

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: November 09, 2018

CASE NO(S): PL161069

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Annette Burfoot
Appellant:	Frontenac Heritage Foundation
Appellant:	Samantha King
Appellant:	Vicki Schmolka
Subject:	By-law No. 2016-184
Municipality:	City of Kingston
OMB Case No.:	PL161069
OMB File No.:	PL161069
OMB Case Name:	Burfoot v. Kingston (City)

Heard: March 26-29, April 3-6 and 9-13, 2018 in
Kingston, Ontario

APPEARANCES:

Parties

Frontenac Heritage Foundation and
Building Kingston’s Future Inc.
 (“Appellants”)

IN8 (The Capitol) Developments Inc.
 (“IN8”)

Counsel

David Donnelly
Sarah Gray (Student-at-law)
Alexandra Whyte (Student-at-law)

Alan Cohen
Philip Osterhout

DECISION OF THE TRIBUNAL DELIVERED BY DAVID L. LANTHIER

INTRODUCTION AND HEARING

[1] The Appellants have appealed the prior decision of Council for the City of Kingston (“City” or “Kingston”) in relation to the proposed mixed use, condominium development (the “Development”) at 223 Princess Street (the “Site”) proposed by IN8.

[2] The somewhat unusual background to the two decisions of Council, in relation to the IN8’s application, is addressed below. The City did not appear at the hearing of these appeals, although one of the City’s planning staff was summoned as a witness by IN8. A number of persons and entities were granted Participant status during the earlier Pre-Hearing Conferences, and as well during the course of the Hearing which was conducted for a period of 11 days over the course of three weeks.

[3] At the opening of the hearing, the opportunity of a Site visit by the Panel Member was suggested by the Appellants, but was declined. As was communicated, the Panel Member is well-familiar with the exterior of the Site and building, including both the Princess Street and Queen Street façades and streetscapes, as well as the surrounding context in the City. The Member is also familiar with the interior of the building as it was during its operation as a multi-plex theatre over a period extending from the late 70s to 2012 when the theatre was closed. With the benefit of photographs showing the current interior partly stripped of its interior elements, and this personal familiarity, a Site visit was considered to be unnecessary (For the purposes of this Decision, for brevity, Princess Street will sometimes be referred to as “Princess” and Queen Street will sometimes be referred to as “Queen”).

[4] As indicated herein, during the course of the hearing held in the Council Chamber of City Hall, the Panel Member disclosed the benefit of observing portions of the Downtown area from the upper interior viewing platform within the dome of City Hall, where the hearing was held.

TRANSITION – ONTARIO MUNICIPAL BOARD AND LOCAL PLANNING APPEAL TRIBUNAL

[5] The prior Pre-hearing Conferences, and the first four days of the hearing between March 26 and 29, 2018, were conducted by the Ontario Municipal Board (“Board”). On April 3, 2018, part way through the hearing, the *Local Planning Appeal Tribunal Act, 2017* (“LPATA”) was proclaimed in force, which provides that the Board will be continued as the Local Planning Appeal Tribunal (the “Tribunal”). The continuation of the hearing after April 3, and this Decision as issued, occurred subsequent to the proclamation of LPATA, and accordingly are continued under the jurisdiction of the Tribunal. Any reference to the Tribunal in this Decision is therefore deemed to also be a reference to the Board as it then presided over the initial aspects of the appeals, and the first four days of the hearing, prior to proclamation.

BACKGROUND – THE APPLICATION AND REGARD FOR DECISIONS OF COUNCIL

[6] The history of the applications and the decisions of Council on the Development are not disputed, though the interpretation of these events by the parties differs.

[7] IN8 first filed its application to amend the Zoning By-law to permit the proposed Development in 2015. In the course of subsequent review of the proposal, and changes to the proposal, there were two public meetings on July 2, 2015 and again on June 16, 2016. The zoning amendment by-law, By-law No. 2016-184, (the “Zoning Amendment By-law”) was approved by Council and passed, and the Notice of Passing issued on September 23, 2016. The Appellants then filed their appeals.

[8] Ordinarily that would have been the full extent of the municipal prelude to the appeals about which the Tribunal must have regard pursuant to s. 2.1 of the *Planning Act*. However, subsequent to the passing of the By-law, for reasons relating to a non-disclosed conflict on the part of a Councillor, Council voted 11 to 1 to reconsider its

decision to pass the Zoning Amendment By-law. The subsequent reconsideration vote to approve the By-law by City Council then resulted in a tie-vote, and was thus defeated. The Tribunal was informed that under the City's procedural By-law this vote represented a "No" vote and the original Zoning By-law, as passed, remained in force, despite having subsequently been the subject of a reconsideration vote.

[9] The Appellants submit that the Tribunal should have regard to the second vote of council which essentially resulted in a failure to approve the Development. The Appellants also argue that the City's non-appearance in this hearing, and the fact that the City is choosing to present no evidence in favour of, or opposed to, the Zoning Amendment By-law now under appeal, demonstrates that the City is "sitting on the sideline" and is not supporting the Development.

[10] IN8 views the circumstances of Council's vote under a different lens and points to the fact that while the City has decided not to attend, Council has also clearly chosen not to repeal the Zoning Amendment By-law and thus the Tribunal must proceed upon the record and upon the understanding, that the Zoning Amendment By-law has been properly passed by Council and is intended to remain in force. The Tribunal should therefore have regard to the initial vote in favour of the Development, which has not been repealed.

[11] IN8 submits to the Tribunal the case of *Re PROUD Port Dalhousie*, 2009 CarswellOnt 1096 ("*Port Dalhousie*") in support of its position. The Tribunal has considered that decision and would note that unlike these Appeals, in that case an entirely new Council in those circumstances reversed the prior decision of Council which had approved the development. The new Council in the facts of *Port Dalhousie*: held no further public meetings; considered little of the reports and documents which were before the original slate of Council members; opposed the City's prior By-law; did not repeal the prior By-law; passed an entirely new By-law; and then directed the City Solicitor to attend the hearing to convey the fact that the majority of Council did not support the decision of the previous Council. The Board, as it then was, considered the

actions of the new/second Council decision to be flawed, concluded that it did not bear scrutiny and “did not pass the smell test” and in making its decision had preferred regard for the original decision of Council.

[12] In contrast to the *Port Dalhousie* case, in this case, at the second vote on IN8’s Development, the same Council members, benefitting from the same prior public meetings and the same prior reports and documents, reconsidered the matter and in the absence of the councillor in conflict, did not approve the Development as a result of a tie-vote. Due to the prior non-declared conflict on the part of one Councillor, unlike *Port Dalhousie*, it could be said that it is the first vote of Council that can, in this case, be considered as the “flawed” decision, though certainly the required transparent processes under the *Planning Act* were followed. That prior flawed vote was then subject to reconsideration (with the same compliant processes under the *Planning Act*) and substituted by a tie-vote and the resultant non-approval of the proposed Development. The fact that the Zoning Amendment By-law was not subsequently repealed does not, in the view of the Tribunal, constitute anything that would persuade the Tribunal to have priority regard to the first decision of Council, as occurred in *Port Dalhousie*.

[13] As to why Council, in the case of IN8’s proposal, did not repeal the Zoning Amendment By-law and issued no direction to the City Solicitor as to its conveyed position to the Tribunal, remains unknown and ultimately the Tribunal is unable to conclude with the same assuredness conveyed by the Board in *Port Dalhousie*, that it must have regard for the first decision of Council over that of the second non-decision of Council.

[14] To the extent that the Tribunal is required, under s. 2.1(1) of the *Planning Act*, to have regard to any decision by City Council in relation to this Development, under such unusual circumstances, the Tribunal in this case, finds itself in a position where it must, also unusually, have regard for a recorded lack of clarity and definitive decision by Council on the Development by virtue of the chronology of Council’s decision-making

process. The first vote and expressed will of Council was flawed due to the vote by a member of Council in conflict which was, by motion to reconsider, to be substituted by a second vote to determine the will of Council. That second vote resulted in an expressed absence of support by Council and a non-decision. The Tribunal must have regard to these decisions. For the reasons indicated, the absence of an affirmative decision not to repeal the Zoning Amendment By-law, as first passed by Council, is not necessarily a decision which the Tribunal can have regard to. Section 2.1(1) does not direct the Tribunal to have regard for the lack of a decision. This recorded lack of clarity and definitive decision by Council on the Development arises from: the absence of a majority favourable vote on the reconsideration of the Zoning Amendment By-law; a resulting tie-vote on the passage of the By-law; the non-attendance of the City at the hearing; and the fact that Council has not repealed the By-law but equally so, has not instructed a solicitor to defend the prior decision subsequently reconsidered by Council.

[15] Ultimately, in adjudicating this appeal, the Tribunal must find that there is an absence of a decision on the Development arising from the ambiguity of both a “yay” (from the first vote, clearly intended to be substituted by the majority of Council voting to reconsider the Development but still in effect and under appeal by virtue of the City’s procedural by-law) and a “nay” (arising from the reconsidered tie-vote which defeated the motion to approve the Development). The Tribunal has had regard to the manner in which the decisions of Council were made.

[16] The Tribunal is mindful of the jurisprudence of the Court, and other decisions of the Board, as it relates to the requirements of the Tribunal under s. 2.1 of the *Planning Act*, and in particular the analysis and conclusions of the Divisional Court in *Ottawa v. Minto Communities Inc.* 2009 CanLII 65802 (ON SCDC). The Court there observed that the Tribunal is required to conduct a hearing *de novo* with the benefit of “fresh and expanded evidence” elicited in a full hearing, with the opportunity to present evidence, including expert evidence that may not have been before the municipal council in making its decision. This would include the benefit of cross-examination of experts and the ability to test the veracity and relevance of expert opinions, which is not afforded to

the Council. The Court stated that the Board, on an appeal "...has the obligation to exercise its independent judgment on the merits of the application and to assess the proposal and the positions of the parties" upon all of the evidence and law. Justice Aston, speaking for the majority of the Divisional Court, at paragraph 33, concluded:

The words "have regard to" do not by themselves suggest more than minimal deference to the decision of Municipal Council. However, in the context of the *Planning Act*, and balancing the public interest mandates of both the Board and the municipality, I would agree with Member Stefanko in *Keswick Sutherland* that the Board has an obligation to at least scrutinize and carefully consider the Council decision, as well as the information and material that was before Council. Furthermore, because Bill 51 now obliges Council to give written reasons when refusing to adopt requested planning amendments, which are part of the record before the Board, the Board also ought to carefully and explicitly consider the specific reasons expressed by Council. However, the Board does not have to find that the Council decision is demonstrably unreasonable to arrive at an opposite conclusion.

[17] In summary, for the reasons indicated, the Tribunal finds that it is in an unusual position as to the manner in which it must have regard for the decision of municipal council. The Tribunal has, in this hearing, nevertheless, carefully examined, analyzed and considered the supporting planning reasons recommending support of the Development as permitted by the subject Zoning Amendment By-law, as provided to Council and which led to its first decision. The Tribunal has also had regard to all of the information and material that the Council received in relation to the matter on both votes which includes the reports from planning staff, about which the Tribunal heard evidence from the City's Senior Manager of Client Relations and Development, and a registered Professional Planner, Ms. Marnie Venditti, on both examination and cross-examination.

THE ISSUES AND THE WITNESSES

Height, History and Heritage

[18] The Issues Lists appended to the Procedural Order defined the parameters of the hearing of the appeals and identified matters relating to urban design and architecture, cultural heritage concerns, traffic, and a number of other various planning

issues.

[19] As the evidence was presented, and submissions have been made to the Tribunal, there is little doubt that the core issue at play in this hearing is the height of the proposed Development. That issue of height is closely interrelated to the historical heritage context of the downtown area of the City where the Development is proposed, and the various planning policies relating to the cultural heritage elements of Downtown Kingston. Intensification in this part of the City, is also an issue in dispute, though ultimately it too is tied to the issue of the height of the building. No witness really challenged the proposition that intensification should occur and development encouraged at this Site under the Growth policies of the OP. Witnesses, including a number of Participants, generally supported the benefits to be achieved by allowing for intensification and redevelopment. The question though was how much, in how many floors, and ultimately at what height.

[20] The Appellants, supported by a number of the Participants, submit that the City's planning policies prevent a building rising to 16-storeys in its location within the identified Heritage Character Areas and the City's downtown area that has a "near perfect" uniformity of massing, scale and height which supports the historical heritage character that draws tourists from around the world. Permitting the Development will result in an objectionable high-rise anomaly to the low-profile heritage character of the Central Business District that will be incompatible, represent poor planning and create an irreversible adverse precedent that will mark the beginning of the end of Kingston's unique historical downtown area.

[21] IN8, also supported by some Participants, submits that Kingston's tourism and heritage will not be destroyed by the height of its proposed building and that heritage and history are not so fragile as to be eradicated in an instant if the Tribunal approves this Development. The height of the proposed building will not kill history or heritage in Kingston. To the contrary, IN8 submits that the height, scale and attributes of the proposed Development will result in a compatible, built-form that is sensitive to the

heritage character in this portion of Kingston's downtown and will actually improve the streetscapes of both Princess Street and Queen Street and serve to provide much-needed redevelopment and intensification and thus help to revitalize the downtown in accordance with the Official Plan ("OP") policies addressing growth and development.

[22] Closely connected to the issue of height is, of course, the issue of shadow and light as they arise in relation to the height of the proposed building, and related consideration of the massing and scale of the proposed built-form.

[23] In closing submissions, IN8 submitted a list of what this hearing "was not about", and in many respects, the Tribunal agrees, following a review of the evidence, that the hearing is primarily about height and its related considerations as outlined above. In this decision, the Tribunal will address and make findings upon the other issues laid out in the Issues List. These additional issues relate to: the design of the Queen Street and Princess Street façades and other urban design issues raised by the Appellants; traffic and pedestrian safety; parking; and the preservation of heritage elements of the Theatre. These are indeed issues that have been placed before the Tribunal. Although the Tribunal will make such findings as are necessary on each of matters as they were raised, and which the Tribunal can describe as "second tier" issues, individually and cumulatively the Tribunal concludes that these other adverse or negative concerns raised by the Appellants are insufficient to result in a finding that the Development does not represent good planning in the public interest.

[24] Ultimately the Tribunal must agree with IN8 that upon the totality of the evidence presented, although these additional issues have been raised, and have been the subject of scrutiny and opinion by the experts, and argument by the parties, this hearing really was not about these "second tier" issues.

[25] The Tribunal however cannot agree with IN8 that the hearing of the core central issue of height is "not about heritage". Upon the evidence, and in particular given the City's planning policies that direct significant focus on the preservation of cultural

heritage and Kingston's historical character, the issue of height is, as indicated, closely and directly interrelated with issues of heritage, and intertwined with issues relating to compatibility and intensification as they must be addressed within the City's planning context.

[26] These additional "second tier" issues arising from the evidence and argument are as set out below. It is the intention of the Panel Member to first focus on the primary core issue of height, and the related issues of heritage, compatibility, shadow, and intensification. Thereafter, the Decision will provide brief analysis and discussion on the second tier issues.

Witnesses

[27] The evidence for the parties was presented through the following witnesses (with the noted area of expertise for which each witness was accordingly qualified by the Tribunal during the hearing):

For the Appellants:

Annette Burfoot (Lay Witness)

Vicki Schmolka (Lay Witness)

David Cuming (Land Use Planning and Heritage Conservation Planning)

Anne McIlroy (Land Use Planning and Urban Design)

Bruce Downey (Heritage Architecture)

Dennis Jacobs (Land Use Planning)

For IN8:

Joe Somfay (Architecture)

Scott Johnston (Traffic Planning and Parking)

Michael Stott (Urban Design)

Donald Loucks (Heritage Architecture)

Marnie Venditti – appearing under Summons (Land Use Planning)

Michael Keene (Land Use Planning)

[28] The Tribunal also heard from a number of Participants (Attachment 1) who provided oral testimony, accompanied in most cases by a written statement. In some cases a spokesperson provided the oral statement on behalf of like-minded Participants.

THE SITE, EXISTING BUILDING AND PROPOSED DEVELOPMENT

[29] The Site is a large and unique irregularly shaped property that is located mid-block, west of Sydenham Street and east of Montreal Street stretching across the entirety of the block with a total size of approximately 2,486 square metres (“sq m”). The Site possesses frontage on both Princess Street to the south, where the entrance and marquis of the theatre is located, and on Queen Street to the north, which has rear exits, but is primarily composed of plain brick walls. Both Princess and Queen Streets descend in elevation from Division down to the waterfront. The extent to which there is a slope and changes in elevation from west to east, and to a lesser degree from Princess Street to the south and Queen Street to the north, is visible in the photographs.

[30] The main theatre portion of the existing building (the “Building”) was listed as a protected heritage property on March 22, 2016. An additional segment of land within the block was added to the total Site area, and the listing was amended.

[31] The photographs forming part of the visual evidence provide a good overview of the exterior and interior of the Building and the street views and aerial views of the Site, as well as a number of interior photographs of the interior of the theatre complex after being stripped of most chattels, design and theatre elements such as seating, theatre, lobby, ticket booth and confectionary stand components. As indicated, many aspects of the current Site and Building, as well as the immediate streetscape and spatial context,

are familiar to the Panel Member. The visual evidence included a few renderings. Additional renderings from a more distanced perspective, were provided during the course of the hearing as a result of an inquiry by the Panel Member, with the caution that they might not be fully accurate. These additional renderings provided some additional assistance as to the manner in which the height of the Tower might be viewed in additional locations.

[32] Part way through the hearing, which was conducted in the Council Chambers of City Hall, the Panel Member was given the opportunity to go up to the upper level of the Dome. From that vantage point it is possible to look out across much of the Downtown Landscape and Harbour which assisted in putting the evidence into context from a location and height that might not otherwise have been available. The brief attendance to the upper level of the Dome was communicated to the parties at that point in the hearing.

