. Higgins and Mr. McClelland that these additions have no connection to the heritage of Port Dalhousie.

Mr. Higgins testified that the only elements of the original hotels which remain are the foundation footprint, an elevation difference between the two structures, sections of the south wall and some fragments of a party wall. He has extensively examined the fabric of the building and was of the opinion that due to severe disturbance during the 1980 renovation, and the use of inappropriate materials, the front façade is “doomed to structural failure and is nearly impossible to repair”. Mr. McClelland agreed that there are inherent problems in the building’s façade.

Witnesses for the City and PROUD, Messrs. Blozowski and Morgan, planners, and Mr. Goldsmith, a heritage architect, testified that they have observed only 12 to 15 bricks on the façade which show evidence of failure. They, on the evidence, had not been on the roof of the building, nor had they closely inspected the building. The Board must therefore prefer the evidence of Mr. Higgins on the condition of Port Mansion. He is an acknowledged expert on heritage masonry and he has actually inspected the building. The Board accepts his evidence that the Port Mansion is, for all intents and purposes, a 1980’s building with a failing façade and a façade which replicates nothing that is of heritage significance in Ontario.

Certain PROUD witnesses took the position that since the renovation in the 1980’s, Port Mansion has gained “iconic” status in Port Dalhousie, rendering it of heritage significance. If a 1980’s renovation with its imported elements is of such iconic status in the Heritage District, the Board can only ask why it was not mentioned in the District Study or Guidelines. Those documents, the Board was repeatedly told, represent a community consensus on what is of heritage significance in Port Dalhousie. The Board can only conclude that Port Mansion, like the Hydro Building, Erskine’s Pharmacy and the backside of Lock and Lakeport were not considered by community consensus to be significant heritage attributes until the PDVC proposal appeared.

Outside the Commercial Core, the low-rise character of the residential area of Port Dalhousie is clearly a significant heritage attribute for the entire District. The impact of the PDVC proposal on this component of the Heritage District is relevant to a determination of whether the PDVC proposal conserves the heritage attributes of the District.

Michael Kirkland, the architect of the PDVC proposal, testified in detail about PDVC’s development proposal, its constituent parts and his opinion on the appropriateness of the proposal for this specific site in Port Dalhousie. Mr. Kirkland

referred extensively to Exhibit # 13, the Application to Amend the City of St. Catharines Official Plan and Zoning By-law; Exhibit # 7, the Site Plan and Heritage Applications; Exhibit # 15, the Graphic Evidence Book; Exhibit # 16, the Design Primer; Exhibit # 17, the Visual Impact Study; a scale model of Port Dalhousie, including the proposal; and a myriad of other visual exhibits. He presented the Board with alternatives for the proposed development, one which includes publicly owned land, Hogan's Alley and a laneway at the northerly end of the site, and one which he described as a "mild variation" which does not require the use of public land. His preference is the proposal which includes the public land as it allows for a "comprehensive revitalization of the block"; it facilitates delivery and garbage access; and it provides good access through a publicly accessible court to Lakeside Park.

Mr. Kirkland's evidence on the proposal was exhaustive and it is well summarized in his Issues List Responses contained in his Witness Statement, Exhibit # 8, TAB 2. In his opinion the proposal is compatible with its context as the "scale of the heritage streets (Lock and Lakeport) is observed and replicated with infill buildings on those frontages". Colours and materials used complement the existing buildings (particularly the Austin House); the higher residential component is well back from the heritage streets, located on Main St. and the street with no name; the residential building "provides transitional built form, material and colour to facilitate sympathetic transition between lower and higher elements"; and the street wall buildings are built to the property line, as are the existing buildings.

Mr. Kirkland considered impact on the neighbourhood immediately adjacent to the development, and at a distance. In his opinion the revitalization of the Commercial Core will have a major positive impact. The visual impact of the development, especially the residential tower is "virtually nil" from the heritage streets in the core, due to the positioning of the buildings. The Visual Impact Study demonstrates, in his opinion, that there is no "ill effect" from seeing the building. Finally, in his opinion, the visibility of the project and its tower is positive, as it marks the location of Port Dalhousie and it signals revitalization.

In his opinion the proposal results in no negative impact on the heritage attributes of Port Dalhousie as the significant heritage attributes are conserved.

