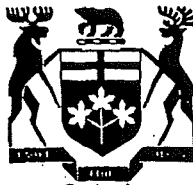


OMB TRACKING # 04-340-10 OPA 187

OMB TRACKING # - 04-341-10 ZONING AMENDMENT

COPY: A ZUIDEMA
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ISSUE DATE:
April 1, 2004
DECISION/ORDER NO:
0684



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

RECEIVED

APR 06 2004

LAW DEPARTMENT

Ron Thachuk has appealed to the Ontario Municipal Board under section 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, against Zoning By-law 03-231 of the City of Hamilton. O.M.B. File No. R030223

Ron Thachuk has appealed to the Ontario Municipal Board under section 17(24) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from a decision of the City of Hamilton to approve Proposed Amendment No. 187 to the Official Plan for the City of Hamilton to re-designate land at 398 King Street West from "H" District (Community Shopping and Commercial) to a site specific "Major Institutional" designation to permit a wellness centre with limited commercial uses in a mixed use commercial-residential building. O.M.B. File No. O030351

APPEARANCES:

Parties

City of Hamilton

Good Shepherd Non-profit Homes Inc.

Strathcona Community

M. Volterman

Counsel*/Agent

A. Zuidema*

P. Pickfield*

R. Thachuk

OFFICE OF THE CITY CLERK

APR 05 2004

REC. BY DATE
REF'D TO DATE
REF'D TO DATE
REF'D TO DATE

ACTION: _____

DECISION DELIVERED BY N. M. KATARY AND ORDER OF THE BOARD

There are two principal issues. First, whether or not a proposed use notwithstanding its lesser intensity than the potential use that is permitted as of right is appropriate for the site. Second, whether or not amending the Zoning By-law jeopardizes both the intent and the integrity of the By-law. Several sub-issues and parallel issues stem from the principal ones.

In the light of the length of the decision, the sequence of reasoning is sketched here to facilitate the journey, as a guide to the destination. A capsule description of the property is followed by a delineation of the proposal and key elements of the Amendments that are being requested. A number of preliminary matters are outlined to give a glimpse of the undercurrents. The witnesses are identified to indicate the people who have taken a keen interest in the matter. The reasoning in this decision

encompasses five major themes. First, issues such as the inability to reach a mutually satisfactory agreement, the need for the Women's Emergency Shelter, the park use expectation, and the limitations of the planning process are analysed. Second, one of the principal issues, namely, the compatibility of the proposal with existing development – both built and natural is analysed. Under this rubric seven sub-issues are examined. Third, the other principal issue, namely, whether or not amending the Zoning By-law injures both the intent and the integrity of the By-law is analysed. Fourth, the policy framework for the proposal is analysed. Fifth, the concept of sustainable development as it applies to the proposal is analysed. Finally, the disposition is delineated.

Matters Before The Board

The subject parcel of land is located on the north side of King Street West, east of Pearl Street North, and west of Ray Street North in the Strathcona Neighbourhood and is municipally known as 398 King Street West. The parcel has a frontage of approximately 103 m. along King Street West, a depth of approximately 138 m. on Ray Street North, and a depth of approximately 117 m. on Pearl Street North, with an area of approximately 1.34 ha. Currently it is a vacant parcel of land owned by the Separate School Board and the applicant, Good Shepherd Non-profit Homes Inc., has a conditional agreement on sale and purchase.

The proposal (Exhibit 7, shown on page 48) consists of redeveloping the land in phases to contain four buildings when the site is fully developed.

The first phase consists of a three-storey Women's Emergency Shelter fronting onto Pearl Street North to accommodate sixty (60) beds for two programs in one building with some shared spaces.

Although the phasing on the other three buildings is unknown at present the composition is known. Two mixed use buildings front onto King Street West and contain two storeys of commercial uses and residential apartment dwellings with the entire west building being eight storeys high while the east building is eight storeys high in the front half in Block "2" with the rear half in Block "4" being four storeys high. The west building will contain seventy-two (72) dwellings and the east building will contain sixty (60) dwellings for a total of one hundred and thirty-two (132) apartments in the two buildings facing King Street West. The two mixed use buildings have a two-storey wrap

around podium on frontages facing the streets, namely, King Street West in the south, Pearl Street North in the west, and Ray Street North in the east in addition to the sides facing the parkette between the two buildings.

The fourth building fronting onto Ray Street North is a three-storey apartment building containing twenty-four (24) apartments. In all when the site is fully developed it will contain one hundred and fifty-six (156) apartments and will be offered at market rents.

In order to execute the entire proposal the applicant needs site specific amendments to the Official Plan and the Zoning By-law of the City. The Council of the City approved the two amendments. Mr. Thachuk, who owns a property on Pearl Street North, across the street from the subject parcel and rents out the dwellings and lives approximately "one and a half miles from here to the west" has appealed the decision of the Council on behalf of residents in the relevant neighbourhood, namely, Strathcona Community.

The Official Plan Amendment is to create a Special Policy Area to permit limited commercial uses on the first and second storeys of the two mixed use buildings that front onto King Street West in the south part of the subject parcel.

The Zoning By-law Amendment is not only site specific but also "project specific" (in the memorable words of the planner for the applicant) to ensure that the proposal is executed as proposed in the site plan. Evidence was adduced to demonstrate how even minor changes to the proposed Amendment would require the invocation of the planning process. Currently, the subject parcel has two zones. The southern third (Blocks "1" and "2") fronting onto King is zoned "H" that permits Community Shopping and Commercial, etc. with a building height of eight storeys. The northern two-thirds (Blocks "3", "4", "5", and "6") is zoned "D" (Urban Protected Residential) that permits One and Two Family Dwellings, etc. with a building height of three storeys. The present By-law requires a minimum radial separation distance of 300 m. between residential care facilities.

Being project specific, the By-law amendment is a complicated document with a number of elements set forth in great detail in Attachment 1. The subject parcel is divided into six (6) blocks and the main elements of the Amendment are as follows:

Modifications to the established "H" (Community and Commercial, etc.) District is sought in Blocks "1" and "2". A change in zoning from "D" (Urban Protected Residential – One and Two Family, etc.) District to "H" (Community Shopping and Commercial, etc.) District is sought in Blocks "3" and "4". A change in zoning from "D" (Urban Protected Residential – One and Two Family, etc.) District to "DE" (Low Density Multiple Dwellings) District is sought in Blocks "5" and "6". The proposed Amendment requires a minimum radial separation distance of 120 m. between residential care facilities.

The Master Site Plan exhibit 7, p. 48 under the *Planning Act* is not before the Board. The Master Site Plan however, constituted an integral part of evidence by all the witnesses. The Board, therefore, shall use the expression site plan throughout the decision for ease of understanding.

The Backdrop

At the commencement of the hearing, the appellant, Mr. Thachuk, stated that he was representing the views of Strathcona Community, a group of people in the relevant neighbourhood and that the group was not an incorporated body.

At the commencement of the hearing, a tenant who lives on a property that abuts the northeast corner of the subject parcel of land, Mr. Volterman, sought party status. With the consent of the other three parties, he was granted party status.

At the commencement of the hearing, the appellant, the counsel for the City and the counsel for the applicant stated that they would like to see the hearing completed in an expeditious manner. The two legal counsel also pointed out that there was a good deal of urgency in not only completing the hearing but also in receiving a decision quickly. The counsel also urged the Board to render an oral decision following the hearing with reasoning to follow.

The Board made it clear to the legal counsel that they ought not to presume any outcome merely because one component of the project, namely, the Emergency Shelter for Women, had a funding deadline. Both counsel stated that they did not necessarily expect an outcome favourable to them but only that a decision be rendered.

The Board stated that it had read the numerous documents in the three volumes of the joint document book (Exhibits 2 A, B, and C) filed by the City and the applicant and that given the complexity of the matter the Board would not render an oral decision, but would consider an expeditious decision. The Board took time to clarify that the decision would issue when it would and that the counsel ought not expect a decision by any particular date.

After opening statements by the parties, it became clear that the hearing could not be completed in the allotted time of four days. The parties stated that they would be able and willing to take extra time each day and come back for extra days. In all, the hearing took six very long weekdays and one short Saturday for arguments. At the end of the hearing, the Board thanked the four parties and the fair number of people present throughout the hearing for their cooperation in completing the hearing in an expeditious manner and would like to do the same now.

Notwithstanding the extended hours of hearing and the expeditious manner in which the witnesses gave their testimony, the Board asked every witness if she or he had any more to add in order to make certain that no witness felt compelled to shorten her or his evidence in the light of the urgency and importance of the matter. All witnesses without exception stated that they had stated everything that they wanted to state. During the evening hearing there was a good deal of repetition but the Board made sure that everyone who wanted to say something had an opportunity to do so in spite of the lateness of the hour.

At the end of opening statements, the parties requested the Board to make a site visit. At the end of the hearing on Saturday, February 7, 2004, the Board made a site visit to get an experience of place. As the Board explained at the hearing, the decision is based entirely upon the evidence that was presented at the hearing because a site visit, no matter how thorough, is no substitute for the evidence by the parties who are highly knowledgeable about the issues by virtue of their intimate association with them over a period of years.

On the morning of the second day of the hearing, after substantial cross-examination of the planner for the applicant by the appellant, the Board asked the four parties if they would like to explore the feasibility of coming to a mutually satisfactory

agreement on the dispute among themselves. With the consent of the parties, the Board took a recess. The parties called the Board back within fifteen minutes and stated that they could not agree even upon a framework for agreement (a matter to which we shall return later) and that it was best to resume the hearing immediately. The Board resumed the hearing promptly.

