

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



ISSUE DATE: August 09, 2019

CASE NO.:

PL170714

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

Applicant and Appellant:	Homestead Land Holdings Limited
Subject:	Request to amend the Official Plan - Failure of the City of Kingston to adopt the requested amendment
Existing Designation:	Central Business District
Proposed Designated:	Site Specific (To be determined)
Purpose:	To permit the development of two property blocks which will include: 1) A 21 storey residential building with 180 dwelling units and a municipal parking garage. 2) A 21 storey mixed use building with 200 dwelling units and some retail/commercial office space.
Property Address/Description:	51-57 Queen St., 18 Queen St. and 282 Ontario St.
Municipality:	City of Kingston
Approval Authority File No.:	D09-039-2015
OMB Case No.:	PL170714
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OMB Case Name:	Homestead Land Holdings Limited v. Kingston (City)

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

Applicant and Appellant:	Homestead Land Holdings Limited
Subject:	Application to amend Zoning By-law No. 96-259 - Refusal or neglect of the City of Kingston to make a decision
Existing Zoning:	Specific Central Business System (C1-22(H))

Proposed Zoning:	Site Specific (To be determined)
Purpose:	To permit the development of two property blocks which will include: 1) A 21 storey residential building with 180 dwelling units and a municipal parking garage. 2) A 21 storey mixed use building with 200 dwelling units and some retail/commercial office space.
Property Address/Description:	51-57 Queen St., 18 Queen St. and 282 Ontario St.
Municipality:	City of Kingston
Municipality File No.:	D14-146-2015
OMB Case No.:	PL170714
OMB File No.:	PL170715
Heard:	February 4 to 8 and 11 to 15, 2019 in Kingston, Ontario

APPEARANCES:

Parties

Homestead Land Holdings Limited

City of Kingston

Frontenac Heritage Foundation

Counsel

Alan Cohen,
Philip Osterhout

Tony Fleming

David Donnelly,
Alexandra Whyte

DECISION DELIVERED BY MARCIA VALIANTE AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This decision addresses the question of whether two high-rise buildings would be appropriate within the low-rise heritage context of downtown Kingston. Homestead Land Holdings Limited (“Homestead” or “Appellant”) applied in 2015 for amendments to the City of Kingston (“City” or “Kingston”) Official Plan (“OP”) and Zoning By-law No. 96-259 (“ZBL”) to permit two mixed-use developments on separate parcels of land in the

Central Business District (“CBD”) of the City. One parcel is located at 51-57 Queen Street, on part of what is known as “Block 3”. The other parcel is located at 18 Queen Street and 282 Ontario Street, and is known as “Block 5”.

[2] In May 2017, Homestead submitted revised proposals and in June 2017 appealed the City’s failure to make decisions on the applications within the applicable statutory periods to the Ontario Municipal Board, now the Local Planning Appeal Tribunal (“Tribunal”), pursuant to s. 22(7) and 34(11) of the *Planning Act* (“Act”). A non-statutory public meeting was held on August 3, 2017 to present the revised proposals. On November 22, 2017, the Tribunal held the first Pre-hearing Conference (“PHC”). At that time, the Tribunal granted Party status to the Liquor Control Board of Ontario (“LCBO”), Building Kingston’s Future Inc., and the Frontenac Heritage Foundation (“Foundation”) and Participant status to eleven persons. At the second PHC, held on February 2, 2018, the Tribunal set the hearing dates and approved the Procedural Order and Issues List.

[3] Prior to the hearing, the Appellant revised its development proposals in response to City and third-party reviews and resubmitted them for the City’s consideration. On August 7, 2018, City staff presented settlement recommendations with respect to Homestead’s appeals to City Council in closed session. City Council approved the recommendations and Minutes of Settlement (“MOS”) were entered into on September 4, 2018. The MOS were approved at an open meeting of City Council on September 18, 2018. The Foundation and many of the Participants oppose the developments as endorsed in the MOS.

[4] The hearing was held in Kingston over 10 days in February 2019. The LCBO, granted Party status at the first PHC, did not participate. At the outset of the hearing, Building Kingston’s Future Inc. requested that its status be changed from a Party to a Participant, to which the Tribunal agreed. Additional persons requested Participant status. These requests were not opposed by the Parties and most were granted by the Tribunal. Two evening sessions were held for the Tribunal to hear from the

Participants. The Participants are listed in Attachment 1.

THE DEVELOPMENT SITES

[5] Blocks 3 and 5 are located within a 4.5-block area of the City's CBD known as the "North Block". Four of the blocks are bounded by Place D'Armes on the north, Wellington Street on the west, Ontario Street on the east, and Queen Street on the south. The remnant half-block is on the south side of Queen Street between King and Ontario Streets; this is Block 5. One block in the North Block was redeveloped in 2008 with construction of the K-Rock, now Leon's, Centre, an entertainment venue. Just to the east of the North Block are the harbour, the Wolfe Island ferry terminal and the Fort Frontenac National Historic Site. One block to the south of Queen Street is Princess Street, the City's historic commercial street, with mostly two-to-four-storey buildings. The OP identifies a defined portion of Princess Street as the Lower Princess Street Heritage Character Area. To the northwest of Block 3 is the St. Lawrence Ward Heritage Character Area, a largely residential area. These areas ("HCA") are not designated heritage conservation districts under the *Ontario Heritage Act* ("OHA"). Two blocks to the south of Block 5 is City Hall, designated under Part IV of the OHA, and the Market Square Heritage Conservation District ("HCD"), which is designated under Part V of the OHA.

[6] The two development sites both front onto Queen Street; they are not contiguous but form the northwest and southeast corners of the intersection of Queen and King Streets. The Block 3 site is essentially a half-block, with an area of approximately 0.4351 hectares ("ha"). The site occupies the full 100.2 metre ("m") frontage of the north side of Queen Street between Wellington and King Streets, with 42 m of frontage on Wellington Street and 44 m on King Street. At present, the site is vacant, used for a surface parking lot. The north portion of Block 3 is developed and is occupied by a two-and-one-half-storey fitness club and a one-storey LCBO store. Block 5 has an area of approximately 0.3943 ha. It occupies the full 100.2 m frontage of the south side of Queen Street between King and Ontario Streets, with 34.5 m of frontage on King Street,

and 41 m on Ontario Street. It is also vacant and used for a surface parking lot. The remainder of that block, south of Block 5, contains several buildings of varying heights fronting onto Ontario, King and Princess Streets and a vacant lot on Princess Street. At the corner of Princess and Ontario Streets is the Smith & Robinson (“S&R”) Building, a four-storey designated heritage building with a recent addition of contemporary design, north of the protected portion, on Ontario Street abutting Block 5. On Block 4, which is owned by the City, fronting onto Queen Street directly across from Block 5 and across King Street from Block 3, are four low-rise designated heritage buildings: the red brick Kingston Public Utilities Commission (“PUC”) substation and three adjacent limestone buildings historically associated with the Kingston Gas and Light Company.

[7] Most of the North Block, including both development sites, are brownfields, due to historic use of the area for coal gasification and other industrial and transportation uses. Although the City spent \$2.2 million to clean up the contamination, some contamination remains in the bedrock, soil and groundwater on the sites. This imposes limits on development, specifically a limit on the allowable depth of excavations and a prohibition on residential use of the ground floors. Archaeological assessments have been conducted on the sites.

[8] In the OP, the sites are designated “Central Business District” on Schedule 3-A and are within a “Centre” as shown on Schedule 2. They are subject to Site Specific Policy No. 22 (Schedule 3-D). Under s. 10A of the OP, the sites are within the Downtown and Harbour Special Policy Area (“DH Area”). On Schedule DH-1, Block 3 is in the “North Block and Environs Sub-Area” and Block 5 is in the “Lower Princess Street Retail Area”. On Schedule DH-2, both sites are identified as Major Development Sites. On Schedule DH-3, both sites are identified as Areas of Pedestrian Focus.

[9] Under the ZBL, the sites are zoned Specific Central Business System C1-22 (H), subject to holding provisions. The holding symbol cannot be removed until a Record of Site Condition has been registered. The ZBL permits mixed commercial/residential development.

THE FINAL REVISED PROPOSALS

[10] The first submission to the City, in 2015, was for two 21-storey residential buildings, together with a municipal parking garage on Block 3. The second submission, in 2017, was for one 17-storey building and one 19-storey building. The final revised proposal for Block 3 is for a 19-storey mixed use building, comprised of a five-storey podium with a tower above and underground parking. The podium would step back above the fourth floor. The ground floor would be used for active amenity space and commercial purposes, save for space at the corner of Queen and Wellington Streets intended for a municipal art gallery. As part of the MOS, this use for a minimum of 10 years would be secured through an agreement between the Appellant and the City under s. 37 of the Act. The remainder of the podium and the tower would be for residential use, intended to be 200 rental apartments.

