Appendix 3
Additional Readings

Please see the Additional Readings document for more helpful articles and resources to help you prepare for the Professional Examination. Please also refer to the attached summary table which links the articles to the CIP Code of Professional Conduct in greater detail.

- Five Skills for Young Planners – Plan North West, Autumn 2016 (page 2)
- Planning West Spring 2017 – Gifts and other inducements (page 3)
- “Dear Dilemma” excerpts (page 9)
- Ontario Municipal Board Decisions (page 22)
  - Oakville (3 cases) (page 22)
  - Ottawa (page 67)
  - Stoney Creek (page 91)
  - St. Catharines (page 108)
- Journal of the American Planning Association Articles (page 175)
- OPPI’s Standards of Practice (page 213)
- Acknowledgement of Expert’s Duty – Ontario Municipal Board (page 229)
- Rethinking the Public Interest as a Planning Concept – Article by Jill Grant, FCIP, RPP (page 230)
- “Are You Wearing Two Hats?” – Ontario Planning Journal (page 233)
- OPPI Summary of Determination and Decision (page 234)
- CIP Code of Professional Conduct Sections and Alignment of Readings (page 235)
Five Skills for Young Professional Planners

As a young professional working as a planning consultant, I often speak to students about my experiences in the industry. While academic studies provide a solid foundation in planning theory and history, students often ask what skills and competencies are needed to succeed early in their careers and beyond.

Communication
Planners need to be able to articulate their message to a wide range of stakeholders and audiences. An accomplished planner will be fluent in the technical lingo of architects and engineers, but still be able to express their views in plain and accessible language for the broader public. We must be active and patient listeners, in order to truly understand the feedback and input that we seek out from stakeholders. Moreover, we often act as mediators and facilitators between groups with varying interests and potentially conflicting views. Public speaking is also an asset for planners, who serve as advocates for the public good and sound planning practice. Finally, written communication is also key, as writing planning reports, background studies, and development plans are common tasks in the planning profession.

Research and Analysis
The ability to compile, analyze, and synthesize large amounts of information is invaluable to planners. While data is everywhere in today’s digital world, it is a planner’s job to distill it in order to pull out common themes and assess their relevance. Researching growth projections, demographic trends, local context, market conditions, and geography, etc., is crucial for the background studies that lay the foundation for plans. The ability to provide a planning rationale based on best practice, data, relevant information, and facts will help communities achieve their planning goals.

Interdisciplinary Approach
From engineers and landscape architects to city councillors and residents, planners are often the professionals that coordinate between diverse groups, professions and disciplines. Planners should be able to see the “big picture,” which is why they are often looked upon to integrate transportation, sustainability, and design (among others) into land-use planning. Planning is also an iterative practice, where the interdisciplinary exchange of ideas and expertise occurs throughout a project’s life-cycle.

Problem Solving
Planning is about managing change. How can we accommodate density in existing neighbourhoods when residents are in stark opposition? How do we plan for alternative modes of transportation in self-proclaimed “car cities”? These are the types of problems that planners tackle on a daily basis, whether through policy, engagement, or other planning tools. Envisioning alternatives, proposing creative solutions, and applying best practices to the local context are just some of the methods respected planners employ to overcome barriers and constraints.

- Understanding the Planning Framework
Density. Sustainability. Mixed-use development. While these planning concepts are ingrained early in our studies, it often takes time and experience to understand the local planning framework within which to implement them. Know your province’s legal framework for planning, including its planning act and any accompanying regulations. Recognize the difference between development plans, secondary plans, and zoning by-laws. Understand the application and approvals process for variances, conditional uses, rezonings, and subdivisions. Planners are most effective when they understand the implementation tools at their disposal and how these tools work in concert.

To the young planners hoping to gain experience (either on the job or elsewhere): Seek out opportunities for professional development, stay current on local context, get involved in your local affiliate, approach a mentor, and keep an open mind.

Brendan Salakoh, MRP, is a planning consultant with Landscape Planning & Design in Winnipeg, Manitoba.
PROFESSIONAL

gifts and other inducements
The Code of Ethics sets out PIBC’s higher-level expectations of its members in regard to competence and integrity, including maintaining the independence that is required to enable them to exercise professional judgment without bias.”

The last issue of Planning West included, as an aspect of discipline to which a PIBC member consented for breaches of the PIBC Code of Ethics and Professional Conduct, a report on the member’s acceptance, for the member’s personal use, of event tickets from a developer who had regular business dealings, including current applications, with the member’s municipal employer. The member had failed to fully disclose to the employer the possible conflict of interest that the gift created (contrary to 14.5.8 of the Code), and accepted a gift that could, or could appear to, influence or affect planning advice (contrary to 14.5.9). This incident and the ensuing PIBC investigation and discipline of the member offer an opportunity to review some basic aspects of the Code, and some of the issues inherent in the handling of gifts and other types of favours that might become available to members during their professional careers.

The views expressed in this article do not constitute an official interpretation of the Code. They represent the collective personal views of the authors, informed by their work on PIBC’s Professional Practice Review Committee (PPRC), many years of work in the profession, and numerous presentations on professional ethics in academia and at planners’ conferences and seminars.

Why are planners’ ethics important?
One of the differences between members of professions on the one hand, and persons who work in trades and other types of employment on the other, is that members of professions are often governed in their work by codes of professional conduct that protect the public from incompetent or unethical professional practices. Canadian society is willing to allow baristas and house painters to ply their trades with the discipline that discourages poorly made cappuccinos and shoddy paint jobs being provided solely by market forces - there are other coffee bars to patronize, and other painting contractors. When it comes to professions whose members are able to do significant harm to the public or clients, like physicians and engineers, we have decided as a society that market forces aren’t enough. Professional codes of conduct set a standard that protects the public from incompetence and ethical breaches. The existence, and enforcement, of the code of conduct also maintains the overall reputation of members of the
Inducements that could appear to affect planning advice (as distinct from those that actually affect planning advice, which we like to think are extremely rare) come in many guises, and may be highly nuanced.”

What is the Code of Ethics and Professional Conduct?
The Code of Ethics sets out PIBC’s higher-level expectations of its members in regard to competence and integrity, including maintaining the independence that is required to enable them to exercise professional judgment without bias. It is this professional independence that makes the opinions of planners valuable. The Code of Professional Conduct provides greater detail regarding a planner’s particular responsibilities to the public interest, clients and employers, the planning profession and other members of PIBC. Members of the public, clients and employers, and PIBC members may complain to PIBC about breaches of the Code, and PIBC may also initiate investigations regarding breaches of the Code on its own initiative. PIBC members have a duty under the Code to report to PIBC breaches committed by other PIBC members; in that regard we note that the recent case reported in Planning West originated with a complaint by another PIBC member employed in the same organization as the member whose conduct was the subject of the complaint. Failure to report breaches of the Code is, itself, a breach of 14.6.8 of the Code.

On the subject of maintaining professional independence, the Code imposes several requirements, including timely and full disclosure to a client or employer of a possible conflict of interest arising from the member’s private or professional activities, and avoiding any financial or other inducement, that could, or could appear to, influence or affect planning advice. These particular aspects of the Code tend to produce the largest number of inquiries and “hypotheticals” in ethics discussions among planners, and were at the heart of the case that the PPCRC recently dealt with. Some planners seem to have difficulty adhering to these standards, perhaps due to a lack of appreciation of the rationale that lies behind them. In this article we drill down into the murky world of conflicts of interest, particularly those associated with inducements.

“It’s not a conflict of interest if it doesn’t actually affect my advice”
As noted, the Code requires planners to disclose possible conflicts of interest to their clients or employers. A conflict of interest is, generally speaking, a situation where a planner has a personal stake or interest in a matter in which they are also involved professionally. Such situations can be expected to arise from time to time - planners are, after all, usually citizens of the communities in which they work - and are not, in themselves, breaches of the Code. The Code does, however, impose a disclosure obligation; it requires planners to be alive to conflicts of interest when they ex-
ist or come into being, and to disclose them to the party (client or employer) who could initially be harmed if the planner continues to perform their work despite the conflict of interest. Identification and disclosure of the conflict are the first steps, and are the planner's responsibility. The client or employer can then decide whether to allow the planner to continue despite their conflict of interest, or to assign the task to another employee or consultant.

It's worth pausing here to examine the types of harm to which the client or employer is exposed, when making that decision. Suppose a city planning director is making a recommendation on a rezoning application and the applicant is the director's sister. The city manager has an interest in making sure that the council is getting objective advice, but (knowing the director well) might have enough confidence in the director's professionalism and objectivity that the director can be trusted to continue to handle the application despite the conflict of interest. The city manager also has an interest, however, in making sure that members of the public have confidence that the council is making decisions on the basis of unbiased professional advice. Because members of the public likely have less insight into the director's ability to keep personal and professional interests separate, the city manager might well decide that the director should not be allowed to continue; the application will be re-assigned. The point here is that the employer or client gets to make that decision, which they cannot do unless the possible conflict of interest is disclosed to them in the first place.

The same factors are at play in a private sector setting. The client has an interest in ensuring that the contents of their consultant's neighbourhood plan for a greenfield development is not affected by the fact that the consultant's in-laws own the parcel of land next door, and also in ensuring that members of the public have no reason to think that the neighbourhood plan that the client is asking the local government to accept reflects anything other than the consultant's professional judgement, objectively exercised and free of conflicts of interest. Either factor could move the client to withdraw the assignment from the consultant when the possible conflict of interest is disclosed.

There is a good reason that the Code goes on to categorically prohibit the acceptance of a gift or other inducement that could, or could appear to, affect planning advice: it is because the acceptance of a gift inherently creates the possibility that planning advice will be seen to be compromised, and undermines public confidence in the objectivity of planning advice and in the planning profession generally.

The Code does not allow professional conduct standards in relation to gifts to vary with the level of tolerance of clients and employers to this type of exchange; rather it sets an objective standard of intolerance, related to the primary objective of maintaining public confidence in the integrity of the profession. In our experience, some clients and employers of planners allow, under their own policies and codes of conduct, behaviour such as the acceptance of certain kinds of gifts that violates PIBC's Code, a circumstance that certainly complicates the application and enforcement of the Code.

"It's not an inducement if it doesn't work"

We have just noted that the Code categorically rules out the offering and acceptance of inducements that could appear to influence planning advice. (Members should also be
aware that such a transaction can also engage the "municipal corruption" provisions of the Criminal Code, which criminalize both the offering and the acceptance of a bribe to a municipal official, which would include any municipal planner.) This aspect of the Code challenges us to consider carefully what constitutes an inducement, and how to deal with such day-to-day matters as who pays for lunch when the developer meets with the municipal planner to prepare the agenda for the developer's open house on their development proposal. Each of us has observed examples of planners rationalizing the offering and acceptance of gifts that could potentially be perceived, by the public, as inducements to provide favourable planning advice.

Inducements that could appear to affect planning advice (as distinct from those that actually affect planning advice, which we like to think are extremely rare) come in many guises, and may be highly nuanced. The Code specifically mentions prospective employment, acknowledging that a client might attempt to induce a planning consultant, with offers of engagement on future projects, to comment favourably on the client's current development scheme though it fails to comply with basic community planning principles, or a developer might attempt to induce a government planner to make or recommend a favourable decision on the client's application by hinting at lucrative employment prospects in the private sector. Alternatively a developer's or interest group's inducement to a government planner might take the form of an invitation to a golf tournament; tickets to a hockey game; an expenses-paid trip to Portland to see the developer or interest group's last project; or lunch at Burrowing Owl Winery or The Keg. These activities may be framed as educational or relationship-building. We're not suggesting that learning and building relationships are not important, but rather that the activities be carefully managed to avoid the appearance of potentially affecting the planner's professional advice. Usually this requires, at a minimum, that the planner covers their own costs; in a scenario where event tickets are difficult to acquire at any price, it may require that the planner decline the offer completely. Note that the Code prohibits both the offering (by a PIBC member) and the acceptance (by a member) of inducements. A government planner's offer to a consultant planner of an appointment to a government committee or another government consulting contract, could be perceived as capable of influencing the consultant's recommendations in a current consulting assignment, both planners should be avoiding discussions of this type until the current assignment has been completed.

A finely-honed sense of personal integrity seems to blind some planners to their professional obligations in relation to inducements. They're quick to assert that none of the inducements described here, or any other that is conceivable, could possibly affect their professional advice. This wholly subjective take on conflict of interest situations perfectly mirrors that often adopted by elected officials: "How could anyone sincerely think that my advice (or in the case of elected officials, my vote) can be bought for the price of a lunch?" Of course, to pose the question in this way implies that the advice or vote might in fact have a price, which is precisely the problem. It's not the planner's subjective opinion on whether the inducement is capable of affecting their advice that is relevant; it's the opinion of a typical member of the public on whether it is. Unfortunately, in the current social climate a typical member of the public can be deeply cynical as to the integrity of members of the "professional classes", and an inducement of trivial value can quite easily form the basis of a claim that planning advice appears to have been "bought and paid for".

In this regard, we note the information in the discipline report in Planning West that "there was no allegation or evidence of actual influence" with respect to the gift of tickets. A focus on "actual influence" doesn't address the aspect of the Code that deals with the appearance of influence, and even a not-exceptional-cynical member of the public of the local government involved might well consider that one of its planners could be influenced by the gift described in the report. In the same vein, the fact that the member had eventually paid for the tickets in question doesn't address the possibility that they could still be perceived as an inducement; we don't know whether the event in question was otherwise sold out, whether the particular seats in question were available to the general public at any price, or whether a member of the public with a citizen's interest in one of the developer's projects might have been alarmed to see a member of the local government's planning staff sitting with the developer in those seats, regardless of who paid for them. Some government employers have addressed the business community's persistence in supplying gifts by insisting that they be donated to charity or (as in the case of a box of Christmas chocolates) simply shared with the public in the foyer of City Hall.

An ethical minefield?

