

ISSUE DATE:

**Jan. 11, 2007**

DECISION/ORDER NO:

**0080**



PL060359

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

East Lofts Inc. has appealed to the Ontario Municipal Board under subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Committee of Adjustment of the City of Toronto which dismissed an application numbered A0987/05TEY for variance from the provisions of By-law 438-86, as amended, respecting 275 King Street East OMB File No. V060195

**APPEARANCES:**

**Parties**

**Counsel\*/Agent**

East Lofts Inc.

K. Kovar\*

City of Toronto

S. Bradley\*

St. Lawrence Neighbourhood Association

F. Burns

**Participants**

R. Sherrin

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

East Lofts Inc. (the "Appellant") has appealed to the Board from a decision of the Committee of Adjustment (the "COA") of the City of Toronto (the "City") which dismissed an application for six variances from the provisions of By-law 436-86, as amended (the "By-law") in respect of 275 King Street East.

The variances are as follows:

1. The maximum permitted height of the building is 30.0m with a 5.0m mechanical penthouse. The proposed height of the building is 44.0m with a 2.3m mechanical penthouse, for a total height of 46.3m.

2. The By-law requires 258.0msq. of outdoor residential amenity space with 40.0msq. to be adjoining or directly accessible to the indoor residential amenity space (multi-purpose room). The proposed outdoor residential amenity space is 0.0msq.
3. The By-law requires the portion of the building located beyond 25m of a street to be set back a minimum distance of 7.5m from the side and centre line of the lane. The proposed building is set back 0.0m from the west lot line and 3.06m from the centre line of the lane.
4. The By-law limits the building height at the street line to 16.0m. The proposed building has a height at the street line of 25.5m.
5. The By-law requires the building to be within the 44 degree angular plane projected over the lot line from an elevation of 16m over the street line. The proposed building penetrates the angular plane.
6. The By-law limits a building height to 30.0m. The proposed building has a height of 46.3m.

The City opposes the variances, noting that the essence of its opposition is the height of the proposed building and the penetration of the angular plane. The St. Lawrence Neighbourhood Association (the "SLNA") also opposes the variances.

**Position of the Appellant:**

Frank Lewinberg was qualified by the Board to provide expert land use planning and urban design evidence on behalf of the Appellant. Mr. Lewinberg testified to his extensive experience with the neighbourhood of the subject property, noting that he was involved in the preparation of the City's King-Parliament Study and that he worked on the first master plan for the St. Lawrence Neighbourhood.

Using Exhibit #2, which includes architect's drawings, shadow studies and projections, Mr. Lewinberg described the proposed building. It is proposed that the building have a street wall on both King and Princess Streets. A high ground floor is to

contain retail space; the second floor is to be office/commercial. The next four floors are residential with a stepback to five more residential floors. On the first floor, along the street wall, is architecturally demarcated retail space. To the south of the proposed building is an existing laneway which is to be retained and utilized for vehicle access.

Mr. Lewinberg testified that the proposed building is “remarkable” as it contains large units with either balconies or terraces. The architectural style is “modern”; he describes the architect, Peter Clewes, as one of the “two or three best architects in Toronto” with a strong sense of design.

Mr. Lewinberg described the King-Parliament area as being characterized by older warehouse-style buildings, with a “great mixture of styles”. Since a City initiative in the mid-1990’s, the area has seen the development of 12, 16 and 17 storey condominium buildings, which, in Mr. Lewinberg’s opinion demonstrate the “next generation of development with more interesting and contemporary design”. The area has a significant heritage character, with a number of either designated or listed buildings. The existing building on the site is neither designated nor listed. The building is currently used for storage.

Mr. Lewinberg reviewed what he considered to be the relevant policy documents with the Board. In his opinion the proposal meets the objectives of the Provincial Policy Statement, 2005 (the “PPS”). The project supports residential intensification and contributes to the provision of a wider range of housing opportunities. In his opinion the project also complies with MetroPlan in that it furthers the goal of “reurbanization”. The property is, in his opinion, ideally located within the Central District, which should see the greatest degree of intensification.