[11] For Block 5, the final revised proposal is for a 23-storey mixed use building, comprised of a seven-storey podium, stepping back above the fifth floor, and a tower above, with underground parking. The two uppermost storeys of the podium would be for office use by Homestead. The ground floor would be for commercial uses and some residential amenity space. The remainder of the building would be for residential use, with 200 rental apartments planned.

[12] As set out in Schedule A to the MOS, the Appellant requests Tribunal approval for the following OP amendments to permit development of the final revised proposals:

- a. Amend Schedule 3-D, Site Specific Policies, to designate the sites as “Site Specific Policy Area No. 66,” and to add site-specific policies in a new section, s. 3.17.66;
- b. Amend Schedule DH-3 to remove the mandatory commercial frontage from Wellington Street and a portion of Queen Street on Block 3;
- c. Amend Schedule DH-3 to remove the courtyard/open space area opportunity

from the sites;

- d. Delete s. 10A.5.1 and 10A.5.3 and replace them with new s. 10A.5.1 and 10A.5.3, permitting new large-scale development on the sites, subject to the policies in new s. 3.17.66.

[13] As set out in Schedule B to the MOS, the Appellant requests Tribunal approval of amendments to the ZBL for site-specific regulations to establish the building envelopes as found in the attached site plans and architectural drawings.

ISSUES

[14] The Parties presented a revised Issues List at the start of the hearing. The following issues were raised:

- a. Are the proposed OP and ZBL amendments consistent with the Provincial Policy Statement, 2014 (“PPS”), specifically policies 1.1.3.3, 1.1.3.4, 1.1.3.5, 2.6.3, and 4?
- b. Are the proposed OP and ZBL amendments in conformity with the applicable OP, specifically policies in s. 2, 2.7, 3.4A, 3.18.22, 7.3.D.2, 8.1, 8.3, 8.4, 8.7, 9.3.2, and 10A?
- c. Do the designs of the buildings that would be permitted by the proposed amendments reflect good urban design?
- d. Do the designs of the buildings that would be permitted by the proposed amendments conform with the policies and objectives of the OP?
- e. Are the heights of the buildings that would be permitted by the proposed amendments good land use planning?

- f. With respect to the towers only, do the proposed amendments provide for pedestrian-oriented and safe functional movement corridors within an appropriate streetscape that reflects a human scale?
- g. Is the removal of the requirement for ground floor commercial space for certain street frontages appropriate?
- h. If the amendments are approved by the Tribunal, with or without further amendments, are community benefits appropriate pursuant to s. 37 of the Act? If the answer is yes,
 - i. What community benefits are appropriate given the increase in height and density approved?
 - ii. What is the appropriate value of the benefits to be provided pursuant to an agreement authorizing the community benefits?

[15] Because of the overlap between these issues, they are addressed below under the general headings of: consistency with the PPS; conformity with the OP – which addresses height, urban design, human scale and good planning; ground floor commercial space; and community benefits.

THE EVIDENCE

[16] The Appellant called three expert witnesses:

- a. Rod Lahey is a Registered Architect and President of the firm Roderick Lahey Architect Inc. in Ottawa. He has been involved with the proposals since 2015. He did not do the initial architectural designs but completed two revised designs since being retained. The Tribunal qualified Mr. Lahey to give opinion evidence in the area of architecture.

- b. Mark Brandt is a Registered Architect and member of the Canadian Association of Heritage Professionals (“CAHP”). He is Principal Conservation Architect, Urbanist, Built Heritage and Context Design Specialist with MBTA Associates Inc. Mr. Brandt was retained by the Appellant to analyze the impacts of the proposed designs from urban design, heritage conservation and architectural perspectives. He prepared the Urban Design Report and contributed to the Heritage Impact Statement (“HIS”) submitted in support of the development proposals. The Tribunal qualified him to give opinion evidence in the areas of urban design, heritage conservation and architecture.

- c. Mark Touw is a Registered Professional Planner, employed with IBI Group. He was retained throughout the application process to provide the Appellant with a planning analysis of the proposed developments and advice on the amendments to the OP and the ZBL. He prepared Planning Reports in 2015 and 2017 and prepared a witness statement updating his analysis in those Reports. The Tribunal qualified Mr. Touw to give opinion evidence in the area of land use planning.

[17] The City called three expert witnesses:

- a. John Stewart is a Landscape Architect and member of the CAHP. He is the principal of Commonwealth Historic Resource Management. The City retained Mr. Stewart in December 2018 to review the plans, reports, MOS and witness statements and provide an opinion on whether the proposed developments are appropriate from a heritage conservation perspective. The Tribunal qualified him to give opinion evidence in the area of heritage conservation.

- b. John Tassiopoulos is a Registered Professional Planner employed as a Senior Urban Designer and Senior Project Manager, Planning, Landscape Architecture and Urban Design, with WSP Canada Group Limited. Mr.

Tassiopoulos was first retained by the City in 2016 to prepare a peer review of the Urban Design Report submitted by the Appellant. He reviewed the subsequent iterations in the designs, providing comments, and prepared a first draft of a second peer review report, as well as a witness statement. His comments and recommendations significantly influenced the final designs. The Tribunal qualified him to give opinion evidence in the area of urban design.

- c. Paige Agnew is a Registered Professional Planner and the Director of Planning, Building and Licensing Services for the City. Ms. Agnew led the City's review of the proposals and was involved in negotiation of the MOS. The Tribunal qualified her to give opinion evidence in the area of land use planning.

[18] The Foundation called four expert witnesses:

- a. George Baird is a Registered Architect, Founding Principal of Baird Sampson Neuert Architects and Emeritus Professor of Architecture at the University of Toronto. Mr. Baird is the author of two studies relevant to the North Block and DH Area, discussed below. He was retained by the Foundation in November 2018 to review and comment on the architectural and urban design features of the proposed development. The Tribunal qualified him to give opinion evidence in the area of architecture and urban design.
- b. Bruce Downey is a Registered Architect and Partner in Hugh Downey Architects. Mr. Downey was retained by the Foundation in November 2018 to review the proposed developments with respect to their impact on the quality of the built environment and historic urban fabric in the North Block and downtown Kingston more generally. The Tribunal qualified him to give opinion evidence in the area of architecture.
- c. Carl Bray is a Heritage Planner and Landscape Architect, a member of the

CAHP and Principal of Carl Bray & Associates Ltd. Mr. Bray was retained by the Foundation in November 2018 to provide a heritage planning opinion with respect to the proposed developments. The Tribunal qualified him to give opinion evidence in the area of land use planning, heritage planning and urban design.

- d. Allan Ramsay is a Registered Professional Planner and Principal of Allan Ramsay Planning Associates Inc. Mr. Ramsay was retained by the Foundation in October 2018 to provide a planning opinion on the proposed developments. The Tribunal qualified him to give opinion evidence in the area of land use planning.

[19] The Participants raised a range of issues with the proposed developments. Many of the Participants who are opposed to them addressed similar concerns as those raised by the Foundation's witnesses. Leading the concerns was the height and density of the proposed developments and their lack of compatibility with the heritage resources and existing ambience of downtown Kingston. Many highlighted the need to protect views of the skyline and City Hall as important community values. Many viewed the proposed developments as transformative, setting a precedent that would undermine the qualities that make downtown Kingston unique. Some Participants raised process issues, in particular with respect to the determination of the municipal gallery as the community benefit. Some questioned why affordable housing was not sought as the community benefit and some questioned the calculation of the benefit to the community.

[20] Other Participants spoke in support of the proposed developments. They highlighted the need for housing in a city with a very low vacancy rate and the importance of intensification of the downtown as a step toward Kingston's goal of becoming the most sustainable city in Ontario. Some Participants stressed the investments the City has made in infrastructure downtown, including separating sewers, brownfield clean-up and transit, in order to facilitate more intense residential development downtown. Many emphasized that old and new can fit together.

ANALYSIS AND FINDINGS

Introductory Comments

[21] At the heart of this appeal is a dispute over whether the built heritage of downtown Kingston would be diminished or even destroyed if the proposed developments were approved. The City and its residents are justifiably proud of their history and the rich fabric of cultural heritage resources in the CBD. All of the witnesses agreed with the statement in the 2007 DH Area Architectural Guidelines Study that the DH Area 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...”. As described in the OP, these resources “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.” The OP goes on to outline the City’s responsibility with respect to these resources. It states: “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.”

[22] The City supports the proposals and embraces the change they represent as a step toward a vibrant future, injecting needed vitality into the North Block, in support of its sustainability goals and in the full conviction that the unique cultural heritage resources of the CBD will not be diminished as a result. While many residents support this direction for the future, the Foundation and many of the Participants consider the downtown to be at a “tipping point”. Although the North Block is only a small portion of the CBD, they fear that the proposals and the future they portend would precipitate the destruction of the historic integrity of the City.