[33] The evidence as to the nature of the Development itself is not in dispute. The building footprint, as shown on the Site Plan, will have a lot-coverage of approximately 91%. The existing Princess Street façade and entrance will be a pedestrian entrance with the current long lobby hallway serving as the connection to the residential tower, commercial spaces and two exterior courtyard/patios. The Princess Street Marquee and street walls are to be refurbished and preserved with the existing three storey built-form (with two setback units above the current lobby). The Queen Street façade will serve as the loading areas and vehicle parking entrance and exit with parking located on one basement level, the ground level and the second floor with architectural detailing and elements to create separate fenestrated components. There will be no retail/commercial at the rear of the building.

[34] The foremost component of the Development which gives rise to the primary issues relating to height, mass and scale, is the 16 storey residential tower ("Tower") that would be constructed within the north half of the Site, closer to Queen Street, extending partially into the south half of the Site and separated from Princess Street by

approximately 107 ft. The 16th storey of the Tower is inclusive of the mechanical/elevator area and a “sky lounge”, with a maximum height of 52.5 metres (“m”) facing the south (with a top height of 54.9 m for the mechanical penthouse). The 49.4 m height of the north face of the Tower, on Queen, is subject to a 3 m step-back above the first and second levels (3 storeys), then rising to full height at a limited angular plane of 86 degrees (and not the required 39 degree angular plane referred to in the City’s planning instruments).

[35] The proposed exterior design of the Tower will have a horizontal cornice feature separating the top five residential unit levels below the rooftop elements from the lower eight floors. The lower levels will be clad with red brick while the top section is to be covered in a light grey building surfacing intended to accentuate the “lightness” of the top of the building. (The south level will present with fourteen levels of units integrated into the rooftop level). All floors of the Tower will have glassed balconies and glazed windows.

[36] The Site Plan and Drawings filed as Exhibit 7, the Visual Evidence in Exhibit 3, and the Planning Letter dated July 27, 2016 at Tab 32 of Exhibit 1 provide the details relating to the Site, the Development and the Tower.

PLANNING CONTEXT OF THE DEVELOPMENT

Introduction

[37] The planning context for the Development was covered extensively by the witnesses in the hearing. Given the focused issue on the appropriate height of the Development Tower relative to its placement within heritage areas, it is important to include and, as necessary, highlight the key provisions of the City’s planning policies.

[38] Appended to this Decision as Attachment 2, are portions of the City’s OP, Zoning By-law and applicable design guidelines which are particularly relevant in this hearing

and which have been the subject of review and expert opinion from the witnesses in this hearing.

[39] The Tribunal was directed to a number of the various policies in the OP which were the subject of analysis by all of the expert witnesses. The Tribunal has considered all of those policies in its consideration of the appeals but has focused on those policies as they relate to the central core issue identified in these appeals, and has thus considered: (a) the policies for height, massing, scale and built form; (b) policies governing heritage, history, and compatibility; and (c) policies relating to intensification and growth.

[40] The opinions of the expert witnesses, and the discussion and analysis by the Tribunal of the relevant planning policies at play in these Appeals are addressed below.

[41] As the evidence unfolded there were various references to “Downtown Kingston”. Aside from the defined planning areas variously identified in the City’s planning policies (as identified in this Decision and excerpted in Attachment 2) “Downtown Kingston” was generally referred to as the area of the City extending eastwards from the corner of Princess and Division Street, down to the waterfront and extending from the parallel street to the south, (Brock Street), to the parallel street to the north (Queen Street) and broadening west and east nearer to the waterfront. This area is more or less consistent with the Central Business District as defined in the OP.

Official Plan – Central Business District, Special Policy Areas

[42] The Site is within the Central Business District land use designation and within the Downtown and Harbour Special Policy Area (“DHSPA”). It is also part of the Princess Street Corridor leading to the Primary Centre east of Division and to the waterfront, as identified in the OP’s City Structure. As the property lies between Princess Street to the south and Queen Street to the north, it straddles two historic Heritage character areas explained below. Within the OP’s DHSPA the Site is also part

of the Lower Princess Street Retail Area. Applicable zoning is set out below.

Heritage and History (and Height) in the Official Plan

[43] The City has, within its adopted planning policies, elected to recognize the preservation and significance of its history and heritage within both the existing and planned context of the City's fabric within the primary Centre and the Central Business District. The OP policies in various iterations, repeatedly express the manner in which planning, and all proposed development, in this area must be evaluated upon these policy elements. This includes policies relating to growth, development, density, intensification, land use compatibility, and specifically cultural heritage, as directed by provincial policies.

Heritage Character Areas

[44] As an integral part of the OP policies dealing with cultural heritage, s. 7.3.5 of the OP identifies Cultural Heritage Character Areas that are subject to investigation and that even if not determined as appropriate for designation under the *Ontario Heritage Act*, "...may nonetheless be recognized for their specific heritage character" and as "having a specific heritage character" (s. 7.3.D).

[45] The southern portion of the Site facing Princess Street is within the long rectangular Lower Princess Street Heritage Character Area ("HCA") extending eastward from Barrie Street the length of Princess Street down towards the waterfront. Section 7.3.D.2 specifically indicates that the Lower Princess Street HCA "recognizes the traditional downtown as a significant cultural heritage resource" as defined in the OP.

[46] The northern portion of the Site facing Queen Street is part of an irregular segment area north of Queen Street that extends westward to Clergy along Queen Street and is identified as the St. Lawrence Ward HCA. Unlike the Lower Princess Street HCA, the St. Lawrence Ward HCA does not extend eastwards to the waterfront

and it excludes the blocks of the Central Business District which are east of Bagot and Rideau and north of the parallel mid-line of the blocks between Princess and Queen Streets extending to The Tragically Hip Way and Bay Street and which includes that portion of this area referred to as the “North Block”. The North Block, encompassing four and a half City blocks, was the subject of a 2004 Study that produced specific Urban Design Guidelines for the North Block Central Business District.

[47] Only a limited narrowed portion of the DC Business District area lies within the two HCAs and the Heritage District encapsulating Market Square and City Hall. (There is also a smaller portion of the DC Business District which is included in a third HCA, the Old Sydenham HCA.) There are three irregular “outlying” areas excluded from these heritage areas in the DC Business District: one to the south of City Hall to Earl Street and nearest to the waterfront (with taller, and more recent buildings built on brownfield lands); the one area north of the mid-line between Princess and Queen Streets described above (containing the North Block and more contemporary developments such as the K-Rock/Leon Centre, the OHIP building, and the No Frills, Goodlife and LCBO buildings); and the third outlying area near the “top” of Princess (containing the Metro, a retail strip complex and the much-maligned “Princess Towers”).

Policy Highlights in the Official Plan

[48] The following are some, but not all, of the various policy references in relation to heritage and history [emphasis added] which have emerged in the evidence from the various witnesses and which form the foundation for certain of the opinions provided by the expert witnesses, and in turn, for the findings of the Tribunal:

- (a) In addressing the intended preservation of the broad City structural elements in s. 2.2, which are not expected to change significantly over the life of the OP, the stated goal is to “**promote the continued evolution of Kingston as a unique City with valued natural and built resources and a historic legacy, having an efficient, sustainable, and strategic structure that best serves its citizens, businesses, workforce, and visitors**”.

(b) Section 2.3.7 provides that “**cultural heritage resources will continue to be valued and conserved as part of the City’s defining character, quality of life, and as an economic resource** that contributes to tourism in both the urban and rural portions of the City”.

(c) In the primary Centre, east of Division Street, and the Central Business District, where the Site is located, the policies recognize “**the importance of maintaining and conserving the heritage buildings and character of the Lower Princess HCA**”. This is again expressed in the Principles of Growth in the OP which support intensification through development that “**respects cultural heritage resources**” and the same recognition of the importance of maintaining and conserving the heritage buildings and character of the Lower Princess HCA.

(d) Land use compatibility polices integrate a number of references to cultural heritage. The policies in s. 2.7 are generally applicable but recognize the principle of compatibility that **respects the “quality of existing areas”** and a “**suitable transition between areas of differing use, sensitivity, urban design treatment and intensity in order to avoid mitigate adverse effects**”. Land use changes through development will only be approved if they are compatible and avoid adverse effects which includes “**reduction in the ability to enjoy...[the]...historic quality or setting**” of a property, and “**visual intrusion that disrupts the streetscape, building, or cultural heritage resource**”, and “**architectural incompatibility in terms of scale, style, massing and colour**”.

(e) Section 2.8.9 again speaks to the protection of heritage and specifically identifies Cultural Heritage Resources being guarded, stating: “**Cultural heritage resources**, which include protected heritage buildings, built heritage resources, cultural heritage landscapes and archaeological resources **will be conserved, managed and marketed for their contribution to the City’s unique identity, history and sense of place** in such a way as to balance heritage with environmental and accessibility concerns.”

(f) Section 7 of the OP, containing policies relating to Cultural Heritage Resources, speaks to the importance of such resources to Kingston: “**The City of Kingston is well known for its cultural heritage resources which play a key role in the City’s identity, and contribute to its economic prosperity as well as to the cultural enrichment of its residents and visitors. Cultural heritage resources are a valued trust that has been inherited from the past,**

and must be cultivated as a legacy to be passed on to the future.”

(g) Under s. 7.3 of the OP, the City has identified a number of parts of the City recognized as having specific heritage character. Although these cultural heritage character areas do not yet have formal designation under the *Ontario Heritage Act* as significant cultural heritage landscapes they are given particular attention under the OP. As indicated **the Lower Princess Street HCA is specifically identified as a “significant cultural heritage resource”** (s. 7.3.D).

(h) The Lower Princess Street HCA, is recognized for its “streetscape, courtyards and laneways, heritage buildings, landscape elements, as well as the pedestrian activity, civic and commercial functions that maintain the historic function of the area. **The arrangement of buildings, street orientation, pedestrian activity and continuity of height all contribute to the historic sense of place.”**

(i) Section 7.3.D.2 continues: **“It is the intent of this Plan to maintain the heritage integrity of the area with the application of the following heritage policies”**. Heritage policies b and c importantly provide that:

b. new buildings will reinforce and be compatible with the existing heritage buildings and any upper storeys beyond the height of existing rooflines will be required to step back in accordance with the build-to plane provisions of Section 10.A.4.6 of this Plan.

c. building heights in the Lower Princess Heritage Character Area must comply with the provisions of Section 10A.4.6 of this Plan.

(j) The policies relating to **“New Buildings & Height Provisions”** referenced above in 10A.4.6, as they relate specifically to the Lower Princess Street HCA and St. Lawrence Ward HCA, (and which also apply to the North Block) are as follows:

New Buildings & Height Provisions

10A.4.6. - While striving to maintain character-defining buildings, the City may support new buildings that are of a scale and massing complementary to buildings in the surrounding area. The following provisions will generally be required:

b. for the Lower Princess Street Heritage Area and the Downtown portions of the St. Lawrence Ward Heritage Area and Old Sydenham Heritage Area which are shown on Schedule 9:

- street wall buildings with a ‘build-to-plane’ up to 17 metres, to be specified in the zoning by-law;**

- a minimum building height of approximately 8.5 metres with two storey height or the appearance of two storeys; and,
- a height between ground floor and second floor of 4.25 metres or alignment with second floor of adjacent buildings if these are considered to reflect the character of the area as established in the Downtown and Harbour Area Architectural Guidelines;

(k) One important additional section follows s. 10A.4.6, which provides for potential exemptions to the height limitation policies set out above. That section states:

Potential Exemption

10A.4.7. - Notwithstanding the above provision related to height, if a site-specific urban design study, presented to the public, clearly indicates to the satisfaction of the City, that a taller building is compatible with the massing of surrounding buildings, does not create unacceptable amounts of shadowing, and meets the land use compatibility policies of Section 2.7 of this Plan, a greater height within a specified building envelope may be approved.

(l) It is necessary, before leaving the policy provisions in s. 10A.4.6 relating to new buildings and height provisions, to also reference s. “c” that follows “b” (as reproduced in subparagraph (i) above) which is applicable to the area identified as the “North Block” of the DHSPA. Subsection “c” provides that the North Block, (which, as noted, lies outside the two HCA areas, and which lies to the north of the Lower Princess Street HCA and east of the St. Lawrence Ward HCA), is governed by the same build-to-plane limitations and second floor maximum height/alignment provisions that apply to the Lower Princess Street and St. Lawrence Ward HCAs. However, it contains an additional provision stating that for this area there is “a maximum height (after employing angular plane setback) of 25.5 metres”. This additional provision is relevant to the opinion evidence and submissions of IN8 as discussed below.

(m) Section 7.3.D.6 recognizes the St. Lawrence Ward HCA as “**one of the oldest areas of the City with an urban style that has survived since the 1800’s.**” As compared with the Lower Princess HCA, the policies relating to the St. Lawrence Ward HCA are more limited, stating that the intent of the OP is to recognize the heritage style of the area as created through the combination of “**buildings, street pattern, varying street widths and public spaces**” and **undertake further investigations that will define appropriate boundaries and policy**”.

(n) Section 10A includes policies relating to the DHSPA which covers the

Site. The DHSPA is identified as “...**the oldest, most diverse area of the City** where the Market Square Heritage Conservation District features prominently. **Its heritage continues to be a defining element of its character and is intrinsically linked to its continued form and function** as a mixed use, commercial node with retail, **office and tourist focus**, resident population and **civic prominence**”.

(o) Section 10A.1 identifies the Strategic Intent and Function of the DHSPA which again highlights the “**nucleus of historic public activity**”:

(p) Section 10A.1.6 states: “**Cultural heritage resources are a valued legacy of the City and constitute character-defining elements of the Downtown and Harbour Area that are to be conserved. New development must protect, enhance, support or adaptively re-use these resources.**”

(q) Section 10A.2 land use policies for the DHSPA recognizes the widest range and mixture of land use in the DHSPA that are “**supportive of the pedestrian orientation, historic character and related scale..**” of the DHSPA. Such uses “...all contribute to the vitality, and pedestrian focus of the area and **are encouraged in this location in a form that maintains human scale and historic context.**”

(r) Section 10A.4 provides policies relating to Urban Design as it relates to Cultural Heritage in the DHSPA, again emphasizing “the wealth of cultural heritage resources” and that “**its heritage components continue to be a major part of its character and quality of life**” and are “intrinsically linked” to the DHSPA’s economic functions including “**its attraction for tourism**”.

(s) Section 10A.4 includes one specific policy highlighted for the DHSPA in relation to urban design. It seeks to address the manner in which cultural heritage resources have been compromised by “the recent unsympathetic development.” It provides that “Section 7 of this Plan and the 2007 Downtown and Harbour Area Architectural Guidelines (the “Guidelines”) provide direction and opportunities for **protection and enhancement of the cultural heritage resources and contain guidelines for further development that will be compatible with the heritage character of the area.**”

(t) Mr. Cuming, in his testimony, supported by his Witness Statement and inserted textual extracts, also included a review of the historical background to

the planning policies which identify Princess Street as a heritage character area. With examples from the past 29 years Mr. Cuming noted the continuity and consistency of policy that preserves the heritage character of the Princess Street and Downtown Harbour area. The policies that are in place as of the date of the application are of course the guiding policies, but the Tribunal does note that this asserted consistency of the historical planning approach to protecting the heritage character is supported by the excerpts of prior planning policies.

Growth, Intensification and Density

[49] There are, of significance, policies in the OP promoting the objective of growth, intensification, development and increased density, particularly in the Primary Centre and Central Business District.

[50] Section 2.3 of the OP sets out the principles of growth confirming that the City supports intensification by redeveloping the existing built area through compatible infill development (subject to the requirement for respect of cultural heritage resources)

[51] Section 2.4.3 of the OP sets a minimum residential density target of 75 residential units per net hectare and contains no maximum limit on such density. Section 7.2 of the Zoning By-law sets a maximum density in the C1 Zone at 123 residential units per net hectare. The density targets are, however, governed by the compatibility constraints as variously stated in the OP.

[52] In furtherance of the principles of growth and policies of intensification s. 10A.2.12 and s. 10A.2.13 provide that medium and high density residential uses are encouraged in the Downtown in areas where mandatory commercial uses are to be located at ground level and those where ground floor commercial uses are not mandatory. The policies also speak to the intent to encourage mixed-use development in this area of the City with a broad range of ground floor commercial uses with higher density residential uses on upper floors, to promote the vibrancy and vitality of this central area of Kingston.

Zoning By-law No. 96-259

[53] Under the Downtown and Harbour Zoning By-law No. 96-259, (the “Zoning By-law”) the Site is also zoned in two parts: the Queen Street segment is zoned as Central Business System (C1); and the Princess Street segment is zoned as Heritage Commercial (C1-3).

[54] Under the provisions of the Zoning By-law the Maximum Building Height along Queen Street at the Build-to-Plane is **4 storeys**, not to exceed **17 m or 55 feet (“ft”)** and the Height along Angular Plane is **6 storeys**, not to exceed **25.5 m or 83 ft** (Exhibit 2, Tab 5, p. 112).

[55] On Princess Street, under the performance standards for Maximum Building Height in the Heritage Commercial zone, the Height at Build-to-Plane is the same as Queen Street, being **17 m or 55 ft**, but the Maximum Building Height is set at **17 m or 55 ft**. (Exhibit 2, Tab 5, pp. 112-114).

[56] For the purposes of discussion and analysis, the Zoning By-law defines “Angular Plane” as a plane which projects up at a 39 degree angle and is contiguous to the build-to-plane. The angular plane commences at a specified height measured at the build-to-plane and extends across the entire length of the property abutting the public street and is demonstrated in a Zoning By-law diagram (p. 47 of Exhibit 2, Tab 5). Section 5.6 of the Zoning By-law provides the general restriction that no part of the main building or structure shall project above the angular plane.

[57] Section 10A.6.2 of the OP, as part of the policies applicable to the DHSPA, provides that zoning in that area will continue to reflect built-form provisions and ensure that the form of new development is compatible with the built heritage fabric and street-oriented pedestrian function of the Downtown and Harbour Area.

Downtown and Harbour Architectural Guidelines Study 2007

[58] In accordance with s. 10A.6 relating to the DHSPA, implementation of the policies applicable to the Site and the proposed Development are to be undertaken in accordance with the Downtown and Harbour Area Architectural Guidelines (the “Guidelines”).