Mr. Lewinberg reviewed in detail relevant portions of the City’s Official Plan (the “OP”) found in Exhibit #1, TAB 2. He noted section 1.4, Physical Structure and Urban Quality, noting that “Council will build upon past planning achievements by continuing to preserve, protect and strengthen the successful elements of the City’s physical structure...In recognizing this physical structure, it is the goal of Council to improve the quality of urban life, particularly in relation to the planning of new and existing residential neighbourhoods and the design of streets, parks and other public spaces, buildings or works. Council will implement a framework for regulating densities that places the

emphasis on built-form, urban design and environmental objectives, including sunlight and wind". In Mr. Lewinberg's opinion the proposal "fits this context".

Section 1.7 deals with Maintaining the Vitality of the Central Area. It provides that "it is a goal of Council to strengthen the vitality of the Central Area and to support its unique role as the region's primary concentration of diverse activity and major international centre...Council shall pursue a system of financing municipal services that nurtures a prosperous and vital Central Area and encourages the maintenance of high quality neighbourhoods, promotes residential intensification where appropriate and supports small businesses". In Mr. Lewinberg's opinion the proposal "absolutely" promotes this goal, including promoting small business.

Mr. Lewinberg testified that the proposal furthers the goal of maintaining and improving the public realm. Section 3.1(a) of the OP provides "Council regards the public realm as an important asset for the benefit of all people. The public realm comprises public streets and lanes, parks and other open spaces, and the accessible parts of public buildings. Council will seek to extend the public realm and maintain and enhance its quality, by measures such as encouraging development that enhances the quality of the public streets and other publicly accessible open spaces". In Mr. Lewinberg's opinion this "development particularly pays attention to enlivening the street". He noted sections 3.12(a) and (b), opining that the proposed building would reinforce the City's existing street and open space patterns as the street level and lower portions of the proposed building would be aligned parallel to the street, and, as it is to be located at a corner, it would be sited and massed in a way that acknowledges the intersection. In his opinion the goal of section 3.13 is also met; there is a high quality of urban design with a structure which harmonizes with the neighbouring development as the siting and massing of the proposed building is appropriate in relationship to neighbouring development.

Mr. Lewinberg reviewed the axonometric drawings in Exhibit #2, which he testified demonstrate that as little as possible of the proposed building is up against the neighbouring Abbey Lane condominium development. In his opinion the relationship to the adjacent building is good; the impact on that building is minimized.

In having regard to section 3.14 of the OP, Building Setbacks, Heights and Densities, Mr. Lewinberg reviewed street elevation drawings found in Exhibit #2. Elevations along King, Front and Princess Streets are depicted. Mr. Lewinberg pointed out the heights of 160 King St. E., 247 Richmond St. E., 311 Adelaide St. E., 214 King St. E., 288 King St. E., and 26 Esplanade. 159 Frederick St., 120 Front St., 109 Front St., 37 Jarvis St., and 230 King St. E. Mr Lewinberg testified that the proposed building would fit in well to the “consistent line of buildings”. In his opinion, for an important street like King St., the proposed height, before the stepback, is more appropriate for the street line than the permitted 16m.

In his opinion, the proposal also meets the requirements of sections 3.15, 3.16 and 3.18 of the OP. The entrances to the proposed building are designed and located in a manner that enhances the public realm. Primary entrances are clearly visible and on a street frontage; access from sidewalks to the retail and office components are convenient and direct. The proposed building is practical and functional, within the constraints of the site. The laneway as exists is being utilized for vehicle access. No new curb cut is required for access.

Mr. Lewinberg reviewed the shadow studies found in Exhibit #2 in the context of section 3.27 of the OP, Sunlight on Parks and Important Public Streets. He compared the as-of-right shadows for June 21 and September 21 to the shadow cast by the proposed building. In his opinion the studies demonstrate that in June there is no additional impact from the proposal, while in September there is some additional shadow on the north side of King St. The additional shadow on the sidewalk lasts from noon until 3pm. In Mr. Lewinberg’s opinion three hours of additional shadow on the north sidewalk constitutes “a very small impact” and is “not important”.