On the penultimate day of the hearing (February 6, 2004), the Board met with only the four parties (the two legal counsel, the appellant, and Mr. Volterman) to learn about the set of circumstances that had led to "the less than perfect" (in the words of the counsel with the City) scheduling of the hearing, the time allotted for the hearing, and the repeated requests by the two legal counsel for a decision on or before February 15, 2004. The Board learned a good deal about the situation. The Board thanks the parties for clarifying matters.

On the morning of February 10, 2004, the counsel for the City informed the Board that the funding deadline of February 15, 2004 was no more in force and that the Board could issue the decision at a time when it deemed appropriate.

During the hearing, the objectors presented the Board with some letters in opposition to the proposal. The document book by the Strathcona Community (Exhibit 11, Tabs 1 and 11) contains a number of documents filed by people objecting to the proposal. Also, the joint document book (Exhibit 2 C) contains a large number of letters by interested people. The Board has read all the documents, for and against. As stated by the Board at the hearing, the Board gives much greater weight to the evidence by the witnesses who took the time out to appear at the hearing in person. Also, as the Board clarified at the hearing, it is neither the number nor the sincerity with which an opinion is held that matters as much as relevant and reliable evidence. What matters most to a quasi-judicial body is the test set out by the great Russian writer Boris Pasternak, namely, "the irresistible power of the unarmed truth".

The following people gave evidence in opposition to the proposed amendments during the long day/evening hearing: (1) Mr. Gary Porter, a land use planner whose entire professional career is in Nova Scotia; (2) Mr. Douglas Dore, a real estate broker and a resident of the neighbourhood; (3) Mr. Ron Thachuk, the appellant who owns a property on Pearl Street North, across the street from the subject parcel and rents out

the dwellings and lives approximately "one and a half miles from here to the west"; and (4) Mr. Mark Volterman, who rents the top floor dwelling in the house that abuts the subject site at the northeast corner.

The following people gave evidence in support of the proposed amendments during the long day/evening hearing: (1) Brother Richard MacPhee, the Executive Director, Good Shepherd Centre; (2) Mr. Edward J. Fothergill, a land use planner consultant; (3) Mr. Heinz O. Schweinbenz, a registered professional engineer who specializes in transportation planning; (4) Mr. William J. E. Curran, an architect; (5) Mr. Stephen Robichaud, Manager, Growth Related Integrated Development Strategy with the City and the principal author of the planning staff report (Exhibit 2B, Tab 32) that formed one of the bases for the approval of the proposal by the City Council; and (6) Ms Lee Ann Coveyduck, a General Manager with the City who is a professional land use planner and the supervisor of Mr. Robichaud at the time of the staff report preparation.

The following people gave evidence in opposition to the proposed amendments at the special evening hearing: (1) Mr. Don Fairfax, the Chairperson of the Zion United Church located across the street from the site on Pearl Street; (2) Mr. Ian Warren, a graphic artist by occupation and a resident of the neighbourhood; (3) Ms Virginia Cameron, who resides across the street from the site on Ray Street; (4) Mr. Mark Strutt, an artist painter and a resident of the neighbourhood; (5) Mr. David Beland, on behalf of the Hamilton Masonic Centre whose Grand Lodge and the Scottish Rite buildings are located on the south side of King Street southeast of the subject site; (6) Mr. Lauchlan Harrison, Executive Member, Stinson Community Association; (7) Mr. James Daniels, a resident of the neighbourhood; (8) Ms Ellaline Davies, a resident of the neighbourhood; (9) Mr. David Ross, a resident of Stoney Creek, a municipality adjacent to and east of the city of Hamilton; (10) Ms Vileta Hofer and (11) Gian Hofer, both reside across the street from the site on Pearl Street; (12) Ms Christine Corsini, a resident of the neighbourhood; (13) Ms Cathy Gazzola, President, Durand Neighbourhood Association Inc; (14) Mr. Doug Feaver, a resident of the neighbourhood; and (15) Reverend Ronald Burrige, a resident of James Street North in the heart of downtown Hamilton.

The following people gave evidence in support of the proposed amendments at the special evening hearing: (1) Ms Shelly McCarthy, a resident of the neighbourhood who has worked in the social services field; (2) Ms Marion Emo, the Executive Director

of Hamilton District Health Council; (3) Ms Katherine Kalinowski, the Director of Women's Services, Good Shepherd Centres; and (4) Ms Joanne Santucci, the Executive Director of Hamilton Food Share.

Ms Nina Chappell, a heritage conservation consultant, called by the appellant made it clear that she had no position for or against the proposal. She gave evidence on the historic character of the built form in and around the subject site. Mr. Volterman, a party opposed to the proposal, called Mr. William J. Nesbitt, the curator of the National Historic Site at Dundurn Castle. Mr. Nesbitt gave evidence on the European military history associated with the subject site and took no position on the proposal. Mr. David J. Cuming, a planner with the City with experience in heritage matters, called by the City, gave evidence on how an application is assessed on matters relating to heritage value of a site.

In the analysis that follows, the evidence adduced by the residents of the area is important not only because of their proximity to the project, but also because of their intimate knowledge. The prepared statements by several of the residents were most helpful in understanding their concerns. From time to time, individual witnesses may be cited, but the evidence by all residents, cited or not, has been given due weight. Where citations are used from oral evidence, the Board has made a conscious effort to be accurate as to the meaning, formalizing the syntax in the recognition that ratepayers are not experienced witnesses. The evidence brought forward by the residents is tested against the evidence given by the professional witnesses before making a finding.

At the end of the hearing, the Board asked the two legal counsel who appeared in support of the applications to provide a revised copy of the suggested Zoning By-law Amendment incorporating the changes recommended by different witnesses. The counsel have complied with the request.

The Immovable Meets The Irresistible

During his evidence-in-chief, the appellant, using several documents (Exhibit 11, Tab 1), repeatedly stated that the neighbourhood group, Strathcona Community, was always in favour of a compromise solution wherein the applicant and the appellant would arrive at a mutually satisfactory agreement on the dispute. During cross-examination, however, he stated categorically, "Our bottom line is no women's shelter

under any circumstances on this site." The same sentiment is expressed in the written submission by the appellant where he states, "We strongly object ... not only as a site for one and/or two women's shelters, but also for any other residential care facility, retirement home, emergency shelter, corrections residence or correctional facility as stated in the City By-law 01-142" (Exhibit 11, Tab 4, p. 1).

The appellant's position and interest converge on one thing, namely, the prevention of the erection of the proposed Women's Emergency Shelter. The applicant, on the other hand, was most interested in erecting the Emergency Shelter in the first phase of the development of the site as soon as feasible. This was a textbook case of the immovable meeting the irresistible.

The uncontradicted evidence was that in the "H" Zone land fronting onto King Street the two proposed programs in one building is permitted as long as the size does not exceed 50 beds and meets the 300 m radial separation distance requirement from another residential care facility. Given this as of right provision in the Zoning By-law, it is not clear to the Board why the appellant was so categorical in his opposition to the Women's Emergency Shelter anywhere on the site. The matter of radial separation distance will be analyzed later.

The Board notes that neither the parties opposed to the proposal nor the parties in support of the proposal put forward a proposal that would place the Women's Emergency Shelter for fifty (50) or sixty (60) beds on land fronting onto King Street within the "H" Zone. The applicant gave a number of reasons why it had moved the Shelter to the rear of the site. The appellant during his evidence or during argument gave no reasons why he or his group would not accept the Shelter on King Street. Under these circumstances, a compromise, however sincerely wished for by the appellant, was simply not in the cards.

The Need for Women's Emergency Shelter

One of the unusual aspects of this hearing was the unanimity of opinion by all witnesses who had an opinion on the matter of need that there was a great need for facilities and services to address the problems faced by women.

Ms Shelly McCarthy, a resident of the neighbourhood who has worked in the social services field, the Executive Director of Hamilton District Health Council, the Director of Women's Services, Good Shepherd Centres, and the Executive Director of Hamilton Food Share outlined in differing ways the urgent need for the two programs proposed to be located in the Women's Emergency Shelter building. All four spoke highly of the kind of professional operation that Good Shepherd runs in the City and elaborated on why the location of the building on site was ideally suited from several points of view.

Most of the objectors, in fact, commenced their statements by commending Good Shepherd for its work and emphasizing the undeniable need for the proposed two programs to be housed in the Women's Emergency Shelter building. All the objectors were unanimous in their opinion, however, that the proposed location of the building on the subject parcel was wrong. A couple of them suggested locations where the building would be appropriate and asked the Board to recommend such locations. The Board clarified that under the *Planning Act* the Board could only deal with the uses in question at the proposed site and could not recommend location of such uses in other possible locations.

Based upon an examination of the pertinent evidence the Board finds that need for the proposed two programs to address the problems faced by women in the City is urgent.

Park Use Expectation

Using photographs and two video tapes (Exhibits 40 A and B), Mr. Volterman expressed the opinion that since the demolition of the Loretto Academy building in 1990 the site had been continuously used by the people in the immediate vicinity and the relevant neighbourhood as a park, and therefore, the park use ought to continue. He was especially concerned that the people who use the walkways on the site to travel from Pearl Street North in the west to Ray Street North in the east would be denied established rights acquired through long-term use. He was of the view that the vacant site provided lung space for the City that ought not to be diminished.

The Board asked Mr. Volterman if the proposed walkways in the campus-like development would act as reasonable substitutes for the existing informally etched

walkways on the site. He was of the view that they would not. The Board also asked him if there were easements on the site that permitted the existing informal walkways and he replied that there were no such easements.