[59] The Guidelines (Tab 7, Exhibit 2) contain an introduction which was addressed by a number of the witnesses on different occasions through the hearing, and which highlights the significant heritage qualities of Kingston’s Downtown which reflect similar statements in the City’s OP (**emphasis added**):

...the Downtown and Harbour Area of Kingston is a **remarkable urban artefact**. It continues to be an active commercial centre for the entire Kingston region, as it has been for two centuries. At the same time, **it is one of Canada’s most well preserved heritage areas, possessing a great legacy of historic buildings, many of which have been lovingly restored and preserved....**

The successful future of the Downtown and Harbour Area cannot, after all, be taken for granted. All that Kingstonians would have to do to see this, would be to visit such other Ontario communities as Belleville, Brantford, or London. In each of these cities, it is all **too easy to see the tragic urban results of municipal** inattention to downtown commercial vitality, and **indifference to its heritage legacy...**

...in its efforts to encourage revitalization of the Downtown and Harbour Area, City Council should do so judiciously. **It should not permit upzonings that will result in the creation of new buildings tall enough to fundamentally change the image of the Downtown and Harbour Area.**

AREA CONTEXT – HEIGHT AND BUILT-FORM

[60] The mixed use Central Business District is primarily composed of a low built-form profile of between one and four storeys. This includes a number of more recent redevelopment projects such as the building at the corner of Brock and Wellington (165-177 Wellington) and the S&R Department Store Building and Springer Bank of Nova Scotia located on Princess which were pointed out by Mr. Downey, and in the case of the Wellington and Brock building, by Mr. Loucks.

[61] The predominant built-form and character in this area of the City is composed of designated or listed Heritage Properties under the *Ontario Heritage Act*, and older low-rise interspersed with only a few contemporary structures. Mr. Downey testified that this is due to the fact that the historic time in which many of these buildings were constructed, were limited by materials and technology. Due to the fact that the Downtown landscape has largely been preserved, and that much of any redevelopment that has replaced or restored buildings has done so with similarly reduced massing and heights to ensure continuity with adjacent and surrounding buildings, the elements of human scale in Downtown Kingston, and a continuity of low-profile building landscape remains now, as it was then,

[62] As a result there is generally uniformity of low building heights, excepting only public buildings. There are a variety of historic architectural styles from multiple periods with most architectural materials composed of stone or brick. The stylistic diversity is described in the Guideline Study as existing within a consistent framework of building massing and with a building grain based upon a narrow mixed-use form and generally consistent façade composition. The many photographs, some historical, scattered throughout the Exhibits, corroborate the descriptions of the uniform patterns of built-form and heritage character provided by the experts and as contained in the various policy documents and studies.

[63] It is this pervasive presence of historic built-form that has given rise to the planning policies expressed in many and varied forms within the OP recognizing the “valued legacy” of such cultural heritage resources and which “constitute character-defining elements of the Downtown and Harbour Area that are intended to be conserved” (s. 10A.1.6) and “the importance of maintaining and conserving the heritage buildings and character of the Lower Princess Street Heritage Character Area” within the Central Business District (s. 2.3.4). Mr. Downey, as a member of Kingston’s Heritage Committee testified that the Guidelines Study in 2007 was commissioned to create Guidelines to protect Kingston’s heritage character, and took into account the Zoning By-law governing the area. Mr. Downey states that the resultant Guideline Study specifically supported intensified development with the provisos that the scale

and massing reflect the historic configuration in compliance with the existing by-laws.

[64] There are some exceptions in height and built-form in the Central Business District. With the exception of the Anna Lane Condominium, the rest are located on the north, south and west periphery of the Central Business District and outside the two HCAs:

(a) A nine storey mid-rise condominium known as “Anna Lane” is located at 121 Queen Street which is the only higher building in the Central Business District which is within the St. Lawrence Ward HCA;

(b) The building known as “Princess Towers”, known by many under its first assigned name “Elrond Tower”, was an experiment in cooperative student housing built in the early seventies. Its height is estimated at 16 or 17 storeys. Described by many witnesses in a variety of ways, none of them flattering, the evidence in the hearing as to Elrond Tower was unanimous and consistent as to the lack of aesthetics and compatibility of this anomaly in built-form and height. Mr. John Garretson, a recognized member of the community and Participant, referred to it as “an atrocity”. Another Participant referenced the building as an “eyesore, not to be repeated”. Situated at the “top of Princess” and visible from a sizeable portion of the City this Brutalist style concrete tower forms part of the height context of Kingston’s skyline – regrettably so, in the opinion of most witnesses. Elrond Tower is outside, and to the west of, the Lower Princess HCA.

It is likely appropriate to note here that IN8 pointedly recognizes the unavoidable blunt deliveries of criticism as to the height, massing and scale of Elrond Tower within the context of downtown Kingston. The submission of IN8 is equally forthright in drawing attention to the fact that notwithstanding the failings of this building that rose up in the early seventies, tourism and heritage have nevertheless flourished in Kingston in spite of the presence of such an unpalatable building. History and heritage are not so fragile, argues IN8, that higher development on the Site cannot coexist. If tourism and heritage can

flourish with Elrond, submits IN8, it will also continue to flourish with the IN8 Capitol tower.

(c) There is a series of higher hotel, apartment and condominium buildings along Ontario Street at the waterfront, south of Market Square, which is outside, and to the south of, the Lower Princess HCA.

(d) The K-Rock Centre, a larger massed recreational facility, the Goodlife, LCBO and No Frills buildings, and the OHIP government complex, are contemporary buildings located to the north of the Lower Princess HCA and east of the St. Lawrence Ward HCA in what is referred to as the North Block.

DISCUSSION AND ANALYSIS – HOW HIGH IS TOO HIGH? – BALANCING HEIGHT AND INTENSIFICATION, HERITAGE, AND COMPATIBILITY

Overview of the Positions of the Parties

The Appellants' Position

[65] The Appellants rely on the evidence of their experts to support their submission that the proposed height, massing and scale of the proposed Development is excessive, incompatible and not in keeping with Kingston's unique heritage character in the all-important downtown area. The Appellants argue that the planning policies in place do not permit a building of that height and size within the centre of the Downtown and primarily point to the various policies relating to height, massing and scale, as affected by the policies relating to heritage, history and the character of the Downtown as contained in the City's OP, and as implemented through the performance standards in the City's Zoning By-law and Architectural Guidelines, all in accordance with the Provincial Policy Statement 2014 ("PPS"). The Appellants also object to the excessive height, massing and scale as it disregards the angular plane requirements, as well as the maximum height provisions contained in the Zoning By-law and the policies directing that the low-rise heritage character of the area be maintained.

[66] As discussed below, the matter of where the Tower is perceived to be situated, emerged as a threshold issue in the analysis of the evidence. The Appellants take the position that the Tower is, with its height and massing, perceived as much as a development on Princess Street and part of the Lower Princess Street HCA, as it is on Queen Street, and within the St. Lawrence Ward HCA.

[67] The Appellants' experts have noted that the Site itself clearly fronts onto Princess and the major heritage façade, marquee and entrance, which are the recognized heritage elements for the "Capitol" Development residences, will be the focal point for the promoted Princess Street aspects of the Development, and not on Queen. The Appellants also point to the fact that despite the placement of most of the Tower on the north half of the Site closest to Queen, the Tower nevertheless extends well into the south half of the Site which is within the Lower Princess HCA. The Appellants submit that the high visibility Tower has been admitted, highlighted, characterized and promoted as a "landmark" that will be clearly visible from a broad range of vantage points, not only along Princess and Queen and in the Central Business District, but also from many parts of the City without such a fine distinction that it is "on Queen, and not Princess".

IN8's Position:

[68] IN8's position on the issue of height, massing and scale, and the appropriateness of permitting a building that is 16-storeys in height, is first based on the assertion that there are no established adverse effects or impact and that mere apprehensions of impact upon "history and heritage" in the City should not be enough to dismiss this Development as appropriate and compatible. IN8 challenges the assertion that the placement of the Development at that height, and with the proposed mass and scale of the Tower built-form, is in any way incompatible, and to the contrary, IN8's witnesses assert that the design is thoughtful, harmonious and represents an appropriate and proportionate form of intensification which can easily coexist in its Site context, and which is encouraged by the PPS and permitted by the City's planning policies.

[69] Central to the position of IN8 is their second assertion that the City's OP policies encourage and facilitate proper redevelopment and intensification on the Site without any limitation as to height. IN8 argues that notwithstanding the general limitation of 6-storeys in the policies and a Zoning By-law that is over 20 years old, as long as it can be justified through the urban design study required by s. 10A.4.7 of the OP, which has been completed, there is simply no ceiling cap as to building height which exists within the OP. IN8 asserts that the OP clearly permits residential intensification at heights rising to 16-storeys, and perhaps even higher, within the framework of the OP policies relating to heritage, history and the preservation of the character of the Lower Princess Street and St. Lawrence Ward HCAs. Sixteen storeys are appropriate and can readily coexist in its heritage context.

[70] As to the planning rationale to support this position that the OP allows for unlimited height at this location, IN8's analysis first acknowledges that the policies respecting height, as set out in s. 10A.4.6 of the OP, do indeed provide a maximum build-to-plane height of 17 m to maintain a continuity of street level heights. However, the City's policies, IN8 argues, intentionally omit any reference to maximum height limits in its policies relating to new development set back from compliant street level heights in this area on Queen. As long as the Development complies with the height limitations for the facing street walls, and maintains a required step-back from the street, IN8 submits that there is simply no height limit which exists to prevent a building at 16 storeys and 52.4 m in height. Furthermore, since there are no height-restrictions contained in the OP policies, IN8 submits that the angular plane and maximum height performance standards in the City's dated Zoning By-law, which provide for maximum heights of 17 m or 25.5 m, exist *without* an approved policy basis in the OP. IN8 concludes that because the Zoning standards are dated, and are not clearly supported by OP policies regulating height, the height of the proposed Tower is therefore unrestricted for this Development, and in fact encouraged by the growth and intensification policies of the same OP.

[71] IN8 submits that the expert opinion evidence presented within these appeals fully

supports such a planning conclusion and finding that the proposed height massing, scale and built-form of the Development is in complete conformity with the high density retail and residential intensification policies in the OP. As IN8 has posed the question in its written submissions: “How can one say that a property that fosters, encourages and promotes high density mixed-use development, *without a height limit*, cannot accommodate high-rise development?”

[72] That answer is dependent upon whether the City’s planning instruments do indeed support the assertion that there is no height limit, as IN8 argues.

[73] As to the matter of the perceived location of the Tower, the submission of IN8, as it relates to the evidence of their witnesses, is that the higher Tower component of the Development is very much perceived, and practically is, located solely as a Queen Street building in relation to its spatial context, and within the St. Lawrence Ward HCA. Emphasizing its distance of 107 ft from Princess, and placement along the Queen Street façade, IN8 asserts that this location on Queen, and not on Princess, very much informs many aspects of the planning analysis and favourably permits the Development heights.

Intensification - Generally

[74] Turning first to intensification, the opinion evidence of the experts was unanimous in confirming the Development as consistent with the PPS policies relating to intensification, and in conformity with the policies supporting medium and high density intensification within mixed use buildings in the Central Business District, on the Princess Street Corridor and specifically within the DHSPA. In various ways a number of the Participants, and Ms. Schmolka and Dr. Burfoot on behalf of the Appellants, also acknowledged that some addition of residential units in developments to foster intensification and growth in the Downtown, is appropriate at this location, and in that respect, would conform to the OP and be consistent with Provincial policies and plans.

[75] In that regard, and subject to the provisos below, the Tribunal finds that the

placement of some residential intensification through the proposed Development is consistent with, and conforms, to the residential intensification planning policies in both the Provincial PPS and Growth Plan, and the City's OP.

[76] The issue of course is how *much* intensification and density is compatible and appropriate, and at what height, mass and scale the Development should be permitted, to accomplish this residential intensification. Over-intensification of the Site through significantly higher density than identified in the City's policy documents plainly stated, and/or contrary to the heritage policies of the OP would not conform with the OP. What then is the appropriate limit of such increased residential density as it is impacted by height, mass and scale?

[77] The consideration of this question, in the City's planning policies, zoning and guidelines, necessitates a consideration and balancing of intensification with the City's heritage policies.

Kingston – The Pre-eminent Cultural Heritage Community on Lake Ontario – The Importance of Heritage Preservation Policies in the City's Planning Instruments

[78] The Tribunal has addressed the key components of the City's policies relating to the heritage and history of the City and the manner in which such heritage and history is to be protected and promoted within the City's OP, as set out in paragraphs 43 to 48 above.

[79] For the purposes of this Decision the Panel Member has devoted considerable time to a careful assembly and review of the relevant policy provisions of the City's OP that were referred to, and relied upon, to support the various opinions of the expert witnesses. Attachment 2, as it summarizes the relevant policies, should be considered more than a mere compendium of the referenced policies during the hearing, and rather, as a carefully culled and reviewed collection of the policies that the Tribunal has analyzed in concert with the testimony of the experts to reach the findings and conclusions herein.

[80] The collective body of policy, as opined upon by the expert witnesses, leads the Tribunal to conclude that the City's policies on heritage have strongly directed the protection of cultural heritage resources and imposed rather stringent requirements for development to be compatible with the heritage resources and the identified HCAs identified in the OP.

[81] The Tribunal has considered the PPS in regards to such heritage policies. The Tribunal has also turned its mind to the PPS policies relating to intensification and development, as such provincial policies also inform the analysis. Given the unique character of Kingston's Downtown, Policy s. 2.6 of the PPS dealing with Cultural Heritage and Archaeology, and in particular s. 2.6.1, is of importance in that it requires that significant built heritage resources and significant cultural heritage landscapes shall be conserved. Development will not be permitted if it has not been demonstrated that heritage attributes of protected heritage property will be conserved. The City's OP is consistent with the Provincial Policies, and has been drafted to address the unique heritage characteristics and resources in much detail.

[82] Each and every expert witness acknowledges the unique heritage context of Downtown Kingston and the extent to which the City's planning policies recognize and then protect such context. No witness challenged the clear OP objectives and policies that exist in the OP to protect and preserve such heritage character. The Appellants' witnesses were consistent in acknowledging Kingston as a pre-eminent cultural heritage community on the shore of Lake Ontario with the opinion that no other community in Ontario has such a concentration of heritage.

[83] In turn, each of IN8's witnesses also acknowledges that this is the case. Mr. Stott indicates that Ottawa also has a similarly robust planning and design policy framework that speaks to heritage but concedes that Kingston's heritage character is significant. Mr. Somfay and Mr. Keene also agree with the reputation of Kingston's Downtown and Harbour as either *one* of the, or *the*, preeminent heritage landscapes in Ontario and Canada. So too has Ms. Vendetti conceded this unique aspect of the City

in her testimony, and the extent to which the heritage policies are prevalent, and must be carefully considered, in assessing development in the Downtown area

[84] Mr. Loucks, an expert in heritage architecture on behalf of IN8, also definitively agreed with the descriptive introduction to the Guidelines set out in paragraph 59 above which had been acknowledged by Mr. Downey and Ms. McIlroy as highlighting the significant heritage qualities of Kingston's Downtown.

[85] The Tribunal has carefully considered the planning instruments and policy documents filed within the Exhibits filed in this hearing and the testimony of the Appellants' experts that have highlighted those policies and instruments. The Board finds that the City's OP and implementing documents, including the Zoning By-law, have clearly elevated policies relating to the preservation of the unique heritage character of the City's Downtown to the forefront, and having notable significance in assessing development in the Downtown.

[86] Although the cited Guidelines references do not represent policy, the quoted references to Downtown Kingston in the Guidelines Study "as a remarkable urban artefact" and "one of Canada's most well-preserved character areas" are nevertheless entirely consistent with the OP's many clear and emphatic policy references to the fundamental importance of cultural heritage and the established historic architectural character of the Downtown.

[87] Having recognized the heritage priorities in the OP, the Tribunal must accordingly assess the totality of the expert evidence relating to the primary core issues mindful of the OP's overarching framework of entrenched and cautionary policies aimed at protecting and preserving cultural heritage elements and the historic character of Kingston's Downtown. In doing so, the Tribunal is persuaded by the evidence of Mr. Cuming, Mr. Jacobs, Mr. Downey and Ms. McIlroy that it must consider such heritage and character preservation policies through the lens of the broader heritage landscape of Downtown Kingston required in the OP's policies and not simply any one or more specific listed or designated heritage properties. While such preservation of individual

properties must also occur, the City's OP speaks to the preservation of the significant cultural heritage resource that is the broader Downtown landscape and heritage character identified by the witnesses.

[88] The evidence is indeed clear, as indicated, that both aspects of these policies are addressed within the City's planning policies and that a balancing of these priorities is to be achieved. That balancing may not occur with the avoidance of key aspects of the policies relating to compatibility, preservation and protection and the importance of maintaining the low-profile heritage character of the Downtown, the Lower Princess and St. Lawrence Ward HCAs.

[89] Having found, on the evidence, that the intentionally crafted planning policies in the City of Kingston have placed heritage, history, and the preservation of the historic low-profile character of the various defined downtown planning areas as a priority the Tribunal also agrees with the Appellant's experts and finds that the balancing of planning goals and objectives within the City's policies cannot occur without sufficient and proper consideration for these heritage policies. It is the Tribunal's additional conclusion, based on the whole of the planning and urban design evidence, that not only must such heritage policies be given proper and due consideration, but they have, in many respects, been moved to the forefront in some instances when undertaking the process of balancing the intent to preserve and protect the heritage character of Downtown Kingston with the intent to promote intensification and revitalization of the Downtown through appropriate development.

[90] Overall, the Tribunal prefers the evidence of the Appellants' experts, to that of IN8 and finds that in a number of respects, IN8's experts excessively minimized the importance of the City's OP planning policies relating to heritage, the priorities identified for the Lower Princess HCA, and the various policies and derivative Guidelines relating to the Downtown and Harbour area on the one hand, while unduly prioritizing policies relating to growth, intensification and economic development to improve the vitality of the downtown on the other. It is the finding of the Tribunal that in a number of instances

in the hearing the experts put forward by IN8 have failed to focus the required attention to such heritage policies which has, in the view of the Tribunal, raised doubts as to the veracity of some of the opinions of IN8's experts. In doing so the opinions have not credibly acknowledged and applied the heritage policies in the manner required.