Mr. Lewinberg reviewed section 6.14 of the OP, Residential Intensification, which provides “in order to accommodate future demand for housing in the City, it is Council’s objective to encourage Residential Intensification, as defined in the (1989 PPS)...The development of new housing units through new construction, conversion, infill and redevelopment shall be considered within the intent of the land use policies and regulations contained in this Plan or in Part II of this Plan. Mr. Lewinberg testified that the proposal meets this intensification goal. Further, having regard to section 8.6, the Role of Housing Intensification in Transportation, Mr. Lewinberg was of the opinion that

this goal is met. Council is to encourage housing development in the Central Area to reduce the need to build costly additions to the transportation system. Mr. Lewinberg noted that the King streetcar runs right by the front door of the proposed building.

The proposed development is subject to the King-Parliament Secondary Plan (the "Secondary Plan"), and to specific King-Parliament Urban Design Guidelines. Mr. Lewinberg reviewed the provisions of the Secondary Plan in detail with the Board. The major objectives are set out in section 2. Section 2.1 provides "it is the policy of Council to attract new investment to King-Parliament". Section 2.2 provides "Council shall regard King-Parliament as an area having an emerging hybrid mixture of commercial, institutional, industrial, light industrial, entertainment, recreational, residential and live/work activities, all of which are mutually compatible and all of which respect and compliment the existing built form character of the area".

The Secondary Plan, Mr. Lewinberg testified, sets out specific planning policies for the area. He reviewed the policies detailed in section 2 which include the promotion and retention of existing buildings, particularly heritage buildings, the promotion of good quality working and living environments, the protection of the structure of public streets and open spaces and the promotion of high urban design. In particular, Mr. Lewinberg noted section 2.9(a) which provides that it is a policy of Council that "the portion of King-Parliament west of Power Street shall be viewed as a Reinvestment Area for a wide variety of land uses including commercial, retail, entertainment and compatible industrial development, and live/work and residential land uses all within both existing and new buildings".

Section 8 sets out policies for the Jarvis-Parliament reinvestment area in which the subject property is located. Again, the area is regarded as a "diversified mixed use area with numerous historically and architecturally significant buildings". Section 8.2 provides "Council regards the introduction of new residential uses, including live/work units, as complementary to King-Parliament's role as a business area, providing an incentive for the retention of existing buildings, especially those of architectural or heritage merit". Section 8.3(d) provides that Council may pass by-laws to "permit residential buildings...in combination with...commercial uses, provided that the residential uses shall provide a satisfactory living environment, by having regard for light, view and privacy standards; the appropriate separation of car and truck activity

from areas of pedestrian activity; the provision of a satisfactory noise environment for both residents and workers...”

Section 3 of the Secondary Plan deals with Urban Structure and Built Form. King St. E. is recognized as a “Special Street”, located within an “Area of Special Identity”. Council seeks “to maintain and enhance the quality, role and character” of “Special Streets”. “Areas of Special Interest” are recognized as having “unique characteristics which should be protected and enhanced by regulations and guidelines”, specifically urban design guidelines.

The built form policies for the area are set out in section 3.2. New buildings are to be located in such a way that they define and form edges along the streets; siting of lower levels of new buildings should enhance the public realm; servicing and vehicle access should be from rear lanes; new buildings should be sited and massed to meet adequate light, view and privacy standards; compatible relationships should be established through consideration of matters like building height, massing, scale, setbacks and stepbacks; and wind and shadow impacts on streets are to be minimized. In Mr. Lewinberg’s opinion, the proposal meets these built form policies.

Specific Urban Design Guidelines are set out for the area in the Council-adopted guidelines of July 20, 2004 (Exhibit #1, TAB 5). The subject property is located within the Old Town of York which is still recognizable “as having a special pattern of small, square blocks within generally larger, more rectangular blocks. Presently the area lacks a separate or distinguishing built form character, and, as such, it is important that design guidelines are adhered to”. For King St., specifically, “new infill development will respect and reinforce the established built form character in terms of general building type and height along the street frontage and vertical and horizontal articulation”.. In Mr. Lewinberg’s opinion, the proposal, built to the lot line, articulates the streetline and accentuates the grid of the streets. As such, it meets the urban design guidelines.

Mr. Lewinberg drew the Board’s attention to section 4 of the OP, Heritage and Community Improvement. Council recognizes that heritage buildings are essential elements of the physical character of the King-Parliament area. Heritage buildings are to be retained, conserved and rehabilitated. However, Mr. Lewinberg pointed out that the existing building on the subject property is neither designated nor listed. New

buildings are to achieve a compatible relationship with heritage buildings through consideration of such matters as height, massing, scale, setbacks, stepbacks and architectural character.