[23] For the witnesses, the Parties and the Participants, the central issue in this hearing was largely about the heights of the proposed towers. The witnesses for the Foundation generally conceded that the scale and design of the podium for each

building would be appropriate within the planned and built context, would be at a human scale, and would not threaten the City's cultural heritage resources.

[24] The North Block is poised on the threshold of a shift from an underutilized former industrial area to a mixed-use area. As the first significant developments in the North Block, the revised proposals would no doubt frame expectations for the rest of the area. Despite this area being at a turning point, there was no evidence presented to support the bare assertion that downtown Kingston is at a "tipping point", such that adding two tall buildings within the North Block would cascade into the wholesale destruction of the City's heritage and turn the CBD into a "pale imitation of Toronto".

[25] All the Parties made reference to the Tribunal's decision in *Burfoot v Kingston (City)*, 2018 CanLII 107780 ("*Burfoot*"). The Tribunal in that case repealed a zoning by-law amendment passed by the City that would have permitted a 16-storey residential development at 223 Princess Street, in the Capitol Theatre building, which also has frontage on Queen Street several blocks from the North Block. That site is within the Lower Princess Street HCA. The Tribunal in that case found that the proposed development would cause undue adverse impacts on the heritage character of the area, primarily due to its height. The Foundation argues that the two cases are so similar in most respects that the Tribunal in this case should adopt the same reasoning and conclusions. Many of the Participants echo this argument. In response, the Appellant submits that the sites in each proceeding have significant differences in terms of their physical character and the applicable planning regime so the decision in *Burfoot* should not be treated as a binding precedent. The Tribunal notes that there are both similarities and differences between the two cases, some of which are discussed below. The findings that follow are based on the evidence that was heard in this proceeding and on the Tribunal's interpretation of the policies and guidance that apply to these sites, within the context of the North Block and the DH Area more broadly.

[26] Several witnesses for the Appellant and the City put great emphasis on the significant changes made to the design of the proposed developments from the first

submission to the revised final submission, in response to input from City staff and third-party reviewers including Mr. Tassiopoulos and Brent Toderian, a well-known Vancouver planner and urbanist, who had initially come to Kingston as a guest speaker on several issues and was then retained by the City. Ms. Agnew testified that Mr. Toderian reviewed the Appellant's submissions and Mr. Tassiopoulos's reviews and recommendations, met with Council and staff, walked the sites and generally agreed with Mr. Tassiopoulos's recommendations with respect to the urban design aspects of the proposals. This evidence was helpful in clarifying the evolution of the designs and demonstrating the City's careful approach toward North Block redevelopment through the investment of significant time and effort, led by Ms. Agnew, that was put into working with Homestead's consultants to arrive at more refined designs. Because of these efforts, the City was ultimately satisfied that it could support the final revised proposals. There is no dispute among the Parties that the final designs are a significant improvement over the original designs. Nevertheless, the Tribunal's task is limited to considering only whether the final revised proposals, as set out in the MOS, are appropriate and meet the statutory requirements.

[27] The Appellant emphasizes that towers at the heights proposed are necessary to ensure the economic viability of the final proposals. Some of the Foundation's witnesses attempted to demonstrate that the same number of units could be accommodated within the "as of right" zoning standards on the sites, which was strongly countered by Mr. Lahey's evidence in particular. The evidence was insufficient to demonstrate that alternative designs would meet the programming or financial needs of the Appellant. Whether the proposals, or alternative designs, are supportable from a business perspective is a decision for the Appellant. For the Tribunal, the central question is whether the final revised proposals meet the statutory tests and represent good planning.

[28] In reaching its findings, the Tribunal has had regard for the decision of Council.

[29] For the reasons that follow, the Tribunal dismisses the appeals.

Consistency with the PPS

[30] The PPS directs growth and development to “settlement areas” within municipalities. Section 1.1.3.3 of the PPS provides that planning authorities are to identify appropriate locations and promote opportunities for intensification and redevelopment, taking into account several factors including brownfield sites, availability of infrastructure, and public services. Section 1.1.3.4 requires the promotion of appropriate development standards, which facilitate intensification, redevelopment and compact form and avoid or mitigate risks to public health and safety. Section 1.1.3.5 requires planning authorities to establish and implement minimum targets for intensification and redevelopment.

[31] The sites are within Kingston’s designated settlement area, close to employment, commercial activity, educational institutions, cultural opportunities and transit, and are identified in the OP as “Major Development Sites”. They are underutilized brownfield sites that are being cleaned up to support redevelopment for mixed uses, including much-needed residential spaces. The City has designated and promoted the North Block as an area for redevelopment and intensification, and these are the first private sector proposals to come forward. None of the witnesses challenge that these are suitable sites for intensification and redevelopment. The real dispute is over whether the proposals represent too much intensification.

[32] The Foundation did not pursue the issue of lack of consistency with these PPS policies with any vigour. It was only Mr. Ramsay, the Foundation’s planning witness, who testified that, in his opinion, the proposals do not reflect “appropriate development standards”. He stated that the built forms of the proposals, specifically with respect to height, density and massing, represent significant and transformative change in the area and should only be considered as part of a comprehensive review of policies for the downtown, and not in the context of these site-specific applications. For this reason, he stated, the proposals are not consistent with these policies of the PPS.

[33] The City has adopted development standards for intensification of the North

Block, following numerous studies and consideration of their conclusions and recommendations, carried out over many years. These studies include: The Downtown Action Plan: An Infrastructure Renewal and Public Open Space Plan (2003); Urban Design Guidelines for the North Block Central Business District (2004); Downtown and Harbour Area Architectural Guidelines Study (2007); North Block District – Community and Business Enhancement Opportunities (2009); and North Block District: Block 4 Design Guidelines (2014). The earlier studies provided the foundation for the development standards that were incorporated into the OP in 2009. Although some of the witnesses disagreed with the standards in the OP, the Foundation did not present sufficient evidence for the Tribunal to conclude that the City does not have appropriate development standards to facilitate intensification and redevelopment in the North Block or that another comprehensive review is required before any development can occur there. Whether the built form of the proposals is “appropriate” – in the sense of whether the OP and ZBL amendments requested represent good planning and conform with the standards in the OP – is the primary issue in this proceeding and is discussed below.

[34] The other issue on the final Issues List regarding consistency with the PPS is with respect to cultural heritage. Section 2.6.1 provides that “[s]ignificant built heritage resources and significant cultural heritage landscapes shall be conserved.” Section 2.6.3 states that planning authorities shall not permit development on lands that are adjacent to protected heritage property except where the proposed development has been evaluated and “demonstrated that the heritage attributes of the protected heritage property will be conserved.” The PPS defines “conserved” to mean:

... the identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained under the *Ontario Heritage Act*. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment. Mitigative measures and/or alternative development approaches can be included in these plans and assessments.

[35] The revised HIS carried out in support of the applications noted that the sites are not within a HCA or HCD and do not contain designated buildings. This is unlike the

situation in *Burfoot*. Although “adjacent” lands are defined as those that are contiguous or separated by a narrow strip of land, the HIS evaluated both contiguous and nearby lands and concluded that heritage resources adjacent to and in the area around the proposed developments would be “conserved”. Although Mr. Bray, the heritage witness for the Foundation, initially testified that the proposals do not have sufficient regard for adjacent cultural heritage resources, on cross-examination he stated that he does not expect any physical impact on any heritage resources but is primarily concerned about visual impacts. Mr. Bray conceded that the proposals would not fail to conserve any heritage resources or the heritage attributes of any protected property in the immediate area. Visual impact is addressed below.

[36] Based on the evidence provided, the Tribunal finds that the final revised proposals are consistent with the PPS.

OP Conformity

Applicable policies

[37] Section 9.3 of the OP contains the policies on OP amendments. Section 9.3.2 provides that applications for amendments will be evaluated on the basis of several criteria, including conformity with the general intent of the OP and compatibility of a proposal with adjacent uses. In s. 9.3.2.a and s. 9.3.2.c, it identifies these considerations:

the degree of conformity of the proposed amendment to the general intent and philosophy of this Plan, particularly the vision and planning principles, including sustainability, stability and compatibility outlined in Section 2, and consistency with provincial policy; ... and

the compatibility of the proposal, or the adequacy of proposed mechanisms for achieving compatibility, with adjacent and planned uses, including cultural heritage resources and natural heritage features and areas...

[38] The general intent and philosophy of the OP is to ensure a balance between intensification and heritage protection, between the new and the old. The key to

achieving this balance is the principle of compatibility. Section 2.7 of the OP outlines the general land use compatibility principles applicable to new development. It provides that “[f]urther growth and development within the City will be guided by principles of land use compatibility that respect the quality of existing uses and provide for suitable transition between areas of differing use, sensitivity, urban design treatment, and intensity in order to avoid or mitigate adverse effects.”

[39] Section 7 of the OP addresses policies on cultural heritage resources. Similar to the PPS, s. 7.2.5 provides that the City may permit development on lands adjacent to a protected heritage property where the proposed development has been evaluated and it has been demonstrated through a HIS that the protected property’s heritage attributes will be “conserved”.