The open space afforded by the project in Hogan's Court, is in Mr. Kirkland's opinion a major benefit for Port Dalhousie. It opens a commercial area; it provides an effective path to Lakeside Park; and it can facilitate year-round animation.

Mr. Higgins was retained by PDVC to "assist Michael Kirkland in ensuring that heritage-related issues identified in our 2005 Heritage Assessment Report (on the Diamond Scheme) were properly incorporated into the new scheme". He subsequently developed the detailed Conservation Strategy for the heritage resources on the site, specifically for the site plan and heritage permit applications. As noted above, Mr. Higgins work was extensive and informed by a high degree of expertise. His evidence on the relevant issues before the Board is summarized in his Witness Statement, Exhibit # 8, TAB 7.

Philip Goldsmith, a prominent, well-qualified heritage architect, testified on behalf of PROUD, concluding that PDVC's proposal "does not have appropriate regard for the word or intent of the Heritage Conservation District Plan and guidelines". The proposal, in his opinion, does have an adverse impact on both individual heritage buildings and the cultural heritage attributes of Port Dalhousie. In particular, he is of the opinion that the new building façade beside the Austin House "diminishes the stand alone individuality of the historic hotel"; the replication of the McGrath-Union House "could potentially remove character of use and adaption over time"; the new theatre façade "is a cinematic modern work out of place in an historic setting"; and the tower "looms literally over the delicate but historically significant jail house". Mr. Goldsmith prepared on behalf of PROUD a Heritage Evaluation of the Proposal (Exhibit # 234).

Mr. Goldsmith specifically addressed the visual impact of the proposed development through a massing study, Exhibit # 237. The Board finds that this study undoubtedly informs all of his opinions about the PDVC proposal. Under cross-examination Mr. Goldsmith acknowledged that his massing model focuses exclusively on massing; it provides no details of the proposed buildings, the surrounding buildings or the general foreground and background. He acknowledged that because his models were just that, massing models, Mr. Kirkland's models and images were more representative of what a person would actually see. He agreed that his opinion on "compatibility" or "lack of fit" of the proposal was informed strictly by the massing issue, and he further agreed that compatibility cannot simply be determined by considering mass.

The Board has reviewed the evidence and work of all the qualified heritage experts on the vital issue of heritage conservation. Their evidence is informed by considerable expertise, exhaustive work and a good deal of passion, none of which this Board can fairly summarize in this decision. The Board finds that the fairest, most balanced and most persuasive evidence on the heritage issue was given by Michael McClelland. Mr. McClelland's work was not done on behalf of a proponent of development, nor on behalf of an opponent focused on heritage conservation. Rather his work was done on behalf of the City, the public authority charged with having regard to the adopted policy regime and the public interest.

Mr. McClelland's work on the Diamond Scheme (Exhibit # 5e, TAB 2) demonstrates that he knows the difference between a development proposal which includes a proposed tower which "would in effect dominate this heritage district and compromise the protected character of both the commercial and residential areas of the Port Dalhousie Neighbourhood" (Exhibit # 5e, TAB 2, p.44) and a proposal which "can be seen as furthering the objectives and priorities of the Port Dalhousie Conservation District Guidelines for Conservation and Change" (Exhibit # 5e, TAB 5, p.183).

The Board's reliance on the work of Mr. McClelland is buttressed by the reliance Mr. Chapman, and by extension, City Council placed on his work. The Board finds that the evidence of Messrs. Chapman and McClelland, witnesses working in the public interest and not for a proponent or opponent is convincing in this matter. In that regard, the Board finds that after reviewing in detail almost 300 exhibits and days of testimony, the most persuasive evidence is found in Exhibit # 5e, TAB 5, Mr. McClelland's Peer Review of the Revised Proposal and Exhibit # 5e, TAB 6, City Planning Staff Report on the Revised Proposal, and the testimony of Messrs. McClelland and Chapman.

The Board finds that the work of Messrs. McClelland and Chapman provided a firm basis upon which City Council made its decision with respect to OPA 31 and the zoning by-law amendment in June 2006. Section 2.1 of the *Planning Act* directs this Board to have regard to the decision of municipal council and any supporting information and material on which it relied in making its decision on a planning matter. As the Board found above, Council's decision was made following a thorough, fair and open public process in which the voices of all interested were heard, and after Council had the benefit of the comprehensive work of Messrs Chapman and McClelland.