It was Mr. Lewinberg's opinion that the six variances requested meet the four tests set out in section 45(1) of the *Planning Act* (the "Act"). They are minor, they are desirable for the appropriate development of the land and the general intent and purpose of the OP and the By-law are maintained. The 30m height restriction in the By-law has not been met in the vicinity of the subject property and the proposed height, in his opinion, fits "comfortably" within other approvals in the area. The area is eminently suitable for intensification, as is evidenced by the approved and built developments immediately surrounding the subject property.

In his opinion the proposed building is carefully massed with an appropriate height for King St. E. The near neighbours, newly built developments, set the context for the proposal, and in Mr. Lewinberg's opinion, the proposal fits the context.

In his opinion the extra three hours of shadow on the north sidewalk does not constitute a substantial impact when one considers what residential intensification is doing in terms of revitalizing the area. New residents and consumers will be attracted to the area by what he considers to be "architecture of the highest possible quality". The specific design of the building allows for sensitive massing, with little impact on the condominium building to the west, and it brings to the market condominium units which are relatively large.

The general intent and purpose of the OP, especially as set out in the Secondary Plan are maintained in his opinion. Further, the general intent and purpose of the By-law which is to enclose the street with a stepback to ameliorate shadow impact, is maintained in his opinion. The variances are minor as there is little impact. The development is appropriate as it furthers the goal of intensification and revitalization in the Central Areas.

With respect to the variances concerning amenity space, Mr. Lewinberg was of the opinion that the four tests of section 45(1) are met when one considers the nature of the area. There are a number of parks in the area, and the neighbourhood is "culturally rich". The subject property is in proximity to the Distillery District, theatres, the

waterfront and recreational facilities. Due to the building design, 70 out of the proposed 129 units will have private outdoor amenity space on terraces or balconies. A payment of \$175,000 by the Appellant, for the improvement of local park space is proposed.

Mr. Lewinberg reviewed the details of a number of other development projects in the area, in terms of variances which were granted. With respect to height, outdoor amenity space, setbacks and stepbacks, the proposal is similar to the other projects. Mr. Lewinberg noted that City staff did not object to the proposal and the required variances before the COA. In addition, Mr. Lewinberg noted that City staff encouraged proceeding by way of variance, rather than by way of rezoning. Reinvestment in this area is encouraged in this way, in Mr. Lewinberg's opinion.

Michael Cole, Planner, City Planning Division, Downtown Section, testified for the Appellant pursuant to a summons. He testified that he is responsible for reviewing development applications, including variances, rezoning, OPA's and site plans for the subject area. With respect to the subject proposal, he met with the Appellant prior to the consideration of the application by the COA. The decision by the Appellant to proceed by way of variance was discussed and "staff was comfortable with that approach".

Mr. Cole was responsible for preparing the staff reports, Exhibits #14(a), (b) and (c) which went to the COA. In the first report, dated February 7, 2006, he noted that the applicant had indicated that they would work with staff to "address built form issues through the Site Plan Approval process, in particular, with respect to the streetwall relationship of the proposed building with the existing building adjacent to the west". Mr. Cole testified that he was "satisfied remaining concerns can be dealt with through the site plan process". That process has been held in abeyance pending the outcome of this hearing. He testified that prior to this, City staff had been working with the Appellant and the neighbourhood association to attempt to resolve issues.

Mr. Cole recommended the payment by the Appellant of \$175,000 for local streetscape and/or park improvements, based on what has been secured from other developments in the area. He recommends "indexing" the payment. The payment should be made upon the application for a building permit and the indexing should "kick in" if construction does not commence within 12 months of approval.

Mr. Cole was of the view at the time he prepared the staff reports, and continues to be of the view, that the six variances satisfy the four tests found in section 45(1) of the Act. On the issue of heritage preservation he consulted with City heritage staff to determine whether they were interested in preserving the existing building on the site. No such interest was expressed.