While we acknowledge that the Code requires some challenging interpretations in the face of the vast array of circumstances in which PIBC members may find themselves, we're convinced that members can't go far wrong by asking themselves such simple questions as 'How would this look if it were splashed across the front page of the local paper?' or "Could anyone do my client/employer any damage with these facts on Twitter?" The ethical principles that the Code has been written to establish and uphold are much simpler than the myriad justifications and prevarications that can potentially be created to get around them, and it is those basic principles that members ought to have foremost in their minds when confronted with ethical choices. The manner in which a planner's employer has "always done things" will be irrelevant when the PPRC investigates a complaint of unethical conduct. Members should also keep in mind that one of the functions of members of the Professional Practice Review Committee is to provide advice to PIBC members on ethical and professional conduct issues. The names of committee members can be found on the PIBC website.
Resolving complaints

Dear Dilemma,

I am a practicing planner in a municipality in Ontario and a Full Member of OPPI. A lot of my time is spent at the office counter and in meetings advising landowners, residents and business owners who want to submit planning applications. Quite often I give them my opinion on their requests including their chances of success. Often I have told people that some of the policies in our municipal planning documents are weak and should be changed or ignored. Over the last six to 12 months my manager has heard of my opinion from the public and councillors, so much so that he has asked me to tone down my concerns. Frankly, I think I am entitled to my professional opinion and have not altered my position significantly.

My employers have now taken the matter more seriously than I expected and have filed a complaint to OPPI’s Discipline Committee. I now have to answer and respond to the complaint so what should I do? I love the profession, enjoy the debates over policy and development applications and believe myself to be a good planner.

Can you advise me what to do? I do not want to lose my status as an RPP.

Alleged Offender

Dear Alleged Offender,

First, let me say, do not panic. The Institute’s Discipline Committee seeks to resolve matters on a fair basis. Sometimes complaints are made to resolve planning opinions and to establish professional practice procedures within a planning group. This may be something to think about in your case.

The Discipline Committee gets its mandate from OPPI’s General By-Law No. 1. The Committee is defined in section 5.1.1.4 and its terms of reference are outlined in section 6, including the Professional Code of Practice (Appendix 1) and Disciplinary Proceedings (Appendix 2). You should make yourself, and any advisers you might use, aware of these documents. The process and procedures for dealing with a complaint are clearly outlined.

If you firmly believe in your position and can propose policies and procedures that would define agreed upon protocols for your situation in the future, then you should be proactive and bring them forward. However, remember that sometimes issues can be resolved by mediation rather than confrontation so continuing to be singularly firm in your opinions may not be helpful.

Finally, here are some steps you could take in dealing and responding to the complaint:

a) Communicate immediately with your professional adviser(s)—lawyer, colleague or union.

b) Take the complaint seriously.

c) Put the facts in writing to your advisers and gather all relevant documents, memos, emails, etc.

d) Consider mediation or without prejudice discussions with Discipline Committee representatives appointed to your case.

e) Establish a timeframe to address and resolve issues on a proactive basis.

f) Prepare a written statement of facts with your adviser’s input and concurrence.

g) Protect your other rights—job security, benefits, etc.—don’t let resolution of the complaint overshadow your day to day job performance.

h) Keep organized and focused on establishing a clear and permanent resolution to the complaint.

—Yours in the planning interest,

Dilemma
advance, and at the outset of the hearing ensure the decision maker is aware so that a proper process can be established to address the issue.

Whether appearing as a witness, calling or cross-examining them the qualification of experts forms an integral part of the process and is worth considering at every hearing.

Eric Gillespie and the other lawyers at his Toronto-based firm practice primarily in the environmental and land use planning area. Readers with suggestions for future EJTO related articles or who wish to contribute their comments are encouraged to contact him at any time. Eric can be reached at egillespie@gillespielaw.ca.

Professional Practice

The heart of the matter

Dear Dilemma,

I am a planning student and on the advice of a mentor I have sat in on a few Ontario Municipal Board hearings. At the hearings I have enjoyed seeing first hand how planning appeals are resolved and how planning evidence is presented and challenged by planning professionals and lawyers. While I find this an enriching experience, there is one thing I can’t seem to get a solid grasp on: How can the planners who are appearing at the board to support or oppose the same application have such divergent definitions of how the application in question is or is not in the public interest?

—Interested in the Public Interest

Dear Interested,

First, glad to hear that you are taking steps to enrich your planning education outside of the classroom. Attending OMB hearings is a great way to see how planning policy is tested and enforced. As for your question, understanding and defining the public interest is at the very heart of what it means to be an RPP. In fact, the first item of OPP’s professional code of practice outlines the “Planner’s Responsibility to the Public Interest.”

There is no dispute that serving the public interest is a primary role of the planner. Balancing and understanding the many voices of the public is a central task of a professional planner and a unique responsibility that planners have over other professionals. What is far more variable is how that public interest can be defined.

Because each planning exercise has its own unique circumstances and context, one’s definition of the public interest can be equally nuanced. In any given instance the public interest may be broadly defined and elements of it weighed and considered in various ways by different planners, all based on the same facts. What one planner may see as an efficient use of resources and public infrastructure another may see as overdevelopment and disrespectful of neighborhood context.

One of the most exciting parts of our profession is the dynamic nature of the public interest and the planner’s role in defining it. Next time you are hearing opposing evidence at the OMB consider the evidence for yourself and determine where you think the public interest lies. It will be good practice.

Best of luck in your studies and your future opportunities to define and serve the public interest.

—Yours in the Public Interest,

Dilemma

Through this regular feature—Dear Dilemma—the Professional Practice and Development Committee explores professional dilemmas with answers based on OPP’s Professional Code of Practice and Standards of Practice. In each feature a new professional quandary is explored—while letters to Dilemma are composed by the committee, the scenarios they describe are true to life. If you have any comments regarding the article or questions you would like answered in this manner in the future please send them to info@ontarioplanners.on.ca.

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participation constituted a “land use planning ground” upon which the board could allow the appeal. The board concluded that the question of sufficiency of public notice and participation was a procedural issue, not a substantive land use planning ground, and that since no apparent land use planning ground was raised, the board could dismiss the appeal without a hearing. Ultimately, the issue of public consultation is but one example of a procedural issue which must be dealt with by the courts.

Eric Gillespie and the other lawyers at his Toronto-based firm practice primarily in the environmental and land use planning area. Erin Wallace is an associate at Gillespie Law. Readers with suggestions for future articles or who wish to contribute their comments are encouraged to contact him at any time. Eric can be reached at egillespie@gillespielaw.ca.

Clarification

Re. OPJ Nov/Dec 2012 column entitled Qualification of expert witnesses

It is important for professional planners to understand the role of expert witnesses before ELTO tribunals, and the process that must be followed in qualifying those witnesses. At the same time, as a point of clarification members of OPPI and other non-lawyers and non-paralegals should generally not be leading a case before an ELTO board. For OPPI members, there are prohibitions against this from the point of view of the OMB, Law Society of Upper Canada and OPPI Standard of Practice.

The OMB Rules of Practice and Procedure stipulate that a "representative" before the OMB is "a person authorized under the Law Society Act, R.S.O. 1990, c. L.8 or its by-laws to represent a person in the proceeding before the board, and this includes legal counsel or the individuals that are authorized to provide legal services." These particular rules are interpreted and enforced by OMB panels themselves, so there may be some slightly different allowances from panel to panel.

From the perspective of the Law Society Act and the Law Society of Upper Canada By-law professional planners in the normal course of carrying out their profession are allowed to provide certain legal services, but not to represent a person in a proceeding before an adjudicative body (such as an ELTO board). However, committees of adjustment are explicitly deemed not to be "proceedings," so here professional planners may represent clients.

The OPPI Standard of Practice for independent professional judgment states that "The Professional Planner in applying independent professional judgment cannot be an advocate of any position other than his or her professional opinion... It is therefore important to distinguish an opinion... from the position of the employer or client even though they may be the same."

BB/EG

Public interest takes precedent

Dear Dilemma,

As a Registered Professional Planner working for a municipality, I recently researched and prepared a report on a complex issue that will likely have a significant land use compatibility impacts. My boss, also an RPP, directed me to revise some of the findings of my research, the recommendations, and the proposed official plan and zoning by-law amendments. As a result, the balance between competing interests has shifted and if supported, will likely result in unmitigated impacts, which in my opinion does not represent good planning.

The boss was not pleased when I indicated that I could not include my RPP credentials beside my signature because I do not agree with the conclusions, but accepted my decision, provided I would still sign the report. The boss will also sign the report. Employers here are pressured to do what they are told. Although I want to stay in the boss’ good books, I am now having misgivings about signing the report at all. Can you give me any guidance in this matter?

Sincerely,

—Stuck Between a Rock and a Hard Place

Dear Stuck,

You are not alone in this dilemma. There are often differences in opinions between planners. In fact, these differences encourage healthy debate. But you are right to be concerned when you are being pressured to change your research, recommendations and opinion. I would suggest that when you are having “misgivings,” review the Professional Code of Practice as it will often help in deciding what you must do in a given situation.

To begin with, you are incorrect to think that it would make any difference if you signed the report but did not cite your RPP. Since it is a report that you have prepared, in your employment as a professional planner and RPP and many people reading it will be aware of that, they will reasonably assume that it reflects your professional opinion. This is different from a situation where you, as a private citizen, write a letter regarding a proposed development in your neighbourhood—in that case, omitting the RPP would allow you to express an explicitly personal opinion.

So the issue comes back to whether you agree with the report, whether it reflects your independent professional opinion—and if it does not, whether you can still sign it.

As you know from the Professional Code of Practice, your primary responsibility is to define and serve the interests of the public, and to provide full, clear and accurate information on planning matters to decision makers. In the case of a conflict, this responsibility must take precedence over other values in the code (such as acknowledging the values held by employer).
Crossing the line

Dear Dilemma,

I am an RPP who recently moved to Ontario to set up my own firm. So of course all my clients are new to me. In several situations, other planners have accused me of breaching the Professional Code of Practice by “supplanting” them. I will describe the situations below, and ask you—what the heck is “supplanting” and am I guilty of it?

A: An individual hired me. Planner Z later contacted me and said that they had always done that individual’s planning work, and had expected to be assigned this project as well.

B: An individual approached me and said that Planner Y had already done some work on the file, but the firm was dissatisfied with that work. I was hired to carry forward the file. Planner Y later contacted me and advised that he had not been paid.

C: I heard that an individual needed to hire a planner, and the individual was considering the well-known local names, such as planner X. I contacted the individual and pointed out that I had unique qualifications to take on the file; they hired me.

D: I heard an individual was talking with Planner W about a particular project; I contacted the individual and pointed out that I had unique qualifications to take on the file; they hired me.

—Confused

Dear Confused,

Section 3.11 of the code states that a member shall “not attempt to supplant another Member once the planner has knowledge that definite steps have been taken toward the other’s employment.” The dictionary defines “supplanting” as “usurping the place of, especially through intrigue or underhanded tactics.”

What you need to know first and foremost is that only the OPPI Discipline Committee can make a finding as to whether the code has been breached in any particular case. However, my comments follow.

In situation A, it appears unlikely you “supplanted” Planner Z. There are many situations where a client feels comfortable with a planner and will use the planner’s services for a number of files. However, for a planner to expect (or hope) to receive work from a client on all files is not relevant. From time-to-time a client will mix it up, try someone new, or perhaps the client feels that the planner is unable to do the new assignment. In any event, I suggest that whenever you are approached by a potential new client, make it your professional protocol to get to know the client, find out what planners the client has used in the past, and if the client has informed them that they intend to seek someone else for the assignment. You can also pre-empt a phone call from your professional colleague by contacting them directly to let them know you have been approached by one of their clients to do work on a new assignment.

In situation C again, it appears unlikely you supplanted the other planner. It appears the individual was on a search for a planner. It is normal for clients to meet with at least two or three planners to get to know them and understand their respective qualifications to undertake an assignment. You were hired, congratulations!

In situation D you may have crossed the line. It would depend on whether the client had taken definite steps to employ the other planner, and on how far you went to convince the client to hire you. For instance, if you were too forceful, you may have breached sections 3.9 and 3.10 of the code (falsely or maliciously injuring the professional reputation, prospects or practice of another member, or offering ill-considered or uninform criticism of the competence, conduct or advice of the member).

Situation B can be tricky. Many professions that prohibit “supplanting” also include specific language about not taking on a file when a fellow professional has an outstanding invoice on the same matter. Our code does not contain such language, but as a matter of professional courtesy and to avoid potential ethics complaints (by the other planner), many planners avoid taking on such files. I suggest in future, you ask the potential new client whether or not the planner that has been working on the file has been paid in full and that all reasonable steps to terminate the relationship have been taken.

Professionally Yours,

—Dilemma

Through this regular feature—Dear Dilemma—the Professional Practice and Development Committee explores professional dilemmas with answers based on OPPI’s Professional Code of Practice and Standards of Practice. In each feature a new professional quandary is explored—while letters to Dilemma are composed by the committee, the scenarios they describe are true to life. If you have any comments regarding the article or questions you would like answered in this manner in the future please send them to info@ontarioplanners.ca.

A consultant’s perspective

By Christian Huggett

I’d like to share three observations I’ve made on the practice of urban design through my experience as a consultant working in planning, urban design and architecture in Toronto and the surrounding municipalities over the past 10 years. These observations are primarily relevant to urban design practice in urban areas, but carry weight on the practice of urban design in general.

Challenging urban sites

Many larger Canadian cities are reaching maturity due to a convergence of a number of issues: The strong Canadian
departments

Professional Practice

In a quandary

Dear Dilemma,

As a planner, I work for a large municipality. I have worked for this organization for a number of years and really enjoy my job and my colleagues. However, a situation has arisen that is causing me great concern and is making me think about looking elsewhere for employment.

Seven months ago a new planner was hired by the organization. We share a cubicle space. This planner was specifically hired to process development applications including the preparation of staff recommendations to council. My manager indicated that the pool of potential applicants had been particularly strong and this planner had stood out based on past experience. Right from the beginning “Tom” (alias) began asking for my help. At first I thought it was because he was new to the organization and was nervous, wanting to make a good impression. However, soon I began to realize that it was more than just nerves and I began to question Tom’s competence in this area of planning.

Two weeks ago Tom confessed to having no development experience and that he had “stretched the truth” to get this job. I was shocked that a professional would do that. I am concerned about Tom making recommendations to council without the appropriate experience. Now I’m not sure what to do. Should I speak to my manager or should I file a complaint with OPPI? I like this person but I feel strongly that planners must uphold the Professional Code of Practice. If I did file a complaint would it be kept confidential? I don’t want anyone to know it was me, especially if this planner was not disciplined. I am starting to think it might be easier for me to find a new job.