Using the table of parkland available in the area (Exhibit 2B, Tab 32, p. 22), the land use planner with the City, Mr. Robichaud stated that the required parkland for the Strathcona Neighbourhood was 6.78 ha. whereas there were 21.88 ha. of parkland in the Neighbourhood, and therefore he was neither suggesting parkland use nor recommending the acquisition of the subject site for parkland purposes. His analysis was not contradicted.

The subject parcel of land is vacant at the present time. Currently, the parcel has two zones. The southern third (Blocks "1" and "2") fronting onto King is zoned "H" that permits Community Shopping and Commercial, etc. with a building height of eight storeys. The northern two-thirds (Blocks "3", "4", "5", and "6") is zoned "D" (Urban Protected Residential) that permits One and Two Family Dwellings, etc. with a building height of three storeys.

During cross-examination, the planner called by the appellant who gave evidence in opposition to the proposal stated, "Expectations by area residents have to be based upon current zoning. Some residents think that the site should be made into a park. That is not a reasonable expectation."

The concept of reasonable expectation and the distinction between situations the redress of which rightly belongs to the private sphere and those that can legitimately be passed over to the public sphere have been dealt with by the Board in the past. They are readily accessible and are in the public domain.

The Board accepts the opinion of the planner for the appellant and finds that to expect a parcel of land in the built up area of a large city that is zoned for a variety of uses to be maintained as a park constitutes an unreasonable expectation.

Planning Process

One of the sub-themes that pervaded the hearing was the contention by both the appellant and Mr. Volterman that the planning process that led up to the decision by the

City Council to approve the applications for Amendments to the Official Plan and the Zoning By-law was flawed.

The appellant cross-examined the planner with the City, who appeared as a witness at the hearing and who had drafted the staff report (Exhibit 2B, Tab 32) that went to the Council before the Council made its decision, on the errors in the report. The planner readily admitted that the density should be 130 units per hectare instead of 21.5 units per hectare as shown on page 28 and explained how the conversion error had come about because the density figure in imperial units was accurate. The planner again admitted that the figure of 6 residents shown on page 30 should have been 0 for the "D" District and explained how that error had come about. Also, the planner admitted that on page 31 the report should have said one residential care facility in the moratorium area was being relocated to the site rather than two and explained the ease with which such a mistake could arise out of the kind of map that he was working with.

It was the contention of the appellant that the above errors in the report might have misled the Council to approve the applications. The planner repeatedly stated that, notwithstanding the errors in the report, the Council was fully aware of exactly what was before it.

Mr. Volterman was of the opinion that not all the people in the 120 m. radius from the subject property were contacted by mail in sufficient time to enable them to plan their evening to come to a public meeting. He was also of the view that the sign posted on the site contained an error since the colour of the land use did not match the colour in the legend and might have misled people. His view on the error was confirmed by the documents he brought forward (Exhibits 17 and 18). He stated that the sign on the property was located in a less than perfect place and that the sign did not show the date of the public meeting, thereby causing confusion in the minds of the people.

Using his prepared report (Exhibit 2A, first document, pp. 24 – 26), the planner for the applicant detailed the steps taken to secure public input as the applications wended their way through the thickets of planning.

An examination of the relevant evidence on the planning process associated with the two applications indicates the following.

The planning report prepared by Mr. Robichaud does contain some errors to which the planner readily conceded and rectified them at the hearing. There is no evidence, however, that the errors in the report led the City Council to make its decision to approve the applications solely based upon inferences drawn from the errors. In fact, the errors are of the kind that occurs routinely in a complex report and as long as the witness admits to them in a professional manner and corrects them the Board does not see any merit in placing much weight upon them.

The error in the sign is in a similar vein. As to the adequacy of notice received by the people, the evidence by the planner called by the appellant is helpful.

During cross-examination by Mr. Volterman, the planner for the appellant stated:

I am not familiar with the *Planning Act* in Ontario and I am reading it for the first time as you are showing it to me. The colour coding in this photo (Exhibit 17) does not give accurate information and public would be confused. If a letter was delivered to me on Saturday, I check my mail late Monday afternoon and if the letter was a notice for a meeting on Tuesday evening, I would have really one day notice. Notwithstanding this particular letter that you are showing me, people appear to have had opportunities to give input on the proposal.

It is important to the Board that there are no errors in signs, reports, late delivery of notices, and the like. The more important thing, however, is whether or not the people affected by the proposal had adequate opportunities to participate in the planning process and make their view known.

The evidence is clear on this matter. The applicant and the City have taken all necessary steps to involve the public from the earliest stages of the applications. The proposal itself has evolved with the contribution of the people affected. The large number of letters for and against the proposal (Exhibit 2C, Tabs 42 and 43), demonstrate beyond any doubt that interested people had adequate opportunities to participate in the process.

Based upon an examination of the pertinent evidence, the Board finds that the planning process associated with the proposal in spite of some limitations is not flawed.

Compatibility

One of the two principal issues is whether or not the proposal is compatible with existing development – both built and natural. Compatibility in this instance, as the objectors pointed out, has many aspects and the relevant ones need to be examined individually.

Heritage Value Preservation

A number of witnesses opposed to the proposal were of the view that the proposal would irreparably damage the heritage value of both the invisible and the visible past and, therefore, the proposal was not compatible with existing development – built and natural. The heritage value of the invisible past and the visible past as represented in the present need to be disentangled for analytical purposes.

During his comprehensive and lengthy evidence-in-chief, Mr. Volterman described in detail the association of the site with four different past uses. He outlined the manner in which aboriginal people might have used the site. He described how the European military forces might have used the site. He set forth how Mr. James Mills and his family might have been associated with the site. He spent some time describing the nature of use by the Loretto Academy prior to the demolition of all buildings around 1990. His observations on past associations were not contradicted by anyone.

The Board asked if he had some documentary evidence by way of studies done by other qualified people to substantiate his observations. He was forthright and professional in stating that he simply did not have the financial resources to commission such studies and expressed the view that someone qualified would be able to verify his observations in a more systematic fashion. The Board is persuaded that Mr. Volterman was making the observations rooted in his knowledge as an amateur historian and has no reason to doubt his sincerity.

Using prepared notes (Exhibit 30), the heritage planner with the City outlined how the proposal was reviewed from a heritage point-of-view. He stated that heritage impact assessment was not warranted as there were no above ground buildings or structures on the site to assess for their value. He then went on to describe in some detail the four stages of the archaeological resource management work that is being undertaken on

site. He concluded his evidence by stating that the holding provision recommended in the proposed Zoning By-law Amendment would address the preservation of archaeological heritage, if any, based upon the study underway.

The appellant cross-examined him on the minutes (Exhibit 11, Tab 1, pp. 1 & 2) of a public meeting held on January 14, 2003 and asked him to clarify why the minutes show him saying, "An 8 storey building would be out of keeping" with 19th century buildings in the area". Mr. Cuming stated that he did not prepare the minutes, and this was the first time he was seeing the minutes thereby denying the opportunity for him to correct the minutes. The Board notes that the same minutes also show him saying, "[current] Zoning is an important point."

On the basis of the evidence by the qualified and experienced heritage planner, the Board is satisfied that the subject site is neither an Environmentally Sensitive Area nor a candidate for heritage impact assessment. The Board is also of the view that the archaeological study underway will adequately address the heritage value of any below ground features. The quality of work in Stage 1 Archaeological Report (Exhibit 2C, Tab 43) is a harbinger of the remaining stages to come.

One of the unusual aspects of the objection based upon loss of heritage value of the past was the complete absence of any recognition of the value on the site at present. One of the merits of the proposal is that a sound archaeological study is underway as part of the process and efforts are being made to identify and preserve artefacts worthy of preservation. Mr. Volterman made a singular contribution to the hearing by bringing forward knowledge of past association of the site with aboriginal people, European military forces, and Mr. James Mills. The knowledge about the previous building associated with the Loretto Academy, although well known was brought into sharper focus by the efforts of Mr. Volterman.

The applicant has voluntarily given an undertaking to ensure that the association of the site with the four past uses be demonstrably acknowledged in a proper setting on the site. The Board is persuaded that a responsible organization such as the Good Shepherd will adequately highlight the past heritage value of the site in an appropriate manner. The proposed development has in fact made possible recognition of the past. The Board invites the people concerned about the loss of past heritage value to

contemplate what would have occurred if the applicant had proceeded with the as of right developmental rights and secured a building permit.

The remaining question is whether or not the proposal has any significant adverse impacts upon the heritage value of the past as represented in the present buildings surrounding the subject site. The focus below is on the impact on heritage value and not upon the built form of existing development, a matter that will be analysed later.

The heritage conservation consultant called by the appellant, Ms Chappell, commenced her testimony by stating that she was not involved in the project before the Board and that she had "no comments for or against the project." Using a report prepared by her (Exhibit 11, Tab 2) on the heritage character of an area called Ray-Pearl North District that includes the subject site, she described the history, the built form, and the open space characteristics of the area. She concluded her evidence-in-chief with three recommendations. First, "the late Victorian and early 20th century architectural heritage ... is coherent, authentic and historic in character; it is an irreplaceable resource and worthy of a systematic heritage assessment." Second, "... new development proposals be designed in a manner that is sensitive to, and supportive of, both the district's heritage values and its existing low-rise, human-scaled, residential character." Third, "... the blanket "H" zoning now in place for the King West corridor [that permits 8-storey buildings] be re-examined."