[40] The OP policies on urban design address, in s. 8.3, the maintenance or enhancement of the character of streetscapes through “preserving human scale in locations that are pedestrian-oriented by controlling building heights, requiring step-backs” and other measures, by “protecting views to the water, City Hall and other significant buildings or landscapes”, and by “siting new buildings and structures in a manner that repeats and complements the siting and spacing of existing buildings...in order to continue a pattern that is characteristic of surrounding neighbourhoods and heritage areas.” Section 8.4 requires new development to be “visually compatible with surrounding neighbourhoods and areas of historic or cultural significance”.

[41] The City’s policies and guidelines specifically applicable to the North Block are complex, detailed, and overlapping. The expert witnesses agreed that the policies in the OP are the most significant as the Act requires conformity with these. The background work that led to the provisions of the OP included the 2004 Urban Design Guidelines for the North Block and the 2007 DH Area Architectural Guidelines, both of which were authored by Mr. Baird. The Parties agreed that not all of the recommendations in these studies were incorporated into the OP. Nevertheless, they do contain relevant guidance. Section 10A.4 of the OP provides that s. 7 of the OP and

“the [DH] 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.” Section 10A.4.11 states that the City “will refer to” the 2007 DH Area Architectural Guidelines Study “in assessing the type of development that is compatible in the sub-areas” of the DH Area.

[42] The OP recognizes the “special status” of the North Block as an area that was “assessed in the context of an urban design study, analyzing the potential for long-term intensification and development.” Both sites are identified as “Major Development Sites”. There is no doubt that the City’s intention for the North Block is to support and encourage redevelopment and intensification.

[43] Section 3.18.22 of the OP provides that the North Block policies are to “guide the area’s transition and gradual intensification.” These policies address building heights, pedestrian connections and arcades, maintenance of waterfront views, parking, the protection and conservation of heritage buildings, site remediation, and so on. Section 10A of the OP, with respect to the DH Area, also guides development on the sites. Section 10A contains general policies, applicable to the DH Area as a whole, and specific policies, applicable to each site. Section 10A.4 states that the DH Area’s cultural heritage components “continue to be a major part of its character and quality of life.” It outlines the goals for cultural heritage and urban design in the DH Area: “to respect and foster the cultural heritage resources... of the [DH] Area and provide guidelines for new private development and public investment that will complement this heritage and enhance the use and enjoyment of the [DH] Area.” The language used in s. 10A indicates that the general goal of these policies is thus to ensure that new development is not “unsympathetic” but is “compatible” with, “enhances”, and “complements” the prevailing heritage character of the DH Area.

[44] Section 10A.5.2 states that Block 5 is “potentially able to accommodate new large scale development that will maintain the character of the district if certain

provisions are maintained.” In addition to s. 3.18.22 policies, Block 5 “proposals are encouraged to” build at street edges, limit vehicle access onto Queen Street, and “explore the potential of creating an additional mid-block walkway and courtyard...” Section 10A.5.4 states that Block 3 “is able to accommodate new large-scale development and maintain the character of the sub-area if the proposal conforms to current zoning heights, angular planes and other provisions”, including s. 3.18.22.

Building Height

[45] The OP in s. 3.18.22 provides that, with respect to building heights for developments in the North Block, s. 10A applies, “including the public meeting requirements”, except that for building heights above 25.5 m, “an urban design study will be required to show that the development would not overshadow surrounding buildings, that it would be compatible with the scale and massing of buildings which provide the built form context of the surrounding areas,” and that it satisfies other OP policies. Section 10A.4.6, applicable to the DH Area generally, provides that “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.” Specifically for the North Block and Environs Sub-area and the Harbour Area, shown on Schedule DH-1, s. 10A.4.6.c provides that “in addition to the policies outlined in s. b above, a maximum height (after employing angular plane setbacks) of 25.5 [m].” Subsection 10A.4.6.b sets a maximum height of 17 m for street wall buildings with a build-to-plane, a minimum height of 8.5 m, and a ground floor height of 4.25 m.

[46] A significant focus of the evidence and submissions, and a key provision for determining this case, is s. 10A.4.7, which provides for an exemption from the height provisions in s. 10A.4.6. It provides:

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.

[47] The Parties and their witnesses strongly disagree about whether the proposed developments meet these exemption criteria. The Foundation submits that the proposed developments meet none of the exemption criteria, either procedural or substantive. Specifically, the Foundation argues that: the urban design study was completed after the MOS were signed and was not presented to the public prior to City's endorsement; the urban design study does not "clearly indicate" to the City that taller buildings meet the compatibility policies of s. 2.7; and the evidence presented to the Tribunal demonstrates that s. 2.7 is not satisfied. The City counters that the final designs for the proposed developments were presented to the public and were supported by an urban design study, and that Council was satisfied that its policies had been met.

[48] The Foundation has not demonstrated that the City failed to fulfil the intent of the process outlined in the OP. Here, the process was complicated because there was a non-decision of Council that was appealed to the Tribunal, followed by confidential settlement negotiations. There is nothing in the evidence presented to the Tribunal to suggest that Council did not have information of sufficient depth and detail to reach an informed decision on whether the final revised proposals meet the OP criteria and should be approved. In any event, a Tribunal hearing is a new hearing and not a review of the process followed by a municipality. As the Member stated in *Brayman v. Kawartha Lakes (City)*, [2004] O.M.B.D. No. 712 ("*Brayman*"), at para. 16, which was cited by the City:

When hearing an appeal on the merits of a municipal decision, the Board's proceedings are *de novo*, meaning that it is like beginning the process anew. In doing so, the Board is invested with substantial powers by the *Planning Act*. There is no obligation, in a hearing *de novo*, to define whether the original decision-making body was procedurally right or wrong: in a sense, the Board becomes a substitute for the original decision-maker, charged with the task of defining what is good and desirable planning under the circumstances.

[49] The Member went on in *Brayman* at para. 17 to quote from an earlier Board decision in which it was stated: "The [jurisprudence] concludes that the municipal procedure, almost regardless of defect, is irrelevant if the matter is to be ultimately decided by the board and an opportunity for a full hearing of all relevant issues is given

therein.” Here the Parties have had a full and fair opportunity to provide evidence and submissions and to test the evidence of the other Parties.

[50] The Parties disagree about the intention of the OP with respect to whether an absolute maximum height, referred to as a “hard stop”, is implied by the exemption in s. 10A.4.7. The Appellant emphasizes that, because there is no express limit in terms of measured height or number of storeys identified, it does not matter how high the proposed developments are, so long as the compatibility criteria are met. The Foundation and some Participants argue that the heights of the proposed developments, at 63 m and 76 m, which are up to three times the permitted 25.5 m, would be at heights never contemplated by the City when it adopted the exemption. Some suggest that only exemptions on the scale of what would constitute a minor variance from 25.5 m should be permitted, and that the proposals fall well outside that scale. The Foundation’s experts, Mr. Downey and Mr. Bray, went further, giving their opinions that, not only are the proposed developments inappropriate because of their height, but *no* towers would be appropriate in downtown Kingston because of the prevailing heritage context. They would effectively treat 25.5 m as a hard stop on height because nothing higher would ever meet the exemption criteria.

[51] Certainly the City could have written a hard stop on height into the OP for the North Block, as it did for the Market Square HCD, but it did not. The specific wording of the exemption permits heights above 25.5 m; thus, there must be circumstances where those criteria can be met. Otherwise, the provision becomes meaningless, which could not have been the intention of the City when it adopted the exemption policy. Thus, the Tribunal cannot accept the interpretation of Mr. Downey and Mr. Bray. But it is also not necessary to determine in the abstract the question of whether there is an absolute height limit implied in the OP. The substantive question in this hearing can be resolved by consideration of the issue of compatibility.

[52] “Compatible” is defined in s. 2.7.1 of the OP to mean the “ability of various land uses, buildings, sites, or urban design treatments to co-exist with one another from 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.” In s. 2.7.1, “adverse effects” expressly include shadowing, loss of privacy, nuisance effects, traffic, environmental damage, overloading of infrastructure, reduction in the ability to enjoy a property, visual intrusion, architectural incompatibility, and impairment of significant views of heritage resources.

[53] The Parties all suggest that the elements of compatibility at issue in this proceeding are primarily “subjective” and that experts can reasonably disagree about the proper interpretation of these elements. The Tribunal acknowledges that there is a degree of subjectivity in the meaning of “intrusion” and “compatibility” and, frankly, in the meaning of “good planning”. Nevertheless, the expert witnesses all made reference to accepted principles within their respective fields that disciplined their conclusions. The Tribunal relies on that evidence, as discussed below.