—Searching Workopolis

Dear Searching,

You have not said whether “Tom” is a Registered Professional Planner. However, whether he is or not, I would suggest you have a frank discussion with your manager. You may want to approach your manager by indicating that a good percentage of your time has been spent coaching Tom and you are concerned that this seems to go beyond settling into a new community and learning the nuances of its planning policies. Depending on the reception you get from your manager (your manager may have noticed something too), you may be able to get into a discussion about Tom’s competence.

If Tom is an RPP, you also may want to discuss the OPPI Professional Code of Practice, which states “A Member shall not perform work outside of his/her professional competence.” The Independent Professional Judgment Standard of Practice in the code outlines that a professional planner should only render an independent professional opinion if the planner has sufficient information and resources, and appropriate training and experience.

You should consider that through the interview process your manager would have spoken to Tom about his experience and probably checked his references. The hiring was the manager’s decision; he or she may have recognized that this planner would gain sufficient experience and knowledge to do the job.

Be prepared to provide your manager with any evidence you have about Tom: did you document the times he asked for your help and/or opinion? Did anyone else overhear any of these conversations? Do you have copies of his unimpressive drafts of documents (before you helped improve them)? Did Tom explain why his references would be misleading or impossible to check?

It would be good if you and your manager agreed on a course of action. If, however, Tom is an RPP and you feel that he has breached s.3.14 of the Professional Code of Practice you are obligated under s.6.7.3 of the by-law to report him to the OPPI Discipline Committee. The process starts with a written letter of complaint to the Executive Director, who refers the complaint to the Discipline Committee for a confidential preliminary inquiry. However, if the matter proceeds to a hearing, you would be asked to give evidence.

—Yours in the public interest

Dear Dilemma,

I am a Registered Professional Planner working for a municipality that has seen better days. Like many communities in Ontario, it has experienced a significant loss of jobs over the past few years. As a result, the council of this municipality appears to want to forgo good planning for any type of development that might provide jobs.

Developers have recognized this tendency in council’s decisions and are asking council for relief from conditions of approval, such as the provision of sidewalks and setbacks for the preservation of environmental features, even payment for services. At these council meetings, staff members are only permitted to speak if a question is directed to them. The developer may speak and in some cases deliberately misinforms council. Staff does provide a written report but it is difficult, if not impossible, to anticipate all of the matters that might arise in these situations.

Rumour has it that many councillors have close ties to the
development community and yet seldom does a councillor declare a conflict of interest. I believe the public interest is not being served and that I am obligated by our Professional Code of Practice to do something. But what can I do? I'm so frustrated I'm losing sleep over this matter.

—Misinformed

Dear Misinformed,

Here are some thoughts that may help you get some sleep. I believe there are three factors contributing to your frustration:

- Council members' potential collusion with the development industry
- Your inability to fully inform council with accurate and impartial information
- Council's concept of what is in the best public interest is different than yours.

The answer to the first matter is easy. If this concern is based on rumour rather than any solid information, you cannot and should not do anything about it. It would not be professional. Instead, focus on what you might be able to do to effect a change.

In looking at the second matter, consider how you might successfully achieve "improvement" in your council's procedures that would allow your director or a planner the opportunity to speak after the developer. This would ensure there is an opportunity to identify potential issues and make recommendations in situations that may adversely affect the public interest. If your director agrees, perhaps s/he could have a chat with the council chair and clerk about council procedures and your concerns regarding the implications of developer-requested last minute revisions.

Perhaps at the very root of this matter are differences in opinion. As planners, our primary job is to define and serve the interests of the public. A council decision that does not support a recommendation and refutes your professional opinion is difficult: to accept because you understand the probable short- and long-term implications of the decision. However, an RPP's responsibility is to inform council and make recommendations based on comprehensive analysis. Council's responsibility is to make sound decisions weighing all the evidence before it. Assuming you have performed your responsibility to the best of your ability, you need to allow council to do the same. Accept that sometimes you just won't agree.

—Yours in the Public Interest

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a thousand words. If you can show your audience what it is you are talking about through moving pictures you can communicate much more in a short time than if you had put it all down in text. This is important in contemporary culture where competing for people’s focused attention is often difficult.

Ask new questions

To have the potential for wide distribution through social networks, videos need to be short and captivating. To maximize the likelihood of it being passed on to others, the viewer needs to feel connected with something that goes beyond just the quality of the information. To make sure this happens planners need to ask some new questions about what is being created: “Does the content cause an emotional reaction? Is the presentation particularly visually appealing? Is what is being presented being done in a personable way that reduces perceived or expected barriers?” The infographic “How Videos Go Viral” on Mashable (http://mash.to/gfalk2x) provides some insights into how one might create videos that can maximize their impact through social networks.

You can get more than you pay for

Until recently, the cost of production has been an obstacle to using videos as a planning tool. An example illustrating how inexpensive this communication approach can be is the Walkable 101 videos international active transportation expert Dan Burden just created with Martin County Florida (http://vimeo.com/35259036). These videos are short enough to easily share online, are visually interesting compared to typical planning informational materials, and do not have to be expensive to create. This kind of product is essentially within reach of all planners.

It doesn’t all have to be done on a shoestring budget though. Organizations that have the resources may still wish to invest them, such as this example from the City of Toronto: Living Up To It: Tall Buildings, Inviting Change in Downtown Toronto (http://bit.ly/I78EZc). This 7:38-minute video provides an overview of the Tall Buildings Downtown Project. Note that in terms of production value, this example is a Spielberg compared to your family camping videos.

We are seeing significant changes in how people communicate all around us. As professionals we need to respond. The information and examples in this article are intended to raise people’s expectations for positive change in communication strategies for their organizations and their own capacity to adapt and integrate new ways of doing things.

For a short course on making online videos go to http://bit.ly/wM70ao or http://sc.ify0 XLwY.

Robert Voigt MCIP, RPP, specializes in urban design, community health, active transportation, and organizational development. He authors CivicBlogger, a website focused on planning issues. He also wrote and produced OPI’s 25th Anniversary video which can be viewed at www.ontarioplanners.ca/content/planning-library.aspx. Voigt is a member of the Municipal Urban Designers Roundtable and the OPPI Urban Design Working Group. He can be reached at rob@robovoigt.com on Twitter @robovoigt, or Google+ and LinkedIn.

Professional Practice

Under Pressure

Dear Dilemma,

The Planning Director of my small-town Ontario municipality is not a Registered Professional Planner. There are times when, as a registered planner myself and directly under the director’s supervision, I become very frustrated by his willingness to bow to political pressure and recommend approvals for development applications that clearly do not meet the municipality’s official plan policies. He does not always appreciate my “public interest” arguments, or any suggestion he is compromising the sustainability of the community. He seems more interested in winning council members as friends and helping them with their pet projects. What can I do to make him understand professional planning responsibilities?

—A Planner under Pressure

Dear Under Pressure,

Have you taken time to review your municipality’s official plan policies with your director? With all the administrative and political pressures it seems he is under to attract new development, it may be that he is not current with the nature and intent of the policies that should direct land use decisions. Your offering to brief him privately might be the support he needs without his having to admit to not knowing how to use the policies in his decision-making.

After giving him benefit of the doubt regarding his decision-making approach, it is not inappropriate to ask what you can do to make him understand professional planning responsibilities. To the point of your question, the Professional Code of Practice for Registered Professional Planners in Ontario clearly states that members have a primary responsibility to define and serve the interests of the public (2.1.0), which means providing full and accurate information on planning matters, while recognizing a developer’s right to confidentiality, to interested members of the public and to decision-makers, in this instance your director.

While you are obligated to be diligent in pursuing a client’s or an employer’s interests (2.2.1) and acknowledge the values held by the employer or client (2.2.5), the code also requires you to inform the client or, in this instance your employer, in the event of a conflict between his or her values and those in the code (2.2.7).

You didn’t say what project approvals in particular have caused your frustration, but we can assume that the developments your director is recommending may suit the developer’s preference for location or size but are not in the public interest or they require amendments to the zoning by-law or the official plan to be permitted. This could be the case if, say, new big-box retail were proposed for an arterial road that would displace existing smaller-scale retail in the downtown core, and thereby weaken a historic urban centre while creating a significant disadvantage for anyone without a car to get to the more distant shops.

While this hypothetical scenario is all too real in small
towns across the province, still a registered professional planner would be tasked with communicating the values based in the Canadian Institute of Planners Statement of Values associated with balancing the needs of the community with individual interests, fostering public participation and protecting diversity in built environments and distinct places.

Bringing this response back to your dilemma, you are correct in bringing planning matters to your employer's attention where a recommendation to council would, in your professional opinion, diminish the public value of a project or undermine the sustainability of the community.

It seems you have a clear understanding of the conflict between your employer's actions and OPPI's Code of Practice and we encourage you to take it up with the director, documenting your efforts. Be prepared to defend your independent professional judgment.

Yours in the public interest,

—Dilemma

Dear Dilemma,

As an RPP planner working for a local municipality, I am responsible for processing, reporting and making recommendations on an application to rezone a property. Recently, I have been having misgivings about the applicant's planner, also an RPP. Besides being rude and abusive to me, the planner is not meeting necessary timelines for required technical information to allow his client's application to be dealt with expeditiously. He is also providing incomplete, badly researched and poorly rationalized plans and arguments on behalf of his client. As a result, I have no option but to delay the application until the planner can provide complete and useful supporting information, but I feel badly for the applicant, who is not receiving competent professional planning service. Also, I believe such behavior reflects badly on the profession. What should I do?

—Uncertain

Dear Uncertain,

Based on the short description you provided, the applicant's planner may have run afoul of any number of standards in the Professional Code of Practice regarding independent professional judgment. However, the advice you seek concerns how you deal with the situation.

The code requires respect to be shown between fellow institute members. You should consider the planner's behaviour carefully and be convinced that you are showing objectivity and fairness and avoiding ill-considered or uninformed criticism of the competence, conduct or advice of the member. Ensure you are not reacting to a personality or style that you find personally objectionable.

If you are convinced your concerns are well-founded, then you have an obligation to fulfill your responsibilities under the code, which ultimately means reporting to the institute that the member's behaviour is believed to be in breach of the Professional Code of Practice. Before reaching this decision however, other interventions may be appropriate such as consulting with a colleague who also knows the planner in a professional capacity, or engaging in an off-the-record conversation with the planner to voice your concerns.

Yours in the public interest,

—Dilemma

A Clarification

Dear Readers,

We received comments about the March/April 2012 Dilemma article, Community conduct. The reader quite correctly pointed out that given the explicit direction in 2.8 of the Professional Code of Practice, "Community Minded" was required to declare the conflict to her/his employer. Further, and this point is not mandated but consistent with the code's intent, if after disclosure she/he was still required to continue with the file, a further disclosure should be included in any report. This would include a statement that she/he has provided an impartial opinion free of conflict.

We thank this reader for these comments and invite other readers to provide comments on this and other important matters.

—Dilemma

Through this regular feature—Dear Dilemma—the Professional Practice and Development Committee explores professional dilemmas with answers based on OPPI’s Professional Code of Practice and Standards of Practice. In each feature a new professional quandary is explored—while letters to Dilemma are composed by the committee, the scenarios they describe are true to life. If you have any comments regarding the article or questions you would like answered in this manner in the future please send them to Info@ontarioplanners.on.ca.
Professional Practice

Community conduct

Dear Dilemma,

I entered professional planning practice because of my keen interest in community building, protecting the environment and supporting sensible planning decisions and as a municipal planner believe I have contributed positively in this regard.

Outside of my professional work, I also support community building through involvement in a number of community organizations and service clubs. Recently, one of those organizations wanted to improve and promote a lakeside park by constructing a combination gazebo and bandshell.

Therein lies the challenge. To construct it as the organization wishes, it would exceed the maximum height allowed by the zoning by-law. While council supports the general concept, it requires a minor variance. Part of my role in my day-to-day work is to provide recommendations to the committee of adjustment on minor variance applications.

The project is now attracting some controversy. The community organization says it is supporting the broader community by building the facility for community use. Those who do not support the development argue it is too high and blocks views.

I am not directly involved with the committee that is actually delivering the project, but even so, am feeling some subtle and direct pressure from the association that I am involved with and which is the proponent. That pressure is to support the height variance that would allow it to proceed despite some community concerns.

I am trying to balance my professional responsibilities with my involvement in and support for the objectives of the community organization. Do you have any advice?

—Community minded

Dear Community minded,

Your commitment to your community both through your professional work and your affiliation with community groups is commendable, but it certainly can bring about some challenges.

Central to the Professional Code of Practice is the standard of practice for independent professional judgement. It sounds like you are required to provide professional advice to the committee of adjustment on this application.

The professional planner, in applying independent professional judgement, cannot be an advocate of any position other than his or her professional opinion. That opinion must be balanced and fair and result from an evaluation process.

You do not say whether you are operating in a small office where you are the only planner able to provide a professional opinion to guide the committee in its deliberations, or in a larger office where another professional planner could be asked to provide advice if you are feeling pressured.

In either circumstance, the key principles outlined in the Code of Practice are critical: “A planner shall not perform work if there is an actual, apparent or foreseeable conflict of interest....” “zealously guard against conflict of interest or its appearance” and “disclose unavoidable conflicts” or “deny favourable treatment to special interest groups (private and public).”

You are involved with this community organization and I take it that in every sense it is a well-meaning and well established organization with well established credentials for community work. As such, the “remain free of associations and activities that may compromise integrity and damage credibility” would seem not to be relevant. We all have interests outside of our professional careers, and should be free to participate in reputable groups.

To the specifics of your dilemma, if you have the opportunity to step aside and have another professional planner provide the opinion, it may be wise to do so. Declare the potential conflict and avoid any influence on the opinion or decision.

If you must provide the professional planning advice you must do so independent of any influence. The opinion should be the end product of an evaluation process openly and freely entered into with the application of research techniques.

Conducting yourself in such a fashion is critical to the profession, and should be recognized by your employer and the community organization as commendable.