During cross-examination by Mr. Volterman, she stated, "The eight-storey building on George Street [one block south of the subject site] does not fit the style of buildings in the district I studied." During cross-examination by the counsel for the applicant, she stated, "The "H" zone on King West must be revisited because there is so much vacant land downtown. I understand that that is a separate matter. I agree with you that it is better to place high-density development on the main artery. This proposal is on a vacant site and there is no demolition of any existing stock and that is a good thing here."

The architect for the applicant, Mr. Curran, during his extensive evidence on the built form of the proposal and the existing built form in the immediate vicinity explained how the design features are sensitive to the heritage character of the relevant

neighbourhood. His description of the treatment of facades of the four buildings was especially instructive. Pointing to the photographs of dwellings that abut the site on Napier Street (Exhibit 25, p. 25, Nos. 49 & 50), he commented on how even the old buildings were adapting to the present "tastes" and that no built form, however old and venerated, remained the same unless there was a wilful commitment to preserving it. He did not see any compelling reasons to mirror the existing buildings in the new buildings, regardless of their form or scale.

An examination of the proposed campus-like development on a vacant site surrounded by older buildings indicates the following. The development proposed does not result in the removal of any existing buildings or structures. The sketch design/rendering of proposed four buildings (Exhibit 9) that attempt to mimic buildings across the street and adjacent to them show a high degree of sensitivity to the kind of exterior walls of existing residential dwellings that surround the site. The trees preserved in conjunction with the new trees added and the vegetative buffers all around the site set the proposed development apart. The proposed four buildings will be different of course. It is difficult to see, however, how the proposal will have any significant adverse impact upon the heritage character of existing built form surrounding the site. In assessing impacts the Board has to be conscious that there is absolutely no assurance whatsoever that a developer wanting to exercise her or his right assured by the current By-law will be any more sensitive to the heritage character of the relevant neighbourhood.

The past is not an immutable scripture. It is a continuing dialogue with the present in order to make sense out of it for the present. If the dialogue is stunted by a collage of myths, legends, and inflexible meanings, there is no hope ever of accommodating the past to the present and laying the foundations for the future.

Based upon an analysis of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon the heritage character of past and present development.

Built Form

Using a summary statement, excerpts from the Zoning By-law, and the design principles used by the architect to create the built form for the campus setting on the site

(Exhibit 11, Tab 5), the appellant stated that the proposal represented "overdensification." It was his opinion that the proposed 156 apartments together with the 60 bed Emergency Women's Shelter amounted to a great increase over what is permitted under the current zoning. The appellant was of the view that the proposed eight-storey buildings on King, the bulk of the three-storey Emergency Women's Shelter on Pearl, and the bulk of the three-storey apartment building on Ray did not fit into a neighbourhood characterized by one and a half to two and a half storey houses. His main point was that the proposed bulk, height, and configuration of buildings "will stick out like a sore thumb ... and are definitely out of character with the neighbourhood."

Mr. Daniels, a resident in the vicinity at 55 Pearl, was of the opinion that "the Good Shepherd proposal is too large and too ambitious to be assimilated into our community and will undermine the quality of life" (Exhibit 20). Ms Cameron, a resident in the vicinity at 28 Ray, was of the opinion that "the project height and design are not in keeping with the existing streetscape. The neighbourhood is a charming mixture of Victorian and pre-Confederation styles" (Exhibit 16). Mr. Warren, a resident in the Strathcona neighbourhood, was of the view that "the shelter is a worthy undertaking, however, as it stands this is a case of over-development and not development." (Exhibit 15). Mr. Fairfax of the Zion United Church stated, "... this proposed location is not suitable for the size of the proposed development." (Exhibit 13).

The professional planner from Nova Scotia called by the appellant, Mr. Porter, stated his opinions on three matters, namely, compatibility of the proposal with existing development, the reduction in separation distance proposed between residential care facilities, and the notice given to residents of the area as to public meetings on the proposed changes to the Official Plan and the Zoning by-law. His three-part evidence will be examined under appropriate issues.

Relying upon Sections A.2.6.5, A.2.1.1, A.2.1.13, A.2.1.14, and C.7.2 of the Official Plan of the City, Mr. Porter stated that the proposal did not fit well into the existing character of the built form. It was his opinion that the buildings in the vicinity to the west, north, and east of the site were all old residential dwellings that were two to three storeys in height and as such "the proposal will look different notwithstanding some architectural features that try to integrate the proposed buildings with the existing buildings."

The planner for the appellant was cross-examined at length by the counsel for Good Shepherd. In the light of the fact that the witness was giving evidence for the first time at a quasi-judicial body, the Board read back some of his opinions to him to ensure that it had taken down the notes accurately. The planner was forthright and professional and the main points made by him are reproduced under the appropriate issues. The following was his evidence on compatibility.

I reviewed the Provincial Policy Statement and the Regional Official Plan only as they are in the Staff Report (Exhibit 2B, Tab 32). I had a copy of the City Official Plan but did not read it carefully from cover to cover. I agree with you that you have to look at all relevant policies and planning is a balancing act. It is fair to say that my focus was on the Staff Report.

It is important to look at more than immediate vicinity and neighbourhood in coming to a conclusion on compatibility. You have to look at the core [of the city] and the functions of the larger community. What I am suggesting is that I would be putting different weight on the policies that I relied upon relating to compatibility because compatibility is very important. You cannot plunk a twenty storeys [high] apartment building next to a bungalow. If you do it, do it sensitively. Acknowledge that the "H" Zone on King Street permits eight storeys high buildings. I do agree that some thought has gone into making the proposal fit the vicinity here. As per policy A.2.1.14, the proposal creates higher density on King and lower density in the rear and the effort is good. Also, saving trees in the middle of the site is good.

The architect and the planners who appeared in support of the proposal disagreed fundamentally with the above people in opposition.

Using a number of exhibits, the architect for the applicant during his comprehensive and detailed evidence explained how the site plan and the built form made the proposal compatible with existing development. First, using the site plan (Exhibit 7), he described how the four buildings formed an integrated campus-like whole and how the pedestrian and vehicular circulation functioned both within the site and between the site and the immediate vicinity. Second, using approximately 85 photographs (Exhibit 25), he described the existing built form surrounding the vicinity and pointing to "worker housing" buildings individually explained why the buildings were not architecturally significant. Third, using a massing study, an aerial rendering, and a street level rendering (Exhibits 8, 9, and 10), the architect outlined the intricate design details of the proposed four buildings. Fourth, using a document prepared by him (Exhibit 2B, Tab 12), in conjunction with the previous five Exhibits, he elaborated on

how the proposal is a response to the concerns expressed by the neighbours, how the design principles were derived from such concerns, and the fine details of design improvements incorporated as a result of the interaction between the concerns of the neighbours and the design principles. Fifth, using a set of calculations and sketches (Exhibits 26 A and B), he stated how the proposal was a significantly less intensive development than what might be developed as of right under the existing By-law provisions. Sixth, using a set of large scale shadow diagrams (Exhibits 27 A through D), he described the potential impact of shadows within and in the immediate vicinity of the site and stated that the shadows cast by the proposed buildings would be either the same as or less than the development if the site was developed under the existing By-law requirements. Seventh, he briefly addressed the concerns expressed by the witnesses at the hearing and stated how they have been dealt with in the proposal before the Board. He concluded his evidence-in-chief by explaining how the proposal was compatible with the existing built form.

The architect was cross-examined rigorously and at length by both the appellant and Mr. Volterman. His opinions were not shaken.

Using the staff report prepared by him (Exhibit 2B, Tab 32), the planner with the City, Mr. Robichaud, explained in detail how the proposal was compatible with existing built form. He expressed a preference for a maximum of four-storey height for the two buildings fronting onto King, a matter that will be analysed shortly. In all other regards, he was of the opinion that the proposal fitted in well with existing development.

Using a summary document titled "Planning Report" prepared by him (Exhibit 2A, first document) in conjunction with a number of other documents, maps, and photographs, the planner for the applicant explained in detail how the proposal was compatible with existing built form.

The two planners were cross-examined rigorously and at length by both the appellant and Mr. Volterman. Their opinions were not shaken.

An analysis of the evidence on the built form indicates the following.

The existing built form in the immediate vicinity of the subject site is as follows. The uncontradicted evidence by the appellant and several other objectors is that the

buildings on King are one to three-storeys high whereas the buildings on Pearl and Ray are one and a half to two and a half storeys high. An examination of the photographs submitted by various witnesses indicates that the buildings are modest and old, situated on lots in the range of 9 to 12 m with many of the lots missing on-site parking. Also several witnesses were forthright in stating that the residential buildings provided housing for middle-income households, an opinion confirmed by Mr. Dore, a resident of the area and a real estate broker. The opinion of the architect that the buildings were not architecturally significant was not contradicted. Ms Chappel, however, saw heritage value in them "worthy of a systematic heritage assessment." To date, no systematic heritage assessment has been undertaken. All witnesses agreed that the immediate vicinity and the relevant neighbourhood had an established character.

The question, therefore, is how is the existing built form affected by the proposal?

As pointed out at the very beginning of the decision, the site is bound on three sides (west, south, and east) by streets and on the north by existing houses whose rear yards and side yards abut the site. In the words of the planner for the applicant, "it is a self-contained site that lends itself to a campus-like development."

The salient built form features of the proposal as stated in the design principles and reflected in the actual design of the proposal are helpful in assessing the impact of the proposed built form upon the existing built form.

The uncontradicted evidence by the architect and the planner for the applicant is that the proposal is a significantly less intense form of development than what could be developed as of right. The planner with the City stated that the overall residential density is approximately 130 units per hectare (53 units per acre), a density consistent with medium density apartment designation. It was his opinion that in the light of the site fronting onto an arterial road with two of the mixed-use buildings being located on the arterial, the density was appropriate for the site. In examining "overdensification," to employ the terminology of the appellant, it is not sufficient to look at only the residential density. It is both necessary and sufficient to look at the intensity of development of all uses on the site as the planners and the architect did in arriving at their conclusion about the density of development.