Adverse effects – visual intrusion, architectural incompatibility, and loss or impairment of significant views of cultural heritage resources

[54] The Parties disagree on whether the proposed developments will result in undue adverse effects. The Foundation emphasizes three types of adverse effects: visual intrusion, architectural incompatibility and impairment of significant heritage views, specifically views of City Hall and views of the skyline. Because of the locations of the sites, proximate to heritage areas within the DH Area of the City, these types of adverse effects are interrelated. The Parties agree that shadowing and other adverse effects listed in the OP are not at issue in this proceeding.

Visual intrusion

[55] Section 2.7.3.i provides that “visual intrusion that disrupts the streetscape, building or cultural heritage resource” is an adverse effect. Thus, in order not to conform with this provision, visual intrusion must be of such a degree that it becomes

disruptive.

[56] The primary focus of the Foundation's evidence was that the proposed developments would result in visual intrusion that disrupts one's experience of the streetscapes and cultural heritage resources of downtown Kingston. Mr. Downey testified that the North Block historically had small lots and two- to three-storey buildings. It was his opinion that, by ignoring this historic context, the development proposals diminish it. His primary concern was with the heights of the towers, rather than the podia. He conceded that the podia reflect the rhythm of Princess Street. However, he stated that the towers are uncharacteristically tall for downtown Kingston and would create visual intrusion that would disrupt the historic and current urban fabric. It was his opinion that the visibility of the towers from Princess Street would diminish that street's historic authenticity. He stated further that he considers an appropriate height for all of downtown Kingston to be between three and six storeys. Citing the work of Danish urbanist Jan Gehl, he noted that heights up to six storeys are within "human scale", in the sense that people relate to, and are most comfortable with, such building heights. When cross-examined, he conceded that Mr. Gehl was only discussing the experience of people at street level within the immediate context of buildings and did not speak to their comfort level if they viewed tall buildings at a distance.

[57] Mr. Baird, for the Foundation, agreed that the OP permits an exemption from the 25.5 m height limit but that the heights proposed far exceed what was contemplated by the exemption. He testified that buildings at the heights proposed would not be compatible with the massing of surrounding buildings, and would create visual intrusion and disrupt the fabric of downtown Kingston and the skyline of the City. Mr. Baird further stated that there would be visual intrusion onto Princess Street and Market Square. He noted that, in his opinion, the most damaging aspect of the buildings' visual intrusion would not be when a person is close to or within a block of the buildings but when they would view them from a distance. He stated that limiting heights would also ensure protection of the silhouette of the City Hall cupola. According to Mr. Baird,

making incremental refinements to the massing of the towers to moderate their dominance, as suggested by Mr. Lahey and Mr. Brandt, would make only a marginal difference to their disruptive visual impact.

[58] It was Mr. Bray's opinion that the proposed developments do not provide an appropriate transition to adjacent neighbourhoods. He further testified that, in his opinion, the proposed developments would interfere with the silhouette of the City Hall cupola. He also stated his view that the tower on Block 5 would create considerable adverse visual impact on Fort Frontenac and visitors' experiences of its historic character.

[59] Mr. Stewart, heritage witness for the City, agreed that the proposed developments have the potential to visually impact the heritage character of the designated buildings on Block 4, which were designated because of their architectural value, rather than associative or contextual values. He concluded that the proposed designs mitigate this potential impact. He considered the podium heights and step backs and the corner elements as respecting the PUC Building and the modulation of the façade of the Block 5 building as providing a transition to the limestone buildings. Mr. Stewart further stated that the design of the podium of Block 5 is of comparable height to the S&R Building and is placed on the block so as not to interfere with perceptions of the historic part of that building. With respect to other designated buildings, on Queen Street and Ontario Street, Mr. Stewart emphasized that the use of grey stone and red brick would mitigate the size of the podia and complement the existing vernacular material palette in the area.

[60] Mr. Stewart stated his opinion that the towers would not adversely impact any protected views. He agreed that they would be visible from City Hall and Market Square but would be seen as background buildings and thereby would not create undue visual intrusion. With respect to views from Princess Street of the tower on Block 5, he stated that the tower would be visible as background, with the building façades on Princess Street experienced as foreground for pedestrians moving along the street, so that the

tower would not detract from that streetscape.

[61] Mr. Lahey, for the Appellant, stated his opinion that greater height is appropriate in the North Block and is permitted by the OP. It was his opinion that the proposed designs are compatible with the surrounding neighbourhoods and that, although they would be the tallest buildings in downtown Kingston, they would not create visual intrusion or diminish the dominance of City Hall or other heritage features of the skyline. In cross-examination, Mr. Lahey agreed that, if only the towers were built, they alone would not be at a human scale, but that the podia and the buildings as a whole will be perceived as being at a human scale. He stated that his opinion is based on his own and others' experience elsewhere, where podia of four to five storeys are commonly used to frame the street and, when stepped back above that height, to improve the experience for pedestrians, and where tower floor plates are small to increase facing distances and reduce the visual and shadowing impacts of tower construction. He agreed that the podia would not entirely mask the towers but that the experience at street level would be of lower-scale buildings with towers behind.

[62] Mr. Brandt, for the Appellant, stated that the towers, particularly the tower on Block 5, would be visible from City Hall and the Market Square HCD but, in his opinion, they would be perceived as background buildings and would not interfere with a person's comprehension or appreciation of the heritage value of City Hall or the Market Square HCD. Similarly, he stated, the towers would be visible from the Lower Princess Street HCA. According to him, the HIS concluded that views of Block 3 would be limited to areas east of Wellington Street where it would be perceived as a background building, while the tower on Block 5 would be visible from many locations within the HCA but only as background. On cross-examination, he disagreed that the towers would be perceived as "looming" over the street or that the Block 5 tower would create visual intrusion on Princess Street or Fort Frontenac.

[63] There is no doubt that the towers would be *visible* from multiple locations in downtown Kingston. To Mr. Downey and Mr. Bray, there seemed to be little difference

between being visible and being disruptive. Mr. Baird went further, asserting that the towers would be disruptive even when not visible because, once viewed, one's perceptual memory of them would linger.

[64] The OP does not define "visual intrusion" or "disruptive". Mr. Baird offered a definition of disruptive as something "unexpected", that is, "something sufficiently different or substantial in the visual scene that you thought you already knew", but he conceded that some unexpected sights can be positive. Ms. Agnew stated that she interprets "visual intrusion" to mean an "unwanted addition". Mr. Tassiopoulos stressed that there would have to be a contrasting element that "I can't get away from". Mr. Brandt focused on the impact on protected heritage resources and whether the new buildings would impose themselves so strongly that they would interfere with the ability to comprehend or appreciate the heritage value of protected resources.

[65] The *Canadian Oxford Dictionary*, 2d Ed. (Oxford University Press, 2004), defines "disrupt" as meaning "to interrupt the flow or continuity of" or "to bring disorder to". Given this ordinary meaning and the wording of the OP, something beyond the towers being simply visible, or remembered, must be present to offend the section. Unexpected but positive sights do not seem to be what was contemplated. The OP uses the words "undue", "adverse", "disruptive" and "intrusion". This language indicates that there must be some negative or unwanted element present in order to offend the provision. At the same time, the OP speaks only of an element that is "disruptive", not "destructive", implying that something jarring or significantly uncharacteristic would suffice.

[66] Mr. Tassiopoulos and Ms. Agnew both testified that the podium element and the landscaping opportunity of the two proposed developments would be a positive visual addition to the streetscape. With respect to the towers, they emphasized the towers' narrow profiles and the potential for a visual framing of the Queen Street corridor as positive visual elements. The Tribunal agrees that there are a number of elements of the proposed developments that would positively affect the streetscape of the North

Block.

[67] The Foundation's argument is that the towers would be so prominent when viewed from Princess Street or Market Square that they would disrupt the streetscape and interfere with the experience pedestrians would have of the significant protected heritage resources of those areas. Mr. Baird and Mr. Brandt both relied on computer models to illustrate the impacts of the massing of the proposed developments. The viewing angle used by each was somewhat different, and somewhat self-serving, with the result that the towers in Mr. Baird's models appeared to "loom" more than those in Mr. Brandt's. There was also some disagreement between the witnesses on whether people look up as they walk along a street and what the ordinary view frame of a pedestrian is. The writings of Mr. Gehl, referred to by Mr. Downey, state that the ordinary angle of vision of a pedestrian without lifting one's head is limited to 50 to 55 degrees above the horizon. While this may be a rule of thumb for a pedestrian's usual view while walking, it does not ring true that a person would not look up if suddenly confronted with an uncharacteristically tall building. Mr. Stewart noted that one's experience of buildings is the foreground, middle ground and background. In addition, while principles of urban design seek to enhance the experience of pedestrians at ground level, the OP does not restrict the consideration of visual impact to one view frame.