Mr. Cole continues to be of the opinion that the COA process is appropriate for this type of development in this area. Mr. Cole agrees with Mr. Lewinberg that to encourage appropriate development the planning process can be expedited through the COA. He testified that no comprehensive review of the planning policies for the King-Parliament area is being done, he sees no need for such a review and he sees no need to hold off processing applications until such a review is done. In reaching his opinion he reviewed all the plans presented for the proposed building and particularly considered potential negative impact. In his opinion there is no significant negative impact that should lead to the denial of the variances.

**Position of the St. Lawrence Neighbourhood Association (the “SLNA”):**

Frank Burns, representing the SLNA acknowledged that the membership of the Association had not authorized his appearance at the hearing. He also acknowledged that recent condominium developments like Abbey Lane, MOZO and Kings Court are not members of his association. In the original ten blocks of the Old Town of York, no commercial owner of property is a member of the association. The SLNA has objected to some, but not all, of the proposed and built residential projects in the area.

The SLNA sought to have Avrum Regenstrief qualified to give expert urban design and land use planning evidence. Mr. Regenstrief was cross-examined by Counsel for the Appellants on his qualifications. It was clear to the Board that Mr. Regenstrief, while sincere in his opinions, could not be qualified to provide expert opinion evidence. He gave up his license to practice as an architect in Ontario in 1970; his most recent work was in 1997 to 2000 on his own house. His most recent professional work in urban design was 12 years ago. He acknowledged that he has retired from professional planning practice in Ontario. The Board therefore permitted Mr. Regenstrief to testify as an interested citizen.

Mr. Regenstreif believes that the variances should not be authorized. The 30m height limit is “rational” for the area. He believes that the proposed building would not relate well to its neighbours and would have a negative impact. The additional shadow cast by the proposed building would be unacceptable. A wind study should have been completed. The lack of outdoor amenity space is a problem and the developer should provide the City with \$1,750,000 to make up for the lack of the amenity space. Mr. Regenstreif is particularly concerned about the precedent which would be created if the proposal is permitted.

Mr. Sherrin, a resident of 261 King St. E., the Abbey Lane building to the west of the proposed building, appeared as a participant and testified in opposition to the proposal. It is his belief that the proposal will “overwhelm” his building. He too is concerned about the precedent the approval of this proposal would create.

### **Position of the City:**

Ronji Borooh was qualified by the Board to provide expert land use planning and urban design evidence on behalf of the City. Mr. Borooh is an architect and planner employed by Young+Wright Architects Inc. He was retained by the City for the purposes of testifying at this hearing. Mr. Borooh prepared Exhibit #17, graphic material supporting the City’s position.

In Mr. Borooh’s opinion the six requested variances do not meet the tests set out in section 45(1) of the Act. If the variances are approved, the proposed building will adversely change the character of the area, particularly the south side of King St. E. In Mr. Borooh’s opinion the approval of the variances will create a dangerous precedent. Such a major change, in his opinion, requires a broader, area-wide study on the built form changes in the area.

Mr. Borooh reviewed Exhibit #17, discussing the character of the area. He acknowledged that there has been a range of development in the area, with the tallest buildings located on King, Adelaide and Richmond Streets. However, he testified that the character of the south side of King St. E. has remained constant at three to four

storeys. The OP and the Zoning By-law have worked to protect this area of special identity.

Mr. Borooah prepared projections, contained in Exhibit #17, which he testified demonstrate the problem with permitting the construction of the proposed building. Pages 17 and 18 depict King St. E. with high-rise buildings built along the street at heights he believes will be permitted in the future if this proposal is allowed to go forward. A “canyon” effect is depicted.

Mr. Borooah reviewed the provisions of the OP which focus on the necessity of protecting the character of the Old Town of York. The built form and urban design guidelines, including the height restriction and angular plane provision found in the By-law work, in his opinion to protect this character. He testified that sections 3.1, 3.13, 3.14 and 3.27 are particularly relevant in that they emphasize protecting the public realm and ensuring comfortable street level conditions.

Mr. Borooah reviewed the Secondary Plan, noting section 2.2 which provides that new development is to be compatible and complementary to the existing built form and scale of the area. He discussed section 2.4 which calls for the retention and re-use of existing buildings, particularly heritage buildings. The “special physical character” of the area is to be protected and enhanced (section 2.6).

Section 3, Urban Structure and Built Form recognizes the unique physical characteristics of the Special Streets in the area and Council is to “maintain and enhance the quality, role and character of” these streets. Mr. Borooah pointed out that the Old Town of York, in particular, is to be protected through specific urban design policies.