[91] Additionally, this leads the Tribunal to conclude that the report and recommendations of the City's Planning staff provided to Council, as supported by Ms. Venditti, and leading to the initial vote that passed the Zoning Amending By-law: (a) failed to consider and properly apply the heritage and compatibility policies; (b) gave undue weight to IN8's priority of achieving maximum intensification; and (c) ignored a number of the design standards relating to angular plane and height, about which the peer review consultants, ERA, had serious concerns – concerns that were left unaddressed.

Joe Somfay, Michael Stott, and Anne McIlroy – Architecture and Urban Design

[92] As to the manner in which IN8's experts appeared to be unduly focused on narrowed aspects of the Development planning that avoided addressing the priority policy requirements relating to heritage and compatibility, there are a number of examples. The Tribunal finds, for example, that Mr. Somfay's architectural opinion evidence was unduly "density-centric". The Tribunal is of the view that Mr. Somfay's opinions regarding the appropriateness of the architectural design of the built-form were dictated by the need to accommodate (i.e. maximize) the desired residential density, and the shifting of that density towards Queen Street within the Site. The Project's architect has rather frankly stated that achieving maximum density has dictated the Tower's form, height, massing and scale, which, in the Tribunal's view, is done in priority to undertaking a proper consideration of compatibility and design relative to its context.

[93] The Tribunal accepts that increased growth and density in the Centres and Central Business District is clearly a goal under the OP. Nevertheless, Mr. Somfay's testimony that IN8's proposed elevated density of approximately *seven* times the

maximum density under the City's density performance standard, is what is being "accommodated" by the design, is troubling for the Tribunal. IN8's architect has plainly indicated that the achieving such high density has informed the design process. This pre-determined objective of high density leads the Tribunal to conclude that the density of the built-form has, in the design process, created a subjective imbalance of policy consideration, to the detriment of properly conforming to the City's heritage policies.

[94] In the Tribunal's view, Mr. Somfay, in his evidence, further revealed the nature of this imbalance of policy considerations when he testified that the floor plates of the building were also increased in size specifically to counter the reduction in the number of floors from 20 to 16, thus increasing the mass and scale of the built-form within the Site to between 1,225 and 1,245 sq m. This floor-plate size is thus increased by approximately 65% above the recommended 750 sq m base-line applied to tall buildings in Toronto and identified by Ms. McIlroy and the peer-review consultants, ERA. It is the Tribunal's observation that during the iterations of design described by Mr. Somfay, this transfer of density from the four storeys removed from the Tower, to the remaining floors, not surprisingly results in increased mass in the remaining lower storeys. This massing of the building's Tower design was, on the evidence, done to maintain IN8's higher density objective. This objective also clearly dictated the Tower's size and design in priority to a proper consideration of heritage and compatibility policies.

[95] The Tribunal also finds that much of the motivation for the design of the Development as explained by Mr. Somfay, and his resultant opinions regarding the appropriateness of the overall height, mass and scale of the Tower, were also expressed as a means to mitigate the visual impact that a 16 storey, 52.3 m high tower would have on the Downtown Kingston skyline. In examination and cross-examination of Mr. Somfay, his testimony as to the "peripheral" manner in which the proposed Building would appear to pedestrians on Princess and Queen Streets, strikes the Tribunal as being overly general and unsupported by clear scientific study or analysis of any kind. Moreover, the numerous references to the proposed Building as a "landmark", and the admitted intent of IN8's architect (and other development team

members) to evoke such remarkable landmark status to the Building within the Downtown Kingston landscape is at blatant cross-purposes, and in contradiction, to the concurrent objective and opinion that the design of the Building is intended to minimize the visual impact on the city skyline. In the Tribunal's mind it begs the question as to why one would strive to create a visual landmark in the Downtown urban landscape of the City but then attempt to minimize and make its height less noticeable.

[96] It is the Board's findings that Mr. Somfay's opinions and articulation of the visual impact the height, mass and scale of the Building would have on the Downtown landscape, when challenged on cross-examination, do not ring true, are contradictory, and in some instances can be described as "policy-unfocused". Mr. Somfay admitted that this first high-rise Building he was designing for a low-rise neighbourhood context, with significant heritage resources, in Kingston, would "grab your eye" and be recognized at a distance.

[97] Mr. Somfay's opinions also included a conclusion that the Building would not relate to Princess Street and would only "be in the distance" or "beyond Princess" but admittedly seen from Princess Street. He opined that the Tower would really be considered as a Queen Street Building, and testified that Queen Street was, in any event, relegated to serving "mostly as a service access supporting the Princess Street Commercial uses" – a view that does not, in the conclusion of the Tribunal, appear to be borne out by the planning evidence.

[98] In terms of architectural compatibility, Mr. Somfay identified the residential tower as a "foreign object in the heritage mid-block, designed to be stepped, articulated, and coloured to become lighter as it rises over Queen St." As to the matter of pure height, Mr. Somfay also, in his evidence supported the argued technical interpretation of the planning policies in the City as providing no height limit and opined that therefore if "we" (meaning IN8) could determine that there was no harm caused, in terms of light, shadow or wind, then the OP permitted IN8 to put forward a proposal for a height of 16 storeys. Mr. Somfay also provided the Tribunal with the results of the shadow study in

support of the height, and the size of the floor plate.

[99] Overall, Mr. Somfay's opinions relating to compatibility, transition, adverse effect, visual intrusion, suitable human scale focused mainly on the function and prominence of the street-wall facing portions of the podiums on both Princess and Queen. Mr. Somfay, in attempting to support his assertions as to the appropriateness of the height and design, relied primarily upon the portion of the building height at street-wall as supporting the human scale of the Development, thus ignoring the elephant in the room – the 16 storey tower rising up beyond the 3 m step back. For the most part Mr. Somfay provided only generalized, and vague responses when trying to address such height and massing issues relating to the Tower and skirted around the matter of the policy objectives within the OP intended to maintain the low-rise heritage character and visual image of the Downtown. Since the Tribunal finds the protection of heritage to be a high-priority policy component of the City's planning instruments and, it considers Mr. Somfay to have ignored the issue of appropriate visual compatibility that this height and mass of this Tower will have as it rises taller than the surrounding built fabric on Lower Princess and the lower portion of the St. Lawrence Ward HCA.

[100] The Tribunal does not find that Mr. Somfay's dismissive approach to the non-compliant angular plane of the Tower in relation to Queen Street as being related only to adequate light penetration and shadow concerns. While shadow is a factor addressed through angular plane, this narrowed focus fails to consider the other stated intention of an angular plane provided by Ms. Venditti in her Report to the Planning Committee (Tab 39, Exhibit 1, p. 814). As she explained the angular plane is to help ensure a transition of the height and massing of a building away from the street to help mitigate the ways buildings are visually and physically experienced by pedestrians and provide a more human scale building.

[101] The Tribunal prefers this rationale and purpose of an angular plane, as it is also supported the opinions of Mr. Downey, Mr. Carney, Mr. Jacobs and Ms. McIlroy. The Appellants' experts conclude that the significant non-compliant angular plane giving rise

to the tower height on Queen Street, with only a 3 m step-back after the third storey, and the location of the Tower only 107 ft from Princess Street, represent a failure of the building design to respond to the design and heritage policies in the OP and the Guidelines.

[102] As has been noted, how the Tower, as the highest component of the Development, is perceived in relation to Princess Street, Queen Street and the Downtown, is of relevance to the determination of the primary core issue before the Tribunal. In the course of Mr. Stott's testimony, clearly for the purposes of supporting his position as to the limited extent to which the 16 storey Tower is perceived by pedestrians and viewers, he has asserted the existence of a 30 degree view plane. As explained to the Tribunal, the notion of a 30 degree view plane is that an area of 30 degree from the horizontal line represents the limited area of visual perception experienced by an average person, and that anything above that is not ordinarily perceived unless that person raises his or her head.

[103] Mr. Stott provides no supporting evidence or studies to support such a notion and in the totality of the evidence no other witness was supportive of such a restricted approach to the perception an individual might have with respect to buildings rising from the ground. As it may relate to the issue of the perceived location, height and massing of the Development Tower, the Tribunal rejects this notion as merely that, a notion.

[104] The Tribunal accepts Ms. McIlroy's urban design evidence and opinions as she has considered the manner in which the proposed Development, and in particular explains how the Tower fails to conform to the urban design policies provided for in the OP. In weighing all of the architectural and urban design opinion evidence, the Tribunal finds that Ms. McIlroy's focus on the urban design policies which seek to support the cultural heritage priorities already discussed, as supported by Mr. Downey and Mr. Jacobs to be persuasive and consistent with the OP Policies.

[105] Ms. McIlroy drew the Tribunal's attention to the fact that the City possesses no tall building guidelines which would apply to IN8's built-form. This reality itself is a factor

to consider when examining the City's planning and urban design policies which strive to preserve a building fabric in the Downtown that is not intended to accommodate such a tall building. The absence of such tall building guidelines in the City's policies was not in dispute.

[106] Ms. McIlroy was of the view that the height, massing and scale of the Tower and Development will create negative and adverse impact to the surrounding Downtown neighbourhood, considered the height and angular plane limitations to be plainly stated in the OP Policies and the Guidelines, and is of the view that IN8's proposal has completely ignored the height allowance limitations that have remained unchanged in the City's urban design policies. This view is strongly supported by Mr. Downey. Ms. McIlroy relies upon s. 2.7.3 of the OP which identifies adverse impacts to include visual intrusion that disrupted the streetscape or cultural heritage resources. In her opinion this Tower will certainly be such a visual intrusion and will disrupt the Downtown urban built-form patterns. As well, Ms. McIlroy opines that under s. 2.7.76 of the OP IN8's design team has failed to properly transition the Development in relation to the neighbourhood and visually overwhelms the surrounding area with respect to height mass and shadowing.

[107] In the absence of urban design guidelines in Kingston to address floor plate size, Ms. McIlroy has turned to Tall Building Design Guidelines utilized for the City of Toronto. While Ms. McIlroy fully acknowledges that such guidelines have no force and effect in Kingston, she nevertheless is of the view that the maximum floorplate of 750 sq m is a reasonable standard to be applied for tall buildings to minimize massing and impact of tall buildings in an urban environment. From the perspective of urban design and the consideration of creating appropriate context for a development, Ms. McIlroy testifies that IN8's proposed floor plate size, will be more than that of Toronto's maximum allowance. In her opinion, a floorplate of this magnitude, and the resultant massing of the Tower, within the well-established low to medium profile of Kingston's Downtown is undesirable and can not be recommended.

[108] On cross-examination, and with Mr. Somfay's clarification, Ms. McIlroy's previously expressed assumption that the floorplate on the earlier iteration of the Development was in the range of 1,700 sq m was proven to be somewhat incorrect and actually at a figure of 1,175 sq m for the sixth to thirteenth floors. Mr. Somfay testified that after the July 2016 revisions, the final floorplate size of the fifth to the tenth floors was 1,245 sq m and 1,225 sq m from the 11th to the 15th floors. With these clarifications, the Tribunal concludes nevertheless that a floorplate that is 65% greater than the accepted tall building standard of 750 sq m represents a substantial increase of the mass of the Tower from the tall-building baseline standard, when placed within the Downtown. As such, this minor error in the figure does not substantially detract from the underlying and fundamental basis of Ms. McIlroy's opinion that the floorplate of the proposed Tower is, in addition to its height, massed larger than what is generally accepted as a baseline floorplate standard, particularly in its immediate context in Downtown Kingston.

[109] The proposed height and mass of the Development would also, in Ms. McIlroy's opinion, represent a poor example and precedent design for the City's heritage landscape and vibrancy on Princess Street. Ms. McIlroy reiterated the testimony of the other witnesses that the City's planning staff had failed to consider the advice of the retained peer review consultants who plainly indicated the concerns about the manner in which the Tower would, at this height, and with an 86 degree angular plane, result in an excessive extension of the building far beyond the permitted angular plane intended to preserve the continuity of the Downtown's low profile character.

[110] In forming her opinions, Ms. McIlroy drew upon her involvement and expertise applied to the Williamsville Main Street Study, 2012 ("Study") which plainly addressed portions of Princess Street west and north of the policy areas in which the Site is located. Although the Site was plainly outside this area, Ms. McIlroy indicated that the approach nevertheless could be reasonably applied to the design principles from this Study and the recommendations were instructive to the issues of height, massing and scale. Of significance was the fact that the recommendations urged the maintenance of

the provisions restricting height along Princess Street and certainly did not suggest any increase in the angular plane. The Board finds that the extent to which Ms. McIlroy was challenged in her reference and reliance upon the Study does not in any way detract from the veracity and strength of her opinions firmly based on the OP policies relating to compatibility, and the preservation of those urban design policies intended to support the support the heritage policies. This includes the height and angular plane restrictions.

[111] Ms. McIlroy's overall opinion is that IN8's proposal represents overdevelopment, will cause undue adverse impacts on the built-form cultural heritage character which was to be preserved under the OP policies and is designed such that it fails to adhere to plain and direct limitations as to height and angular plane. Ms. McIlroy's evidence supports her opinion that IN8's Urban Design Study simply does not clearly establish that this too-tall building is compatible with the massing of surrounding buildings and meets the compatibility requirements. Accordingly the proposal is not in conformity with the OP.

[112] Finally, the Tribunal accepts Ms. McIlroy's opinions as to the extent to which IN8's proposal, in the context of the heritage protective planning policies reviewed at length, simply does not respect the parameters of development that have been established for the Downtown – parameters that she believes could be adhered to and would achieve a larger massed and higher building that would comply with the OP policies and the Zoning standards but still conform to the policies limiting development to a scale and form that would be compatible with the heritage character and streetscape. Her opinion, as summarized in her witness statement, is accepted by the Tribunal as reasonable and correct:

The current policies offer extensive flexibility to design an appropriate mixed-use development that is harmonious with neighbouring development and conform to the official Plan. The proposed site-specific performance standards are not in conformity with the Official Plan with respect to compatible infill and intensification. The proposed development with its bulk and mass overwhelms the site and the immediate area. It sets a poor precedence for future downtown growth on the corridor and on large sites.

[113] Mr. Downey's testimony, as an architect, reinforces Ms. McIlroy's opinion and he too believes that the policy framework and decades of development history in the Downtown reflect an adherence to the simple but important objective of preventing overdevelopment and maintaining a low-profile urban landscape that respects heritage. Mr. Downey also concurs that intensification can be achieved and increased height can exist in the Downtown without such excess, and points to the development at the corner of Brock and Wellington as a good example.

[114] Mr. Downey also touched upon the primary issues and the Tribunal's consideration of his contributions to the hearing is discussed below.

Donald Loucks, David Cuming and Bruce Downey – Heritage Architecture

[115] Mr. Loucks attended to provide supportive opinions for IN8 as a Heritage Architect as did Mr. Downey and Mr. Cuming.

[116] The Tribunal has separately addressed the issue of conformity of the proposed treatment of the heritage components of the existing building, which is more or less reduced to the appropriate preservation of the Princess Street façade, marquee, and architectural elements, including those that might be revealed upon investigation of the 1970's marquee (versus the 1920 marquee originally extending from the theatre entrance, or the later 1942 version of the marquee). The Tribunal considers these building-specific heritage issues relating to the options for adaptive use and the façades and heritage features to be separate and apart from the primary issues.

[117] The Tribunal has considered Mr. Loucks' testimony as it relates to these primary issues and does not find that the opinion evidence from Mr. Loucks, as an expert in heritage architecture, represents persuasive or probative evidence to support the proposed height, mass and scale of the Tower on the Site. Although Mr. Loucks has assisted the Tribunal in some respects, the Panel Member prefers the testimony of Mr. Downey as it relates to the question of height, mass and scale of the proposed built-form, its perceived location and context in the central heart of the Lower Princess HCA

and Central Business District and the balancing of policy interests relating to “heritage and height”.

[118] Like Mr. Somfay, Mr. Loucks is of the opinion that the shifting of the bulk of the residential tower over to Queen Street transfers the high rise Tower away from the mostly homogenous, low-rise Princess Street profile and thus preserves the heritage character of Lower Princess Street. Were that not the case, said Mr. Loucks, he would not have recommended the design as a Heritage Architect.

[119] He also firmly agreed that how the residential Tower is perceived is the threshold question for the Tribunal.

[120] Although Mr. Loucks acknowledged the priority placed on heritage and history in the City’s planning instruments, he was nevertheless inclined to point to the references in the OP and the Guidelines relating to the importance of commercial “vitality” in the Downtown. He opined that there was to be a balancing of the past and the future, which did not represent an indifference to heritage. Mr. Loucks was of the opinion that the Development would not “fundamentally change” the image of the Downtown but rather, it would be a part of a “healthy narrative” of change and a balancing of the old and new, reflective of a sustainable community.

[121] In regards to height, Mr. Loucks provided the very firm and committed opinion statement that “Height does not kill History”. In support of this opinion, Mr. Loucks has offered a somewhat different analytical approach to the propriety of the Tower’s context within the historic St. Lawrence Ward HCA (versus the Lower Princess HCA) that differed from the traditional consideration of heritage and design policies undertaken by Mr. Downey and Ms. McIlroy.

[122] Mr. Loucks opines that the Development, including the height and mass of the Tower, represents a part of the “changing urban fabric” that reflects an eclectic mix of building types and says that the Tower will itself become part of the historical expansion and evolution of the Kingston Downtown area and a part of the “evolution of a non-static

cultural landscape”. In Mr. Louck’s opinion, the addition of a new element, such as a 16 storey residential tower, itself represents another layer of history and architecture that becomes a part of “balancing the past and the future” where the “incongruity of the new and old” does not necessarily negatively impact the mostly homogeneous building fabric and heritage character. Rather, says Mr. Loucks, the Tower becomes part of the healthy narrative of history and positive change because it contributes to the experience that people have in an urban space that contains both new and old.

[123] Unfortunately the Tribunal does not find that Mr. Loucks’ somewhat esoteric and malleable interpretive approach to the placement of a high-rise glass and limestone residential tower, in an area of the City recognized as having special heritage character, is really of practical assistance in deciding the important question of compatibility and more specifically the required assessment to “clearly indicate” that this tower is compatible with the massing of surrounding buildings. The view of the Tribunal is that simply saying that two things can co-exist does not make it so.