The two three-storey high buildings, namely, the Women's Emergency Shelter fronting onto Pearl and the apartment building fronting onto Ray will have approximately the same height as the existing buildings adjacent to and across the street from them.

The existing By-law permits eight-storey buildings fronting onto King Street within the "H" District. The proposed two eight-storey buildings will extend approximately 10 m north of the existing limit of the "H" District. None of the witnesses opposed to the proposal acknowledged the existing right by stating in any form that they might either consider or accept the two proposed eight-storey buildings as long as they did not go beyond the limits of the "H" District. They just did not want any eight-storey buildings. Even a witness who was willing to compromise, Mr. Warren, stated, "A ceiling of three storeys and a reduction in the overall scope to fit within the character and concerns of the immediate neighbourhood would be a sensible and fair compromise" (Exhibit 15, p.2).

The planner with the City also preferred a maximum height of four storeys for the buildings on King because he was of the view that a four-storey height was more compatible with existing height of adjacent buildings than eight-storey high buildings. In taking this position, the planner failed to acknowledge the existing right to an eight-storey building on King. Nor did the planner recommend that the eight-storey height be limited to the land within the "H" District. During his evidence-in-chief, however, he stated, "the two-storey wrap around podium on the two buildings on King has the effect of reducing the overall height and therefore can reasonably co-exist with the neighbourhood."

The Board is persuaded by the architect's explanation that the following design features reflected in the proposal make the proposal fit well into the existing built form.

The site is designed as a campus of buildings in a park like setting connected by tree-lined walkways with gathering places. The plan also provides for a community parkette around the largest central cluster of trees and encourages public access and use via public walkways. The design employs projecting two-storey podiums of a larger footprint on the eight-storey buildings to reduce the perceived visual mass of the buildings and to avoid having taller buildings come straight down to the ground. Also, the eight-storey buildings employ a material/colour change at podium, use projecting

piers/fins/balconies to break down the scale of the buildings and complement the fit with existing adjacent buildings.

The site design minimizes surface parking and driveways all the while utilizing underground parking to maximize greenspace. The plan calls for a consideration of gates in fences from abutting houses to the north. The configuration of buildings has eight-storey buildings which front on King, that is, at the edge of the community with the three-storey buildings in the rear acting as a transition in scale into the community, thereby making the fit better. The proposal includes a seniors' wellness centre and other program space as significant community amenities.

The building design reinforces residential character through architectural features such as bays, porches, sloping roofs, trim, entrance canopies, trellises and/or canopies and/or sunshades. The design also incorporates building massing, materials, detailing, elements, roof profiles, window size and pattern, porches, etc. from the existing neighbourhood to ensure a sympathetic fit with the community.

The plan retains a maximum number of existing trees, designs around them, and adds a significant number of new trees and landscaping that function as a vegetative buffer between the existing buildings and the proposed buildings.

Based upon an analysis of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon the existing built form.

Traffic and Parking

Using a number of documents (Exhibit 11, Tab 6) including a summary statement of six pages, three pages of elegant sketches showing streetscapes, a set of photographs, and other documents in the public domain, the appellant expressed the opinion that the increased traffic generated by the proposal and the proposed reduction in the parking standard for the proposal would have adverse impacts upon existing development.

Mr. Fairfax, the Chair of the Official Board of the Zion United Church, in a prepared statement (Exhibit 13) said, "The major church congregations (Zion United, Erskine Presbyterian, and Korean United) have been using the land in question [subject

site] for parking for many years and paying for snow removal, etc. If this parking facility is no longer available to the churches and to the public, it will seriously impact on the on-street parking and traffic problems in the area.”

Mr. Beland from the Hamilton Masonic Centre gave oral evidence at the hearing. At the request of the Board he filed a written statement (Exhibit 31) later during the hearing. The Centre owns almost the entire block of land bounded by King Street West in the north, Queen Street South in the east, George Street in the south, and Ray Street South in the west. To state the self-evident, the complex of buildings that forms the Masonic Centre is within convenient walking distance of the subject site to the southeast. He stated, “... the Masonic Centre, like the local churches, has utilised the Loretto Academy property [subject site] for overflow parking for many years. I stated that it was understood the lot could be developed and that parking may no longer be available.” After recounting the parking problems in the vicinity of the Masonic Centre, he went on to recommend that the proposal should be made to comply with the existing parking standard without any reductions. He also recommended that there be surface parking on site, that there should be no reduction in on-street parking to accommodate the proposal, except for the purposes of driveways, and that the intensity of the proposed development be reduced.

The transportation engineer called by the applicant and the traffic engineers with the City disagreed fundamentally with the opinions expressed by the above three witnesses. Using a traffic and transportation study done by him (Exhibit 2C, Tab 41) and updated for the hearing, the traffic and parking specialist explained in considerable detail the additional volume of traffic generated by the proposal and the impact of the same on existing traffic conditions, and the rationale for reducing the parking standard for the proposal. The traffic engineers with the City have examined the results of the study by the transportation engineer for the applicant and find his conclusions to be valid (Exhibit 2B, Tab 32, pp. 23 – 26).

The transportation engineer, Mr. Schweinbenz, was cross-examined rigorously and at length by both the appellant and Mr. Volterman. His opinions were not shaken. Also, no other duly qualified and experienced professional witness contradicted his opinions.

An analysis of the pertinent evidence indicates the following.

Pearl Street and Ray Street abutting the site in the west and east respectively have a paved width of approximately 7.0 m and 6.1 m respectively where there are driveways proposed into the site. The paved widths are less than the current standard of 8.5 m. Both of these local streets contain on-street parking on one side of the street, and these parking stalls are occupied over a significant period of time in a day. The traffic engineer pointed out that this existing situation does cause some operational problems both for regular vehicular traffic and for emergency vehicles under some extreme situations. He stated, however, that there were "no safety concerns anywhere in the vicinity of the site."

During cross-examination, the traffic engineer pointed out that the only meaningful way to resolve this existing situation in the long-term is either by widening the pavement width or by removing parking stalls on both streets. He added, however, that neither of the possible options to improve traffic flow was realistic in the short-term and that a more feasible option was to remove some stalls near the driveway entrance on Ray Street and provide dedicated parking stalls for the stalls removed from Ray in the surface parking lot between the Women's Emergency Shelter and the apartment building at the northeast corner of the site. The planner with the City who is a General Manager agreed with this suggestion and the proposed By-law was amended to reflect this recommendation that emerged during the hearing.

On the matter of traffic generated by the proposal, the traffic engineer was categorical. He stated, "Having examined trip generation with five potential development options, I can say that in all cases the as of right development generates significantly greater traffic than the proposal."

The Board is persuaded that if the concern is with the impact of traffic by development on the site, the proposal offers a clear and better choice than any of the possible scenarios of development under the existing Zoning By-law regime.

The proposal provides fewer parking stalls than the By-law standards, and the rationale for this reduction needs close examination.

The traffic engineer stated that he derived the parking requirements for the proposal based upon both the established practice in the profession and the actual field observations for parking in uses similar to the ones proposed for the site. He was of the opinion that the current By-law requirements were too high, whereas his computations were based upon actual vehicle ownership levels in buildings similar to the ones proposed. He explained in some detail the details of the study he had undertaken and the methodology he had used to arrive at his recommendation of 99 parking spaces using a 20 percent reduction permitted in the By-law from the 124 parking spaces he had derived.

By applying the 20 percent reduction in the correct fashion as contemplated in the By-law, the City recommends a total of 111 parking spaces to be provided both below and above surface.

The Board is persuaded that given the proposed uses a reduction in the parking standard to accommodate 111 parking spaces is appropriate for the site in these particular circumstances.

The concerns raised by the representatives of the Zion United Church and the Hamilton Masonic Centre with respect to parking in the relevant neighbourhood are difficult to address through the proposal before the Board. The two institutions presently rely upon the subject site to provide overflow parking required by their respective patrons. It is difficult to see how development on the site as per the present By-law or through the proposed By-law Amendment can be confined to accommodate their needs.

The evidence by Brother Richard of the Good Shepherd Centre was that his Centre would surely look at a request by the two institutions in a sympathetic manner.

Based upon an analysis of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon existing traffic and parking conditions either on the site or in the vicinity of the site.

Natural Environment

Using a significant number of documents, photographs, and two videotapes (Exhibits 37, 38, and 40 A & B), Mr. Volterman made a lengthy presentation on the reasons for his opposition. First, he was concerned about the potential adverse impact

of the proposal on the natural environment in general and the existing mature trees in particular. Second, he was concerned about the loss of the historic heritage value of the site, a matter that has already been analysed earlier in detail. Third, at the request of the Board, after repeated pleas, he stated the direct impact upon the property where he lives – a matter that will be analysed below shortly.

The overwhelming majority of his opinions dealt with his genuine concern for the environment and how it was imperative for society to take care of it lest it lose its place in the environment. The Board assured him at the hearing and would like to do the same now by stating that his pleas for the environment were deeply moving and the Board is sensitive to all the points he made about how humanity is part of the environment and not apart from it. As stated at the hearing, notwithstanding the Board's empathy with his sincerely held views, the Board is confined by the matters before it and cannot make a decision rooted solely in the larger worldview so eloquently articulated by Mr. Volterman.