Mr. Borooah noted section 3.2(e) which, in his view, explains the need to limit the height of the street wall and to enforce the angular plane requirement on the south side of King. St. E. New buildings are to “achieve a compatible relationship with their built form context through consideration of such matters as, but not limited to, building height, massing, scale, setbacks, stepbacks, roof line and profile and architectural character and expression”.

In section 4 the Secondary Plan speaks to the existence of heritage buildings in the area, specifically permitting increased height in return for heritage preservation. Mr. Borooah testified that the proposed development is not preserving any heritage building and is therefore not entitled to any height increase.

Mr. Borooah considered the height of the proposed building in the context of urban design guidelines. To protect the character of the street, and to guard against the creation of “canyons”, Council has set out guidelines (Exhibit #18) to protect the 1:1 relationship between the height of new buildings and the width of the street. In Mr. Borooah’s opinion the proposal ignores these guidelines. Further, the angular plane requirement addressed in the guidelines speaks to protecting the public realm from shadowing. Mr. Borooah did acknowledge, however, that King St. E. is not identified on the OP map of streets with special sunlight requirements.

Mr. Borooah testified that fundamentally the planning documents mandate change and development in a balanced fashion within “an appropriate framework of certainty and predictability”. The height limits foster this certainty and if they are breached a problem is created, in his opinion. He is especially concerned about the “piecemeal planning” fostered by the use of COA applications, rather than by-law amendments. He reviewed a number of other recent developments in the area, including MOZO and Abbey Lane, and was of the opinion that their impacts are not similar to that of the proposed development. The precedent of allowing a building of the requested height and massing on the south side of the street would be dangerous, in his view. Mr. Borooah pointed to his projections, found in Exhibit #17, to demonstrate what will happen if this proposal goes forward. He projects canyon walls along King St. E. The ‘new normal’ created by piecemeal development, is not what is intended by the planning documents.

Mr. Borooah is of the opinion that the proposal “shows a blatant disregard for the framework of predictability and certainty”. The proposal is not a minor change; in his opinion the variances fail to meet any of the four tests set out in section 45(1) of the Act.

In argument, Counsel for the City emphasised the difference between what might appropriately be built on the north side of King St. E., versus what is appropriate for the south side. In his submission the angular plane and height variances for a building on

the south side of the street, like the proposal, are significant because of the shadow impact. In Counsel's submission the complete elimination of the angular plane requirement is not minor and is not appropriate for the development of the subject property. The City's position is that the increased shadow on the north sidewalk constitutes a significant negative impact.

The City, despite the fact that Mr. Cole testified that staff of the City were supportive of development in the area proceeding by way of variance, takes the position that a proposal like the one under consideration, should proceed by way of zoning by-law amendment. The "abandonment" of the angular plane requirement and its consequences should be examined only through the more considered by-law amendment process. Such a process would allow for a full area study which could revisit the reasons upon which the angular plane requirement is based.

#### **Board's Findings:**

The Board, having reviewed the relevant planning documents and the evidence of all witnesses, prefers the evidence of Mr. Lewinberg and Mr. Cole. The opinion of Mr. Regenstreif can be given little weight by the Board. He was not qualified as an expert, and therefore the Board finds, that while his opinions were sincere, they lacked a proper foundation. The Board appreciates that neighbours like Mr. Sherrin and community activists like Mr. Regenstreif have legitimate concerns about change. However, in determining whether the six variances requested meet the four tests set out in section 45(1) of the Act, the Board must have close regard to the opinions of experts who have been qualified to provide opinion evidence, and who have the requisite familiarity with the planning regime and the subject area.

Mr. Borooah was qualified by the Board to provide opinion evidence, however the Board finds that his opinions, and therefore his evidence, do not have the firm base of those of Mr. Lewinberg and Mr. Cole. Under cross-examination Mr. Borooah confirmed that he had no previous experience in the King-Parliament area. The Board must compare this to Mr. Cole, who is specifically responsible for the review of all manner of development applications in the King-Parliament area. He reviews such applications, consults with a variety of City departments and is involved in the public consultation

process. He is responsible for providing written comments, in the case of variance applications, to the COA.