Yours in the public interest,

—Dilemma

The Partners of MacNaughton Hermansen Britton Clarkson Planning Limited (“MHBC”) wish to congratulate Wendy Shearer, Landscape Architect and Managing Director Cultural Heritage, on receiving the following awards:

- The Canadian Association of Heritage Professionals National Award for the Conservation of a Heritage Landscape for the restoration and rehabilitation of the landscape of Hamilton City Hall;
- The Canadian Association of Heritage Professionals National Award of Merit for Heritage Planning for the Long Range Planning Study of Dundurn National Historic Site, Hamilton (project lead - Stevens Burgess Architects);
- The Canadian Association of Heritage Professionals National Award of Merit for Heritage Planning for the Oil Springs Heritage Conservation District Plan, Oil Springs, Lambton County;
- City of Hamilton Urban Design and Architecture Award of Merit for the Restoration of Hamilton City Hall Renovations (project lead - Garwood-Jones and Hanham Architects);
- The Architectural Conservancy of Ontario, The Margaret and Nicholas Hill Cultural Heritage Landscape Award for the Oil Springs Heritage Conservation District Plan, Lambton County;
- MHBC PLANNING URBAN DESIGN & LANDSCAPE ARCHITECTURE

Wendy Shearer was also invested as a Member of the College of Fellows of the Canadian Society of Landscape Architects at the 2011 CSLA Congress. This is the highest honour bestowed by the Society and recognizes Wendy’s outstanding contributions to the profession. Wendy can be reached by phone at 519-576-3650 or at wshearer@mhbcplan.com.

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Advising previous clients

Dear Dilemma,

I was recently hired by one of the local municipalities in our county as manager of planning. Prior to this, for several years, I was a planning consultant acting for a variety of private clients in the county including many within my municipality.

Since joining the municipality, I have continued to advise my private clients outside of the municipality on planning matters. However, my work for those clients within my municipality has been taken over by another consultant.

I thought that this was a fair and balanced approach, but I have recently been warned by another RPP that my activities are perceived to be inappropriate and that a complaint to our Discipline Committee might be filed. What do I do? I feel I can be trusted to be fair to both groups (my clients and my municipality).

Your thoughts,

—Trying To Wear Two Hats “With Trust”

Dear Two Hats,

It appears you may be pushing the “trust me” envelope a little too far. While you believe you are acting with integrity, it seems that other professionals believe you have a conflict. I suggest it would be prudent of you to step back and consider the seriousness of your situation and any factors that may be contributing to it. Saying you are not acting as a consultant within your municipality may simply not be enough to dispel the perception of a conflict of interest, since you still will be seen as acting for both private sector clients and the public sector.

The core of this problem may be the common assumption that private sector planning consultants routinely advocate for an applicant’s proposal rather than the public interest. Given your managerial position you may also be seen as having additional influence at the county level where planning decisions that affect your private clients may be made.

Suspicion is to be expected and the last thing you want is to be painted with the lack of integrity and honesty brush.

Here are some points to consider that might be helpful to resolve your current situation and to avoid future problems:

Members have a primary responsibility to define and serve the public interest. Think back to your past work. Were there any cases where some planners or members of the public opposed your client’s position and came to believe that you were putting your client’s benefit ahead of the public interest?

Have you reviewed the Professional Code of Practice? You may understand the concerns of others better if you consider the policies under sections 2 and 3, “The Planner’s Responsibility to Clients” and “Employers and The Planner’s Responsibility to the Profession and Other Members,” as well as the “Standard of Practice on Conflict of Interest.” In particular, the Standard of Practice discusses situations where the perception of the planner’s ability to exercise the required independent professional judgement is undermined.

Is your continued consulting work known to your employer (municipality)? Are the terms of this work written into your contract? Were there any “dos” and “don’ts” established on how you would practice? Have you discussed conflicts? How will you deal with former clients that are now applicants?

Equally do your existing clients know about your new job at the municipality? Are they aware of possible impacts, such as availability or other restrictions?

When attending meetings, do you make it clear at the onset, which “hat” you are wearing? Do you change hats during or at the end of meetings to discuss other business?

Did you get legal counsel? Potential conflict of interest situations are difficult ones to judge and settle. A conflict is not resolved simply by openly declaring it.

Have you considered meeting with the planner who identified the concern to explain your “two-hat” approach and outline your contractual arrangement at the start. Perhaps speak to other planning consultants.

What is your plan if one of your clients from outside your community decides that he or she now needs to also do business inside your community?

Finally, as time goes on review your position honestly and consider how this approach is working out.

Good luck in your new position and in resolving this issue.

Yours in the public interest,

—Dilemma

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PROFESSIONAL PRACTICE

Dear Dilemma,

I am a practicing planner in a municipality in Ontario and a Full Member of OPPI. I am also a member of a community group called Citizens Saving Trees. The mission of the group is to save trees from developments as much as possible.

Recently I was assigned a residential subdivision project which involves cutting a large number of trees. Citizens Saving Trees expressed serious concerns over the proposal and suggested the developer preserve most of the trees. The developer rejected this suggestion because the trees in question are not endangered species nor of significant sizes, and saving the trees would double the construction costs. The developer has satisfied all applicable provincial and municipal policies regarding tree preservation and environmental conservation. Citizens Saving Trees later staged a major protest and its president publicly said the group was against the development.

As a member of Citizens Saving Trees and a professional planner, I fully support the community group's position and truly believe that there are still opportunities to preserve the trees, therefore the subdivision should not be approved as currently designed. I'm not afraid to tell people what I think since this is my independent, professional opinion, and I was prepared to make that recommendation.

However, after learning about my association with the community group and my recommendation, the management team removed me from the project. I was quite upset and felt that my professional opinion was not respected. True, I am a member of Citizens Saving Trees, but the planning conclusion that I had reached is purely my own opinion. Doesn't a planner have a right to have an opinion on planning-related issues?

---Confused Member

Dear Confused Member,

This is a good question to ask: Doesn't everyone have a right to have an opinion?

To begin with, it is always sensitive when professional planners are associated with community groups, since dealing with community concerns is embedded into our daily work. How can you separate yourself from the community group you are associated with when working on projects affecting the community group's interest? Although you believe your opinion is an independent and professional opinion, it creates a perception that a group member is working on the project. It will compromise the trust between you and your employer, the applicant/developer and general public.

Being a member of Citizens Saving Trees and working on a project that the group has a strong opinion about creates a conflict of interest for you. The Professional Code of Practice states that a Member shall "ensure full disclosure to a client or employer of a possible conflict of interest arising from the Member's private or professional activities, in a timely manner."

In a situation like this, you should first notify your supervisor that you have a potential conflict of interest. She may want to remove you from the project. You should also speak to the developer disclosing your association with Citizens Saving Trees at an early stage and advise him or her that this relationship would not bias your professional opinion. You may also want to discuss the situation with the community group. You will want to consider removing yourself from the project totally so that your integrity as a planning professional is maintained.

To respond to your question: "Yes, a planner certainly has a right to have an opinion on planning-related issues." However, you want to be certain that you do not have a conflict of interest when expressing a professional opinion so that it can be viewed as truly independent.

Yours in the planning interest,

—Dilemma
It is also clear the tribunals will not condone expert opinions by way of ambush. Participants and presenters who anticipate relying on expert opinions should make that abundantly clear during the preliminary stages leading to a hearing. Tribunals are likely to allow participant opinion evidence that is fairly disclosed; but will probably exclude those opinions if they come late in the game.

The prevailing tendency of ELTU decision-makers is to rely on expert evidence to determine matters. Excluding participants and presenters from providing opinions they are qualified to give would handicap their ability to play a substantive role in hearings. Therefore, the Environmental Review Tribunal’s move towards inclusion is a welcome and necessary step in affirming the important roles of presenters and participants in hearings.

With the tribunals’ changing attitude towards inclusion we may soon see cases where some of the most compelling and independent opinions come from participants and participants.

Footnotes
2 Duncan Development Corp. v. London (City), [1999] O.M.B.D. No. 528 at para. 28

Dear Dilemma,

I am an OPPI member working for a conservation authority in Ontario. My role is to review and comment on development applications circulated to local municipalities within our jurisdiction. Another OPPI member has submitted a site plan control application.

I have advised the municipality and Planner X that the application is incomplete since a critical report is missing. Rather than providing the appropriate complete submission, the Planner X wrote to me, municipal officials and the municipal planner that he had “bent over backwards to work with the conservation authority” and that “rewriting the environmental report is excessive and an abuse of the planning process.”

I believe that Planner X has not provided the information that I require to determine whether the provincial planning policy is met. That is, contrary to section 1.2 of the OPPI Professional Code of Practice, he did not “provide full, clear and accurate information on planning matters to decision makers and members of the public.”
I also believe that by writing as he did, he has questioned my professional integrity in the eyes of the municipality. Again, contrary to sections 3.9 and 3.10 of the code, he did not act toward me, a fellow member, “in a spirit of fairness and consideration” and did not “when evaluating the work of another Member, show objectivity and fairness and avoid ill-considered or uninformed criticism of the competence, conduct or advice of the Member.”

Has Planner X breached the Professional Code of Practice in this scenario? Am I obligated to file a formal complaint?

Thanks very much.

—Wondering

Dear Wondering,

Thanks for your letter. As you are aware, the OPPI Professional Code of Practice is clear on Members’ ethical obligations to the public interest, clients, and professional colleagues. From your comments it is unclear whether Planner X did or did not comply with the code.

Section 1.2 is intended to benefit the decision maker and improve the quality of the ultimate planning decision. From what you described, the municipality accepted the application as complete. While this does not mean that Planner X did not breach the code, your dissatisfaction with the submission does not prove otherwise.

With respect to sections 3.9 and 3.10, it is not clear whether Planner X breached the code in his comments about you and the conservation authority. Reasonable disagreement and criticism is allowed between professionals and the quotes you provide regarding your professionalism and competence do not seem to be so excessive and malicious as to constitute a breach of the code.

When it comes to deciding whether another planner may have breached the code, I suggest you have a conversation with the planner in question about the situation. If s/he is not interested in having that conversation, then approach a professional colleague outside of your organization. Often a fellow planner, unaware of the situation, can help provide an objective and unbiased perspective on whether the conduct breached the code, or is serious enough to warrant further action.

If, after such consultation, you believe the code was breached, it is your obligation to report the matter to the OPPI Discipline Committee. Just remember, it is a serious matter for all of the parties involved.

Yours in the public interest,

—Dilemma

Taking planning to new heights

By Robert Voigt, contributing editor

The ability to integrate technology into urban planning practices is generally becoming easier. In part this is because of the number and low cost of options available for new tools, many of which are accessible directly by smartphones. But it is also because of the inspiration gained when we see something used in another setting and recognize its potential to be adapted for professional purposes. It is not uncommon for creative advances and discoveries to happen at the edges of overlapping but not necessarily related fields. In the following example, the inspiration was found in a popular pastime and online TED Talk video.

It started with remote sensing technology for conservation programs and the great improvement it offered for recreational photography using Unmanned Air Vehicles (UAVs). This resulted in fellow planner Nathan Westendorp and I leading a team to develop an in-house drone program. And the rest is history...

Recognizing the opportunity offered by adaptations to new technology that made the flying of drones and remote sensing cost effective, we noted how other professionals were able to expand not only their physical reach, but the depth of information they could gather. Other commercial and public uses of UAVs include collision investigations by police, photography by reporters, videography for real estate sales and analysis of potential yields and crop health for agricultural fields. These applications will likely increase as the quality of remote sensors improve and drone payloads increase.

This looked like an approach that could be used to overcome common challenges planners face when conducting site analysis of large areas. It offered a way of adding another

Log your CPL

Have you been logging your Continuous Professional Learning activities? Routine logging is painless and won’t leave you scrambling at the end of the year. Take a moment and log your CPL Units now.

CPL includes formal or programmed activities such as taking courses and attending conferences and workshops, as well as self-directed activities like reading, mentoring and volunteering. Have questions about CPL? Take a look at the CPL Program Guide.
Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: August 5, 2015
CASE NO(S.): PL140240
PL140317

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

Applicant and Appellant: 822403 Ontario Inc.
Subject: Amendment to Zoning By-law No. 1984-63 – Refusal of application by Town of Oakville
Existing Zoning: R8 SP 625 & R8
Proposed Zoning: C3R Sp 625
Purpose: To permit the development of a 4-storey mixed use development consisting of 37 residential units and retail at grade
Property Address/Description: 174 Lakeshore Road West, 87 and 91 Brookfield Road
Municipality: Town of Oakville
Municipal File No.: Z.1716.1513
OMB Case No.: PL140240
OMB File No.: PL140240
OMB Case Name: 822403 Ontario Inc. v. Oakville (Town)

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

Appellant: 822403 Ontario Inc.
Subject: By-law No. 2014-014
Municipality: Town of Oakville
OMB Case No.: PL140317
OMB File No.: PL140318

Heard: November 17 to 21, 2014, January 19 to 21, 2015 and April 8, 2015 in Oakville, Ontario
APPEARANCES:

Parties  Counsel*/Representative
Town of Oakville  Nancy Smith* and Joanna Wice*
822403 Ontario Inc.  Ira Kagan* and Alexandra DeGasperis (student-at-law)
Anneke Feberwee and William Ardell  Denise Baker*

DECISION DELIVERED BY C. HEFFERON AND INTERIM ORDER OF THE BOARD

BACKGROUND

[1] 822403 Ontario Inc. ("Applicant") has appealed to the Ontario Municipal Board ("Board") the refusal of the Council of the Town of Oakville ("Town") to approve its application to amend Zoning By-law No. 1984-63 ("By-law") respecting lands municipally known as 174 Lakeshore Road West, 91 Brookfield Road and 87 Brookfield Road ("subject lands"). The Applicant proposes to develop and build on the subject lands a three and four-storey, mixed use building comprising 37 condominium residential suites, with approximately 87 underground parking spaces and a maximum of 383 square metres ("sq m") of ground floor retail commercial space. The in force By-law was passed in 1984.

[2] The appeal is opposed both by the Town and by two local residents, Anneke Feberwee and William Ardell who were granted party status.

[3] The Board also recognized approximately 26 other local residents as participants. Seven of those participants submitted witness statements; six of the seven appeared at the hearing and testified *vive voce*.

LOCATION

[4] At the conclusion of the hearing, the Board visited the site (with the consent of
the Parties) in order to view it in the context of the surrounding area. The subject lands are located at the western edge of the Lower Kerr Village District. Policies relating to the Lower Kerr Village District are found in "Livable Oakville", which is the Town's in force Official Plan. Schedule O of Livable Oakville places the Lower Kerr Village District within the designated Central Business District ("CBD") and in a designated growth area. A copy of Livable Oakville was entered to the evidence as Exhibit 2, Tab 4.