The counsel for the applicant cross-examined Mr. Volterman for approximately a minute on the proposed setback between the house where he resides and the proposed nearest building to that house, a matter that will be analysed shortly. Neither the counsel for the City nor the counsel for the applicant cross-examined him on any other aspect of his very lengthy evidence-in-chief.

Using some documents (Exhibit 11, Tab 8), the appellant expressed the opinion that the proposal would cause some adverse impacts upon the existing natural environment. He was especially concerned that the proposal would result in the removal of "many trees" on the site that might result in the diminution of "hunting ground" for Peregrine falcons, a protected species in Ontario.

During cross-examination by Mr. Volterman, Mr. Cuming, the environmental planner with the City stated, "During 1975-77, Region-wide Environmentally Sensitive Areas were identified. The subject site was not recognized because it is severely disturbed. The site simply does not have the attributes to be recognized as an Environmentally Sensitive Area."

The planner with the City stated during his evidence-in-chief that the site was not designated as an Environmentally Sensitive Area by the then Regional Municipality of

Hamilton-Wentworth and therefore the City did not refer the site to a voluntary body called the Environmentally Sensitive Area Evaluation Group for further evaluation. He also briefly explained the tree preservation plan for the site.

An analysis of the relevant evidence indicates the following.

Most of the witnesses who objected to the proposal because of its potential adverse impact upon the existing environment did not acknowledge either what could be developed as of right or the potential adverse impact of such development. They were concerned only with environmental impact of any development on site and preferred to leave the site as it is, namely, vacant, to be used as a park. Mr. Volterman was willing to "accept what I believe is right for the site, a single building in the middle similar to the Loretto Academy building that was demolished." He showed what would be acceptable to him (Exhibit 37, p. 69).

An examination of the Tree Preservation Plan (Exhibit 29, dated 2004:JA:09) in the context of reply evidence by the planner for the applicant clearly shows that all trees are within the property boundaries of the site. The uncontradicted evidence by the planner was that approximately 75 percent of the existing mature trees would be saved as part of the much-revised current site plan. The trees on King, Pearl, and Ray are to be saved except where there is a driveway access to the site from Pearl and Ray. The proposed parkette between the two buildings on King preserves the cluster of mature trees in the area while providing public access to an "environmentally and aesthetically pleasing area." The proposed site plan also contemplates not only planting new trees to replace lost trees but also to provide additional landscaped open spaces to enhance the quality of the natural environment. This is an instance where the net gain in vegetation is greater than the loss of existing vegetation.

The site plan showing the final configuration of the four buildings displays a degree of sensitivity to the preservation of trees with some heritage value that has to be explicitly acknowledged. The proposed walkways from the three public streets that bracket the site in conjunction with probable gates from existing houses abutting the north boundary of the site ensure that the site shall continue to function as a pedestrian corridor so valued by so many of the witnesses who gave evidence at the hearing.

The Board is persuaded that the environmental quality that results from the proposal will continue to attract the kind of wildlife that uses the space now. One of the most unique aspects of the videotape evidence by Mr. Volterman was the comfort with which an eagle perched itself on the patio railing despite the presence of two people within approximately 3 m. (10 ft.).

One of the collateral benefits of the proposal is that it leads to a deletion of several commercial uses currently permitted in the "H" District land fronting onto King Street, thereby making the entire site more harmonious with the natural environment. The following uses will be deleted: all industrial uses, industrial painting establishment, lumber shop, other workshop, household appliance repair shop, corrections residence, pawnbroker, auctioneer's premises, carpenter's shop, painter's shop, other wearing apparel workshop, rental of bicycles or other goods, wares or merchandise, laundry dry cleaning establishment, public parking lot, and district yard of a municipal corporation. The Board notes that all of these uses may or may not materialize on the site but the opportunity to eliminate them altogether with other more environmentally friendly residential and commercial uses is not an inconsequential consideration to be disregarded.

The principal contention of some of the witnesses who appeared in opposition to the proposal was that it was unlikely to be in harmony with the existing environment. The Board views harmony in the manner indicated below after taking into account the evidence of all the witnesses, both for and against. The Board is, in particular, sensitive to the opinion of Mr. Volterman who has a genuine interest in the preservation and enhancement of the natural environment. The Board is chastened by the consciousness of the main point made in an article submitted by Mr. Volterman (Exhibit 37, p. 8) and invites all interested persons to reflect upon the message.

In the view of the Board harmony turns on the impact of the proposal on the capacity of the natural environment to absorb the impact and establish a new equilibrium without adversely impeding the integrated functioning of the ecosystem as a whole. Harmony is the combination of different elements of nature so as to form a consistent and orderly whole. It represents an agreeable aspect arising from the apt arrangement of different elements where the parts are in accord with each other. As such, harmony implies a dynamic interrelationship between elements and not a static

relationship implied in the idea of balance. Built and natural environments (human interaction with nature) are in constant interplay and hence in constant evolution, leading to ever newer harmonious equilibriums. Being in harmony, therefore, means nothing more than being capable of merging with the natural environment in such a way that the integrity of the whole is maintained. In the final analysis, the proposal should not adversely impair the capacity of the natural environment to function as a whole.

Based upon an analysis of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon the natural environment.

Direct Impacts Upon the Adjacent Resident

Mr. Volterman, who rents the third-floor apartment in a house that abuts the site at its northeast corner, was of the opinion that the proposal had the following direct impacts upon his enjoyment of his dwelling. He stated that the proposed buildings would cast shadows and deny him and his plants sunlight, obstruct his views, subject him to air pollution from the buildings, obstruct the present pedestrian paths on the site, and cause him mental anguish. He was also of the opinion that the setback of the proposed building from the house where he lives ought to be treated as a rear yard setback because King Street was the de facto front of the entire complex and therefore the setback ought to be 7.5 m. instead of the proposed 2.7 m. His opinions bear a closer look.

Using a set of shadow diagrams (Exhibit 27), the architect explained in detail the impact of shadow created by the proposal and the as of right development at several times during the days of June 21st and December 21st. He concluded his substantive evidence based upon a study of shadows by stating, "The proposed built form with two smaller footprint mid-rise buildings offers a reduced shadow impact over the current allowable zoning envelope which allows one larger building" (Exhibit 2C, Tab 44, p. 1).

Mr. Volterman cross-examined him at length on the shadow impact upon his apartment, his plants, and the immediate vicinity of the subject site. His opinions were not shaken. Also, no other duly qualified and experienced professional witness contradicted his opinions.

Based upon an examination of the pertinent evidence, the Board finds that the shadow impact upon the third-floor dwelling of Mr. Volterman and the immediate vicinity would be either the same as or less than what it would be were the site developed as per the current Zoning By-law standards.

The height of the proposed building closest to the house where Mr. Volterman lives is limited to 11 m. Mr. Volterman lives on the third-level apartment. One of the most revealing aspects of the photographs and the two videotapes submitted by him (Exhibits 38 and 40 A and B) is that he would continue to enjoy the vistas of horizons so accurately depicted in the videotapes. In fact, the videotapes, upon close examination, reveal that the views that would be obstructed by the proposed eight-storey building on Street King West in a significant manner would be those looking south. The present zoning permits eight-storey buildings on King and his views would be obstructed whether or not the proposal before the Board is approved and if the property owner exercises her or his right to develop as per the current By-law. To state the self-evident, the views from his patio or windows looking south would be different from what is there now. Given the sophisticated presentation, the Board is also persuaded that he is fully cognizant that there is no right to a view over the properties of others unless specifically granted by planning and other instruments.

Based upon an examination of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon the views currently enjoyed by Mr. Volterman.

Whether or not to treat the setback from the house where Mr. Volterman lives to the proposed nearest building as side yard or rear yard setback, an examination of the evidence indicates the following. If it is treated as side yard, the setback is 2.7 m. whereas if it is treated as rear yard, the setback it is 7.5 m. The proposal is to treat it as side yard. The planner with the City stated that since the entire site was being developed as a campus with King Street constituting the frontage of the entire campus, the property boundary abutting the house where Mr. Volterman lives technically becomes the rear property line. His opinion was that the technical definitional nature of the property boundary does not warrant the line being treated as the rear of the property with the setback being set at 7.5 m. During reply evidence, the planner for the applicant was cross-examined by Mr. Volterman on this point. The planner for the applicant

stated that if single detached dwellings were built as per current zoning facing Ray Street North, the setback from the house where Mr. Volterman lives would be clearly, by definition, a side yard with a 2.7 m. setback. The planner went on to state that the important point was not whether it was a side yard or a rear yard setback, but the impact of such a setback on the adjacent property and that the impact of the proposed building would not be significantly different from a single detached dwelling with a height of either 14 m. or 11 m. next to the side of the existing house where Mr. Volterman lives.

Based upon an examination of the pertinent evidence, the Board finds that treating the boundary of the subject property abutting the house where Mr. Volterman lives as "the rear property line" with a setback of 2.7 m. does not cause an unacceptable adverse impact upon Mr. Volterman.

Based upon an analysis of all of the relevant evidence pertaining to the direct impact of the proposal upon Mr. Volterman, the Board finds that the proposal does not cause an unacceptable adverse impact upon the property where Mr. Volterman rents a dwelling unit.

Socio-Cultural Identity

The appellant crystallized the issue of continuity of socio-cultural identity of the immediate vicinity and the relevant neighbourhood (not the same as Strathcona neighbourhood as defined by City) in an arresting fashion both during his evidence-in-chief and during his argument. The written statements (Exhibit 11, Tab 4, p. 1, and Tab 10) are most helpful in understanding and are reproduced below for convenience in the order of their appearance:

..., this component of the project has generated fear and anxiety and in some case anger beyond belief for the majority of the Strathcona neighbourhood community members. These majority of our members are overwhelmingly opposed to even the thought of having not only one but two women's shelters being constructed on the subject property.