Further, Mr. Lewinberg evidenced vast experience in the King-Parliament area. In fact he was responsible for undertaking the OP study of the King-Parliament area. Throughout his testimony, even under cross-examination, Mr. Lewinberg demonstrated to the Board a thorough, unshaken knowledge of the King-Parliament area, and the planning documents relevant to it.

On the other hand, under cross-examination, Mr. Borooah was confused about where the purported policy requiring a three-hour window of sunlight for King St. E. was set out. In fact, King St. E. is not included on Map 5 of the OP as a street requiring the three-hour window of sunlight. When height, angular plane and shadow impact are front and centre as issues in a hearing, the Board expects an expert witness to have sufficient familiarity with the planning documents to provide accurate, reliable evidence. He also lacked familiarity with the details of other development projects in the area, while at the same time attempting to distinguish their approval from the requested approval of the subject proposal.

In considering whether the variances requested meet the four tests set out in section 45(1) of the Act, the Board must have regard to the relevant provisions of the OP. In particular, when a property is located within an area subject to a secondary plan, the Board must carefully consider the provisions of that plan. Therefore, in determining whether the variances requested are desirable for the appropriate development of the land, whether they maintain the purpose and intent of the OP and whether they are minor, the Board will focus on the provisions of the King-Parliament Secondary Plan.

In addition, in determining whether the four tests are met, the Board must consider not only the planning context, but also the physical context of the proposal. The Board will have regard to the built context of the proposal, which it finds includes a significant number of approved and/or constructed developments.

Section 1 of the OP mandates Council to build “upon past planning achievements by continuing to preserve, protect and strengthen the successful elements of the City’s physical structure”. It is a goal of Council to improve the quality of urban life. Therefore, it is important, the Board finds, to balance the retention and protection of the existing

urban fabric with the need to accommodate growth and enhance the physical structure of the City.

The subject property is located in the Central Area of the City and in section 1.7 of the OP it is recognized that this area has a “unique role as the region’s primary concentration of diverse activity”. Therefore, in this area, Council is to “promote residential intensification where appropriate” and to support small businesses.

In section 3 of the OP the quality of the public realm and appropriate built form are considered. The quality of the public realm is to be enhanced and new buildings must demonstrate a high quality of urban design. Building heights, setbacks and densities must provide an appropriate degree of continuity and enclosure to the streets. In terms of potential impact of new development, Council focused particularly on the need for sunlight on parks and important pedestrian streets. Parks and streets subject to specific standards are set out on Map 5 of the OP. King St. E. is not on the map.

Having reviewed the evidence of the three expert witnesses and the lay witnesses, the Board is satisfied that the goal and intent of the OP are maintained by the requested variances. The proposal will appropriately contribute to residential intensification in the Central Area. The Board accepts Mr. Lewinberg’s evidence that the design of the proposed building, including its height, setbacks and stepbacks provide, as section 3.14 of the OP requires, “an appropriate degree of continuity and enclosure to the street spaces”. Building entrances, servicing and vehicle access are appropriately located, with no negative impact on either the neighbours or the public realm.

The Board accepts the shadow studies presented by Mr. Lewinberg and his opinion that the additional three hours of shadow on the sidewalk on the north side of the street do not constitute a negative impact, in the context of the site. The proposed building is located on a major City street, in a neighbourhood which is being transformed through redevelopment. The vibrancy of King St. E., the Board finds, has been enhanced by developments like that proposed, and in that context, three hours of additional shadow, at a particular time of the year, do not constitute a negative impact such that the Board cannot find the variances requested to be minor.

After reviewing, in detail, the King-Parliament Secondary Plan, the Board finds that the proposed development is precisely the type of development envisioned and mandated by the plan. The fact that Mr. Cole, a well-qualified professional planner, employed by the City, with extensive experience in the subject area, is of the opinion that the variances are appropriate, contributes to this finding.

It is a major objective of the City to attract new investment to the King-Parliament area. The area is to have “an emerging hybrid mixture” of uses, including residential and commercial. The area is to have an enhanced role as a major employment area. Certainly the proposed building with residential, office/commercial and retail components meets this objective. In particular, the portion of King-Parliament west of Power St. is to be viewed as a “Reinvestment Area” for a wide variety of uses. The subject property is located in this reinvestment area and the proposed development constitutes reinvestment.