[5] The subject lands are approximately 40 metres ("m") x 71 m (or 2,845 sq m in area). Three detached houses currently occupy the subject lands. The houses at 174 Lakeshore Road West and 91 Brookfield Road are occupied. The house at 87 Brookfield Road is boarded up and appears vacant. Frontage of the subject lands is on Lakeshore Road West. Brookfield Road flanks the subject lands on the west. From the corner of Lakeshore Road West and Brookfield Road, the subject lands slope down to the south and east. An Axiomatic Drawing entered to the evidence as Exhibit 8, Tab 1 shows the drop in elevation from the northwest corner of the subject lands to the south end of the gully running north/south through the approximate mid-point of the block between Brookfield Road and Brock Street to the east to be approximately 6.2 m.

[6] Located immediately east of the subject lands are 16 townhouses in three blocks. The townhouse complex is municipally known as 98 Brock Street. Two of the three blocks each contain four two-storey townhouses, which front on Brock Street. The third block, which is west of the first two on lands sloping down toward the property line it shares with the subject lands, comprises eight two-storey townhouses. The gardens at the rear units in this third block of townhouses are accessed via a basement or lower level walk out. The Board was told that the gardens are an average of approximately 2.5 m lower than the grade level of the homes that currently occupy the two northernmost parcels of the subject lands (that is, 174 Lakeshore Road West and 91 Brookfield Road) and because of the slope of the gully toward the south, slightly less than that when measured from grade level at 87 Brookfield Road.

[7] Each of the townhouses has a private integral garage. In addition to the private
internal garages accessed from a private internal road from Brock Street, there are a total of four surface parking spaces for visitors.

[8] An arborist report submitted with the application (Exhibit 2, Tabs 13 and 14) indicates 43 trees on the subject lands, a number of which may have to be removed if the subject lands are redeveloped as proposed. The Board was told that the trees provide a high degree of privacy and protection from overlook for the residents of the third (or lower) block of eight townhouses, which is as noted above the block closest to the east or rear lot line of the subject lands. A book of photos of the amenity spaces and rear yards of the townhouses at 98 Brock Street was entered to the evidence as Exhibit 22.

[9] Most of the single detached homes closer to Lake Ontario (that is, to the south of the subject lands) were built prior to the 1960s. The homes tend to get progressively grander the further south towards Lake Ontario one travels on Brookfield Road. Most of the homes on Brookfield Road sit on lots with frontages estimated to be between 15 m and 18 m. An estimate by one of the participants puts the average gross floor area of these homes in the 200 to 220 sq m range. The homes backing onto the lake from Brookfield Crescent, which is a cul-de-sac running east from Brookfield Road are considerably larger than those on Brookfield Road and sit on lots with greater frontages. Photos of properties in the area, including those on Brookfield Road and Brookfield Crescent, are found in Exhibits 4 and 8.

[10] Directly opposite the subject lands on Brookfield Road are a group of about one dozen modest two-storey row houses, which could have been developed in the mid-to-late 1970s. These are part of a complex of about 60 similar row houses on lands south of Lakeshore Road West between Brookfield Road and Garden Drive to the west. This complex can be accessed from either Brookfield Road or Lakeshore Road West (via Maurice Lane). Between Garden Drive and Dorval Drive to the west is St. Jude’s Cemetery. The cemetery fronts on Lakeshore Road West. The north/south running Dorval Drive, Garden Drive and Maurice Drive all dead end at Lakeshore Road West.
[11] South of the row houses that front on the west side of Brookfield Road are three single family detached homes. Immediately south of these is the entrance to Lakewood Drive. Lakewood Drive is an upscale, well-treed street that meanders west from Brookfield Road and dead ends some distance further west at the cemetery. The large single-family detached homes on this street were developed some time after most of the homes on Brookfield Road.

[12] Directly opposite the subject lands is a large Fortinos supermarket with both enclosed and open parking areas. West of the Fortinos parking lot is a large, extra parking and loading area for a strip of single-storey shops, which fronts on the north/south running Maurice Drive. Just west of that at the northwest corner of Maurice Drive and Lakeshore Road West are the Lakeshore Condominiums — a relatively new four-storey residential condominium building with roof top (fifth floor) amenity space. The Board noted that although facing on the opposite side of Lakeshore Road West, the Lakeshore Condominiums are less than 125 m from the subject lands and should be considered a part of the area.

[13] Several of the participants said that they did not consider the lands on the north side of Lakeshore Road West in this general area to have “the same character” as those on the south side. This could be in part because the use of lands on the north side of Lakeshore Road West between Sixteen Mile Creek (Forsythe Road) and west to Dorval Drive is in the process of changing from older strip commercial, light industrial and multiple unit residential to new uses, whereas a large number (but by no means all) of the properties on the south side of Lakeshore Road West have already been re-developed.

[14] The block east of Brock Street on the south side of Lakeshore Road West is developed with a standalone Harvey’s restaurant anchoring a single-storey strip plaza with about a dozen tenants. Starbucks is one of these tenants. This plaza has double rows of paved parking on both its north and south sides. The north side parking is separated from Lakeshore Road West by a landscaped strip. The two rows of parking
on the south side of the plaza abut a fenced-off cleared strip of land approximately 15 m wide running between Brock Street and about 25 m west of Brant Street. South of this strip of vacant land, between Brock Street and Brant Street are the rear lot lines of the well-maintained single family homes fronting on the north side of Burnet Street.

[15] East of Brant Street on the south side of Lakeshore Road West is a three-storey mixed-use residential and retail complex and a large Beer Store outlet. South of these buildings on Brant Street and Kerr Street as far as Burnet Street are rows of contemporary three-storey townhouses and semi-detached houses.

[16] Along the south side of Lakeshore Road West between approximately Brant Street and Forsythe Road (west of Sixteen Mile Creek) are a number of contemporary-style mixed-use residential and retail commercial buildings. None appears to be taller than three-storeys. Continuing east of Navy Street (on the east side of Sixteen Mile Creek) along both sides of Lakeshore Road West are more two and three-storey mixed-use residential buildings with commercial retail on the ground floor.

[17] Clustered at the corner of Forsythe Road on the north side of Lakeshore Road West are several high-rise mixed-use buildings. With the exception of these structures and the four-storey Lakeshore Condominiums on the northwest corner of Lakeshore Road West and Maurice Drive, there are no buildings greater in height than three-storeys on either side of Lakeshore Road West between Sixteen Mile Creek and Dorval Road.

THE TOWN’S POSITION

[18] The Town submitted that at four-storeys the proposed structure is too tall for its site, situated as it is at the top of a gully. With four-storeys the structure would read from the back gardens of the lower block of townhouses at 98 Brock Street as six-storeys high and would loom unacceptably over the lower block of townhouses. In addition, shadows from the fourth floor of the proposed structure would cause an unacceptable adverse impact on the occupants of several of the lower block of townhouses.
[19] The Town indicated during the hearing that it would however support an application for a residential building with a maximum of three-storeys and 12 m in height, exclusive of mechanical penthouse. This would constitute, it maintained, an acceptable compromise between the By-law standard and what the Applicant has proposed, and would represent an appropriate transition to the neighbourhood to the west and to the townhouses to the east.

[20] The in force zoning on the two northernmost lots of the subject lands is R8 Sp. 625. “R8” is a residential zone. “Sp. 625” is a special provision added to the existing zoning on the site in response to an application for development submitted some 20 years before the current application. That first application, which Council approved, was never acted upon. Under Sp. 625 a maximum of seven, two-storey townhouses (no taller than 9 m) is permitted on the two northerly lots, that is, 174 Lakeshore Road West and 91 Brookfield Road. The southernmost of the three lots, 87 Brookfield Road, is also zoned R8. The R8 zone on this lot, which is not subject to the special provision on the two other lots, permits a multi-unit residential building of three-storeys and 12 m.

[21] When the Town’s new comprehensive Zoning By-law No. 2014-014 (“InZone”) was adopted in 2014, the special provision (now Sp. 349) applied to the proposed new zoning “CBD” for the two northernmost lots. The zoning map (entered to the evidence as Exhibit 2, Tab 7, page 214) indicates that the third lot, 87 Brookfield Road, is also zoned CBD.

THE POSITION OF ANNEKE FEBERWEE

[22] Ms. Foberwee testified that the current proposal will result in unacceptable shadowing on her back garden and will also block sunlight from entering the main living rooms of her townhome in the lower or west block of 98 Brock Street. She suggested that she would not oppose the application if one floor were removed from the proposed four-storey northerly portion to make the entire structure three-storeys (or 12 m) in height, exclusive of the mechanical penthouse and any rooftop amenity area.
THE POSITION OF WILLIAM ARDELL

[23] Mr. Ardell testified that the proposed mixed-use development will adversely impact the existing physical and social character of the neighbourhood. Photos of the neighbourhood homes Mr. Ardell referred to were entered to the evidence. He maintained the proposed four-storey building will, as well, create additional unwelcome traffic congestion on side streets in the immediate area, particularly on Brookfield Road south of the proposed development, on Burnet Street and on Brock Street between Burnet Street and Lakeshore Road West.

[24] Mr. Ardell also expressed concern that the lower block of townhouses at 98 Brock Street will experience unwelcome intrusions on their privacy (as a result of overlook from the proposed four-storey structure) as well as shadowing, which would have an unacceptable adverse impact on the residents of those townhouses. He supported Ms. Feberwee’s recommendation that the entire proposed structure be restricted to three-storeys and 12 m in height.

THE PARTICIPANTS’ POSITION

[25] Mike Stevens, Dawne Rudman, Nolan Machan, Vanessa Mitchell, Mr. R. Chisholm and Lorrie Clark, who had been recognized as participants presented both viva voce and written evidence to the Board. The participants who testified expressed generally the same concerns as Ms. Feberwee and Mr. Ardell.

[26] Three of the participants indicated that they own and occupy units in the lower or west block of the three buildings comprising 98 Brock Street. Several testified that they personally did not consider either the Brock Street townhouses or the subject lands to be part of the CBD growth area as designated in Livable Oakville. The participants, all but one of whom indicated that they have lived in the area at least seven years, testified that they consider the CBD to stop south of Lakeshore Road West at the southeast corner of Lakeshore Road West and Brock Street, where the Harvey’s restaurant is located. They acknowledged however that the CBD continues on the north side of
Lakeshore Road West at least as far as the west side of Maurice Street. As noted above, Schedule C, which is the Kerr Village District Land Use map in Livable Oakville, delineates the boundaries of the CBD.

[27] The participants said they considered the subject lands to be on the edge of the CBD and that in order to allow for appropriate transition to the adjacent residential area, the subject lands should not be developed at the maximum height contemplated in Livable Oakville.

[28] Even though a number of the participants mentioned growing congestion in the area, on consent of the parties, traffic was removed as an issue.

**THE APPLICANT'S POSITION**

[29] The Applicant contended that the proposal for a mixed-use four-storey 37-unit residential structure with up to 383 sq m of ground floor retail conforms to the CBD designation of the subject lands in Livable Oakville and is consistent with Provincial policy. The Applicant also pointed out that the subject lands are within a designated growth area where Town policy encourages redevelopment, urbanization and active street life. It also contended that its proposed four-storey design set well back (14 m) from the east property line would create less shadow and overlook on the lower or west block of the 98 Brock Street townhouses than would a three-storey building constructed to the C3R zoning standard, which is also found in the area.

**MATTER BEFORE THE BOARD**

[30] The Applicant has requested an amendment to the By-law to rezone the subject lands from the residential R8 Sp. 625 and R8 to a site specific zone to allow a residential development of four storeys on the two most northerly lots, reducing to three storeys on the south lot with the possibility of retail uses on the ground floor level facing onto Lakeshore Road West. The Applicant also indicated its intention to create an outdoor amenity space on a portion of the rooftop of the proposed building.
CORE ISSUE

[31] The core issue in these proceedings is whether the subject lands, which are located on the western edge of the Lower Kerr Village District growth area should be developed to four storeys excluding a mechanical penthouse and an (uncovered) roof top amenity area, which the Applicant proposes or to three storeys, which is supported by the Town.

[32] The current proposal (for four storeys stepping down on 87 Brookfield Road to three storeys) is opposed by a significant number of local residents. After lengthy negotiation and review, Oakville Council also refused the application for four storeys. Council instead proposed a three-storey structure for the entire subject lands. Both the four-storey and the three-storey proposals require an amendment to the zoning by-law.

EVIDENCE AND FINDINGS

[33] The Board qualified Dana Anderson, a registered professional planner employed as chief planner of the Town, to provide opinion evidence on land use planning. She appeared under summons initiated by counsel for the Applicant.

[34] Before reviewing the evidence of Ms. Anderson, it is incumbent on the Board to provide a few brief comments regarding the obligations of a municipal planner who testifies under summons before the Ontario Municipal Board. It is a well-established principle, that like any other witness who is qualified to present opinion evidence, a municipal planner who appears under summons has an obligation to provide her evidence in a fair, impartial, objective and unfettered manner on the matters on which she has expertise. To put it bluntly, her evidence is not to be fettered by fear of her employer (municipal council) or by fear of contrary instructions from a person within the municipal hierarchy.

[35] In order for the Board to carry out its function (which is to make decisions which reflect the public interest) the Board must rely on objective and impartial opinion
evidence. That includes the evidence of a municipal planner who may have an opinion on matters at issue in the appeal that are contrary to the view or position of her employer. Many Board decisions have confirmed or emphasized this obligation, as the appearance of a municipal planner who appears under summons is not uncommon.

[36] The Board observed at this hearing, primarily from the vigorous cross-examination of Ms. Anderson by Nancy Smith, counsel for the Town, that this well-established principle was unfortunately overlooked. The Board appreciates the challenge for a municipal planner who testifies under summons. That planner, typically a public servant, once qualified to provide opinion evidence has a duty to this Board to provide fair, impartial, objective and unfettered evidence.

[37] Ms. Anderson began her testimony by explaining the planning instruments that apply to the subject lands. She advised that Livable Oakville (the in force official plan) and the in force By-law (Zoning By-law No.1984-63) are the applicable statutory instruments in this matter. Town Council first adopted Livable Oakville in 2009, but it did not come into force until 2011 when it was approved by the Board. Livable Oakville designates the subject lands as CBD, which permits the lands to be developed with mixed-use buildings. Mixed use can include residential, commercial office and retail. For lands fronting on Lakeshore Road West, Livable Oakville encourages retail at grade level.