[124] Neither does Mr. Louck’s approach assist in the commonly applied exercise of determining conformity with the City’s somewhat more functional planning and urban design policies, and supportive Guidelines, which require practical recognition and an applied process of assessing compatibility with the City’s specific heritage character and historic sense of place, and the consistent low-rise building heights and patterns.

[125] The Tribunal is also of the view that, of a different sort, this approach advocated by Mr. Loucks similarly attempts to formulate the architectural heritage analysis and rationale to fit and support a pre-determined objective of maximizing density at this location (as Mr. Somfay’s testimony did). The Tribunal’s conclusion, in this regard, is based in part on Mr. Loucks reliance upon his opinion that the Development will result in an “increase in residential density fronting onto Princess Street” (reflecting the intent of s. 2.7 of the OP which directs the location of increased in net urban residential density) and thus support the intent of integrating high density residential uses into the downtown and contribute to the vitality of the Lower Princess Street area (reflecting the

Land Use policies in s. 10A.2 of the OP).

[126] Accordingly Mr. Loucks attempt to explain why residential density, and improving the economic vitality of the Downtowns, are properly matters for consideration by a heritage architect, the Tribunal would agree with the Appellants' submissions that such opinions appear to have strayed into the realm of planning instead of heritage architecture and lends strength to the submission that such opinions are more in the form of planning arguments than reliable expert opinions within Mr. Loucks' field of expertise.

[127] The Tribunal also prefers the evidence of Mr. Cuming, Mr. Downey and Ms. McIlroy as it relates to: (a) their scope and focus of the applied balancing exercise between heritage policies and intensification and growth policies in relation to the primary issues of height, mass and scale and (b) their more practical approach to determining how the Tower is to be perceived in its resultant context, both in relation to Princess Street and the broader context of Downtown Kingston and Harbour.

[128] It is the Tribunal's finding that Mr. Loucks' analysis, in responding to the question of compatibility with the heritage character of the traditional downtown as a significant cultural heritage resource identified in the Lower Princess Street HCA, and the continuity of height which contributes to the historic sense of place and "heritage integrity" identified, is also unduly narrowed and constrained in referencing only the restoration and re-instating of the architectural heritage elements of the marquee, façade and "Princess Street elevation".

[129] As advocated by Mr. Downey, and to some extent by Ms. McIlroy, the City's planning policies, as they require a priority consideration of the heritage and historic character in the Downtown, demand more robust and meaningful consideration of the broader heritage context. Mr. Loucks' written responses to the issues of heritage considerations in his witness statement, (which he formally adopted in the hearing) and his supporting oral testimony, was perfunctory in some cases (i.e. "The required Heritage Impact Assessment has been completed"), repetitive in other cases (in

repeatedly referencing the restoration of the architectural details of the Princess Street elevation and façade as being indicative of conformance with heritage policies) or deflating (in resorting to his more ethereal approach to melding the past and the present to validate the introduction of a contemporary Tower into a low-scale heritage-laden historic Downtown rather than considering the more practically stated OP policies outlined in this Decision).

[130] As for the concept of Intangible heritage attributes opined upon by Mr. Loucks in relation to the illuminated marquee, street level animation and people moving in and out of the building for the first time since the closure in 2012 – the Tribunal finds that all those intangible heritage attributes will be realized regardless of the height massing and scale of the residential tower 100 ft beyond the façade and marquee. As indicated elsewhere, on the much more narrow and limited consideration of the plans for the heritage attributes on the Princess Street building façades, the Tribunal finds that the proposed Development does conform to the heritage policies of the OP and is consistent with the PPS in regards to the proposed restoration and design for the façade and street wall of Princess and Queen. This, however, is quite separate and apart, from the broader and more significant issues of conformity and consistency in relation to the matters of height, mass, scale and heritage policies.

[131] The Tribunal has considered Mr. Loucks' testimony as to how the Tower will represent a worthy landmark in the City and how the Tower will be perceived.

[132] Near the conclusion of his testimony, Mr. Loucks, pointed out the windows of the historic City Council Chamber just beyond Market Square to a recently completed restoration of a heritage building located at the corner of Wellington and Brock Streets, within the same Lower Princess HCA. Mr. Loucks considered this illustrative of manner in which the restoration/infill of a site in the Downtown could accommodate both old and new as the view from the west window of the Council Chamber allowed a view of the restoration of the heritage building and tower on the corner, but behind was a modern addition and expansion. Mr. Loucks indicated that it was this juxtaposition of old and

new materials that reflected the evolution of use.

[133] The Tribunal would accept this opinion as valid and reasonable. However, as the Panel Member viewed this example of development identified by Mr. Loucks at the corner of Wellington and Brock, the Panel Member was able to put this into context from the view afforded in that direction from the City Hall dome, and the street view. What is significant is that this development, as observed within the Lower Princess HCA has been completed within the height restrictions and angular plane without rising to the height of IN8's Tower.

[134] Mr. Downey's approach to assessing matters relating to Heritage Architecture, against the City's OP and the PPS was far more pragmatic and, in the Tribunal's view, more consistent with the planning interpretations accepted by the Tribunal. Mr. Downey, as a Heritage Architect practicing in the City for many years, responded to the notion that the Downtown was "in transition". Mr. Downey firmly stated that the Downtown has in fact been very stable for decades, and any infill development or renovations have been consistent with the height regime in the Downtown without the kind of significant transition suggested by IN8's witnesses. Mr. Downey points to recent redevelopment projects on Princess such as the S&R Store, the new Springer Bank of Nova Scotia building, the Anna Lane condominium at Queen and Bagot and the substantial heritage renovation at Brock and Wellington (the example identified by Mr. Loucks as a worthy example of juxta positioning the old and new) all of which respected the height requirements of the OP and Zoning By-law. Mr. Downey was of the opinion that the success of the Downtown has resulted from vigilance, and the fact that height is "carefully, carefully monitored".

[135] Mr. Downey provided a succinct and compelling description of the Downtown Kingston landscape from the perspective of a Heritage Architect well-familiar with the limited alteration of the Downtown that has occurred through the years. Mr. Downey indicated that the best perspective of the Downtown landscape comes from a vantage point off the Wolfe Island Ferry or from the Royal Military College across the harbour.

From there, Mr. Downey indicates that one sees the unfolding of a beautiful low-rise landscape with mature trees, City Hall's dome and the downtown church spires defining the cultural heritage aspects of the Town. Mr. Downey's description is of the Downtown area of the City rising up from the lake and cresting at Sydenham Street, revealing the grid street patterns originally laid out by the British military engineers, uniquely positioned between the river and the lake. Mr. Downey opines that: "There are very few places as beautiful as this" and asserts firmly that the planning policies developed in Kingston have been intended to protect this architectural landscape.

[136] It was Mr. Downey's professional opinion that the 2007 Guidelines Study recognized that the appropriate development height for the Downtown should be set at six storeys, and that density could only be increased using that 6-storey maximum. In that architectural context Mr. Downey was of the view that the proposed Tower in the Development will be without consideration for the surrounding context and thus incompatible. Having reviewed the planning rationale from the perspective of an architect Mr. Downey's opinion is that while the façades on Princess and Queen might represent an attempt to respond to compatibility with the surrounding low-profile Downtown this does little to address the simple fact that the Building is "massive". Mr. Downey's assessment is that it is actually the mass, balconies, large footprint, balconies and substantial height which make the Tower present as very "jarring" and an "overpowering building mass that does not relate to the buildings that it is amongst" and which visually overwhelms the adjacent areas.

[137] Mr. Downey also provided an opinion regarding the planning rationale that had been completed for the Development and the peer review undertaken by ERA Architects including the report of August 17, 2016 which contained the three options. Mr. Downey was critical of the attempt to assess the height of the Tower against the hypothetical build-out of all buildings to the maximum as-of-right height levels of six storeys. Ignoring the fact that six storeys is a long way off from 16 storeys, Mr. Downey opined that conceptually raising the entirety of the Downtown to six storeys essentially is proposing an imaginary scenario to account for the Tower anomaly that is to be

inserted in the landscape, and artificially reduce the height differences between 16 and 6 storeys. Mr. Downey's criticism is that such a Planning Rationale relies on various steps taken to minimize the visual impact, such as the use of the façades, and the fact that the Rationale relies upon references to the build-to as-of-right heights as a means to shrinking the differences between what is proposed and what could exist, instead of what does exist. What Mr. Downey says the Rationale does not do is adequately demonstrate how the height of the Tower could ever be compatible with its context.

[138] Mr. Downey's spoke to the matter of human scale which is believed to be around the height of 6 storeys and opines that the focus of IN8's consultants on this standard of human scale is to suggest that this 6-storey height for the podium of the Tower respects this human scale. Mr. Downey's opinion is that the provision of human scale and the 6-storey maximum height should be the final result skyline and not merely the podium height for a 16 storey Tower rising behind it, as suggested by IN8's experts. Mr. Downey is of the view that the Guidelines Study protects that maximum six-storey skyline, but this is being ignored by this Development.

[139] Mr. Downey points out that ERA's peer review clearly identified the problem arising from the Tower's height and massing that required an alternative height and massing solution to balance the City's intensification and heritage conservation objectives. His opinion, based on the advice from ERA Architect and the subsequent decision by planning staff to ignore these concerns and approve the Tower at 16 storeys has meant that the rationale being used is to ask "Is there any way we can let these people build this Tower?".

[140] It was Mr. Downey's opinion that the recommended solution to the question of how to solve the policy issues is simply to adhere to Option 1 as provided by ERA (Tab 38, Exhibit 1, Page 779). That option would maintain the status quo provided for within the City's planning standards and keep the maximum height to the as-of-right angular plane and height as shown in ERA's comparative examples. In his witness statement, Mr. Downey indicates that the three diagrams prepared by ERA and appended to the

August 17, 2016 report clearly indicate the overpowering physical relationship of the proposed Development relative to the surrounding Downtown area.

[141] The Tribunal finds that Mr. Downey's opinions in regards to the matters he addressed in his testimony to be persuasive, credible and consistent with the body of planning and design policies reviewed at length in this Decision. The Tribunal, in particular, agrees with Mr. Downey's observation that the planning rationale and the opinions of Mr. Somfay, Mr. Stott and Mr. Loucks, and the planning opinions expressed by Ms. Venditti have generally failed to address the central question of how a 16-storey tower, with such a floorplate, is compatible with the context of the Downtown area. This failure is, in the Tribunal's opinion, heightened by the additional failure of IN8's planners to convince the Tribunal that there is conformity with the City's heritage policies, substantial and robust as they are.

Planning Evidence – Mr. Jacobs, Ms. McIlroy and Mr. Keene

[142] In support of IN8's argument and conclusion that there is no applicable maximum height limit in the City's OP Policies or Zoning By-law, Mr. Keene is of the opinion that the 6-storey angular plane height limit was in place for anticipated commercial-style development with expected floor heights of over 4 m and that for him, this therefore practically translated to an 8-storey residential/commercial building form. Mr. Keene was of the opinion that the absence of any maximum height limit in s. 10A.4.6 of the OP is intended to be an intentional grant of flexibility as to height for any proposed development, particularly because of the obvious policy allowing for greater heights as provided for under s. 10A.4.7. Mr. Keene testifies that, in his view, these higher order policy provisions allowing for site-by-site flexibility should prevail over the specific, 20-year old, dated height standards imposed through the Zoning By-law. Mr. Keene's approach is to accept the street-wall heights and set-backs to be appropriate, but in the absence of any height limit, to consider the as-of-right height provisions (i.e. 25.5 m or 6 storeys) as contained within the Zoning By-law more or less as non-applicable in determining total height beyond the step-back from the street wall.

[143] Mr. Keene's planning opinion supporting the height, mass and scale of the Building, is rooted firmly in the intensification policies in the PPS, the Growth Plan and the OP, as well as the Stats Can data relating to expected growth and need for residential units. Mr. Keene refers to a number of policies, including s. 2.2.8 which identifies the Centres as the area where intensification will be focused, and where greater heights and densities will be permitted. Mr. Keene also has relied upon s. 2.4.5 of the OP which states that intensification targets are to be achieved through "larger scale developments, the expansion or conversion of existing buildings, and the redevelopment of vacant, underutilized, or brownfield sites and infill developments"

[144] Applying the City's OP policies, Mr. Keene has determined that this Site, in the Downtown, is where intensification must be achieved, and that it cannot be accomplished through smaller projects and the addition of just a few additional storeys, but rather only through large scale projects such as this one. Relying on the preceding conclusion that there is an absence of a clear policy restriction on height (and the non-applicability of the Zoning By-law in restricting heights) Mr. Keene concludes that the growth and intensification policies clearly require a high-rise development such as this. The only requirement, he confirms, is that of compatibility.

[145] Mr. Keene's evidence was challenged on cross-examination in a number of ways. Mr. Keene was pressed to point to those policies or guidelines in the City which expressly provided planning support for the type of high-rise development that IN8 would be placing into the Downtown, and which he had concluded was supported by the OP Policies. Notwithstanding his view that the OP Policies invite such density and height of residential development at this location, Mr. Keene acknowledged that he did not know of any high-rise building policies or standards in Kingston that existed to support this form of development.

[146] Mr. Jacobs providing his planning opinions on the issue of conformity with the City's OP, as it relates to: (a) what he described as the "uncommon degree of specificity" for built-form requirements and design guidelines that have been integrated

to the OP development review policies; and (b) the policies relating to the preservation of heritage and required compatibility. Mr. Jacobs considered these aspects of the City's planning policies to be of significance.

[147] Mr. Jacobs' opinions were firmly opposed to those of Mr. Keene, and the submissions of IN8 that posit an absence of height controls within the OP, and the non-application of the height and angular plane standards within the OP and the Zoning By-law. Mr. Jacobs' view is that the angular plane and height controls integrated into the OP Policies represent policy entrenched guidelines that simply cannot be ignored. In his opinion, based upon the Guidelines Study, s. 10.A.4.6 of the OP recognizes the importance of height and build-to plane standards intended to maintain and complement the character found in the Lower Princess Street CHA and the Downtown portions of the St. Lawrence Ward HCA.

[148] Mr. Jacobs' adamant view is that strict OP policy controls, including a street-wall build-to-plane up to 17 m, implemented through a 39 degree angular plane requirement in the Zoning By-law provides clear and unequivocal restrictions on height. Mr. Jacobs also opines that the Tower height and massing can only be permitted by significant amendment to the established performance standards in the Zoning By-law which would represent excessive deviation from the policies and standards relating to building height, building height along angular plane, angular plane and density. Such a departure from the prevailing and accepted regulatory framework of maximum heights, angular planes and building planes represents overdevelopment with a built form, height and massing that is excessive and not compatible. Mr. Jacobs indicates that the fact that such design and performance controls exist to restrict height and massing must be considered in light of the important introductory wording in s. 10A.4.6.b which strives "to maintain character-defining buildings" and support only those new buildings that are "of a scale and massing complementary to buildings in the surrounding areas".

[149] From an urban design policy perspective, Ms. McIlroy's opinion was that the maximum building height permitted on Queen Street is limited to 4 storeys at build-to-

plane and 6 storeys (25.5 m) along angular plane thus rejecting the interpretation offered by Mr. Keene that maximum heights applied only to street height build-to-plane. Ms. McIlroy has referenced the City's Zoning By-law's definition of angular plane at 39 degrees which is far removed from the 86 degree angular plane proposed by IN8 – more than double. In her opinion the fundamental policy framework of the Lower Princess Street Area and the St. Lawrence Ward Area requires a low to medium profile built-form – an approved built-form that is far below the proposed height and massing of the Tower.

[150] On the matter of the existence or non-existence of maximum height restrictions, for the reasons given, the Tribunal prefers the evidence of Mr. Jacobs and Ms. McIlroy (and Mr. Cuming) and rejects the proffered opinions and submissions of IN8 which suggest that height is unregulated with no overall height restrictions for building in the Downtown. This approach is rejected for a number of reasons.

[151] First, the Tribunal considers that such technical and interpretive policy gymnastics do not stand up to the totality of the solid and cohesive policy restrictions on height as contained in the OP, the Zoning By-law, and the Guidelines. In particular this approach wholly ignores the entirety of the angular plane requirements which are contained in the in-force Zoning By-law, and the clearly designated maximum height on Queen Street of 6 storey or 25.5 m.

[152] Second, to accept such an approach would also serve to sterilize the numerous policy provisions within the OP that speak to: limiting heights in the Downtown and the Lower Princess and St. Lawrence Ward HCAs that conserve the continuity of the low profile built form character found there; requiring compatibility of any taller buildings with the massing of surrounding buildings; avoiding adverse impacts including visual intrusions that disrupt the streetscape or cultural heritage resource and architectural incompatibility in terms of scale and massing; and protecting the cultural heritage resource that is the “traditional downtown” which is inclusive of the “continuity of height”. These and other protection and conservation policies that speak to limiting height (in the

context of preserving heritage and character) simply cannot, in the Tribunal's view be reasonably seen as logically consistent with IN8's planning approach that advocates an "open season" on tower heights beyond the immediate street wall of Queen Street.

[153] Third, this approach relies on the asserted *absence* of a stand-alone policy statement in s. 10A.4.6 of the OP which references "maximum building height" which IN8 asserts is bolstered by the comparative *existence* of a maximum overall building height after applying angular plane, of 25.5 m for the "North Block". The policy documents contained in Exhibit 2, Tabs 10 and 11 indicate that separate studies and guidelines have been undertaken to address the North Block area separate from the balance of the Downtown Central Business District. The Tribunal cannot conclude that the mere absence of an additional reference to a separate maximum building height for the Lower Princess Street or St. Lawrence Ward areas somehow negates the operation of the height and angular plane performance standards in the Zoning By-law which Mr. Jacobs opines are in conformity with the OP.