The Board finds that the importance of new development in the King-Parliament area is particularly highlighted by section 2.8 of the Secondary Plan. That section provides “it is the policy of Council to encourage the streamlining of the development approval process, including Site Plan approval, in order to facilitate the timely implementation of new development within King-Parliament”. The fact that Mr. Cole testified that City staff encourages, in the right circumstances, developers to proceed by way of the COA, demonstrates to the Board that City staff appreciate the significance of the Secondary Plan, especially section 2.8. The fact that, at this hearing, the City retained an outside expert who was willing to opine that this type of development should proceed only after an area-wide study demonstrates a troubling inconsistency in the City’s approach. This inconsistency is particularly glaring when the Board has regard to development projects which have been approved in the area with little or no opposition by the City and the fact that City staff has not recommended such a review.

The Board finds that the general built form principles set out in the Secondary Plan have been met by the proposed development. The proposed building is sited such that it defines and forms an edge along the streets; public uses are easily accessible; servicing and vehicle access are accommodated through the existing rear lane; and there is a compatible relationship with the evolving built form context. This context

includes not only the low-rise older buildings and the heritage buildings; it also includes the recent development in the area.

The Secondary Plan affirms that the heritage buildings of the area are an essential element of the physical character of the area. Heritage buildings are to be retained, conserved, rehabilitated, reused and restored. However the existing building on the site is not a heritage building. It is neither designated nor listed, and Mr. Cole confirmed that City heritage staff expressed no interest in the retention of the building. While the neighbours and, in fact, this panel of the Board may regret the loss of what appears to be an attractive, older building, which could be adaptively reused, that is not the standard set by the planning documents. If the City wants to ensure the retention of its vanishing heritage fabric, it must act in an efficient, timely and fair manner to do so. The City should not wait until a building is actually threatened with destruction to list or designate it; nor should its witnesses attempt to apply policy inappropriately. In protecting built and natural heritage, forward thinking is critical. No party should rely on this Board to torture either policy documents or the Board's processes to protect valuable resources. Such reliance would require an abrogation of the principles of natural justice, something the Board will not countenance. The existing building does not fall within the definition of "heritage building" and therefore cannot be "saved" under that definition.

The Secondary Plan speaks specifically to the Jarvis-Parliament Reinvestment Area in section 8. The area is to be "regarded as a diversified mixed-use area with numerous historically and architecturally significant buildings, containing a mix of industrial, institutional and residential uses". The introduction of residential uses is regarded "as complementary to King-Parliament's role as a business area". The Board finds that the proposed development will contribute to the future of this reinvestment area with its introduction of residential, office/commercial and retail uses to the site.

The Board therefore finds that six variances requested will facilitate the construction of a building which maintains the goal and intent of the OP, particularly as enunciated in the Secondary Plan.

In considering whether the general intent and purpose of the zoning by-law are maintained, the Board accepts the opinion evidence of Mr. Lewinberg and Mr. Cole.

The neighbourhood in which the proposed development is located is evolving. Heights of buildings are changing as are the manner in which buildings address their neighbours and the public realm. The focus of the City's objection to the variances is the height and angular plane; little or no comment was made about the amenity and setback variances. The Board finds that the proposed building will fit in well to its evolving context and that the general intent and purpose of the zoning by-law are maintained. With respect to the amenity space variances, the Board finds that the balconies and terraces associated with the condominium units provide useful amenity space and that the building is located in an area which is rich with urban amenities.

To summarize: the Board finds that the six variances requested, singularly and collectively are minor, they are desirable for the appropriate development of the land and they maintain the general intent and purpose of the OP and the zoning by-law. The appeals are allowed and the variances are authorized subject to the following conditions:

1. Appellant shall comply with the requirements of the memorandum to the Acting Manager – Committee of Adjustment, dated March 28, 2006, from the Manager, Tree Protection and Plan Review Parks, Forestry and Recreation, on file with the Committee of Adjustment; and
2. Prior to the issuance of a building permit allowing either above grade or below grade construction, the Appellant shall provide a cash contribution to the City in the amount of \$175,000 to be used for local streetscape and/or park improvements.

This is the Order of the Board.

“Susan B. Campbell”

SUSAN B. CAMPBELL  
MEMBER