In his peer review Mr. McClelland considered Mr. Kirkland's design and his supporting work including a visual impact assessment and shadow studies. As requested by the City, he had regard to the District Guidelines and the Region's Model Urban Design Guidelines (2005) and he provided an opinion on the "fit" or compatibility of the proposal in the context of the Port Dalhousie Heritage Conservation District. He specifically considered the proposed design for Hogan's Court in terms of "the integration of the project with Lock Street, Lakeport Road, Main Street and Lakeside Park". At the request of the City, he looked ahead to the site plan and heritage permit applications to consider how design and architectural elements could be secured. Finally, he considered the Heritage Assessment Report of Mr. Higgins to determine "the appropriateness of the criteria applied and the evaluation completed".

The Board finds that in doing his work Mr. McClelland considered all matters relevant to his brief, especially the District Guidelines. During the course of the hearing the Board heard considerable evidence about international charters and guidelines; the Board finds that Mr. McClelland's opinion was appropriately informed by such documents.

In considering the visual impact of the proposed development on the Heritage District Mr. McClelland opined that, with respect to views presented within the Commercial Core, "the new development is visible from the adjacent historic streetscapes of Lock and Lakeport but through the use of stepped setbacks and a balance of materials, it adds interest to the existing streetscapes without imposing a conflicting scale on the established form".

From the residential neighbourhood, up Main Street, Mr. McClelland was satisfied "that the proposed development will have no visual impact on most of the heritage district's residential area...This is important, as it is clear that the low built form character of the residential area of Port Dalhousie should be carefully guarded".

Mr. McClelland considered the District Guidelines and opined that they "recognize the nineteenth and early twentieth century architecture as a defining feature of the commercial core..." He looked in detail at the design considerations for new non-residential construction in the Guidelines and judged the proposed development. He opined that the podium base of the proposal around the perimeter of the development "establishes a positive relationship with the existing heritage fabric of the streetscapes along Lock and Lakeport...the use of decorative awnings and banners add visual

interest to the street wall...While the existing Guidelines assume 3 storey facades, it is our opinion that the proposed development's use of additional storeys at the base present an acceptable interpretation of these Guidelines. The setbacks along Lock Street and Lakeport Road create sensitive connections between the new construction and incorporate heritage buildings...the new development successfully respects the established scale of Lock and Lakeport and allows the historic three-storey façade pattern to remain as the defining feature of the commercial streetscape”.

Mr. McClelland considers that the proposed development “completes” the existing commercial block and he is of the opinion that “the proposed development is successful in contributing appropriate infill design, maintaining the prominence of the historic street wall of buildings along Lock Street and Lakeport Road, and in promoting the core’s vitality by providing the opportunity for appropriate retail, restaurant and entertainment uses”.

Mr. McClelland noted that the “primary focus” of the District Guidelines is the residential component of the Heritage Conservation District, a proposition the Board finds to be correct. As a result, the Guidelines focus on building height in the residential area, ignoring the fact that buildings in the Commercial Core exceed the proposed building height of 9m. Mr. McClelland concluded “that a clear vision for appropriate heights in the commercial core is lacking in the current guidelines” and the Guidelines “while well-intended, (do) not provide a considered response to how change might manifest itself in the commercial area nor how the commercial core might grow to maintain, preserve and improve its economic viability”. As an expert in heritage conservation matters, Mr. McClelland testified that such economic viability is a necessary precondition to conserving heritage resources successfully.

Mr. McClelland specifically considered the three, four, six and seventeen storey components of the proposal and opined that the “work of the Kirkland Partnership utilizes the progressive setbacks, an angular plane analysis and a balance of material, which in our opinion are in keeping with the guidelines of the Region’s Model Urban Design Guidelines...and can be seen as furthering the objectives and priorities of the Port Dalhousie Conservation District Guidelines for Conservation and Change”.

Mr. McClelland faced intense cross-examination in this hearing, dealing with the suggestion that his retainer by the City limited him in considering the impact of the proposed development would have on the heritage attributes of Port Dalhousie. The

Board finds that Mr. McClelland's nuanced, well-reasoned opinions were unshaken on cross-examination.