[38] As noted earlier, under the in force By-law, which implemented the Town’s former Official Plan (replaced by Livable Oakville), 174 Lakeshore and 91 Brookfield Road, the northerly two lots comprising the subject lands are zoned “R8” and are subject to “Sp.625”, which permits only seven, two-storey townhouses, a maximum of 9 m tall. The third or southerly lot is zoned R8, which permits a three-storey multi-unit residential building up to 12 m.

[39] Ms. Anderson explained that Zoning By-law No. 2014-014 (“InZone”), which implements Livable Oakville, was adopted by the Town in 2014. However, because a
number of Oakville landowners have appealed it in its entirety. InZone is not yet in force. InZone zones the subject lands "H25 CBD Sp. 349". H25 is a holding category; CBD is the applicable zoning; Sp. 349 is a special provision in InZone that is identical in effect to Sp. 625 in the in force By-law. Sp. 349 restricts development on the two northerly parcels of the subject lands to seven, two-storey townhouses, no more than 9 m in height.

[40] Ms. Anderson testified that she and her planning staff consider the Sp. 349 restriction on the two northerly properties in InZone to have been unintended and to have found its way into InZone through either error or oversight on the part of Staff. In her evidence, she explained in some detail that Sp. 349 was added at the very last moment into the draft of InZone ultimately adopted by Council. She said that the subject lands are not only designated CBD in Livable Oakville but are also considered to be part of the Lower Kerr Village District growth area. She testified that it is her professional opinion that Sp. 349 restricting the uses on the two northern parcels of the subject lands to seven, two-storey townhouses does not conform to Livable Oakville, is not consistent with the 2014 Provincial Policy Statement ("PPS") and does not conform to the Growth Plan for the Greater Golden Horseshoe ("Growth Plan").

[41] Ms. Anderson went on to explain that lands zoned CBD, which is a new zoning category introduced with InZone to implement the CBD designation in Livable Oakville, can be developed up to a maximum height of four storeys and 16 m exclusive of the mechanical penthouse (Regulations, s. 8.3.1), except where those lands border a "stable residential area". In the latter case, they can be developed to a maximum height of three storeys and 12 m.

[42] She explained that there is such a stable residential area, which is defined by the Town as an area of low density detached residential homes, immediately south of 87 Brookfield Road. Because it touches the stable residential area to the south, the 87 Brookfield Road portion of the subject lands is restricted by Town policy to a maximum of three storeys (and 12 m).
[43] She pointed out that the lands immediately east of the subject lands are also designated CBD in Livable Oakville. While these lands are currently developed with townhouses, they are not considered part of the stable residential area. The significance of Ms. Anderson’s evidence is that Livable Oakville does not limit the height of the portion of the proposed structure on the two northerly parcels to three-storeys (and 12 m) because it would not border a stable residential area.

[44] Ms. Anderson further advised that the proposal currently before the Board is the second such proposal for the subject lands that the Applicant has submitted. The original (or first) proposal differed significantly from the current proposal. The first proposal included a four-storey, 33-unit residential structure with 400 sq m of ground floor retail on the northern portion of the site plus four, two-storey townhouse units on the southern part of the site. A sketch of the first proposal was entered to the evidence as Exhibit 4, Tab 3. The draft site plan for this first proposal shows that the east wall of the four-storey portion of this proposal was to be set back 6 m from the east property line. Ms. Anderson advised that the east property line of the subject lands is shared with four of the eight townhouse units in the third or lower block of townhouses at 98 Brock Street.

[45] She also advised that the planner in charge of the file for the Town, Paul Demczak, did not request shadow studies with the first application. She explained that a shadow study was however requested (and provided) for the second proposal, that is, the proposal before the Board. Sketches of the current proposal were entered into the evidence as Exhibit 4, Tab 4. At the time of the hearing, Mr. Demczak had ceased to be employed by the Town. He too appeared under subpoena requested by the Applicant.

[46] Mr. Demczak was qualified by the Board to provide opinion evidence on land use planning. He advised that he was the Town planner who prepared the planning report to Council on the subject application. His planning report was entered to the evidence as Exhibit 2, Tab 15B. In his testimony, Mr. Demczak adopted Ms. Anderson’s evidence in its entirety.
[47] The Board qualified Paul Johnson, who was retained by the Applicant, to provide opinion evidence on land use planning.

[48] Using shadow studies submitted to the evidence as Exhibit 4, Tabs 4 and 5, Mr. Johnson spent some time explaining to the Board exactly what he interpreted these studies to mean in the context of the Town’s “development application guidelines: shadow analysis”. He testified that the guidelines addressing shadow require only that the public realm (that is, sidewalks, streets and parks) have at least five hours of sunshine per day. He testified that the shadow studies for the current four-storey proposal show that it easily satisfies this criterion. The “development application guidelines: shadow analysis” was entered into the evidence as Exhibit 2, Tab 8.

[49] Mr. Johnson pointed out that Policy 11.1.9 (h) of Livable Oakville, which speaks to development within stable residential areas provides that any adverse impact on surrounding properties as a result of shadow be “minimized.” Policy 11.1.9 (h) provides that:

Impacts on adjacent properties shall be minimized in relation to grading, drainage, location of service areas, access and circulation, privacy and microclimatic conditions such as shadowing.

[50] He explained that since all development within an urban area will inevitably result in some measure of adverse impact on surrounding properties, the objective of this policy is to ensure that any adverse impact is minimized to the degree that a reasonable person would not deem to be unacceptable and that an appropriate transition to the surrounding area is achieved.

[51] Mr. Johnson took the Board to the shadow studies prepared by John Cowle, the architect retained by the Applicant and entered to the evidence as Exhibit 4, Tabs 5 and 6. He opined that shadow produced by the proposed four-storey structure satisfies the “minimize” criterion provided in s. 11.1.9 (h) of Livable Oakville. He testified that shadow would only fall on any one of the townhouse gardens for a relatively short time during the shoulder months of the year (March and September) and far less, or not at all,
during the summer months when the sun is at its highest point.

[52] The Board qualified David Cuming, a registered professional planner retained by the Town, to give opinion evidence on land use planning. Mr. Cuming pointed to a chart he had prepared based on his interpretation of the shadow study entered to the evidence as Exhibit 4, Tabs 4 and 5. Mr. Cuming’s chart, which was entered to the evidence as Exhibit 25, shows that for approximately eight months of the year, roughly 56% of the back gardens of the third block of townhouses would be completely in shadow during the daylight hours. He testified that a more acceptable figure to his clients would be 33%. This would allow the rooms at the rear of the units to be warmed by sunshine during the winter months.

[53] Mr. Cuming advised that he had also developed criteria establishing what he considered to be an acceptable amount of shadow that could fall on adjacent property as a result of a new building. In cross-examination, he explained that although he has done a considerable amount of consulting work for the Town, he had not submitted these criteria to Council for its consideration.

[54] During his cross-examination of Mr. Cuming, Mr. Kagan, counsel for the Applicant, entered another shadow study for a three-storey structure on both the southern and northernmost parts of the subject lands. After considering submissions from counsel for the Town and counsel for the opposing parties, the Board ruled that this study, which was prepared for the Applicant by Architecture49, could be entered into the evidence as Exhibits 33 and 34. After reviewing them, the Board found that this study supported the evidence already provided by the shadow study submitted with the application.

[55] After careful consideration of the merits of four-storeys (favoured by the Applicant) versus three-storeys (favoured by the Town) the Board accepts Mr. Johnson’s evidence and finds that the proposed four-storey structure stepping back on both its east and south faces, and set back 14 m from the east property line adequately
minimizes the shadow impact on the adjacent townhouses.

[56] Mr. Cuming testified that what was most objectionable about the proposed four-storey building was its mass and height. He maintained the mass and height were not compatible with either the lower block of townhouses at 98 Brock Street or the stable residential area to the south.

[57] He raised the possibility of the proposed four-storey structure’s having an unwelcome overlook on the lower block of townhouses. Mr. Johnson advised the Board that a vegetative barrier along the lot line as well as a 20 m separation distance between the rear wall of the lower block of townhouses and the closest rear wall of the four-storey structure are proposed. In addition, a privacy barrier would also be provided on the proposed roof top amenity area. On this evidence, the Board finds that a separation distance of 20 m precludes unreasonable overlook on the lower block of townhouses.

[58] Mr. Cuming contended that because of the slope of the subject lands and the gully formed between the lots fronting on Brock Street and those fronting on Brookfield Street, the underground parking structure for the proposed development forms an unattractive one-storey (3 m) concrete wall that would cause aesthetic distress to the residents of the townhouses, particularly those living in the third or lower block, when they sit in their back gardens or look out their rear windows.

[59] Mr. Johnson’s evidence was that after landscaping is complete, the parking structure would not protrude more than 1 m above grade at the rear. This point was disputed. However, the Board accepted Mr. Johnson’s evidence and finds that after the proposed site grading the underground garage will not unacceptably offend the views of the residents of the townhouses. The Board would also point out that pursuant to s. 41 of the Planning Act ("Act"), final site grading is determined at the Site Plan Approval phase of the application process. The Site Plan is not before the Board in these proceedings.
[60] The concept plans indicate a ground floor level outdoor retail terrace over a portion of the underground garage adjacent to Lakeshore Road West. Mr. Cuming testified that the proposed terrace, which would be located on a portion of the proposed underground garage extending perhaps 5 m beyond the main parking garage structure, would constitute a nuisance to the residents of the townhouses to the east and should therefore also be eliminated. The proposed terrace and the elevations showing the parking garage are found in Exhibit 4, Tab 4.

[61] Mr. Johnson testified that rather than constituting a nuisance to the residents in the adjacent townhouses, this terrace would with proper controls help to animate Lakeshore Road West, and this would implement both Town and Provincial policy. He suggested that proper controls could be provided in the site-specific zoning proposed for the subject lands or during the site plan approval stage. The controls could specify either landscaping or sound-deadening fencing (or both) on the south and east borders of the terrace. Both Ms. Anderson and Mr. Demczak supported this opinion in their testimony. Mr. Demczak testified that the draft site-specific zoning by-law he had earlier prepared included a reference to this outdoor retail terrace. The site-specific zoning by-law referenced was entered to the evidence as Exhibit 2, Tab 17.

[62] Mr. Cuming pointed to a policy of the Town that requires new development to be compatible with the surrounding area. Policy 6.4.1 of Livable Oakville states that in order to achieve appropriate transition (to the surrounding area) four elements are identified (where applicable): the provision of roads; the provision of landscaping; the provision of spatial separation of land uses; and the provision of compatible built form. Of these elements, the most hotly contested was the last.

[63] Policy 6.5.3 provides that:

New development shall ensure that proposed building heights demonstrate compatibility with adjacent existing development by employing an appropriate transition of height to existing development.

[64] Policy 6.4.2 provides that:
Where proposed building heights exceed the predominant built height of adjacent buildings, the Town may require that new buildings be stepped back, terraced or set back in order to reduce adverse impacts on adjacent properties or the streetscape.

[65] Mr. Johnson explained that the Applicant proposes to use a step back on the upper floor as well as setbacks from both the east lot line shared with the townhouses at 98 Brock Street and the south lot line it shares with 81 Brookfield Road, which this experienced planner testified will ensure an acceptable fit (or, compatibility) with the adjacent properties. The Board accepted this evidence and finds that the proposed step back and setbacks conform to this policy.

[66] Pointing to the four-storey Lakeshore Condominiums on the northwest corner of Lakeshore Road West and Maurice Drive, Mr. Johnson advised the Board that the Lakeshore Condominiums should also be considered to be “adjacent” (nearby) since that structure is located within 125 m of the subject lands, albeit on the north or opposite side of Lakeshore Road West. He advised that none of the opposing parties testified that they considered that structure to be incompatible with the character of its area, rather that they personally did not consider it to be part of “their” area. The Board accepted Mr. Johnson’s evidence and finds that both sides of Lakeshore Road West should be considered as part of the nearby area and that the existing four-storey Lakeshore Condominiums are compatible with the subject area.

[67] Compatibility also came to mean in the hearing that the proposed four-storey structure would not cause unacceptable shadow impact on the lower block of townhouses to the east and would not unacceptably loom over them, given that the proposed structure would sit at the top of the gully and the lower block of townhouses some 2.5 m lower.

[68] On the evidence of Mr. Johnson, the Board finds that the proposed four-storey structure stepping back on the east and south and set back 14 m from the east property line represents an appropriate transition to the townhouses to the east and would be compatible in scale with the surrounding area.
[69] The planners also spoke to the consistency of the current proposal with Provincial policy respecting the more efficient use of land as well as Provincial policy on the development of more compact, pedestrian-oriented urban areas that make more efficient use of existing infrastructure. Mr. Johnson explained that the Lower Kerr Village District area is rapidly urbanizing and intensifying. He advised that intensification represents a cornerstone of Provincial policy and is encouraged by Provincial, regional and local policy. All of the planners who testified at the subject hearing agreed, however, that intensification per se was not at issue in these proceedings, and that the Town is on track to meeting its Provincial and regional obligations in that respect.

[70] The planners did not dispute that the proposal generally conforms to the policies set down in the Region of Halton Official Plan (and affirmed in Livable Oakville) particularly those policies encouraging more compact, pedestrian-oriented development in the urban areas. The Board concurs.

[71] Livable Oakville envisions up to four storeys in this part of the Lower Kerr Village District growth area if four storeys are found to represent good planning and the regulations in s. 8.3.1 of InZone provide standards for the implementation of this vision. The Board finds on the evidence that the proposed four-storey structure (with a 14 m setback from the rear lot line) will not cause unreasonable impact on the residents of the lower bank of townhouses or on the stable residential area to the south, and in this respect represents good planning.

[72] The four-storey proposal constitutes, in the Board's view, reasonable intensification without any of the unacceptable adverse impacts that can result from overbuilding. In sum, the Board finds that the subject four storey proposal is compatible in scale with and implements an acceptable transition to the townhouses to the east and to the stable residential area to the south. On the weight of the evidence, the Board finds that the four-storey proposal constitutes good planning.
SECTION 2.1 OF THE PLANNING ACT

[73] While s. 2.1 of the Act requires the Board to have regard to the decision of the Municipal Council and to any supporting material that Council would have heard, the Act provides that when arriving at its own decision the Board is not in any way fettered by the decision of Council.