[68] Mr. Baird likened downtown Kingston to the built fabric of central Paris. He described how the construction of the dramatically taller Tour Montparnasse in Paris in 1973 led to a height limit on development, which was instrumental in preserving the continuity of the nineteenth-century built form and the positive experience of it. He contrasted Paris with central London, where recent high-rise developments have changed the historic skyline to such an extent that it is no longer dominated by the dome of St. Paul's Cathedral, thus diminishing one's experience. Paris and London are at best limited analogues for Kingston but Mr. Baird stated that his point in discussing them was as a warning about introducing excessive height into a historic urban area. He stated that to approve these high-rise buildings in downtown Kingston would break

up the consistency of the low-rise character of the Kingston CBD and diminish the appreciation of the prevailing built form, and would thereby be disruptive.

[69] Mr. Downey suggested that the presence of towers on the sites would be disruptive because they would diminish the historic authenticity of heritage resources. There is no indication in the OP or the other evidence that simply viewing a contemporary building from a heritage area would be enough to make a new development disruptive. Moreover, the Kingston Culture Plan, adopted by Council in 2010, expresses a desire to find ways to integrate contemporary design with heritage in the City to “sustain cultural innovation and vitality”. It states in part, at p. 77:

In order to sustain cultural innovation and vitality in this context, heritage and urban planning need to be integrated. Stewardship of cultural heritage can extend beyond an advocacy and custodianship, to consider ways the community’s built and landscape heritage can be made to resonate with contemporary architectural design, urban forms, and to shape landscapes that foster a dynamic local culture and that are meaningful to residents and visitors.

...

Introducing new forms and styles into the historical building fabric, if done with respect to the heritage context, can create a dynamic relationship that reinforces the cultural values of the community. There are a number of examples to consider: the new Scottish Parliament building set in the UNESCO World Heritage Site in central Edinburgh, the Museum of Archaeology and History in Old Montreal, or “The Gherkin”, a striking oval office tower that emerges from the skyline of the City of London. While these new buildings may not conform to every taste, they show the possibilities for a historic context to resonate with contemporary architecture.

[70] The Appellant’s and the City’s witnesses presented evidence in order to demonstrate that new development in the form of towers can successfully co-exist with and even enhance heritage buildings, particularly low-rise buildings in the foreground paired with towers that are stepped back above and behind. The witnesses discussed the experience in other Ontario municipalities, including Ottawa, to illustrate sympathetic redevelopments, where towers were constructed in proximity to heritage buildings and did not prove fatal to the conservation of the heritage buildings or diminish appreciation of their heritage attributes. The bulk of this evidence demonstrates that new development *can* successfully co-exist in harmony with heritage. However, the issue

circles back to the question of compatibility within the specific context of the North Block and the DH Area of Kingston.

[71] Of most concern to the Foundation's witnesses are the views to the tower on Block 5, less so the tower on Block 3, because the Block 5 tower would be four storeys taller than the Block 3 tower and would be located adjacent to the Lower Princess Street HCA, within the same block as buildings on Princess Street and less than two blocks away from the Market Square HCD. Mr. Brandt agreed that "distance matters" in tempering one's perception of a tower, that is as being perceived as in the background, yet, given the small block size in the area, the Appellant's witnesses downplayed both the proximity of the Block 5 tower to Princess Street and its height relative to the surrounding area.

[72] For a pedestrian walking along Princess Street at street level, in the immediate foreground would be the low-rise buildings fronting the street, with the towers visible intermittently as one progressed down the street. The evidence supports the position that foreground buildings can mediate the presence of a tower and the Tribunal accepts Mr. Tassiopoulos's opinion that the podia here have been designed to create visual interest up close to distract persons at grade on Queen Street from noticing the towers. However, he also conceded that the first tall building introduced in an area would be more evident. As illustrated in the computer models, there is little doubt that a pedestrian on Princess Street or in the middle distance from other locations would readily perceive the Block 5 tower as a prominent contrasting element, increasing in prominence as one got closer to it. From Market Square and other parts of the CBD, somewhat farther removed, the Block 5 tower would be more persistently visible and the mediating force of the podium would recede. From numerous vantage points, when visible, the Block 5 tower would be perceived as up to 20 storeys, or 65 m, taller than any other building around it, a dramatic change from the prevailing urban fabric, and significantly higher than any building in the surrounding area. As such, this tower would be visually disruptive.

[73] Section 2.7.4 of the OP states that mitigation measures may be used to achieve compatibility. The changes in the proposed building designs from the early versions to the final ones – specifically the addition of continuous podia, the step-backs, the shift in tower location on each site and the smaller tower floor plates – follow accepted principles and are intended to mitigate the dominance of the towers. Kingston does not have tall building guidelines, so the peer reviewers and designers looked to other Ontario municipalities for guidance on this. Although larger than the 750 square metres (“sq m”) used as a guideline in Toronto, the final 790 sq m tower floor plates are not dissimilar to the guidelines used in some smaller municipalities. However, as Mr. Baird cautioned, such guidelines are intended to be used where there are clusters of towers to establish separation distances between them, in order to protect privacy, sunlight access and sky views, and are not necessarily appropriate on their own to mitigate the impact of tall buildings in the context of the North Block and the DH Area where there are no other nearby towers.

[74] The Appellant’s witnesses emphasized that subtle adjustments to the massing and articulation of the towers, together with neutral colours and materials, could be employed to further mitigate their impacts and ensure they are perceived as “background” buildings. This is a matter that would be addressed at the site plan approval stage, not in setting the zoning regulations. Even so, Mr. Baird did not accept that such adjustments would be enough to mitigate the visual impact of the towers and the Appellant’s evidence overall was not convincing that these adjustments would make a material difference in the towers’ visual impact.

[75] Furthermore, the Appellant’s and the City’s witnesses variously referred to both towers as “background” buildings and to the tower on Block 5 as a “gateway landmark” building intended to stand out because of its location. This was confusing as to whether the witnesses expect that the Block 5 tower would blend into the background and have little visual impact or would stand out as a signature architectural building helping to define the North Block and the entrance to the downtown from the north, in which case it would intentionally have significant visual impact. A similar issue arose in *Burfoot*.

There the Tribunal stated, at para. 95: “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.” The Block 5 tower cannot be both a background building and a gateway, “look at me” building, as Mr. Brandt coined it. The Appellant’s witnesses did not satisfy the Tribunal that this apparent contradiction was adequately addressed.

[76] Given all of these factors, the Tribunal finds that the proposed developments would create visual intrusion to the streetscape and the prevailing built context.

Architectural incompatibility

[77] The issue of visual intrusion ties in to the issue of architectural incompatibility. The OP in s. 2.7.3.j identifies “architectural incompatibility in terms of scale, style, massing and colour” as an “adverse effect”. Of concern to the Parties here is the scale and massing of the proposed developments and whether they can be considered to be compatible with the surrounding area. Again, the issue relates primarily to the scale and massing of the two towers. The Appellant stresses that Kingston has survived tall buildings and that tall buildings form part of the context of the DH Area.

[78] Compatibility does not require that scale and massing be the same as, or even similar to, existing buildings, but requires that buildings at different scales and massing be able to “co-exist with one another from 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” (emphasis added).

[79] The concept of “transition” was used in two ways by the Parties and the witnesses. Section 3.18.22 of the OP states that Council’s policy is to encourage the development of lands within the North Block in accordance with the development framework established for the CBD “to guide the area’s transition and gradual intensification.” This suggests a temporal notion of transition, in the sense that the

North Block will gradually be developed and change from its existing uses and densities to new ones framed by the development standards outlined in that provision. The other notion of transition is a physical one. As already noted, s. 2.7.1 of the OP refers to the ability of land uses and buildings to co-exist through application of a number of “means of providing transition” including arrangement, location, methods of buffering and massing. This latter meaning of transition is also a recognized principle of good urban design and land use planning, as several witnesses acknowledged. Thus, under the OP, an important approach to achieving architectural compatibility is to provide distance, buffering or other means of physical transition between potentially incompatible buildings.

[80] The primary approach to transition being used here is the use of a podium. In the Urban Design Report, prepared by Mr. Brandt, under the heading “Transition to Surrounding Context”, it states, at p. 67-8, with emphasis added:

As the subject intensification proposal is the first of its kind applying for approval within the North Block, it is more difficult to evaluate the effectiveness of the proposed development, as it relates to responding to adjacent blocks, which are currently largely fallow or with a scattering of non-urban or isolated small heritage buildings. The proposed developments must balance considerations for what there is of the existing context and for the expected and Council-preferred development that will follow, from future North Block proposals. Both proposed development Blocks respond to a number of different contexts, depending on the orientation, but employ podia as the *primary interface*.