[154] The Tribunal finds that there are height and angular plane restrictions which apply and which cannot be discarded when analyzing the extent to which the proposed zoning by-law amendments are appropriate as they would approve deviations from the established performance standards. In the context of the entirety of the planning policies for the Downtown, the Tribunal must consider the fact that the Tower will: deviate and more than double the angular plane from 39 degrees to 86 degrees; rise to a height of 16 storeys and 52.4 m rather than the limited as-of-right height of 6 storeys and 25.5 m; have a floorplate between 1,016 and 1,175 m which is significantly larger than the common floor plate standard of 750 m established for a tall building in Toronto; and possess, at 836 units per net hectare, a density of almost seven times the maximum density standard of 123 residential units per net hectare under the Zoning By-law. Such bench marks and deviations must be considered in assessing compatibility and thus the issue of conformity with the OP.

[155] Having concluded that all of the policy and performance standards apply to

impose restrictions on height and that there is a height limit, the Tribunal must respond to the question posed by IN8 as to how one can say that a property, without a height limit cannot accommodate high-rise development. There are, in the Tribunal's view, very definite policy and performance standards limiting the height, massing and scale of a Building in Downtown Kingston and therefore the question as it is posed by IN8 is based on a false assumption. There is a height limit. Equally important is the fact that the assessment of height must address issues of compatibility and proportionality that are tied directly to robust heritage policies.

[156] It is also Mr. Jacobs' opinion that the tower does not conform to s. 7.3.D.2 and 7.3.D.6 of the OP because it introduces a built form, mass and height which is wholly out of scale and uncharacteristic of the traditional downtown identified as a *significant cultural heritage resource*, as that term is defined in the OP, and an urban style that has survived since the 1800s. In his opinion the Development also fails to address the compatibility policies in the OP governing new development because that height and massing are not in context with the existing or planned development of these heritage areas. Mr. Jacobs again points to the opinions expressed by the City's peer review consultants ERA Architects, which were not addressed within the recommendations presented to Council.

[157] In regards to the question of conformity of the Zoning Amendment By-law which would enable the Development to the City's OP, Mr. Jacobs summarized as follows:

In summary with respect to the Official Plan, my planning evidence has demonstrated that the proposed zoning by-law amendment and related site plan are not in conformity with the Official Plan based on my opinion regarding the Plan's vision and intent relative to the protection of cultural heritage resources and compatible development as outlined in these sections. The policy language on heritage found in the City of Kingston Official Plan is very strong, both in in general intent and in reference to the specific heritage character areas where the site is located. Further, the direct link to Downtown and Harbour Area Architectural Guidelines Study and reference to specific built form stands from these guidelines is very prescriptive for language in an Official Plan. The proposed development does not satisfy the Plan's stated intent with respect to good urban and building design for new development in a cultural heritage landscape. The height, excessive mass and scale of the proposal are not transitional elements in the community and heritage

context but an unprecedented instruction which is incompatible with the local streetscape and established character of the area.

[158] Mr. Jacobs' expert planning opinion was that the proposed Development was therefore not compatible as that term is used in the OP, represents overdevelopment and an unwarranted deviation from established performance standards in the Downtown and that the Zoning Amendment By-law does not represent good planning.

[159] In considering the opinions of Mr. Jacobs, Ms. McIlroy, Mr. Downey and Mr. Cuming against those of Mr. Somfay, Mr. Stott, Mr. Loucks, Ms. Vendetti and Mr. Keene in regards to compatibility and proportionality, the Tribunal accepts the opinions of the Appellants' witnesses, and in particular the overall planning opinions of Mr. Jacobs, over those of IN8's witnesses.

[160] In her testimony Ms. Venditti provided a comprehensive overview of her Planning Report (Exhibit 1, Tab 39) which represented the basis for the report and recommendations to the Planning Committee and to Council, leading to the first Council Vote approving the proposed amending By-law and the 16 storey development as presented at this hearing. The Tribunal finds that there are a number of notable incongruities and failings in that Report which are connected to the Tribunal's findings on height, massing, scale and compatibility.

[161] Repeatedly within the report, and within Ms. Vendetti's testimony, the issue of the height of the residential Tower, and its massing and scale, was not squarely tested against the compatibility and heritage protection policies in the OP, including compatibility with the built heritage fabric, and continuity of the building height and character of the St. Lawrence Ward and Lower Princess Street HCAs, and the significant cultural heritage resource of the traditional downtown. In her analysis, it is the Tribunal's finding that, like the experts on behalf of IN8, Ms. Venditti:

- (a) essentially restricted the analysis of such policy requirements to the manner in which the Princess Street wall heritage façades and planned streetscapes addressed such heritage policies without consideration to the height

and massing of the residential Tower in the context of all the heritage policies;

(b) functionally ignored the requirements relating to the required angular plane on Queen Street which would be abrogated by the height of the residential Tower;

(c) in relation to (a) and (b) avoided the concerns raised in the ERA Peer Review dated August 17, 2016 (Tab 38) which recommended a solution to the excessive height and mass of the proposed 16 storey building that would balance “the City’s intensification and heritage conservation objectives” and “create a more appropriate development form that is compatible with the immediate heritage and built form context”; and

(d) in applying and implementing the policies of the OP, assumed that the residential Tower is perceived only as a Queen Street building and not as having a presence as a Princess Street Building, and with that assumption also consequentially assumed that the Development’s residential Tower need not be fully considered with regard to Princess Street and the Lower Princess Street HCA;

(e) overall, failed to examine and consider the overall impact of the Tower within the context of the Downtown topography and how it might be viewed within that broader context, as required by the OP policies and as was advocated by Mr. Downey, Mr. Jacobs and Ms. McIlroy.

Sun and Shadow Studies

[162] The Tribunal heard, and has considered, the evidence relating to the shadow analysis undertaken by the IN8’s consultants, and presented by Mr. Somfay. Mr. Somfay’s review of the Shadow studies led him to conclude that buildings affected by the height of the Tower were affected for two to three hours a day (thus allowing for more than five hours of sunshine or at least five hours of sunlight a day), with the

shadows moving rapidly. Mr. Somfay concluded that there was no adverse impact.

[163] The Tribunal would not be inclined to find that the shadowing caused by a 16 storey tower, as compared with the as-of-right 6 storey building resulted in no adverse impact. The shadow studies during the spring and fall equinox, for example, do create not-insignificant additional shadowing for areas north of Queen Street which during some parts of the day of the spring and fall equinox, extends over part of the playground on the south side of Central Public School. The Tribunal cannot however find, upon the evidence presented relating to the shadow studies, that the shadows cast by a 16 storey building, as compared with an as-of-right 6 storey building, would, in and of itself, represent a compelling reason to find that the adverse effects were so significant as to create incompatibility and non-conformance with the OP.

[164] In the totality of the evidence presented however, the relevance and impact of the shadow study alone is such that it does not in any way mitigate or alter the substantial issues of non-conformity in relation to the other planning, heritage, and urban design policies, and in-force performance standards which are of primary importance when assessing the Development and the proposed Zoning By-law Amendment.

The Contributions of the Participants

[165] The testimony of the Participants granted status in this hearing reflects the ongoing tussle between two “at-odds” camps within the City – those in favour of development in the downtown core and those opposed. It is the Tribunal’s finding that these two opposing groups are not as diametrically opposed as would appear.

[166] The views of the public were expressed in a variety of ways, and articulated with different emphasis, but it is the Tribunal’s view that within the expressed concerns of those Participants who might be identified as being “opposed” to development in the Downtown area, there can be found a real alignment with the City’s guiding policies and principles which do promote development, intensification and vitality within the

Downtown area of Kingston but which impose the checks and balances.

[167] Although some of the Participants' views have not always been expressed in the planning language of the experts, most were well versed in the fundamental policy concept of preserving the heritage and historic character of the Downtown, inclusive of the continuity of low profile buildings, particularly within the two identified heritage character areas and Lower Princess. Collectively the Tribunal finds that those opposed to the IN8 residential Tower are not disingenuous in stating that they are not opposed to development or the addition of residential units in the Downtown, but rather, to the excessive height and scale of the Development.

[168] Participants supporting the Appellants voiced objection to the extent to which the proposed Development will not adhere to the clearly articulated commitment of the City to the preservation of the unique heritage character of the Downtown and the importance of human scale associated with the low profile historic character of Princess Street and environs. One Participant described the historic and attractive character of the Downtown as a "social good that belongs to the residents" that should be protected and not squandered. Mr. Downey's testimony would, in the Tribunal's mind, represent a consistent expression of that same sentiment, in relation to the stable continuity of the supportive heritage policies through the years

[169] Many Participants referred to the limit of 4 or 6 storeys as appropriate, some amenable to a range of up to 6 to 8 storeys – but not 16. A number of Participants were committed to bringing development into the Downtown "according to scale" and spoke to the fact that the project was "simply out of scale with Downtown Kingston". "Too visible and dominant" said another. The Appellants' representative, Ms. Schmolka and Dr. Burfoot advocate the ability to accommodate density and the addition of residential units within the Downtown but spread amongst available development sites in a lower scale, in order to avoid incompatibility. This was demonstrated, with visual aids, through the suggested exercise of distributing the additional density into a number of undeveloped sites instead of one central urban location.

[170] Most Participants expressed concerns about precedent and the concern that the approval of a building at such height at this location would lead to similar excessive heights in the other remaining gaps and vacant lands in the Downtown. Collectively the expressed views of residents attending to voice their concerns were fervent, impassioned and well-informed.

[171] There were number of Participants from the opposite “camp” who were equally determined and spoke in favour of bringing vitality and investment into the Downtown. The Capitol Condo Purchasers Group, Future Kingston, and The Downtown Kingston Business Improvement Area, through their representatives described the benefits to be achieved from the approval of the Development. Through economic investment in the Downtown, the intensification of a vibrant centre, additions to the tax base, new spending in the downtown, improvements to an otherwise non-functioning site, and the addition of a sustainable larger scale development, the City will benefit. “A vibrant community is not a museum” stated one Participant. It is the Tribunal’s view that these expressed views are also clearly supported by those policies contained within the City’s planning policies which promote growth, development and intensification.

[172] Ultimately the balancing exercise of heritage and history on one hand, and development, growth and intensification on the other hand, is the process required to arrive at a decision that resolves these concurrent planning policies articulated by the City’s OP. Both groups of Participants provided statements recognizing the competing forces at play, and the difference between them was essentially the amount of weight given to one or the other. That balancing process has been examined within this Decision and for the reasons indicated, the Tribunal has found that the Development, and its enabling Zoning By-law fails to conform to the policies requiring that new development, revitalization and intensification must be balanced with, compatible with, and preserve, the cultural heritage resources and unique historic character of the Downtown. That has not been achieved.

Summary of Analysis, Findings and Conclusions

[173] Upon all of the evidence before the Tribunal, including that evidence specifically identified and discussed in this decision, the Tribunal summarizes its findings as follows:

- (a) The Tribunal finds that the City's policies relating to growth and residential intensification support the placement of a mixed-use, residential unit development on the subject Site;
- (b) The Tribunal has had the benefit of a unanimous opinion on the part of all expert witnesses (and many Participants) that the Downtown and harbour area of Kingston, is a remarkable urban artefact and one of Canada's most well preserved heritage areas. The Tribunal agrees;
- (c) The Tribunal finds that through the multitude of various studies, observations and policy references Kingston's Downtown and Harbour area is characterized by a large concentration of heritage buildings within an historic sense of place that has maintained its human scale through the preservation and protection of a continuity of a low-profile building landscape;
- (d) The Tribunal finds that the City's OP, together with its implementing instruments and guidelines, including the Zoning By-law, and Guidelines, contain clearly articulated and very robust policies relating to the preservation of this unique heritage character. There are numerous and emphatic policy references to the importance of cultural heritage and the protection and the preservation of the established historic architectural character of the Downtown.
- (e) The Tribunal finds that these robust and detailed policies relating to the preservation of this valuable cultural heritage and character is supported by a variety of equally definitive urban design policies and guidelines which have been reinforced through inclusion in some cases within the OP itself, and supplemented by in-force and applicable zoning performance standards and other Guidelines developed through studies and public consultation processes;

(f) The Tribunal Finds that IN8's technical interpretation of the City's OP, Zoning By-law, and Guidelines and proposition that there is no maximum height limit for the Site and that the angular plane and street-wall standards set out in the Zoning By-law do not apply, is untenable and cannot stand against the clarity and priority of the very fulsome and interrelated planning policies that require the preservation and promotion of heritage, history and the unique character of the Central Business Core and the DHSPA in the City of Kingston;

(g) The Tribunal finds that the Development is inconsistent with the performance standards and design guidelines that are applicable and in-force in the City and that the amendments to the Zoning By-law, to the extent that they permit such height and massing of the Tower, are excessive and do not conform to the policies of the City's OP. Specifically the Tribunal finds that the new Tower will step back and rise to such a height that it will clearly not exist in accordance with the build-to angular plane policies in the City's planning instruments;

(h) The Tribunal finds that the policies of the OP which address development and the opportunities to develop beyond certain performance standards, including the heights of buildings in the Downtown, are accompanied by stringent obligations for compatibility and require a balancing of development intensification with mandatory regard for heritage and the preservation of the historic low-profile character of the Downtown areas. The Tribunal finds that the design of the Development, and in particular the Tower, has been dictated first by a development objective to maximize density and promote residential intensification to the detriment of policy requirements relating to heritage and compatibility;

(i) The Tribunal finds that the Tower will be visible from a broad and extended range within the Downtown, and beyond. Despite the attempts of IN8 to relegate the Tower almost exclusively within the Queen Street segment of the Site, the Tower from all directions will still be perceived, because of its height and

massing, as a part of the Princess Street streetscape and within the whole of the Princess Street block and corridor.

(j) The Tribunal finds that the Development and in particular the Tower, as proposed: is not compatible with the massing of surrounding buildings; does not respect the quality of the existing area; represents a visual intrusion that disrupts the streetscape and an identified cultural heritage resource; and is overdevelopment that results in adverse impact.

(k) The Tribunal finds that the construction of the Tower of that height, essentially ten storeys above the six storey as-of-right limit and 12 to 14 storeys above the average range of building height in this heritage neighbourhood will fundamentally change the image of the Downtown and Harbour area.

(l) For these reasons the proposed Development, and the Zoning Amending By-law, are not in conformity with the policies of the OP.

(m) The Tribunal also finds that the Development and Zoning Amendment By-law are also not consistent with the policies of the PPS that are supportive and directive as to cultural heritage resources and landscapes;

(n) The Tribunal finds that the proposed rehabilitation and preservation of the Princess Street façade and marquee, while representing appropriate consideration of the specific heritage attributes on that part of the existing Building, is insufficient, in itself, as a means to satisfy the policy requirements and directions which relate to cultural heritage in this area of the City;

(o) The Tribunal has had regard to the decisions of Council and the content of the report and recommendations provided in support of the passing of the Zoning Amendment By-law, and other written and oral submissions. The Tribunal finds that the written report failed to address the facts and matters which support the findings of the Tribunal in this Decision, and importantly failed to address the

concerns and recommendations of the City's peer review consultant relating to non-compliance with the performance standards relating to height and angular plane. Such recommendations included an option of compliance with the Zoning-By-law and design guidelines (limiting the height to six storeys) and the rejection of the options that exceed the as-of-right zoning for the site unless further considered as part of a discussion of broader issues;

(p) The Tribunal finds that a Tower with the proposed height of 16 storeys, with enlarged floor plates, on this Site, is too high, and too massive, and does not represent good planning in the public interest.

[174] Upon all these findings, and those others more particularly set out herein, and all of the evidence, the Tribunal accordingly cannot conclude that the City's OP policies support an interpretation or finding that allows a Tower to rise on the Site at such height mass or scale. The Tribunal must accordingly answer the question, as posed by IN8, by indicating that although the Site can indeed accommodate a higher density mixed use development, the Site cannot support such high-rise development because the totality of the City's planning policies do indeed restrict the introduction of such incompatible height, massing and scale in its context.

[175] The Tribunal is of the view that the planning evidence of the expert witnesses which concludes that heritage, history and compatibility policies must inform the question of "how high is too high" for the Tower is to be preferred over the interpretive policy machinations argued by IN8 to support the notions of unlimited height and the dismissal of concerns for the protection of heritage in the downtown. It is the Tribunal's view that IN8's submission is in contradiction to the mandatory OP policy requirements that first demand the mandatory consideration of heritage, history and the preservation of continuity of the low height built-form that dominates the character of the area, when considering permission for increased height. With such requirements, height cannot be said to be without limits or restrictions.

OTHER ISSUES BEFORE THE TRIBUNAL

[176] As noted, the Appellants raised other issues and concerns in the course of the hearing. The Tribunal has considered this evidence. For the reasons indicated, the Tribunal has decided that the proposed Development, and the Zoning Amendment By-law that would permit the Development, do not conform with the OP and do not represent good planning in the City of Kingston. These three residual issues do not however substantially affect the overall findings of the Tribunal on the central core issues relating to height but the Tribunal will address these briefly.

Traffic and Parking

[177] The Tribunal heard evidence from Mr. Johnston, who had assisted IN8 in the preparation of a report relating to traffic and parking. Mr. Johnston addressed some of the general concerns raised by the Appellants in the course of the hearing. He determined that, in his opinion, the Development supported the transportation objectives and policies of the City. Despite the few expressed concerns about pedestrian safety and traffic concerns that might arise as a result of the movement of people across Queen Street, as expressed by some of the Participants, the Tribunal finds that the development of this Site in the manner proposed does not give rise to concerns of non-conformity with the City's traffic and parking policies.

Heritage Characteristics and Adaptive Use of the Site

[178] A fair bit of the evidence presented at the hearing addressed the difference of position between the Appellants and IN8 as to whether adequate attention had been devoted to determining the heritage potential and possible adaptive re-use of the existing building on the Site.

[179] Mr. Cuming provided supporting evidence with respect to the non-conformity of IN8's proposal to the broader heritage policies discussed at length in this Decision and firmly agreed that the introduction of the Tower represented the introduction of an unsympathetic built form into two heritage character areas and a significant cultural

heritage resource that was incompatible and ignored the heritage policies of the OP. Mr. Cuming reiterated in strong terms that the adaptive re-use of the former theatre's façade, whatever that final form might be, did not in any way represent a sufficient response or conformity to the heritage policies requiring the protection of the Downtown area's cultural heritage resource. In this regard, the Tribunal has considered and accepts such opinion evidence of Mr. Cuming as it advanced the opinions expressed by Mr. Downey, Mr. Jacobs and Ms. McIlroy.