[74] Ms. Smith entered to the evidence as Exhibit 31 a near two-hour video of the February 2014 meeting at which Town Council heard presentations from Denise Baker, counsel for Ms. Feberwee and Mr. Ardell, as well as from Mr. Johnson, the land use planner retained by the Applicant. After considering these submissions, Town Council voted in favour of a Motion put forward by Councillor Cathy Duddek to refuse the application.

[75] It was clear from the video that Council had given this matter a great deal of thought over a considerable period of time and, as well, had put forward a compromise proposal before it made its decision to deny the application. Mr. Johnson responded (respectfully, in the Board’s view) in the negative to the Mayor’s query as to whether the Applicant would consider reducing the height of the entire structure to three storeys.

[76] After receiving and considering the recommendation of its chief planner, Ms. Anderson, to approve the Applicant’s four-storey proposal, Council exercised its discretion to come to its own decision on this matter and refused the application.

[77] It must be kept in mind that land use control in Ontario operates as a policy-driven system that puts a priority on predictability. All land use decisions in Ontario made by a planning authority, including both a Municipal Council and this Board, are required to have regard for the Provincial interest as provided in s. 2.0 of the Act. All land use decisions must also be consistent with Provincial policy as provided in the PPS and conform to the Growth Plan. Consistency with the PPS and conformance to the Growth Plan does not mean with any single given policy but with these plans considered as a whole. The question is not whether a phrase can be found in one of
these documents that supports a particular position, but rather what constitutes Provincial policy or the matter.

[78]  It was clear from the February 2014 video that Council favoured a three-storey structure on all three lots of the subject lands. However, Livable Oakville and the adopted, but not yet in force InZone, both of which represent Council's current thinking on growth and development provide for a four-storey structure if it represents good planning. The four-storey proposal had the full support of not only the former area planner, Mr. Demczak, but also that of the chief planner, Ms. Anderson.

[79]  Once again, the Board would like to point out that as a professional planner, Ms. Anderson has a duty to this Board, to her profession, and to the broader community to give her honest and impartial professional opinion when prompted rather than a view or opinion preferred by her employer. In this Panel's opinion, she lived up to this duty and obligation in these proceedings. The Board simply could not function if expert witnesses were to disregard their professional obligations. For its part, the Board has a duty and an obligation to base its decision on both the impartial fact-based evidence it receives, as well as on the principles of good planning.

[80]  After careful consideration of the testimony of the three planners who testified in favour of the current proposal and the planner who testified in opposition, as well as of the testimony of the participants (who opposed the current proposal but not the redevelopment of the subject lands) and of the deliberations and decision of Council on this application, the Board finds valid land use planning grounds on which to allow the appeal.

AUTHORITIES

[81]  Counsel submitted jurisprudence in the form of a number of cases they considered to have application to the matters at issue in these proceedings. After careful consideration of these cases, the Board finds that overwhelmingly they re-affirm the Board's obligation and duty to come to an impartial decision based on the evidence
presented and the principles of good planning, unfettered by inappropriate outside influence. These decisions also reinforce the notion that it is incumbent on the Board to consider the area context in coming to its decision. This Panel did that.

CONCLUSION

[82] The Board is aware that to date, all of the development fronting on the south side of Lakeshore Road West has been three-storeys in height or less. The Board did not hear any evidence that the official plan in force when these mixed-use buildings were developed actually supported anything higher than three-storeys. However, uncontradicted evidence was given that the currently in force official plan, Livable Oakville, which represents current Council policy, supports the development of mixed-use buildings up to four-storeys in height on lands designated CBD, which includes the subject lands, if it represents good planning.

[83] This Board heard evidence from Mr. Cuming, the land use planner retained by the Town, in favour of the Town’s proposal to reduce the height of the portion of the structure on the two northern parcels from four storeys to three. Apprehension was raised that unacceptable adverse impact on both the townhouses to the east and on the wider community south of Lakeshore Road West between Brock Street and Brookfield Road would result if the new building were allowed to have more than three storeys. The Board heard no fact-based evidence in support of these apprehensions. On the other hand, the Board heard (and accepted) evidence-based testimony in support of the opposite view, which is that the proposed four-storey structure stepped back on the upper levels where it overlooks the lower level of the 98 Brock Street townhouses, is compatible with and represents an appropriate transition to those townhouses. The Board also heard and accepted the evidence of Mr. Johnson and others that the proposed step backs and setbacks from the nearest lot line of the stable residential area to the south represents an appropriate transition to that area. The Board accepted the evidence of three professional planners that the four-storey proposal constitutes good planning.
[84] Mr. Cuming expressed apprehension that there could be adverse impact from noise created by future residents or future restaurant patrons using an outdoor terrace on the Lakeshore Road frontage of the proposed new building, but he did not give any fact-based evidence. Again, the Board heard only unsubstantiated apprehension that the peace and tranquility the residents of the townhouses currently enjoy would disappear if people were allowed access to a terrace to eat and drink al fresco. The Board accepted the evidence of three professional planners that the proposed outdoor terrace also constitutes good planning.

[85] The subject lands are located on a main thoroughfare in the heart of a fast-growing, rapidly urbanizing and highly desirable lakefront community on the outer fringe of Toronto, a city that the February 2015 edition of the Economist magazine found to be “the most liveable city” in the world. These lands play an important role in the Greater Toronto Area. In the Board’s view, it makes good land use planning sense that they should be developed according to the land use planning policies developed by Oakville Council itself (and subsequently approved by the Board) to be consistent with Provincial policy.

[86] Mr. Kagan indicated in his closing submission (Tab 1, Paragraph 6) that he is prepared to work with the Town’s legal counsel, Ms. Smith and with Ms. Baker to draft a site-specific amendment to the By-law to implement the Board’s Interim Order. The Board would encourage counsel to accept this offer.

INTERIM ORDER

[87] The Board orders that the appeal is allowed and Zoning By-law No. 1984-63, which is the in-force Zoning By-law at the time this decision was issued, shall be amended substantially in accordance with the site-specific zoning by-law to be drafted to implement this decision.

[88] The Board also orders that InZone (Zoning By-law No. 2014-14), which is the adopted but not in-force Zoning By-law at the time this decision was issued, shall also
be amended substantially in accordance with the zoning by-law to be drafted specifically to implement this decision.

[89] The Board further directs the Parties to draft a zoning by-law specifically to implement this Decision and Interim Order, and which shall be filed with this Board for its consideration within three months of the date of issue of this decision.

"C. Hefferon"

C. HEFFERON
MEMBER
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: GWL Realty Advisors Inc.
Subject: Request to amend the Official Plan - Failure of the Town of Oakville to adopt the requested amendment
Existing Designation: Region of Halton OP: "Urban Area"
Oakville OP - "High Density Residential"
Proposed Designated: Site specific – To be determined
Purpose: To permit development of the vacant portion of the subject site for a four storey apartment building containing 27 residential units and to increase the density of the site

Property Address/Description: 2220 Marine Drive
Municipality: Town of Oakville
Approval Authority File No.: OPA 1727.04
OMB Case No.: PL171222
OMB File No.: PL171222
OMB Case Name: GWL Realty Advisors Inc. v. Oakville (Town)

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

Applicant and Appellant: GWL Realty Advisors Inc.
Subject: Application to amend Zoning By-law No. 2014 - 014 - Refusal or neglect of the Town of Oakville to make a decision
Existing Zoning: RH - 82
Proposed Zoning: Site Specific - To be determined
Purpose: To permit development of the vacant portion of the subject site for a four storey apartment building containing 27 residential units and to
increase the density of the site

Property Address/Description: 2220 Marine Drive
Municipality: Town of Oakville
Municipality File No.: Z.1727.04
OMB Case No.: PL171222
OMB File No.: PL171223

Heard: June 10-13 and 19, 2019 in Oakville, Ontario

APPEARANCES:

Parties
1213763 Ontario Inc. and 1319399 Ontario Inc.

Counsel
Adrian Frank
Denise Baker
Jennifer Huctwith

DECISION OF THE TRIBUNAL DELIVERED BY GERALD S. SWINKIN

INTRODUCTION

[1] 1213763 Ontario Inc. and 1319399 Ontario Inc. (the “Appellants”) filed Official Plan Amendment (“OPA”) and Zoning By-law Amendment (“ZBA”) applications to facilitate development of the vacant portion of 2220 Marine Drive (“Subject Site”) with a four-storey apartment building containing 27 units. The Appellants have appealed to the Tribunal as the Town of Oakville (“Town”) has refused or neglected to make a decision on these proposed instruments.

The Property

[2] The Appellants are the owners of 2220 Marine Drive (the “Property”), in the Town of Oakville (the “Town”). The Property is a 0.74-hectare parcel of land having approximately 61 metres (“m”) of frontage on the south side of Marine Drive, just east of East Street. It is improved with a 19-storey rental apartment building.
The existing rental apartment building accommodates 149 dwelling units and has a residential floor area of 4,704 square metres. Vehicle parking is provided both in an underground parking facility and by surface parking to a total of 204 parking spaces.

The Property abuts the Waterfront Heritage Trail, which lies to its south, and to the south of that is Lake Ontario. The rear yard of the Property is attractively landscaped, has sitting areas, barbecue facilities and a dog run. The front yard of the Property, apart from the portion which accommodates surface parking, is a very large grassed lawn area with a medallion flower bed and several mature trees close to the front lot line. The actual depth of the front yard is as mandated by the site-specific zoning exception, 51.5 m.

The Neighbourhood

The properties on the north and south sides of Marine Drive, as it extends from East Street over to Southhaven Place, are designated on Schedule F, South West Land Use Plan, under the Town’s Official Plan, which plan is entitled “Livable Oakville” (the “OP”) as High Density Residential, save for the parcel immediately to the west of the Property, which is designated Medium Density Residential.

That immediately abutting property to the west, 2222-2228 Marine Drive, is a three-storey townhouse development consisting of 48 dwelling units. Further to the west is the Bronte Village Growth Area.

To the immediate east of the Property is the Ennisclare development, 2170 and 2180 Marine Drive, consisting of two 22 storey apartment buildings. To the east of the Ennisclare development is a townhouse development on Southhaven Place.

On the north side of Marine Drive in the stretch from East Street is 2263 Marine Drive, a 17-storey apartment building, 2220 Lakeshore Road West (so addressed as it is a through lot which fronts on Lakeshore Road West but fully extends through to Marine Drive), a seniors residence consisting of two apartment buildings of 9 and 12 storeys, and 2175 and 2185 Marine Drive, a complex of two apartment buildings of 15 storeys in height.
[9] The development in this immediate area was predominantly constructed in the 1960s, with the most recent being constructed in the 1980s. The buildings have variable setbacks from the street, which range from 7.2 m for the townhouses to the west to 10.27 m to 25.9 m for the apartment buildings in this stretch of Marine Drive.

[10] Marine Drive is identified in the OP as a minor collector road and is constructed as a two-lane section in this area. It has a curve northward in front of the Property, with the effect that the Property’s frontage is not a straight line but lies on an arc.

[11] Marine Drive has sidewalks on both sides of the street. Based upon the evidence of the Appellants’ transportation consultant, the street has low volumes of traffic, with nearby intersections operating at Level of Service “A” in both peak periods.

[12] In terms of public transit, there is nearby service provided by Oakville Transit, with routes on Third Line and on Lakeshore Road West.

The Development Proposal

[13] The Appellants, with the advice of consultants, came to the view that the Property has intensification potential. In an attempt to seize that potential, they proposed the introduction of a further apartment building in the present front yard of the Property. The proposed building would be four storeys in height. Originally conceived to accommodate 30 dwelling units, the proposal was revised to now yield 27 units. The intended mix is 25 two-bedroom units and 2 three-bedroom units.

[14] The proposed building would function as a rental apartment building, each unit being two storeys in height. There would be a central corridor and elevator access to the underground parking garage as well as to the third floor to gain access to the upper units. The grade level units would have direct access to the outside and would have a patio area immediately outside the entry door. The upper level units would have access to individual rooftop terraces.

[15] The new building would displace some of the current surface parking area. By way of reworking the surface parking and extension of the underground parking garage, on-site parking in the amount of 220 spaces would be provided, of which 195 relate to
resident parking and 25 for visitor purposes. This level of parking supply was generated based upon a synthesis of observed present demand and current zoning parking rates. It works out to supply at the rates of 1.1 resident space per dwelling unit and 0.14 spaces per dwelling unit for visitor purposes. Based on the evidence of the Appellants’ transportation consultant, the proposed approach to parking supply is satisfactory to the Town’s transportation planning staff. The Tribunal heard no contrary evidence on this particular issue.

[16] The design intent is to essentially leave the developed portion of the Property fully intact; that is, the area accommodating the existing 19-storey tower and the developed rear yard, and to integrate the proposed apartment building into the current front yard so as to “fit”. The driveway to the Property would continue to function as the driveway for all purposes.

[17] A pedestrian walkway is proposed to serve the new development by way of running along the east, south and west limits of the new building area. Although the mature trees now located at the front of the Property will likely be removed, the intention is that landscaping would be placed along the Marine Drive frontage, the details of which would be determined at the time of site plan review.

[18] As the new building is also proposed as rental, the Tribunal understood that the Property would function under common property management and that the general site amenities, primarily in the rear yard, would be available to the occupants of the new building.

The Planning Evidence

[19] The Appellants called their planning evidence through the consulting land use planner retained by the Appellants, Dana Anderson. Ms. Anderson has 29 years of planning experience, currently as a partner at MacNaughton Hermsen Britton Clarkson Planning Limited and previous to that, for a period of approximately seven years, as the Director of Planning Services for the Town.

[20] The Town called its planning evidence through the current Town Director of Planning Services, Mark Simeoni, and through a retained planning consultant, Martin
Rendl. Mr. Simeoni has a planning career which spans approximately 32 years, primarily in the public sector, the last four of which have been as Director of Planning Services at the Town. Mr. Rendl has a planning career which spans approximately 42 years, having been a mix of public and private service.

[21] The level of experience of these witnesses provided the Tribunal with seasoned and tempered views of the issues and the Tribunal is grateful for the clarity, candor and thoughtfulness with which these witnesses delivered their testimony.