We would ask that some guarantees be given to the neighbourhood, such as hours of operation of the wellness centre, no drop-in centre as explained at the open house, no soup kitchens, no needle or drug programs.

Once the apartments are built for Market Rent as defined under CMHC what guarantees are there that this cannot change to "low income rental housing"?

Mr. Daniels, a resident on Pearl Street North in the immediate vicinity, concluded his prepared statement (Exhibit 20, p. 2) with the observation, "residents are concerned that our community will become a low cost ghetto and social service enclave."

Mr. Harrison from the Stinson Community Association stated in his brief (Exhibit 19), "There are not enough volunteers to go around. The social service users are unfit to put time, effort, and resources back into a neighbourhood, so the area suffers."

All of them dealt with the impact of the proposal on the experience of place.

Experience of place, as detailed by several witnesses in their own differing ways, is a bundle comprising three discrete elements. First is the physical environment, i.e., the reality of landscape, buildings, climate, and aesthetic quality. Second is the interaction of people with their physical environment, i.e., how the buildings and landscape are used and how the culture of the residents has affected them. Third is the symbolic meaning derived by people when they react to the physical environment and its functions, i.e., how the interaction reflects their intentions and experiences or what the place means to people who experience it. Experience of place includes both compatibility of land uses and continuity of socio-cultural identity related to common activities or traditions and lifestyles.

The detailed analysis of evidence earlier with respect to the impact of the proposal on existing environment - both built and natural, indicated that it does not cause an unacceptable adverse impact.

Destabilisation of the experience of place will occur only if the proposal results in removing attributes from the existing community that the residents currently enjoy.

The uncontradicted evidence by Brother Richard of the Good Shepherd Centre was that they operate their facilities and services in a highly responsible and professional manner and that they have done so for decades in the City without public complaints about the manner in which they run their operations. Several of the people opposed to the proposed Emergency Women's Shelter were gracious in stating that they had nothing against the Good Shepherd Centre because the Centre did much needed good works and that they were only opposing the Shelter in this location.

Experience of place, like all other experiences, is not a static concept frozen in time and place, but a dynamic concept that evolves over time and in place. The defining feature of experience of place is how growth (in the sense of quantitative expansion of the present structure) and development (in the sense of qualitative change in the present structure) are accommodated to reflect both the desires of the present and the hopes for the future.

Based upon an analysis of the pertinent evidence, the Board finds that the proposed Emergency Women's Shelter does not cause an unacceptable adverse impact upon the experience of place.

Finding on Compatibility

The guiding principle of development in an established neighbourhood can be summarized as follows. A developer must take people's preferences, as expressed through the existing experience of place, and must seek to cultivate in the new development the qualities of character necessary to the integration of the new with the established. The land use planning instruments, accordingly, make a genuine effort to accommodate established consumer preference/s as interpreted and articulated by existing residents, because it is these planning instruments that have facilitated the emergence of the existing experience of place in the first instance. In other words, in an existing neighbourhood the focus is upon both the "preservation" of the old and the "creation" of the new experience of place. The developer begins by asking how a proposal can be made capable of integration and seeks the aesthetic principles that promote its meaningful coexistence.

The question, therefore, is whether the developer in this instance has a proposal capable of integration and has indeed sought the aesthetic principles that promote its meaningful coexistence. The uncontradicted evidence by the three planners who appeared in support of the applications was that the proposal was less intense than what is permitted as of right. The architect explained in some detail (Exhibits 26 A and B) what could be built as of right and how that would be much more intense. A close examination of the comparative table (Exhibit 2B, Tab 11, pp. 12 & 13) verifies the opinions of the planners and the architect in this regard.

The detailed analysis of the proposal carried out earlier indicates that the proposal is capable of integration because it relies upon aesthetic principles that promote meaningful coexistence. In this instance, the proposal, in fact, fulfills a set of criteria so as to constitute urban design that is good. The proposal intends to recognize the historical heritage value of the site by completing a comprehensive archaeological study and acknowledging the same in an appropriate manner. The two-storey wrap around podium and the parkette between the two buildings on King represent an effort to achieve architectural distinction on the site. The campus-like design attempts to create a sense of place not only for the future residents of the four buildings but also for the existing residents in the vicinity. The pedestrian walkways into the site from the vicinity of the site culminating in a highly visible and accessible parkette with mature trees and related landscaping are a genuine effort at creating a high quality public realm. The design principles that are executed in the proposal in response to neighbourly concerns coupled with the amenities provided in the wellness centre for the neighbours make the proposal a neighbourly development. Finally, the building design details incorporate elements drawn from the built form in the immediate vicinity and makes the proposal a creative contextual response to the challenge of integrating with the present.

In the view of the Board, as it has repeatedly stated in the past, compatibility turns upon the impact of the proposal on the character of the environment, both built and natural, with due regard for how that character is likely to evolve in the foreseeable future. Being compatible with is not the same as being the same as. Being compatible with is not even the same thing as being similar to. Being similar to means having resemblance to another thing; they are like one another, but not identical. Being compatible with means being mutually tolerant and capable of coexisting together in harmony in the same area. In the final analysis, the proposal should not cause an unacceptable adverse impact upon existing built and natural environments.

Based upon an analysis of all the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon the existing built and natural environments.

Avoiding Concentration through the Radial Separation Distance

The current Zoning By-law permits an emergency shelter of up to 50 beds in the "H" district, i.e., land fronting on King Street provided it is not within 300 m from any other type of residential care facility. The proposal is for an emergency shelter building located north of the "H" district with 60 beds to encompass two programs, namely, abused women and children, and homeless women and children. Also, there are two residential care facilities within 300 m. from the proposed emergency shelter. The Zoning By-law Amendment, therefore, is necessary to execute the proposal.

The strongest objection to the proposal by the appellant (and the Strathcona Community group) was directed at the Amendment to the Zoning By-law that made a site specific exemption to the 300 m radial distance separation between residential care facilities. In the view of the objectors, the proposed Amendment violated both the letter and the spirit of the By-law standard. The letter of the By-law was violated because by amending a two-year-old standard, the integrity of the By-law was brought into question. The spirit or the intent of the By-law was violated because the separation distance was meant to avoid the concentration of residential care facilities in any one municipally defined neighbourhood such as Strathcona. All the witnesses and those who submitted documents in opposition were nearly unanimous in stating that the By-law standard ought to be upheld because it applied to all parts of the City and no exceptions ought to be made. Although the principal issue and therefore the major battle was fought on the compatibility front, the intensity of battle was fiercest on the separation distance front. The two aspects of the opposition must be decoupled for analytical clarity.

Using a number of documents (Exhibit 11, Tab 4), some prepared by his group and others assembled to make the case, the appellant outlined at length his reasons for opposing the By-law Amendment. He was of the opinion that neither the avoidance of concentration of residential care facilities nor the integrity of a two-year-old By-law was being advanced by the proposed Amendment.

During his detailed evidence-in-chief, the appellant made the following points. First, that the proposal represented two facilities within one building and not two programs in one building and therefore contradicted the requirement of the By-law by that very fact. Second, that 60 beds in the "D" zone that permitted 6 beds meant an

over concentration. Third, that there were already three (3) other residential care facilities within 300 m from the subject site and therefore there ought not to be another such as the proposal. Fourth, that the proposal replacing two existing facilities in neighbourhoods of highest concentration amounted to creating another neighbourhood of concentration. Fifth, that the neighbourhoods where a moratorium on similar facilities is in place have a density of 5.2 beds per hectare, whereas the site will have a density of 5.3 beds per hectare. Sixth, that the proposed Amendment was the first test case of the two-year-old By-law and, if approved, would set an unfavourable precedent.

The appellant's summary position on the matter of avoidance of concentration is best captured by his written statement, cited below in part (Exhibit 11, Tab 4, p. 11), at the head of a number of documents:

... The By-law becomes useless as a means of meeting intent. Developers will contend 120 metres is now the price of entry. More OMB Hearings with taxpayers' money. So this is not a case of 'not in my backyard'. We do not want this type of thinking with approval to happen in 'anyone's backyard' in the new City of Hamilton. It is a recipe for disaster with respect to concentration control of these types of facilities covered by the By-law.

The land use planner from Nova Scotia who was called by the appellant was of the opinion that the proposed reduction in separation distance between residential care facilities from 300 m. to 120 m. was a mistake because the 300 m. standard was arrived at only two years ago after much debate and discussion and that sufficient time had not elapsed to derive lessons from experience to warrant consideration of change to the standard. He stated:

I am reluctant to change a recent rule because it does not lend credibility to planning. Once you breach the dam, you do not know where the dam will break. Zoning standards provide protection for people like a contract because people read more into it, although it is only a number to achieve the intent of not concentrating residential care facilities in an area.

The planner for the applicant and the planner who authored the report to the City Council and gave evidence at the hearing, on the other hand, fundamentally disagreed with the people in opposition to the Amendment to the Zoning By-law. Both were of the opinion that any By-law and the standards contained in it must be looked at on a case by case basis regardless of how recently a by-law came into effect and that the intent was at all times more important than a particular standard. The planners were of the

view that the proposal did not amount to a concentration of residential care facilities within the Strathcona neighbourhood.

An analysis of relevant evidence on this matter indicates the following.