[180] In regards to the quite separate issue of the heritage attributes of the Allen-Capitol Theatre itself, and the extent to which IN8 has sufficiently considered and preserved the architectural heritage value of the structure on the Site, Mr. Cuming was of the opinion that the Cultural Heritage Impact Assessment of the building failed to provide an adequate analysis to such potential for the heritage attributes of the Site. This was based primarily on his view that insufficient interior assessment had been completed to determine if architectural elements capable of restoration, preservation or adaptation did, or did not, exist.

[181] Mr. Cuming did not take great exception, or raise serious opposition to the manner in which IN8 would be addressing the preservation of the architectural detail of the façade and the marquee. He acknowledged as well, that the additional processes that would be undertaken by the City to assess and monitor the appropriate manner of preserving the Princess Street façade and marquee through the subsequent site plan processes.

[182] Despite the generalized concerns raised by Mr. Cuming as to the sufficiency of the assessment of the potential for any other architectural finishes and elements within the Building, having reviewed the evidence the Tribunal does not find that any of the issues raised specifically with respect to other potential for the remainder of the building or the planned restoration and preservation of the Princess Street façade and marquee (including the criticism of the "pastiche" approach) have any substantial merit. There is no evidence before the Tribunal to suggest that further assessments or reviews, beyond

those taken by IN8 would lead to further real options for adaptive reuse of the Site. The extent to which the Site was substantially stripped and adapted for use as a multi-plex theatre complex years ago, with the loss of the historic single theatre that once existed within the building, was explained, and is accepted by the Tribunal.

[183] Mr. Loucks, supported by Mr. Keene demonstrated to the satisfaction of the Tribunal that a sensitive and genuine approach has been taken with respect to the Princess Street Façade and Marquee, which would continue and be subject to ongoing review and assessment with the City at the point in time. The IN8 Development Proposal is very much intimately tethered to the concept of the theatre and marquee as part of its design and marketing process, as explained by Mr. Loucks and Mr. Keene. The one contradiction noted by the Tribunal as to whether IN8's consultants were content with restoring the 1970s marquee or would investigate the ability to locate and restore the original Marquee dating back to the 1920s, or perhaps the later 1940s version, as depicted in the photos presented during the hearing, was acknowledged and it was confirmed that IN8 was prepared to preserve whatever might be found.

[184] Accordingly the Tribunal accepts the submission of IN8, and finds that there is no issue of concern in relation to the form and manner of addressing the heritage attributes of the Princess Street façade or marquee, or other remaining heritage building values.

Urban Design Concerns – Queen Street

[185] Finally, the Appellants also, during the course of the hearing, and through the evidence of their expert witnesses, raised a number of various concerns relating to the Queen Street façade. In referring to the Queen Street façade, as the evidence revealed, the discussion revolved around the articulation, design and form of the street-wall podium as it has been created to function as the primary means of vehicle access and servicing from Queen Street.

[186] Given the inability of the Princess Street frontage to accommodate these requirements, and the current bricked street-wall (without architectural features or

detail) that currently exists, the Tribunal accepts the opinions as expressed by IN8's witnesses that the proposed design of the Queen Street façade street wall will be an improvement over what exists now and will represent a functional and sensitive solution to allowing for the proposed mixed commercial use and integration of residential units into the Development.

[187] The Tribunal agrees with the submissions of IN8 that many of the specific details relating to the final form of the Queen street wall will be addressed in the site plan process, and that there is no evidence to support the narrow objection that the Queen Street frontage is not satisfactory. The Tribunal cannot find that such concerns exist in relation to the design of the Queen Street façade are warranted.

[188] It is likely unnecessary to make it clear that the Tribunal's concerns, and the reasons that the Tribunal has concluded that the design, scale, massing and height of the Development do not conform with the OP and represent overdevelopment is not in relation to the Queen Street Podium and Street wall, but instead the 16 storey, heavily massed Tower that rises immediately behind that façade and which is perceived and rises above the Lower Princess Street HCA and St. Lawrence Ward HCA, and the entirety of the Downtown urban fabric that is objectionable to the City's planning policies.

ORDER

[189] The Tribunal orders that the appeal against By-law No. No. 2016-184 of the City of Kingston is allowed and By-law No. 2016-184 is hereby repealed.

“David L Lanthier”

DAVID L. LANTHIER
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

ATTACHMENT 1

LIST OF PARTICIPANTS PRESENTING

No.	NAME (AND ORGANIZATION if applicable)
1.	Eleanor MacDonald, also speaking on behalf of: Peter Burpee, Mary Louise Adams, Michael Capon, Mike Cole-Hamilton, Sharon Deline, Gisele Pharand, and Caroline Yull
2.	Christine Cannon
3.	Mary Farrar
4.	Alan Gummo
5.	Elizabeth Hanson, also speaking on behalf of: Anne Lougheed, Marney McDiarmid, Anna van der Meulen, and Susanne Cliff-Jungling.
6.	Christine Synowich (on behalf of the Coalition of Kingston Communities and/or Barriefield Village Association)
7.	Frank Dixon (written submission)
8.	James Ward (and Melody Knott on behalf of Future Kingston)
9.	Laurie Davey-Quantick, also speaking on behalf of: David Dosset and Rudi Mogl
10.	Helen Finley
11.	Justin Connidis (on behalf of Sydenham District Association)
12.	Graham Lodge
13.	Chris Semchuk
14.	Roger Healey (on behalf of Kingston Coalition for Active Transportation)
15.	Matthew Gventer
16.	Karen Pagratis
17.	Ron Tasker
18.	Peter Barnett
19.	Judith Hazlett
20.	John Grenville
21.	Robert Fonger
22.	Doug Ritchie (on behalf of the Downtown Kingston Improvement Area Board of Management)
23.	Paul Fortier (on behalf of Capitol Condo Purchasers Group)
24.	John Garretson
25.	Helen Cooper

ATTACHMENT 2

APPENDIX 1

Policies within the City's Official Plan, and other Planning Instruments, which are particularly relevant in this hearing include the following:

Official Plan

- (a) A number of definitions within the OP were identified, and come into play in assessing the evidence. They include:

Built Heritage Resources - One or more significant buildings, structures, monuments, installations or remains associated with architectural, cultural, social, political, economic or military history and identified as being important to a community. These resources may be identified through designation or heritage conservation easement under the Ontario Heritage Act, or listed by local, provincial or federal jurisdictions

Compatible - Development that is capable of co-existing in harmony with, and that will not have an undue physical or functional adverse impact on, existing or proposed development in the area, or pose an unacceptable risk to environmental or human health. Compatibility should be evaluated in accordance with measurable, objective standards based on criteria such as aesthetics, noise, vibration, dust, odours, traffic, safety and sunshading, and the potential for serious adverse health impacts on humans or animals.

Cultural Heritage Resources - A human work or a place that gives evidence of human activity or has spiritual or cultural meaning, and which has been determined to have historic value. Cultural heritage resources include both physical and intangible heritage resources, protected heritage properties, built heritage resources, cultural heritage landscapes, archaeological resources, paleontological resources, and both documentary and material heritage.

Infill - Refers to the development or redevelopment of a vacant or underutilized lot, or a consolidated number of lots. Infill development encourages intensification and sustainability.

Intensification - The development of a property, site or area at a higher density than currently exists through:

- a. redevelopment, including the reuse of brownfield sites;
- b. the development of vacant and/or underutilized lots within previously developed areas;
- c. infill development; and,
- d. the expansion or conversion of existing buildings.

Significant - While some significant resources may already be identified and inventoried by official sources, the significance of others can only be determined after evaluation.....(g) in regard to cultural heritage and archaeology, resources that are valued for the important contribution they make to the understanding of the history of a place, an event, or a people

- (b) Following the policies relating to sustainable development, the Official Plan provides overall policies relating to the City Structure:

2.2 City Structure

The City is organized into broad, structural elements as shown on Schedule 2 and these are expected to remain as such during the life of the Plan. Within some of these structural areas, significant change is expected while others will experience more gradual evolution. The City may be asked to respond to employment opportunities or types of housing that are not foreseen at the time of preparing this Official Plan.

Goal:

To promote the continued evolution of Kingston as a unique City with valued natural and built resources and a historic legacy, having an efficient, sustainable, and strategic structure that best serves its citizens, businesses, workforce, and visitors.

- (c) Section 2.2.8 provides that the main Centres are areas of mixed use and that “These will be the areas where intensification will be focused, and where greater heights and densities will be permitted when the infrastructure is available.”

- (d) Section 2.2.9 “Primary Centre” provides as follows:

The primary Centre, east of Division Street, is intended to remain as the primary Centre during the life of this Plan, having the most diverse uses and public facilities, and in a setting that fosters and respects both its heritage resources and commercial role. Increased public access to the water, pedestrian activity and tourism will be promoted within this Centre. The Centre policies within the Central Business District apply to infill lots and the North Block Area. It recognizes the importance of maintaining and conserving the heritage buildings and character of the Lower Princess Street Heritage Character Area, as established in Sections 7.3 and 10A of this Plan. In order to maintain the significance and vitality of the Central Business District, the City may limit the size or extent of uses necessary to support the CBD, such as offices and entertainment uses, in other locations in the City

- (e) Section 2.3 of the OP, titled “Principles of Growth”, emphasizes support for intensification within the City “by redeveloping the existing built area through compatible infill development that respects cultural heritage resources, existing housing stock and the stability of neighbourhoods.”

- (f) Section 2.3.2 “sets out the policy for “Intensification”:

The City intends to increase the overall net residential density within the Urban Boundary through compatible and complementary infill, the appropriate redevelopment of under-utilized and brownfield sites, and the targeting of a density increase for large-scale vacant land development in the Princess Street Corridor and Centres.

- (g) Section 2.3.4 addresses growth in the “Central Business District” and provides:

The Centre policies within the Central Business District apply to infill lots in the downtown core, including the North Block Area and recognizes the importance of maintaining and conserving the heritage buildings and character of the Lower Princess Street Heritage Character Area in accordance with Sections 7.3 and 10A of this Plan

- (h) One of the stated policies governing growth in the City is s.2.3.7 which highlights the significance of cultural heritage resources, one of which is the “traditional downtown” expressly identified as a significant cultural heritage resource in s. 7.3.D.2 of the OP which describes the Lower Princess Street HCA. In promoting growth in the City:

Cultural Heritage

2.3.7. Cultural heritage resources will continue to be valued and conserved as part of the City’s defining character, quality of life, and as an economic resource that contributes to tourism in both the urban and rural portions of the City

- (i) Section 2.4.5 addresses the phasing of growth in the City and provides a policy setting out the priority for residential intensification:

It is the intent of the City to increase urban residential density by a minimum of nine percent (9%) from the current overall density of 21.6 units per hectare within the Urban Boundary to an overall minimum density of 23.5 residential units per net hectare by the horizon year of 2026. The residential intensification target is to be achieved through larger scale developments, the expansion or conversion of existing buildings, and the redevelopment of vacant, underutilized, or brownfield sites and infill developments.

- (j) Section 2.7 of the OP provides policy in relation to the compatibility of land uses which is of relevance in these Appeals:

2.7 Land Use Compatibility Principles

The City contains many land uses of differing type and intensity. Some land uses create little impact on their neighbours, while others can have an adverse effect if not properly located or buffered. In order to foster a sustainable pattern, some land uses need to inter-relate, while others are best separated. Further growth and development within the City will be guided by principles of land use compatibility that respect the quality of existing areas and provide for suitable transition between areas of differing use, sensitivity, urban design treatment, and intensity in order to avoid or mitigate adverse effects.

Goal:

To provide new opportunities for growth and investment within Kingston in a manner that respects existing development and minimizes conflict or adverse effects. Policies: Meaning of “Compatible”

2.7.1. - For the purposes of this Plan, the term compatible means the ability of various land uses, buildings, sites, or urban design treatments to co-exist with one another from

both a functional and visual perspective through their arrangement, location (including in some instances their separation), methods of buffering, massing, or other means of providing transition that are able to successfully address undue adverse effects.

2.7.2. - Only proposed land use changes that are compatible, or can be made compatible, with surrounding sites and land use designations will be approved.

Adverse Effects

2.7.3. - Adverse effects created by one land use on another, or one building on others may include, but are not limited to:

- a. shadowing;
- b. loss of privacy due to intrusive overlook;
- c. increased levels of noise, odour, dust or vibration;
- d. increased and uncomfortable wind speed;
- e. increased level of traffic that can disrupt the intended function or amenity of a use or area;
- f. environmental damage or degradation;
- g. diminished service levels because social or physical infrastructure necessary to support a use or area are overloaded;
- h. reduction in the ability to enjoy a property, or the normal amenity associated with it, including safety and access, outdoor areas, historic quality or setting;
- i. visual intrusion that disrupts the streetscape, building, or cultural heritage resource;
- j. architectural incompatibility in terms of scale, style, massing and colour; or,
- k. the loss or impairment of significant views of cultural heritage resources and natural features and areas to residents.

2.7.4. - All proposed land use changes will be required to be implemented in a manner that either eliminates or minimizes to an acceptable level any adverse effects on adjacent sites and surrounding land use designations.

Distance Separation

2.7.5. - In some cases, distance separation will likely be the recommended form of mitigation, particularly:

- a. between heavy industrial uses (Class I, Class II and Class III Industrial Facilities) and residential or other sensitive uses; or between intensive land uses and sensitive environmental areas; and,
- b. between intensive livestock operations or extractive operations and sensitive uses, sensitive environmental features, or sensitive environmental functions. When identifying a required distance separation related to livestock

operations, the minimum distance separation formulae will be used.

Mitigation Measures

2.7.6. - Mitigation measures between sites with different land use designations and between residential uses of different density will include one or more of the following measures that will be determined through required studies, established in the zoning by-law, or during consideration of applications under the Planning Act:

- a. ensuring adequate setbacks and minimum yard requirements;
- b. establishing appropriate transition in building heights, coverage, and massing;
- c. requiring fencing, walls, or berming to create a visual screen;
- d. designing the building in a way that minimizes adverse effects;
- e. maintaining mature vegetation and/or additional new landscaping requirements;
- f. controlling access locations, driveways, service areas and activity areas; and,
- g. regulating location, treatment and size of accessory uses and structures, lighting, parking areas, garbage storage facilities and signage.

Functional Needs

2.7.7. - Only development proposals that meet the long-term needs of the intended users or occupants will be supported. Proponents, whether developing individual buildings on a single site, or multiple buildings being built at one time or phased over time, will be required to demonstrate to the satisfaction of the City that the functional needs of the occupants or users will be met by providing:

- a. suitable scale, massing and density in relation to existing built fabric;
- b. appropriate landscaping that meets or improves the characteristic green space amenity of the site and surroundings and enhances the City's tree planting program;
- c. adequate land area and appropriate site configuration or provision for land assembly, as required;
- d. efficient use of municipal services, including transit;
- e. appropriate infill of vacant or under-utilized land; and,
- f. clearly defined and safe:
 - site access;
 - pedestrian access to the building and parking spaces;
 - amenity areas and play space;
 - building entry; and,
 - parking and bicycle facilities.

Guidelines and Studies

2.7.8. - When assessing development applications or undertaking new development area studies, the City may require urban design guidelines, a heritage impact statement or an environmental impact assessment, as appropriate, to be prepared by the proponent and at the expense of the proponent, and approved by the City. This is to assist in assessing impacts, to provide means of appropriate transition or mitigation, or to foster cohesive and improved conditions. At any stage of the application process, the City may require such studies to undergo a peer review at the proponent's expense.

....

- (k) A section of the OP is focused on the protection of resources in the City of Kingston. Cultural heritage resources are one such resource given specific attention. With the stated goal of “conserving and enhancing” cultural heritage recourse the policy contained in s. 2.8.9 provides as follows:

Cultural Heritage Resources

2.8.9. Cultural heritage resources, which include protected heritage buildings, built heritage resources, cultural heritage landscapes and archaeological resources will be conserved, managed and marketed for their contribution to the City's unique identity, history and sense of place in such a way as to balance heritage with environmental and accessibility concerns. Care will be taken not to put the UNESCO World Heritage Designation at risk.

- (l) In the introduction to Section 7 of the OP, the importance of Cultural Heritage Resources in Kingston is addressed and contains the stated Goal in section 7.1:

Section 7. Cultural Heritage Resources

The City of Kingston is one of the earliest sites of European settlement in Ontario and has a longer history as a meeting place of First Nations. The City of Kingston is well known for its cultural heritage resources, which play a key role in the City's identity, and contribute to its economic prosperity as well as to the cultural enrichment of its residents and visitors. Cultural heritage resources are a valued trust that has been inherited from the past, and must be cultivated as a legacy to be passed on to the future. These resources are non-renewable and once lost cannot be regained. The types of cultural heritage resources addressed by this Plan include protected heritage properties, built heritage resources, cultural heritage landscapes, and archaeological resources.

....

7.1 Cultural Heritage Resources

Goal:

To conserve and enhance recognized cultural heritage resources within the City so that they may be experienced and appreciated by both residents and visitors, and retained in an appropriate manner and setting, as a valued public trust held for future generations.

- (m) Section 7.1 of the OP sets out the evaluation criteria that will be used by the City to achieve the stated goal of conserving and enhancing recognized cultural heritage resources in Kingson. This includes the mandatory criteria in s. 7.1.2 that states:

7.1.2. The City will recognize and conserve its cultural heritage resources and will promote the maintenance and development of an appropriate setting within and around all such sites.

- (n) Section 7.3 of the City's OP is of some significance in this hearing, due to the nature of the evidence from the Appellants. Under this section of the OP, the City has identified a number of parts of the City as cultural heritage character areas which are to be considered for formal designation under the Ontario Heritage Act. Section 7.3 of the OP provides as follows:

7.3 Cultural Heritage Landscapes

A cultural heritage landscape usually involves a geographically defined grouping of features that are both human-made and natural. These geographical areas of the City have been modified and characterized by human activity and collectively create a unique cultural heritage. They are valued not only for their historical, architectural or contextual significance, but also for their contribution to the understanding of the social, economic, political and environmental influences that have shaped the community.