In October 2006 Mr. McClelland had an opportunity to respond to the Heritage Evaluation prepared by Messrs. Morgan and Goldsmith (Exhibit # 5f, TAB 14). He remained firm in his opinions, after having reviewed their work. In response to the assertion that the proposal does not comply with the PPS he said "it is our opinion that the Revitalization plan exactly addresses the conservation of heritage resources. The heritage values, attributes and integrity are retained through the careful protection, use and management of those resources". He went on to opine "the Revitalization proposes the opportunity for substantial improvements to elements within the site, such as the reuse of the Jail House and the restoration of Lakeport Hotel, a significant heritage building in a current state of disrepair. It is our opinion that such improvements will enhance public appreciation and recognition of the heritage values of the commercial core".

On the issue of a 9m height limit in the Commercial Core, Mr. McClelland was of the opinion that while this limit is appropriate for the residential area, "it is insufficient to accommodate or encourage new construction in the commercial core or to maintain the viability of the commercial area".

To the suggestion that the proposal does not comply with the City's OP heritage policies, Mr. McClelland responded "it is our understanding that the commercial character of the core is a heritage value and that sustainability of this use within the core is a more crucial characteristic than height".

To the suggestion that the proposal "is not supported by a strategy for dealing with the heritage impacts of the proposal", Mr. McClelland again noted that "a heritage easement agreement would be essential to the approval of the revitalization and that the easement would be required to include sufficient detail to fully outline all aspects of heritage conservation issues to the satisfaction of the municipality".

The Board finds that Mr. McClelland's work was one part of the exemplary foundation upon which City Council based its decision on June 2006. It performs the same function for this Board. Mr. McClelland's work was nuanced and even-handed, something vital to the cause of heritage conservation in this Province.

The second part of the strong foundation upon which City Council based its decision was the work of Mr. Chapman as set out in his reports to Council of May 15 and June 26, 2006.

As noted above, the May 15 report reviews that proposed development and the policy regime which must inform a consideration of the proposal. The report includes every possible appendix Council might want to consider in reaching its decision. The complexity of the project and the myriad of issues to which it gave rise were set out in a coherent manner.

With respect to the PPS, Mr. Chapman reviewed not just the heritage conservation policy, but also policies promoting sustainable development. In his opinion the proposal complies with the PPS.

He set out for Council relevant Regional policies, including policy 5.5 which provides that certain matters, like this development proposal fall within the mandate of the City.

As the individual with arguably the most experience working with the City's OP, Mr. Chapman set out for Council the policies relevant to the development proposal. He set the context for considering the proposal, noting "the Official Plan recognizes that the more intensive use of land and buildings is inevitable in a maturing urban area". He thoroughly considered all relevant policies, including those found in the Port Dalhousie neighbourhood plan and those specifically dealing with heritage conservation.

Mr. Chapman made it clear that both the St. Catharines Heritage Committee and the Port Dalhousie Heritage District Advisory Committee were of the opinion that the proposed development would have an adverse impact on the heritage character of Port Dalhousie. The reports of these committees were included in the Appendices to his report.

The report considers the merits of the proposal in terms of five major issues: use, servicing, parking, traffic and heritage and design. Each issue is exhaustively explored.

On the issue of use, Mr. Chapman was satisfied that the proposed uses "are in keeping with the purpose and intent of the Official Plan". Servicing was not an issue from the City's perspective. The parking and traffic issues as raised by Hank Beekhuis, a party to this matter will be considered below.

On the issue of heritage and design, Mr. Chapman reviewed the OP policies which the Board has set out above. He considered these policies, bringing his expertise on planning in the City, together with the opinions Mr. McClelland provided in his peer review. Fit, compatibility, heritage, height, adverse impacts, revitalization and use were all considered. Mr. Chapman concluded that the height of the residential component “remains the key issue”. In this context he said the following:

The issue is one of impact on the area resulting from introduction of building heights that are a departure from those existing in the area. The developer has presented arguments that the 17 storey height is tempered by an acceptable urban design that is sympathetic to the heritage elements of the built form and the existing streetscape. The design serves to enhance and highlight the heritage elements of the district, albeit not in a manner that was envisioned by the District Plan. The Peer Review completed on the architectural and urban design aspects of the project accepts this argument. The project is attractive and a desirable boost to the commercial core of Port Dalhousie and the overall City. In staff’s view, the design ‘fits’ into the heritage district and offers an opportunity to enhance the historical elements of the community and creates a sustainable environment for these elements to be retained for future generations. The future of the City does not hinge on one project but this project could be another significant step towards a City that builds on its assets to create a better future for the overall community.