About two years ago, after a detailed study and public input, the previous 180 m was increased to 300 m radial separation distance between residential care facilities. The primary intent of the separation distance standard is to avoid concentration of facilities in any one of the neighbourhoods identified in the city. A careful reading of the Discussion Paper No. 2 and the parent By-law (Exhibit 11, Tab 4) makes the intent very clear.

It is helpful to examine carefully the evidence by the appellant and the planner

6593 for an emergency shelter permitted under Subsection (b)(iv)(ii), every emergency shelter shall be situated on a lot having a minimum radial separation distance of not less than 120.0 metres from the lot line to the lot line of any other lot occupied or as may be occupied by a residential care facility, retirement home, emergency shelter, corrections residence or correctional facility; and,

(e) notwithstanding Subsection 2.A.(ixa) of Zoning By-law No. 6593. for the purposes of this by-law, an "Emergency Shelter" shall mean a fully detached building or portion thereof offering programmes in a crisis situation to:

- (i) homeless women; and,
- (ii) women and families who are victims of violence;

who require shelter, protection, assistance and counselling or support which is intended to be short term accommodation of a transient nature. An emergency shelter does not include a residential care facility; a lodging home; a corrections residence; a correctional facility; or any other facility which is licensed, approved or regulated under any general or special Act;

7. That in addition to the requirements of Subsection 10A.(1) and notwithstanding the requirements of Subsection 18A.(40) of Zoning By-law No. 6593, Table 1 of Section 18A of Zoning By-law No. 6593 and Subsections 2.(d), 3.(b), 4.(c) and 6.(c) of this By-law, a maximum of 8 of the required parking spaces may be used for public parking;
8. That Subsection 4.(3)(a) of Zoning By-law No. 6593 shall not apply to the subject lands;
9. That the amending By-law apply the holding provisions of Section 36(1) of the Planning Act, R.S.O. 1990, to Blocks "1", "2", "3", "4", "5" and "6" by introducing the holding symbol 'H' as a suffix to the proposed zoning district as follows:
 - (a) The holding provision will prohibit the development of Blocks "1", "2", "3", "4", "5" and "6" until:
 - (i) That the owner/applicant shall conduct an archaeological assessment of the entire development property and mitigate, through preservation or resource removal and documentation, adverse impacts to any significant archaeological resources found. No demolition, grading or soil disturbances shall take place on the subject property prior to the approval of the Director of Development and the Ministry Culture confirming that all archaeological resource concerns have met licensing and resource conservation requirements;
 - (ii) That the owner/applicant shall investigate the noise levels on the site and determine the noise control measures that are satisfactory to the City of Hamilton in meeting the Ministry of the Environments recommended sound level limits. An acoustical report prepared by a qualified Professional Engineer containing the recommended control measures shall be submitted, to the satisfaction of the City of Hamilton, Director of Development;
 - (iii) That the applicant/owner prepare and submit a tree preservation plan for the existing trees located within the King Street West, Ray Street North and Pearl Street North road allowances and the subject lands, to the satisfaction of the Manager of Forestry, Parks Division, Community Services Department and the Director, Development Division, Planning and Development Department;
 - (iv) That the owner has submitted a signed Record of Site Condition (RSC) to the Ministry of Environment. This RSC must be to the satisfaction of the City of Hamilton, including acknowledgement of receipt of the RSC from the Ministry of Environment; and,

(b) That in addition to the requirements of Subsection 8.(a) of this By-law, the development of Block "5" will be prohibited, until such time as the following additional provision has been satisfied:

(i) The property owner enters into an agreement to the satisfaction of the Director, Building and Licensing Division, Planning and Development Department, that the uses at 20 Emerald Street South ("Martha House") and 50 East Avenue North ("Mary's Place") will be abandoned with no intent to reactivate upon occupancy of Block "5".

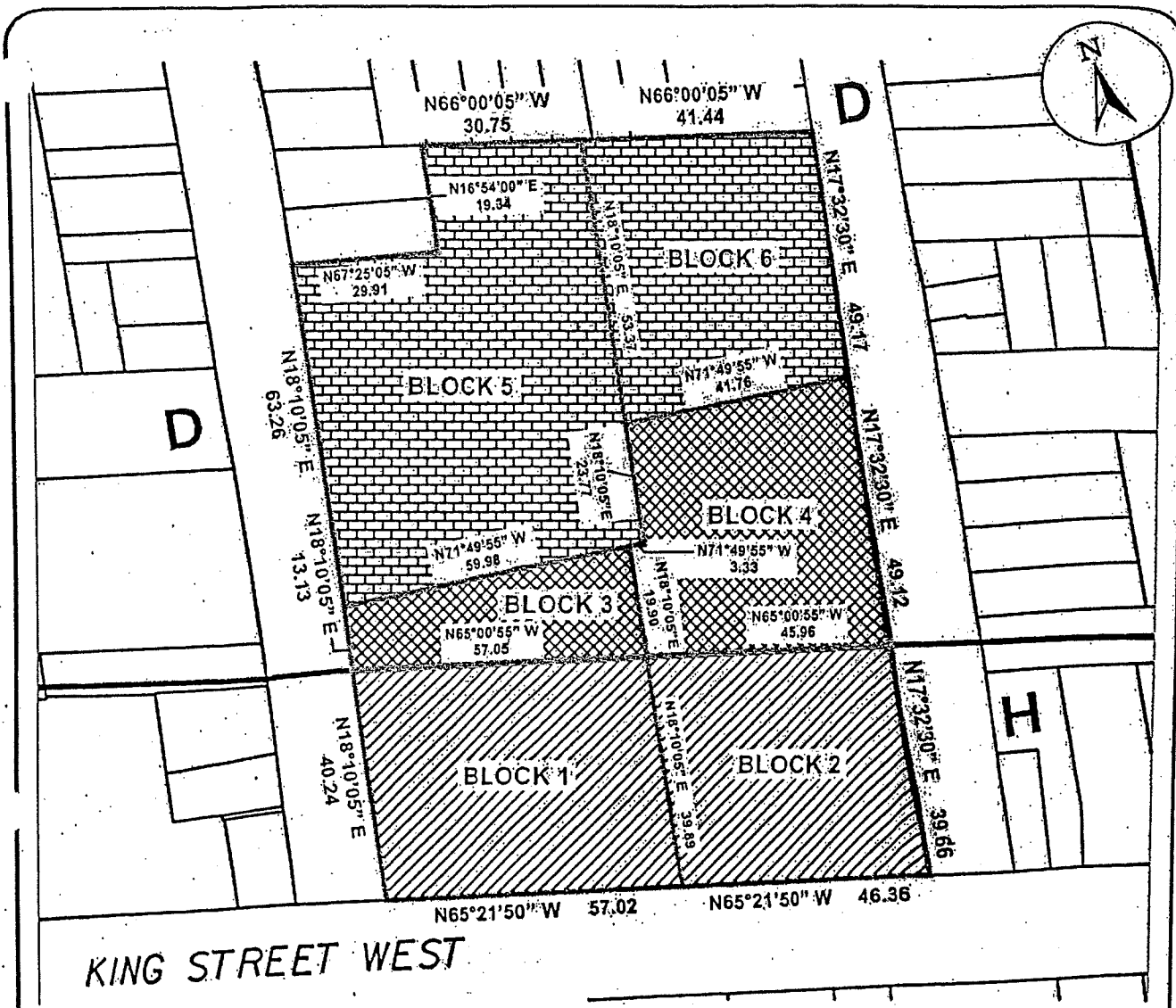
City Council may remove the 'H' symbol and, thereby, give effect to the "H" (Restricted Community Shopping and Commercial) District and "DE" (Multiple Dwellings) District, as amended by the special requirements of Sections 2, 3, 4, 5, 6, 7 and 8 as stipulated in this By-law, by enactment of an amending By-law once the above conditions have been fulfilled;

10. That upon the satisfying the conditions of the 'H' symbols and submitting the required fees, that the General Manager, Planning and Development Department, be authorized and directed to give the prescribed notice(s) in accordance with the provisions of the Planning Act and to prepare a By-law(s) in a form satisfactory to the Corporate Counsel to remove the 'H' symbol(s) for presentation to City Council.
11. No building or structure shall be erected, altered, extended or enlarged, nor shall any building or structure or part thereof be used, nor shall any land be used, except in accordance with the "H" District and "DE" District provisions, subject to the special requirements referred to in Sections 2, 3, 4, 5, 6, 7 and 8.
12. By-law No. 6593 (Hamilton) is amended by adding this by-law to Section 19B as Schedule S-1486.
13. Sheet No. W-12 of the District Maps is amended by marking the lands referred in Section 1 of the by-law as S-1486.
14. The City Clerk is hereby authorized and directed to proceed with the giving of notice of the passing of this by-law, in accordance with the Planning Act.

PASSED and ENACTED this day of , 2003.

MAYOR

CLERK



This is Schedule "A" to By-Law No. 03—

Passed the day of 2003

.....
Clerk

.....
Mayor

Schedule "A"

Map Forming Part of
By-Law No. 03-____
to Amend By-Law No. 6593



Planning and Development Department

Hamilton

Legend

Subject Property
398 King Street West



Blocks "1" & "2" - Modification to the established "H" (Community Shopping and Commercial, etc.) District



Blocks "3" & "4" - Change in Zoning from "D" (Urban Protected Residential - One and Two Family, etc.) District to "H" (Community Shopping and Commercial, etc.) District Modified



Blocks "5" & "6" - Change in Zoning from "D" (Urban Protected Residential - One and Two Family, etc.) District to "DE" (Low Density Multiple Dwellings) District Modified

North



Scale

NOT TO SCALE

Reference File No.

ZAC-03-14

Date

August 7, 2003

Drawn By

MC