Cultural heritage landscapes may include such features as heritage conservation districts designated under the Ontario Heritage Act, villages, parks, gardens, cemeteries, lakes, rivers, main streets, neighbourhoods, shorelines, vegetation, and scenic vistas.

7.3.1. The City intends to undertake a cultural heritage landscape study, which may result in an amendment to this Plan.

7.3.2. It is the City's intent to conserve its cultural heritage landscapes.

7.3.3. The City may use parkland dedication provisions to secure a cultural heritage landscape.

Designation

7.3.4. Significant cultural heritage landscapes will be designated pursuant to the Ontario Heritage Act or as areas of cultural heritage character as set out in this Plan. They may also be designated by the Federal Government through the National Historic Sites and Monuments Board. Cultural Heritage Character Areas

7.3.5. The City will investigate areas and landscapes of special heritage character that are described as cultural heritage character areas in this Plan. After detailed study, these areas

may not be determined as appropriate for designation under the Ontario Heritage Act, but may nonetheless be recognized for their specific heritage character.

7.3.6. Where an area or landscape of special heritage character is not designated, but is recognized for a specific heritage character, the following may be required:

- a. a heritage impact statement where construction, alteration, demolition, or addition to a property located within a cultural heritage character area is proposed;
 - b. the protection of viewplanes, such as those related to City Hall, Kingston fortifications, and the harbor; and,
 - c. notification to relevant public agencies and appropriate First Nations groups of the existing and potential cultural heritage resources at an early planning stage to ensure that the objectives of heritage conservation are given due consideration in any public work project or assessment that may be undertaken.
- (o) Section 7.3.D contains the policies that specifically apply to the two relevant Heritage Character Areas:

7.3.D - Areas of Heritage Character

The City has a number of areas and corridors shown on Schedule 9 that may not, as yet, be determined as appropriate for designation under the Ontario Heritage Act, but which nonetheless are recognized as having a specific heritage character. A heritage impact statement, as outlined in Section 7.1.7, may be required where construction, alteration, demolition, or addition to a property located within an area of heritage character is proposed.

Lower Princess Street Heritage Character Area

7.3.D.2. - The Lower Princess Street Heritage Character Area recognizes the traditional downtown as a significant cultural heritage resource. It includes the streetscape, courtyards and laneways, heritage buildings, landscape elements, as well as the pedestrian activity, civic and commercial functions that maintain the historic function of the area. The arrangement of buildings, street orientation, pedestrian activity and continuity of height all contribute to the historic sense of place. It is the intent of this Plan to maintain the heritage integrity of the area with the application of the following heritage policies:

- a. buildings within the area will be encouraged to be maintained as functional heritage buildings;
- b. new buildings will reinforce and be compatible with the existing heritage buildings, and any upper storeys beyond the height of existing rooflines will be required to step back in accordance with the build-to plane provisions of Section 10.A.4.6 of this Plan;
- c. building heights in the Lower Princess Street Heritage Character Area must comply with the provisions of Section 10A.4.6 of this Plan;
- d. restoration of heritage façades and the application of sympathetic materials and historic styles is encouraged;
- e. new development must protect the height of City Hall as the dominant feature of the

area, and employ building materials that are compatible and sympathetic to the heritage character of the area; and,

- f. parking garages and structures must conform to the general design principles of this Plan and maintain the heritage character of the adjacent streetscape.

St. Lawrence Ward Area

7.3.D.6. - The St. Lawrence Ward, as shown on Schedule 9, is one of the oldest areas of the City with an urban style that has survived since the 1800's. It is the intent of this Plan:

- a. to recognize the heritage style of the area as created through the combination of buildings, street pattern, varying street widths and public spaces; and,
 - b. to undertake further investigations that will define appropriate boundaries and policy.
- (p) The Urban Design Policies of the City's OP include urban design policies which address heritage features and ensure compatibility with respect to streetscapes, public spaces and new development. More specifically the OP provides that good urban design has particular relevance as a tool for achieving compatibility between areas containing cultural heritage resources and new development:

Streetscapes and Public Spaces

8.3. The City maintains or enhances the character of valued streetscapes, community areas and landscapes through the following measures:

- a. preserving human scale in locations that are pedestrian-oriented by controlling building heights, requiring building step-backs, having entrances at street level, and other means as appropriate;
- b. protecting views to the water, City Hall and other significant buildings or landscapes;
- c. siting new buildings and structures in a manner that repeats and complements the siting and spacing of existing buildings, structures or landscaped areas in order to continue a pattern that is characteristic of surrounding neighbourhoods and heritage areas;
- d. the strategic use of building separation, landscaping and buffers to mitigate inharmonious elements of the built or natural environment, such as railways, service areas, or incompatible uses;
- e. designing public spaces or requiring the design of common spaces in private projects that have a clear sense of definition, and provide sufficient amenity and security to encourage public use and linkage to other public areas;
- f. preserving and enhancing the context of special buildings, streetscapes, landscapes and sites that have been identified as having particular architectural, historic or cultural value; and,
- g. encouraging innovative methods to minimize the visual impact of utility features, either

by containing utility features within streetscape elements or by screening them from view.

New Development

8.4. The City requires the design of new development to be visually compatible with surrounding neighbourhoods and areas of historic or cultural significance through its site plan control review, preparation of zoning standards, and preparation of urban design guidelines, as appropriate, that address the following:

- a. siting, scale and design of new development in relation to the characteristics of the surrounding neighbourhood or the significant cultural heritage resources including, scale, massing, setbacks, access, landscaped treatment, building materials, exterior design elements or features;
- b. protecting natural features and areas and cultural heritage landscapes through the siting, design and review of new development; and,
- c. achieving compatibility with a predominant architectural style, street pattern or site arrangement where that style or arrangement forms a valuable component of the existing neighbourhood or the historic or cultural significance of the identified area. Section 2.7 provides additional policy in this regard.

- (q) Section 9 of the OP deals with the Administration and Implementation of the Official Plan. Section 9.5.9 governs the review of zoning by-law amendments such as the one requested by IN8:

Planning Committee/Council Considerations

9.5.9. When considering an application to amend the zoning by-law, the Planning Committee and Council will have regard to such matters as:

- a. conformity of the proposal with the intent of the Official Plan policies and schedules;
- b. compatibility of the proposal with existing uses and zones, sensitive uses, the natural heritage system, cultural heritage resources, and compatibility with future planned uses in accordance with this Plan;
- c. compatibility of proposed buildings or structures with existing buildings and structures, with zoning standards of adjacent sites, with any future planned standards as provided in this Plan, and with any urban design guidelines adopted by the City for the area;
- d. the extent to which the proposal is warranted in this location and the extent to which areas zoned for the proposed use are available for development;
- e. the suitability of the site for the proposal, including its ability to meet all required standards of loading, parking, open space or amenity areas;
- f. the impact on municipal infrastructure, services and traffic;
- g. comments and submissions of staff, agencies and the public; and,

- h. the degree to which the proposal creates a precedent.
- (r) Section 10A, (which is referenced in s. 2.3.4) contains the policies relating to the Downtown and Harbour Special Policy Area, within which the Site is located. Policy 3.4.A governing the Central Business District identifies the wide range of uses and directs that specific guidance for the area is provided within the policies of s. 10A. The key portions of this policy area include the following:

10A. Downtown & Harbour Special Policy Area

The Downtown and Harbour Area of Kingston, as shown on Schedule DH-1, is the oldest, most diverse area of the City where the Market Square Heritage Conservation District features prominently. Its heritage continues to be a defining element of its character and is intrinsically linked to its continued form and function as a mixed use, commercial node with retail, office and tourist focus, resident population, and civic prominence.

The harbour, as an extension of the downtown, has changed its focus over the years and now has a greater public emphasis that includes boating, hospitality uses, and ferry service to Wolfe Island. The area is largely developed but there are some opportunities for sensitive infill or development and there is development potential on the brownfield sites in the North Block area. The Provincial Policy Statement recognizes that “the long term prosperity of a community is achieved, in part, by maintaining and enhancing the viability of its downtown”. Thus, particular attention is warranted to ensure that the health of the Downtown and Harbour Area is maintained and enhanced.

...

10A.1 Strategic Intent and Function

The strategic intent and function of the downtown is to be the prime, multi-faceted “centre” of the city and surrounding region. The downtown area and related harbour sub-area, while not land-use designations, signify the civic focus of the city with City Hall, Market Square and Confederation Park as the nucleus of historic public activity, and linkage to the harbour. The Central Business District commercial land use designation in the downtown is intended to contain the broadest range of commercial uses, tourist and hospitality facilities, and civic activity within a context that preserves human scale, historic amenity and vibrant pedestrian activity.

The harbour area is also intended to contain a mixture of uses with an emphasis on tourist and open space uses that provide a mutually supportive relationship with harbour activities and public access along the waterfront. In addition to the commercial, civic and harbour activities that characterize the Downtown and Harbour Area, higher density residential uses and prominent buildings, such as City Hall and St. George’s Cathedral, are important components of both the downtown and harbour areas that enhance their vitality and contribute to their unique “sense of place” within the municipality.

Goal:

To foster the continued prominence and function of the Downtown and Harbour Area as the principal mixed use business district or commercial “Centre” and civic focus within the City, for both residents and visitors.

....

Cultural Heritage Resources

10A.1.6. - Cultural heritage resources are a valued legacy of the City and constitute character-defining elements of the Downtown and Harbour Area that are to be conserved. New development must protect, enhance, support or adaptively re-use these resources.

....

10A.2 Land Use

As the City's prime Centre, the widest range and mixture of land use is permitted with an emphasis on commercial uses that are supportive of the pedestrian orientation, historic character and related scale of the Downtown and Harbour Area. Civic and public institutions, marine and open space activities along the harbour, and medium to high density residential uses all contribute to the vitality, and pedestrian focus of the area and are encouraged in this location in a form that maintains human scale and historic context.

Goal:

To support the historic, commercial and civic function of the Downtown and Harbour Area by providing for a full and integrated range of commercial, hospitality, civic, and community uses as well as open space, and higher density residential uses that are compatible in scale and type to the historic core.

Policies:

Permitted Uses

10A.2.1. - In accordance with its priority function as the City's prime Centre on Schedule 2, and the apex of the Commercial hierarchy of Section 3.4 of this Plan, a wide range of commercial use is permitted including all levels of retailing, offices, professional and service uses, hospitality uses and tourist accommodation, cultural, entertainment and recreation uses in accordance with the Central Business District designation in Section 3.4.A of this Plan.

10A.2.2. - Within the Harbour Area as shown on Schedule DH-1, tourist and hospitality, marine transportation and recreation, and public open space uses are particularly encouraged in accordance with Section 3.4.A and 3.9 of this Plan.

....

Medium and High Density Residential Uses

10A.2.12. - Medium and High Density Residential uses are encouraged in the Downtown, either above commercial ground floor space as mixed use buildings in the Central Business District or as independent buildings on the periphery of the Central Business District, on streets where ground floor retail is not mandatory as shown on Schedule DH-3. Specialized residential uses including senior citizen accommodation, boarding houses, crisis care facilities, supportive housing, hostels, and similar uses are also permitted in the Central Business District in accordance with the above conditions.

Residential Buildings

10A.2.13. - Where independent residential buildings are permitted in the Central Business District, (on streets where ground floor retail is not mandatory), they will contribute to the pedestrian amenity of the area through design that provides access and common areas adjacent to the street and avoids the creation of driveways crossing Prime Pedestrian Streets shown on Schedule DH-3. In addition, any residential use of the ground floor must be constructed to be physically capable of conversion to a commercial use in the future by providing access directly at the level of the sidewalk, having adequate ceiling height, stair locations, and partition wall layout that enables a future conversion of the ground level for commercial use.

Residential Development

10A.2.14. - Residential development of upper storey commercial space or older one and two unit dwellings into multi-residential buildings in the Central Page 354 Section 10A Downtown & Harbour Area Special Policy Area May 15, 2015 Kingston Official Plan Business District is permitted provided that matters of adequate light, separate access, sufficient floor space, amenity area, and appropriate parking can be satisfactorily addressed.

....

10A.4 Cultural Heritage and Urban Design

The Downtown and Harbour Area contains a wealth of cultural heritage resources including buildings and sites, heritage areas, cultural heritage landscapes, and archeological resources. The Area's heritage components continue to be a major part of its character and quality of life. They are also intrinsically linked to the Downtown and Harbour Area's economic function as a mixed use centre of commerce, civic activity, accommodation, and lake-based transportation as well as its attraction for tourism.

While an exceptional number of cultural heritage resources have survived, many have been compromised by insensitive renovation or by the influence of recent unsympathetic development. Section 7 of this Plan and the Downtown and Harbour Area Architectural Guidelines provide direction and opportunities for protection and enhancement of the cultural heritage resources and contain guidelines for further development that will be compatible with the heritage character of the area.

Goal:

To respect and foster the cultural heritage resources (including buildings, streetscapes, landscapes and archaeological resources) of the Downtown and Harbour Area and provide guidelines for new private development and public investment that will complement this heritage and enhance the use and enjoyment of the Downtown and Harbour Area.

Policies:

Architectural Heritage Elements

10A.4.1. - The historic architecture of the Downtown and Harbour Area is part of the defining and valued character of the City that must be fostered and preserved as an endowment from the past. These rich resources contribute to the economy, as well as to the quality of life of its citizens.

Architectural Heritage Character

10A.4.2. - The historic architecture of the downtown is best maintained by preserving, rehabilitating and restoring existing building stock that reflects the character of its sub-areas as described in the Downtown and Harbour Area Architectural Guidelines. The City will endeavour to ensure that any changes to existing buildings in the Downtown and Harbour Area will not detract from the character of the district.

Restoration of Character-Defining Buildings

10A.4.3. - It is the City's intent to preserve, rehabilitate and restore existing character-defining elements in accordance with Parks Canada's manual, "The Standards and Guidelines for the Conservation of Historic Places in Canada". Each property will be examined to determine its character defining elements and these will be part of a conservation plan in accordance with Section 7.1.6 of this Plan.

10A.4.4. - The City encourages the restoration of character-defining elements such as facades and other exterior treatment where adequate documentation exists, but does not support the creation of a "false history" achieved through the addition of elements from other historic buildings or pseudohistoric elements that did not originally exist.

Infill Character - 10A.4.5.

Current gaps along the streetscape, created by demolished buildings are encouraged to redevelop with infill buildings which are consistent with the massing, widths and heights of existing buildings and with the prescribed planes of the zoning by-law, having regard to the more detailed provisions of Section 8 of this Plan and the Downtown and Harbour Area Architectural Guidelines.

New Buildings & Height Provisions

10A.4.6. - While striving to maintain character-defining buildings, the City may support new buildings that are of a scale and massing complementary to buildings in the surrounding area. The following provisions will generally be required:

- a. for the Market Square Heritage District as shown on Schedule 9:
 - existing building height will not be increased; • the maximum height of any new building must not be greater than the highest building on the same block in the District;
 - a minimum building height of approximately 8.5 metres with two storey height or the appearance of two storeys; and,
 - a height between ground floor and second floor of 4.25 metres or alignment with second floor of adjacent buildings if these are considered to reflect the character of the area as established in the Downtown and Harbour Area Architectural Guidelines;
- b. for the Lower Princess Street Heritage Area and the Downtown portions of the St. Lawrence Ward Heritage Area and Old Sydenham Heritage Area which are shown on Schedule 9:
 - street wall buildings with a 'build-to-plane' up to 17 metres, to be specified in the zoning by-law;

- a minimum building height of approximately 8.5 metres with two storey height or the appearance of two storeys; and,
 - a height between ground floor and second floor of 4.25 metres or alignment with second floor of adjacent buildings if these are considered to reflect the character of the area as established in the Downtown and Harbour Area Architectural Guidelines; and,
- c. for the North Block and environs sub-area and the Harbour Area as shown on Schedule DH-1, in addition to the policies outlined in subsection b. above, a maximum height (after employing angular plane setbacks) of 25.5 metres.

Potential Exemption

10A.4.7. - Notwithstanding the above provision related to height, if a site-specific urban design study, presented to the public, clearly indicates to the satisfaction of the City, that a taller building is compatible with the massing of surrounding buildings, does not create unacceptable amounts of shadowing, and meets the land use compatibility policies of Section 2.7 of this Plan, a greater height within a specified building envelope may be approved.

Zoning By-law

- (a) Under the Downtown and Harbour Zoning By-law, the Site is also zoned in two parts: the Queen Street segment is zoned as Central Business System (Ci); and as Heritage Commercial (C1-3) on the Princess Street portions.

Downtown and Harbour Area Architectural Guidelines Study 2007

- (a) The Site and the proposed Development are also subject to the Downtown and Harbour Area Architectural Guidelines Study 2007. The Summary of Recommendations contain a number of relevant provisions relating to the preservation of heritage and the height of buildings:

In regard to the Official Plan

1. We recommend that the existing policies and zoning provisions be retained in the development of a new Official Plan and Secondary Plan for the area. Some specific adjustments to the Official Plan with respect to its organization, character statement, heritage policy, and views are recommended, in addition to a number of zoning revisions which are discussed in detail within this study

....

3. We recommend that the skyline of the Downtown and Harbour Area with respect to

building heights be considered by the City as an Architectural Character Plan heritage defining element to be retained (legally noncomplying buildings excepted). The City should avoid allowing variances to the height of new development that exceeds the existing allowable zoning.

....

In regard to Zoning

We recommend the following regarding Zoning By-law 96-259:

1. Both the height limits and built form nature of the current by-law should be continued in any further by-law update that may accompany the Official Plan Review

....

4. Maximum heights of street-wall build-to planes should be maintained as per the zoning by-law, with the exception of C1-4 site specific zoning which should be revised to C1 zoning. (Refer to s.4a.2 Guidelines Applicable to all Architectural Character Plan Sub Areas)

5. Existing by-law height limits for construction above maximum height street-wall build-to plane should be maintained, with the exception of C1-4 site specific zoning which should be revised to C1 zoning.