The Board adopts as part of its findings these words of Mr. Chapman. As the Board said above, balancing and weighing interests and policy imperatives is crucial to its determination of appeals like those now before it. City Staff in its report and City Council in its decision to adopt OPA 31 and Zoning By-law No. 2006-228 admirably demonstrated an understanding of this need for balance. No policy document relevant to the matters before the Board gives priority to either heritage conservation or growth and economic vitality. All policy documents mandate balance. Section 41.2 of the new *Heritage Act* may make the objectives set out in a heritage conservation district plan determinative, but for the reasons set out above, the Board has found that the District Guidelines do not constitute such a plan. In any case, the Board does not find that the PDVC proposal is contrary to the stated objectives of the District Study or Guidelines. The Board found above that the Guidelines require that new development must make a positive contribution to the heritage district. The above lengthy excerpt from Mr. Chapman’s report summarizes how this goal is accomplished.

The Board finds that OP policies 7.9.1 and 7.9.2, while not heritage conservation policies, address the issue of a development making an area better than it found it. These policies speak to areas with “no established streetscape” or “where the streetscape is relatively weak”. The Board accepts the evidence adduced by PDVC that

a large portion of the PDVC site suffers from a weak streetscape pattern. The PDVC proposal confronts this problem and makes it better.

With respect to the built heritage resources which are recognized by the District Guidelines, the PDVC proposal would appropriately revitalize them, leaving them better than they were found. The Austin House is to be restored and incorporated into a boutique hotel (adaptively reused); the Jail House is to be restored and given a prominent role in recognizing Port Dalhousie's Heritage (adaptively reused). The streetscape on the heritage streets, Lock and Lakeport are to be revitalized with identified heritage attributes highlighted. The drinking terraces, which everyone agreed pose a problem for the heritage district, are to be replaced by a publicly accessible court with associated retail and restaurant uses.

Parking and Traffic:

Hank Beekhuis put considerable time and effort into the traffic and parking issues, attending much of the hearing. It was the position of Mr. Beekhuis, supported by a number of participants, that the PDVC proposal would cause both traffic and parking problems for the Commercial Core, the adjacent residential area and Lakeside Park. As a summer tourist destination, Port Dalhousie currently faces traffic congestion, particularly on summer weekends. In addition, parking on these weekends and in the evening when the "bar scene" is active, is a problem. As there is insufficient parking to serve the Commercial Core at such times, there is spill over into the residential area.

PDVC retained BA Consulting Group Ltd. ("BA") to provide transportation consulting services with respect to the external road network adequacy and improvement requirements, site access and on-site parking adequacy. Chris Middlebro, an engineer with BA testified on behalf of PDVC at the hearing. A summary of his evidence is found in his Witness Statement, Exhibit # 8, TAB 9. It was his evidence, based on the work the firm did, that traffic volumes during busy weekend afternoons would increase with the PDVC proposal and its theatre. However, it was his opinion that traffic operations at the Lock and Main and Lock and Lakeport intersections could be maintained at acceptable levels with a separation of through and left turn lanes at Lock and Lakeport. His evidence was that traffic demands during the summer evening period would be reduced with the proposed reduction in the "bar scene".

The City retained Paradigm Transportation Solutions Limited to peer review BA's work. Phil Grubb of Paradigm testified on behalf of the City during the hearing. He agreed that the proposed development would reduce late evening bar traffic and parking. The focus of his concerns was on parking on weekend afternoons in the summer.

Mr. Chapman addressed the traffic issue in his staff report of May 2006. He noted that "on summer weekends and when special events are occurring, there is traffic congestion in and around the core area. If the project were built as proposed, there would be more traffic on summer weekends during the day...there will be increased congestion then. The amount of traffic in the summer afternoon peak will still be less than the current summer night traffic. The increased traffic will cause some disruption for the public visiting lakeside Park or the commercial core. There is no evidence that the road system cannot deal with the volume of traffic".