[81] The Tribunal agrees that compatibility and transition should be considered in light of both the existing context and the planned context. The planned context is particularly important here because these developments would be the first major ones in the North Block, which is targeted by the City for intensification. The built context for the sites is entirely low-rise buildings, of between one and five storeys. The Block 3 building would be immediately adjacent to one-storey and 2.5-storey buildings, with one-storey buildings directly across Queen Street from it. The building on Block 5 would be immediately adjacent to two- to four-storey buildings, with one- and two-storey buildings across Queen Street from it. The only building in the surrounding area that is higher than 5 storeys is the recently developed “Anna Lane” condominium at 121 Queen

Street, just outside of the North Block, at nine storeys or 31 m. The tallest buildings within the DH Area are not in the North Block or the immediately surrounding area, but are on or close to the waterfront, south and east of City Hall. These range in height from 10 to 16 storeys and were constructed at various times over several decades.

[82] The “as of right” height under the OP and ZBL is 25.5 m, or approximately eight storeys for a mixed commercial/residential building. This is also the guidance in the 2004 Urban Design Guidelines for the North Block and the 2007 DH Area Architectural Guidelines Study. Of all of the studies done on the North Block and the DH Area, only those anticipating the development of Block 4 proposed building heights above 25.5 m. As approved by Council, the 2014 Block 4 guidelines would preserve the low-rise heritage buildings fronting Queen Street and would permit heights for the northerly portion of Block 4, fronting The Tragically Hip Way, of up to 18 storeys. Ms. Agnew testified that this height increase was adopted because, despite the establishment of guidelines for development of the North Block, “nothing was happening”, in that no development proposals came forward. This led staff to recommend increased height above 25.5 m for Block 4, which is owned by the City, in the range of 10 to 18 storeys in order to attract a private developer. The Report to Council stated:

[a]dditional height is being considered on Block 4 in order to enhance financial feasibility and to achieve a specific list of public benefits. Eighteen storeys was tested in this process, however, the actual height of any buildings will be subject to a detailed negotiation between the developer and the City to determine the appropriate balance among financial feasibility, the public benefits achieved, and the ultimate height of the buildings.

[83] The clear impression given by this Report is that height up to 18 storeys would *include* any bonus agreed to under s. 37.

[84] Development on Block 4 has not proceeded and it is unknown what type or form of development will ultimately occur there. It is not at all certain that the City would approve 18-storey towers on Block 4 but, if it did, Blocks 3 and 5 are situated such that they could be developed to provide a progressive transition in height or horizontal distance between the prevailing low-rise heritage context to the south and west and the

much higher buildings on Block 4. Yet the proposed buildings on Blocks 3 and 5 would be *higher* than those on Block 4 – the Block 3 tower by one storey and the Block 5 tower by five storeys – and thus the opportunity to provide that type of transition would be lost.

[85] The Appellant relies primarily on the podium of each proposed building to provide transition between the existing low-rise built form and the towers. With a 4.5 m high ground floor, each podium would define the street and provide commercial or active amenity space. With respect to overall height, the podium of the Block 3 building would be five storeys, while that of the Block 5 building would be seven storeys. A common tool for determining appropriate building heights and ensuring an adequate transition to surrounding buildings is the “angular plane” calculation. In the Kingston ZBL, the angular plane is defined as “a plane which projects up at a 39 degree angle and is contiguous to the build-to plane” and is measured from 17 m above grade. Both of the podia come within this angular plane, as they step back from the build-to plane above the fourth and fifth storeys respectively.

[86] With respect to the towers, the Urban Design Report outlines the concept adopted:

In order to help ease the perception of the tower height within the pedestrian realm, the proposed podium-tower transition design concept employs a two-storey base set within a recessed area of the streetscape. To further minimize this perception, large entry canopies are used at the apartment entries to focus views downward, rather than upward. Given the character of each tower relative to their podia, the associated transition is considered acceptable as it supports the variation within the podia and somewhat lessens the visual impact of the towers within the immediate context by visually “interlocking” them within their podia.

[87] As this report states, the podia would “somewhat lessen” the impact of the towers within the immediate context. Other techniques have been used to help the transition to the surrounding area. For example, the Block 3 tower has been centred on the block, so that the podium would ease its transition to the west and east, but it would do little to effect a transition to the north or south. The Block 5 tower has been massed toward Ontario Street, and the towers would be set back 5 and 6 m respectively from the build-

to planes of Blocks 3 and 5 on Queen Street. Despite these efforts, rather than a gradual or stepped transition, the increase in height would be abrupt. No one suggested the towers would come close to complying with the angular plane requirement. In effect, the intent of the angular plane was ignored for the tower elements of both buildings.

[88] The evidence as a whole does not satisfy the Tribunal that the techniques employed to minimize the impact of the scale of the proposed developments would provide an adequate transition that would mitigate their impact on the surrounding area. For Block 5 in particular, even with a podium element, a building that would be an additional five storeys above the highest potential planned context, 15 storeys above the general planned context for the DH Area and the North Block, and 19 to 21 storeys above the existing built context cannot be said to be compatible with the surrounding area.

Views of City Hall

[89] The Foundation also raised the issue of the impairment of significant views of cultural heritage resources. Here the focus of the evidence was on City Hall because of its special status as the symbol of the City and as a landmark heritage building. Section 8.7 of the OP protects specific viewpoints and view planes of the cupola of City Hall to ensure that new development “does not obscure or overpower the dome of City Hall”. Section 10A.4.9 provides that views of “City Hall’s cupola as established on Schedule DH-4 must be protected in the approval of new development.” Section 8.7.b further provides that development “will protect the silhouette of City Hall, having particular regard for the protection of the dome from incompatible building heights that would mask the silhouette.”

[90] In the 2004 Urban Design Guidelines for the North Block, Mr. Baird recommended that certain views that were protected in the then-applicable OP be deleted and that additional protected views be added to the OP. In the 2007 DH Area Architectural Guidelines Study, it was recognized that several protected views would be

obscured by allowable building heights and massing if development were to occur. It states: “Allowable building heights described in the [ZBL] make it impractical to maintain many of the designated cross-block views to the City Hall.” However, it was observed that views “from a distance and views from the approaches to City Hall along streets are not as adversely affected by allowable building height.” It was recommended that several new viewpoints be identified and protected in the OP. In the subsequent iteration of the OP, some viewpoints that had been protected were removed and, despite Mr. Baird’s recommendations, additional viewpoints were not included.

[91] Schedule DH-4 in the OP identifies the protected sight lines and view planes from specified viewpoints to the City Hall cupola. These viewpoints include locations at the LaSalle Causeway, the Royal Military College, Point Frederick, Lake Ontario and several locations within the DH Area. The closest viewpoint to the sites is on Ontario Street directly east of Block 5. It was not disputed that the proposed developments do not interfere with any of the sight lines or view planes that are protected in Schedule DH-4.

[92] By contrast, there was significant disagreement over whether the tower on Block 5 would “mask” the silhouette of the dome of City Hall. Mr. Bray testified that a silhouette is to be appreciated only against the sky as background, so that if the dome of City Hall were to be viewed with a taller building behind it from any point, the silhouette would be “masked”. Mr. Brandt disagreed, stating that, because of the distance between the two buildings, one could continue to see the silhouette of the dome from the Ontario and Johnson Street location flagged by Mr. Baird if the Block 5 tower is built. He also observed that there are locations in downtown Kingston where the dome is currently seen with taller buildings behind it.

[93] The Foundation’s witnesses generally overstated the impact of the Block 5 tower with respect to views of the dome. It may be an ideal, but there is nothing in the OP that requires the dome of City Hall to be viewable exclusively against a clear sky from all locations in the DH Area. According to the *Canadian Oxford Dictionary*, the ordinary

meaning of the word “silhouette” is the “dark shadow or outline of a person or thing against a lighter background” and that of the verb “mask” is to “cover” or to “disguise or conceal”. Thus, the OP directs that tall buildings should not conceal the outline of the dome, but that does not mean that viewing the outline of the dome with a building two blocks behind it would necessarily conceal it and thereby constitute a lack of conformity with this OP provision. The Foundation’s evidence in this regard was not convincing. Only a single vantage point was identified as the masked view and the witnesses did not address the evidence of the Appellant’s witnesses that the Block 5 tower would be light in colour and thus act as a lighter background to the outline of the dome.

The DH Area skyline

[94] The Foundation’s witnesses and numerous Participants expressed concern that the towers would predominate in distant views of the downtown skyline, and would thereby detract from the prominence of City Hall (and other protected heritage buildings) as the focal point of the DH Area. It was Mr. Bray’s opinion that the intrusion of the two towers into the historic skyline would represent a fundamental shift in the City’s very identity. Mr. Lahey agreed that the towers would be visible from many locations but disagreed that the towers would “dominate” the skyline. It was his opinion that City Hall is unique, with iconic features, and therefore, for reasons other than height, it would continue to be the dominant focus of the skyline. Mr. Brandt agreed.

[95] The Foundation’s evidence was not convincing that adding the proposed towers to the skyline would undermine the City’s heritage or identity or City Hall’s prominence. Furthermore, the 2007 DH Area Architectural Guidelines Study recommended that the City consider designating the skyline in the DH Area as a cultural landscape under the OHA. The intent of this recommendation was “to ensure that the skyline for the Downtown area remains free of uncharacteristic vertical height.” The City did not implement that recommendation and the historic skyline of downtown Kingston is not separately protected in the OP.