Having reviewed the evidence of the expert and lay witnesses, the Board finds that the PDVC proposal would increase traffic in the core and probably the adjacent residential areas on weekend afternoons during the summer. However, it would decrease the traffic during the problematic evening "bar scene" period. Mr. Chapman concluded that "while there will be increased congestion on summer afternoons...traffic by itself is not a basis for recommending denial of the application". The Board agrees; there was no expert evidence adduced that the road system could not handle the increased traffic. Lakeport Road, Lock Street and Main Street are Regional roads. The Region attended the hearing in support of the PDVC proposal; it raised no concern about the operation of its roads.

The parking issue was also addressed by Mr. Beekhuis, some participants and experts on behalf of PDVC and the City. The City's position on the parking issue, like its position on the entire PDVC proposal, changed radically between May/June of 2006 and the time of the hearing. At the hearing the City took the position that the parking standard used by the City's Planning Services Department based on the recommendation of the Transportation and Environmental Services Department ("TES"), of one parking space for four theatre seats, is inadequate. The City's position at the hearing was that the PDVC proposal would result in a parking deficiency of between 120 and 145 spaces.

Parking was considered in some depth in Mr. Chapman's May 2006 Report. TES reviewed existing parking demand on summer weekend afternoons and summer evenings and projected demand with the PDVC proposal. TES determined that the deficiency would increase by 195 spaces on a summer weekend afternoon and decrease by some 870 spaces on a summer night.

Mr. Chapman noted in his report "the problem of inadequate parking for a commercial core at a lakefront location is not unique to Port Dalhousie. Parking spreading out from the commercial core into residential areas is common in other lakefront communities". He concluded, after assessing the Port Dalhousie situation, that "it is unreasonable to provide parking to meet peak demand that will sit empty the vast majority of the time. As outlined in the TES report, a balance must be struck between maintaining public open spaces and the provision of parking".

The solution to the parking problem recommended by TES and supported by the Planning Department is set out in Mr. Chapman's report. TES recommends reconfiguring the parking in Lakeside Park, at PDVC's expense, thereby adding between 30 and 50 spaces without encroaching on the Park. Additional parking areas were identified by the City on the east side of the harbour. The Planning Department recommended that as a condition of approval to the PDVC proposal, PDVC be required to operate a water taxi between that area and the Commercial Core and be required to cover the cost of that parking off-site.

PDVC took the position that is unreasonable to build parking to accommodate peak demand if that parking will sit empty the majority of the time. PDVC adduced evidence that the underground garage on the site will contain 235 parking spaces. This adequately meets the parking requirement for both the condominium building and the hotel. PDVC is not required to provide parking for retail and restaurant uses as there is a general by-law exemption in place for these uses.

PDVC argued that the 104 parking spaces required to meet the demand of a 415 seat theatre could be located off-site. In 2005 Paradigm, the City's parking consultant completed the Port Dalhousie Parking Study (Exhibit # 110) in which a variety of potential parking sites outside the Commercial Core were identified. These include sites in the east harbour area. The use of the east harbour area for parking would involve a walk of in excess of 15 minutes to the Commercial or the use of a water taxi.

PDVC confirmed through Counsel that it would work with the City to reconfigure the parking lot in Lakeside Park to provide 35 to 50 additional spaces and would provide the balance of the required spaces off-site to the City's satisfaction.

Having reviewed the evidence, the Board finds that the operation of a successful theatre on the PDVC property will result in the exacerbation of an already problematic parking situation in Port Dalhousie on summer weekend afternoons. However, the reduction in bar seating which would result from the development would improve the parking situation in the evening.

The Board finds that the proposition that one does not provide costly on-site parking to meet intermittent demand to be generally persuasive. Off-site parking, built and operated at the expense of a proponent of a development can be used to meet such intermittent demand. However, such off-site parking must be so reasonably and conveniently located that it will be used in preference to residential streets. The parking lot in Lakeside Park is so located and the Board finds that PDVC may work with the City to provide spaces to accommodate theatre parking in that lot. However, the Board finds that a parking lot located on the eastern side of the harbour, reached via a water taxi or a walk in excess of 15 minutes is not a reasonable solution to PDVC's parking shortfall. Therefore the Board finds that however many of the 104 parking spaces required by the theatre which cannot be accommodated in a reconfigured Lakeside Park lot, must be accommodated on site. The Board understands that parking spaces in an underground garage, located so close to Lake Ontario are costly, but that cost must be born by PDVC. If it were not, the cost of overflow parking on summer weekend afternoons, would be borne by residents in the neighbourhood adjacent to the Commercial Core. That would not be fair.