Ground Floor Commercial Space Policy

[96] Two issues on the final Issues List regarding OP conformity were treated as secondary issues. These are the ground floor commercial space and the courtyards policies. The Foundation argues that it is not appropriate to amend the OP to remove the requirement for ground floor commercial space from the sites. Mr. Ramsay testified that the sites are designated for “mandatory” commercial frontage on Schedule DH-3 and that shifting part of the ground floor spaces to residential amenity uses or the municipal gallery would not maintain the intent of the OP.

[97] Section 10A.2.6, which applies to the DH Area, provides that ground floor commercial use is “required along street frontages identified for Mandatory Commercial Frontage on Schedule DH-3. Retail use is preferred on these streets, but commercial activity also includes offices, hospitality uses, services and professional uses.” As Ms. Agnew pointed out, commercial use is mandatory on the ground floor, but the requirement is not that the ground floor be devoted exclusively to commercial use. Here, the entrances to the residential sections of the buildings and active amenity space will be interspersed with retail spaces. Mr. Tassiopoulos noted that the most prominent spaces, at the corners of the major intersections, will be used for retail or the municipal gallery and will work to draw pedestrians to and from Princess Street. All ground floor spaces for both buildings would have a 4.5 m height. The intent of the OP appears to be to create a positive pedestrian realm. Overall, the evidence indicates that this intent would be achieved with the final revised proposals.

Courtyards Policy

[98] The Foundation submits that the Appellant has not provided a proper rationale for removing the sites from the OP policy respecting pedestrian courtyards. The Foundation’s witnesses emphasized the value of pedestrian mid-block connections, which the OP directs should be strengthened.

[99] Section 3.18.22.b of the OP, with respect to the North Block, provides that

development “must strengthen pedestrian access by incorporating interlinking connections through and between the subject blocks, as well as outward from the area, with particular attention to improving connections towards Princess Street...” It further provides: “In particular, a pedestrian connection will be sought to link Queen Street to Princess Street.”

[100] Mr. Touw testified that opportunities for mid-block pedestrian routes and courtyards were “explored”, as is required by the OP, but neither was included in the final submission. He stated that this part of the CBD has small blocks, which makes mid-block connections less critical. He also testified that the OP requires commercial uses along the streetscape and, because of a relatively high commercial vacancy rate in the CBD, he considered it preferable to keep pedestrians on the streets close to storefronts. Ms. Agnew testified that, in her opinion, the Block 5 proposal strengthens the connection between Queen and Princess Streets by providing an improved and continuous pedestrian realm along Ontario, King and Queen Streets, active commercial and amenity spaces at grade, landscaping and a potential patio space on Ontario Street. It was her opinion that the mid-block connection was not needed due to the small size of the blocks. She observed, and Mr. Baird agreed, that the charm of existing courtyards in the CBD, such as that associated with Chez Piggy, a restaurant in a heritage building accessed off of Princess Street with an interior block courtyard, would be difficult to recreate in a new development.

Section 37 agreement and community benefits

[101] The Foundation challenges the s. 37 agreement, by which the Appellant would provide a space in the Block 3 building to be used for a minimum of 10 years as a municipal gallery, as failing to conform with the OP provisions respecting height and density bonuses. One aspect of this challenge is the assertion that the City did not follow the process outlined in s. 9.5.28 of the OP, specifically that the City did not consult with community groups on the proposed benefit as part of the “statutory public consultation process”. The Foundation’s position is that the City did not consult the

community during the only statutory public meeting, held on February 18, 2016, but first raised the issue at the non-statutory public meeting held on August 3, 2017, following Homestead's appeal to the Tribunal. The Foundation and several Participants stated that they consider this process to be unfair.

[102] Despite this concern, and leaving aside without deciding the Appellant's position that this challenge is not a proper issue in this proceeding, the Tribunal agrees with the City that the intent of the OP provision was met, for the following reasons: although the August 2017 public meeting was not technically a statutory public meeting as provided for under the Act, the same statutory notification requirements were met; the notice for the meeting indicated that the City would be seeking community benefits and that "[p]ossible suggestions for community benefits can be provided by the public on August 3rd, 2017 at the Public Meeting"; at the public meeting, community benefits were discussed and members of the public had an opportunity to provide input; the City also provided an opportunity for members of the public to provide written submissions on suggested community benefits. Ms. Agnew's evidence was that the inclusion of a community space was one idea raised at the meeting and that potential benefits were received from Council members and staff, as well as the public. She noted that a gallery space had been identified in the Kingston Culture Plan and was supported by the City's Director of Culture.

[103] The other aspect of the Foundation's and some Participants' challenge to the s. 37 agreement is that they consider a municipal gallery not to be an appropriate community benefit. Mr. Baird also stated that maintaining a gallery space of museum quality would be very expensive for the City, but conceded that museum quality is not necessary for the space to function for its intended use. Mr. Ramsay further suggested in his evidence that there is no nexus between a municipal gallery and the neighbourhood. Ms. Agnew disagreed, testifying that a gallery would be a welcome cultural facility in the downtown, would be physically part of the proposed development and would provide a direct benefit to the neighbourhood and to those experiencing the changes arising from the proposed developments, particularly in light of the artisan

studios and spaces already present on Queen Street. She noted in her evidence that the CBD policies in the OP permit “complementary uses such as arts, cultural, recreational, entertainment, institutional, community or municipal services...” and s. 10A.2.8 identifies “art galleries” as an example of “priority functions” that will be encouraged in the DH Area.

[104] The Participants John Grenville and Matthew Gventer submitted that affordable housing would have been a more appropriate community benefit than a municipal gallery. It was noted that affordable housing had been raised at the public meeting and is identified as one of the “highest priorities” in the City’s draft Community Benefit Guidelines.

[105] Ms. Agnew explained that affordable housing was discussed as a possible benefit “at a high level” but the City concluded that, because the proposed developments would add 400 additional rental units to the City’s supply, the existing affordable housing stock would not be adversely affected and there would be a net positive impact on housing supply.

[106] The Tribunal does not disagree that community benefits other than a municipal gallery might be equally needed. The Tribunal heard that the City has not had a great deal of experience with s. 37 agreements to date and has yet to finalize Community Benefit Guidelines, which will provide useful guidance in future negotiations. In the context of the hearing, the evidence demonstrated that the City’s decision to seek the in-kind provision of a municipal gallery space and a contribution toward the rent was a reasonable one. The Agreement provides that if the space is not provided within a certain time, Homestead will provide \$300,000 to the City. Leaving aside the issue of whether the development imposes adverse effects on neighbouring uses, which is addressed elsewhere in this decision, the benefit under the s. 37 agreement conforms with OP requirements.

[107] The Foundation and some Participants questioned the calculation of the benefit, suggesting the value of the benefit to the City was insufficient. The Agreement provides

that Homestead and the City will enter into a ten-year lease for an area of approximately 241 sq m of “ground floor commercial space” provided in Block 3 and that Homestead will pay the City \$300,000 toward the renting of the space over 10 years. Ms. Agnew testified that the amount was determined by the City’s Director of Real Estate and was based on an average rental for commercial spaces. This evidence was not contradicted.

Summary of findings

[108] In summary, the Tribunal finds that the proposed amendments to the OP and the ZBL that would permit the final revised proposals:

- a. Are consistent with the PPS;
- b. Fail to conform with s. 10A.4.7 of the OP, the policy exempting developments from the maximum height limit of 25.5 m, because they would create undue adverse effects that have not been sufficiently mitigated, specifically visual intrusion and architectural incompatibility; and
- c. Conform with other OP policies.

[109] The Tribunal further finds that the s. 37 Agreement is appropriate and conforms with the OP.

ORDER

[110] The Tribunal orders that the appeals are dismissed.

"Marcia Valiante"

MARCIA VALIANTE
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 Tribunals Ontario - Environment and Land Division
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ATTACHMENT 1 –

List of Participants

Building Kingston's Future Inc. (Samantha King, Vicki Schmolka, Annette Burfoot)
Don Campbell
Christine Cannon
Michael Capon
Mike Cole-Hamilton, Vision for Kingston
Justin Connidis, Sydenham District Association
Mary Farrar, President, Friends of Kingston Inner Harbour
Helen Finley
John Gerretsen
John Grenville
Matthew Gventer
Elizabeth Hanson
Nicole Khan and Kurt Khan
Melody Knott
Donald Mitchell
Rudi Mogl, Laurie Davey Quantick, David Dossett and Virg Allegrini
Michael Purcell and Catherine Purcell
Doug Ritchie, Downtown Kingston BIA
Sandy Sheahan, SPEAKingston
Christine Sypnowich, President, Barriefield Village Association and Chair, Coalition of Kingston Communities
Ron Tasker
James Ward, Co-Chair, Future Kingston