Alternative Proposals:

During the course of the hearing, the Board was presented with PDVC's preferred development proposal which includes public land (Hogan's Alley and a portion of the unnamed road allowance) and an alternative proposal which would not require the use of public land. As noted above, the Board has no authority to order the City to transfer ownership of any public land to PDVC. However it finds that the public benefits associated with the development of Hogan's Court in PDVC's preferred proposal are evident and it is the preferred proposal of the Board.

Issues List:

The answers to the questions posed in the Issues List are found throughout the body of this decision. In summary: the PDVC proposal complies with the *Ontario Heritage Act*, the *Planning Act*, the Regional Plan, the City's OP, the Neighbourhood Plan and the District Guidelines; the proposal represents good planning and is in the public interest; and the appropriate mechanism for securing the retention, maintenance and protection of heritage features on site is the Site Plan Agreement and Heritage Easement Agreements.

Disposition:

The Board finds that PDVC's development proposal constitutes good planning and is in the public interest and hereby approves Official Plan Amendment No. 31 ("OPA 31"), Zoning By-law 2006-228 and PDVC's site plan and heritage permit applications, with the following modifications and amendments and subject to the following conditions:

- (a) Appeals of OPA 31 – The appeals of PROUD et al. are denied. The Board approves OPA 31 with the modifications contained in Exhibit # 289 and any further modifications arising from item e(ii) below;
- (b) Appeals of Zoning By-law No. 2006-228 – The appeals of PROUD et al. are denied. The Board approves Zoning By-law 2006-228, with the amendments contained in Exhibits # 120 and # 287, any further modifications arising from item e(ii) below and the following modification to section 3(ii)(e) parking: Minimum required parking for the theatre shall be provided by either or both of the following: i) on-site underground parking; ii) off-site parking in the public parking lot in Lakeside Park, satisfactory to the Municipality;
- (c) Site Plan Appeal – The appeal of PDVC is allowed. The site plan drawings (Drawings A-002, A-101 to A-107 inclusive, A-B01 to A-B04 inclusive, A-301 to A-303 inclusive, A-401 to A-404 inclusive) and landscape drawings (Drawings SPL-1 to SPL-4 inclusive (Exhibit # 7, Sections 5.1 and 5.3, as modified by drawings contained in Exhibit # 5f, pp.319-349) are approved subject to any revisions and conditions of approval arising from item e(iii) below and any

revisions arising from the necessity to provide additional on-site parking in the parking garage;

- (d) Heritage Permit Appeal – The appeal of PDVC is allowed. The Board directs that a heritage permit issue for the demolition, alteration and new construction proposed in PDVC’s heritage permit application, subject to such demolition, alteration and new construction being undertaken in accordance with the submitted Heritage Conservation Strategy (Exhibit # 7, section 6.0) and with the Heritage Easement Agreements to be entered into between PDVC and the City pursuant to item e(iv) below, and subject to all excavation being undertaken in accordance with the requirements of the Ministry of Culture as set forth in Exhibit # 175;
- (e) Order Withheld – The Final Order of the Board is withheld pending the following:
 - (i) The City has decided whether to close and convey the required portions of Hogan’s Alley and the unnamed road allowance to PDVC;
 - (ii) Any technical modifications and amendments to OPA 31 and Zoning By-law 2006-228 flowing from the City’s decision on whether to close and convey the required portions of Hogan’s Alley and the unnamed road allowance;
 - (iii) The site plan requirements of the City, including those identified in Exhibit # 43, are addressed to the City’s satisfaction, and incorporated into a Site plan Agreement; and
 - (iv) The City and PDVC have settled the terms of the Heritage Easement Agreements.

The Board may be spoken to if difficulties arise and should be updated with respect to the issuance of its Final Order within four months of the date of this decision.

This is the Order of the Board.

“Susan B. Campbell”

SUSAN B. CAMPBELL
VICE CHAIR