**Provincial Planning Policy**

[22] All of the planning witnesses recognized the prevailing planning hierarchy in the sense that there are Provincial planning policy documents which govern the exercise of local planning authority. The two primary documents in this regard, and as it concerns this municipality and this site, are the Provincial Policy Statement, 2014 (the “PPS”) and the Growth Plan for the Greater Golden Horseshoe (the “Growth Plan”). It must be noted that when their witness statements were created, it was the 2017 version of the Growth Plan which was then the governing document. As of May 16, 2019, that version was superseded by the 2019 version. All of the witnesses took cognizance of this fact and addressed their opinions at the hearing based upon the 2019 version. As s. 3(5) of the Planning Act (the “Act”) obliges the Tribunal to ensure that its decision conforms with the Growth Plan prevailing at the time of decision, the references herein to the Growth Plan will be to the 2019 version.

[23] There was reference by the witnesses to the settlement area, land use efficiency, infrastructure and housing policies in the PPS and the Growth Plan, but the real focus of the positions of the planners came down to, and are crystallized in s. 2.2.2.3 of the Growth Plan.

[24] As that section is key to understanding the positions of the parties and the matter which the Tribunal must interpret and arbitrate, that section is reproduced herein in whole:
Section 2.2.2.3
All municipalities will develop a strategy to achieve the minimum intensification target and intensification throughout delineated built-up areas, which will:

a. identify strategic growth areas to support achievement of the intensification target and recognize them as a key focus for development;
b. identify the appropriate type and scale of development in strategic growth areas and transition of built form to adjacent areas;
c. encourage intensification generally throughout the delineated built-up area;
d. ensure lands are zoned and development is designed in a manner that supports the achievement of complete communities;
e. prioritize planning and investment in infrastructure and public service facilities that will support intensification; and
f. be implemented through official plan policies and designations, updated zoning and other supporting documents.

[25] The Appellants direct the Tribunal to the lead-in mandate of the policy, that there should be a strategy to achieve intensification throughout the delineated built-up area. The Property does lie within the built-up area as that term is defined in the Growth Plan.

[26] The Appellants then go on to say that clause (c) must be taken for what it says, that intensification is to be “encouraged generally” throughout the delineated built-up area.

[27] The Appellants point to the Property as a site which presents a clear opportunity to achieve intensification, described by their counsel as “gentle” intensification.

Town’s Official Plan

[28] By contrast, the Town points to clauses (a) and (b) and says that through the OP, they have very clearly and definitively defined the Strategic Growth Areas for the Town, the Property not being in one, and that they have also, in conformity with clause (f), developed OP policies which govern growth management. They treat the OP as being the manifestation of Provincial policy implementation in this local environment and that it should be considered now as the ruling instrument with respect to the matter of intensification.

[29] This discussion then leads one to the relevant policies in the OP. Again, all planners were essentially agreed upon the particular policies which were germane to
this appeal and they addressed them within the context and with regard to the particulars of the Property and its neighbourhood.

[30] There are really three particular policies that bear the weight of the scrutiny here. They are found as s. 4.3, s.11.1.8 and s. 11.1.9 of the OP. Again, for clarity and due to their importance in the consideration of the issues in this appeal, they are reproduced here in whole:

**Section 4.3**
Residential Intensification Outside of the Growth Areas

It is the policy of the Plan that the key focus for development and redevelopment to accommodate intensification will be the locations identified as Growth Areas. Lands outside of Growth Areas are predominantly stable residential communities which consist of established neighbourhoods. While the Plan encourages intensification generally throughout the built up area, it also recognizes that some growth and change may occur in these areas provided the character of the areas is preserved and the overall urban structure of the Town is upheld. Intensification outside of the Growth Areas including additional intensification opportunities such as infill, redevelopment and greyfield and brownfield sites, will be considered in the context of this Plan.

**Section 11.1.8**
Intensification within the stable residential communities shall be provided as follows:

a) Within stable residential communities, on lands designated Low Density Residential, the construction of a new dwelling on an existing vacant lot, land division, and/or the conversion of an existing building into one or more units, may be considered where it is compatible with the lot area and lot frontages of the surrounding neighbourhood and subject to the policies of section 11.1.9 and all other applicable policies of this Plan;

b) Within the stable residential communities, on lands designated Low Density Residential, there may also be sites at the intersection of arterial and/or collector roads, or sites with existing non-residential uses, that have sufficient frontage and depth to accommodate appropriate intensification through development approvals. Intensification of these sites may occur with Low Density Residential uses in accordance with section 11.1.9 and all other applicable policies of this Plan; and,

c) Within the stable residential communities, on lands designated Medium Density Residential and High Density Residential, there may be underutilized lands on which additional development may be appropriate. Intensification of these lands may occur within the existing density permissions for the lands and may be considered subject to the requirements of section 11.1.9 and all other applicable policies of this Plan.
Section 11.1.9

Development within all stable residential communities shall be evaluated using the following criteria to maintain and protect the existing neighbourhood character:

a) The built form of development, including scale, height, massing, architectural character and materials, is to be compatible with the surrounding neighbourhood.

b) Development should be compatible with the setbacks, orientation and separation distances within the surrounding neighbourhood.

c) Where a development represents a transition between different land use designations or housing forms, a gradation in building height shall be used to achieve a transition in height from adjacent development.

d) Where applicable, the proposed lotting pattern of development shall be compatible with the predominant lotting pattern of the surrounding neighbourhood.

e) Roads and/or municipal infrastructure shall be adequate to provide water and wastewater service, waste management services and fire protection.

f) Surface parking shall be minimized on the site.

g) A proposal to extend the public street network should ensure appropriate connectivity, traffic circulation and extension of the street grid network designed for pedestrian and cyclist access.

h) Impacts on the adjacent properties shall be minimized in relation to grading, drainage, location of service areas, access and circulation, privacy, and microclimatic conditions such as shadowing.

i) The preservation and integration of heritage buildings, structures and uses within a Heritage Conservation District shall be achieved.

j) Development should maintain access to amenities including neighbourhood commercial facilities, community facilities including schools, parks and community centres, and existing and/or future public transit services.

k) The transportation system should adequately accommodate anticipated traffic volumes.

l) Utilities shall be adequate to provide an appropriate level of service for new and existing residents.

[31] Section 4.3 is taken by the Appellants as an explicit acknowledgement that intensification may indeed occur outside of the defined Growth Areas. The Town does not deny this, but they suggest that the weight of the reading should be on the assertion that the key focus for development and redevelopment is to be in the areas identified as the Growth Areas. The Town buttresses this argument by turning to the second sentence and indicating that upholding the overall urban structure is part of the policy.

[32] In this regard, they turn to the Bronte Village Growth Area, which lies to the west, across East Street, and say that this is the area where further development within this neighbourhood was contemplated by Town Council. The implication is that there should
be a management of growth in something of a more coercive fashion, whereby Growth Areas will have primacy and until they are reaching a substantially built out stage, development opportunities outside of the Growth Areas should be discouraged.

[33] The Appellants take this sentence and seize upon the proviso that growth and change may occur outside of Growth Areas subject to such change preserving the character of the area within which it is to occur.

[34] Section 4.3 is drafted in a fashion which nominally exhibits conformity with the mandate in s. 2.2.2.3 (c) of the Growth Plan but has woven into it this concept of primacy of Growth Areas and is then, in this proceeding, interpreted by the Town to have the effect of minimizing the breadth of the Growth Plan mandate. There was a clear sense from the testimony of the Town planning witnesses that they approached the OP as providing for a hierarchy of development areas which would be aggressively managed with a tight rein on development outside of the defined Growth Areas.

[35] The difficulty with this interpretation is that its effect is to diminish consideration of sites which are not within defined Growth Areas. The Tribunal treats this as a dilution of Provincial policy that is not warranted. The Growth Plan policy is plain. Intensification is to be "encouraged" generally throughout the built up area. The Tribunal takes that at face value and treats that as creating an obligation to give due regard to intensification proposals throughout the built up area, irrespective of the hierarchy.

[36] In this sense, intensification exists as a possibility over the entire built-up area. It isn’t a designation that serves a planned function. It is a mandate within the planning framework to be alive to opportunities where land and infrastructure efficiency and fulfillment of community completion goals may be achieved.

[37] This then leads from Part C (General Policies) of the OP to Part D (Land Use Designations and Policies) of the OP.

[38] We turn to s. 11.1.8 (c). This policy again recognizes that intensification may occur in stable residential communities. This particular clause relates to lands designated Medium or High Density Residential. As noted at the outset of this Decision, this is an apartment neighbourhood and apart from the townhouse development to the
immediate west of the Property, all of the lands in this stretch of Marine Drive are designated High Density Residential.

[39] But within the first sentence of this clause, a significant difference of opinion opens up between the Town’s planning witnesses and the Appellants’ planning witness. The policy refers to underutilized lands. The Appellants point to a vast expanse of lawn which can accommodate a significant building envelope, complete with parking and services, and assert that this is a bald demonstration that the site is underutilized. This portion of the Property will handily accommodate the proposed apartment structure.

[40] The Town planning witnesses say, and Mr. Simeoni is adamant on the point, that at its current site area and unit count, the density of the Property is 202 units per hectare. With the proposed additional units, this density will rise to 239 units per hectare. They turn to the policies for High Density Residential, found in s. 11.4 of the OP. Section 11.4.2 identifies the density range for High Density Residential as between 51 to 185 units per hectare.

[41] On the basis of this range, Mr. Simeoni says that the Property is not only not underutilized but is currently beyond its planned function.

[42] Something of an academic problem arises in this contention as Mr. Simeoni also takes the position that Zoning By-law No. 2014 - 014 conforms with the OP and implements it. The existing apartment tower with its associated density of 202 units per hectare, in excess of the stated OP range, is expressly permitted by the Zoning By-law and presumably conforming with the OP. This analysis then suggests that the numeric values in the OP may be, in fact, elastic and may only be guidelines.

[43] By contrast, Ms. Anderson relays a history of the genesis of the High Density policy. She was the Town Planning Director at the time of development of the OP. Her testimony was that this range was simply an amalgam of the then various ranges found in the prior OP with respect to the variety of High Density designations which then prevailed. As the Tribunal understood her testimony, the amalgamated density range was really just a carry forward of the low to high limits which then existed.
[44] Based on this understanding of the stated range, Ms. Anderson treats the stated range as intended largely as a guide and not a definitive fixing of the limits. The foundation for this opinion, as expressed by her, lies in the ground reality, which is starkly shown on Marine Drive.

[45] As part of Ms. Anderson’s evidence, Figure 12 in Exhibit 7 was created. This is an aerial photo with 10 properties on Marine Drive identified and a table provided which indicates the density and height of each. The structures identified range in height from 3 storeys (the townhouse development immediately to the west of the Property) up to 22 storeys for the Ennisclare development immediately to the east of the Property.

[46] The densities range from a low of 150 units per hectare, at 50 East Street (which is actually in the Bronte Village Growth Area), up to 390 units per hectare, at 2220 - 2222 Lakeshore Road West, which is right across the street from the Property. A criticism was made by a Participant regarding this complex as a comparable as it is designed for retired persons and the unit sizes are generally smaller, so that there are many more units over the aggregate floor area. That may be so, but the Town has chosen to state density in this fashion rather than as a floor space index.

[47] Kitty-corner to the Property is 2263 Marine Drive. It is an apartment tower at the northeast corner of Marine Drive and East Street. Its density is 260 units per hectare.

[48] The Ennisclare development is declared to be at 171 units per hectare.

[49] The conclusion which the Tribunal draws from these facts is that the policy in s. 11.4.2 of the OP is not sensitive to the developed state of Marine Drive and is therefore not reflective of the built character of this neighbourhood.

[50] The Tribunal rejects the proposition advanced by Mr. Simeoni, at least within this built environment context, that reference to the OP density range determines the measure of utilization.

[51] The companion to the density figure in Exhibit 7 was Figure 13, which used the same aerial photo and building numbering scheme (but did not include Building 10 as it
The setbacks range from a low of 6.6 m for the buildings fronting on the south side of Marine Drive, lying west of East Street, 7.2 m for the adjacent townhouse development, many in the teens (10.27 m, 12.71 m, 13.78 m, 14.9 m, 15.28 m), 2185 Marine Drive at 25.9 m, and then jumping up to the high of 51.1 m for the Property.

Clearly, the Property is the outlier here. The photographic evidence makes very plain that the Property is anomalous with respect to its front yard.

The Property is zoned under Comprehensive Zoning By-law No. 2014-014 within the RH zone. This is a high density residential zone and its permitted residential uses are apartment dwellings. The Property is subject to exception provisions, which are set forth as Exception 82. The exception provisions which apply to the Property make it subject to a minimum front yard setback of 51.1 m, a minimum interior side yard setback of 14.9 m, a minimum rear yard of 15 m and a maximum lot coverage of 10%.

The Tribunal did not receive in evidence any documentary background as to the establishment of this zoning. Based upon the references on the exception provision page, it appears that this zoning was enacted in 1968 and has been amended at least two times since then. The exception section also applies to the parcel across the street, being 2220 Lakeshore Road West, but those exception provisions are segregated from the ones which apply to the Property and are all related to yard setbacks. Interestingly, the stipulated setback from Marine Drive for that property is 7.5 m.

The planning witnesses referred to the development on the Property as reflecting a concept which had great currency in the 1960s. It was referred to as “tower in the park”. This typically consisted of point or slab towers which were surrounded by large open areas, which areas may have accommodated recreational facilities or have simply been landscaped open space. It is an approach to development which has largely been abandoned as it is not consistent with an efficient use of land.

In fact, the evidence was that when the present development proposal was originally conceived by the Appellants, it had the proposed building more distant from
the front lot line than on the site plan which is before the Tribunal at this hearing.
Comment was apparently made by the urban design planner in the Town Planning Department that in keeping with the creation of a compatible streetscape presentation, the building should be brought closer to the street line.

[58] The present design of the proposed apartment building has it so that the building will be stepped back into three segments which react to the arc of the front lot line. The nearest point of the stepped structure at the three closest points is proposed to be 5.2 m. Due to the angle, as one moves away from each of those three points, the depth enlarges. The site plan shows the depth of front setback at the most easterly portion of the building to be 9.6 m.

[59] The argument advanced by Ms. Anderson is that the requested front yard setback of 5.2 m must be understood in terms of the staggering of the front elevation, with this value reflecting the three points where the building is at its nearest but recognizing that the depth varies. The other key point is that the front yard setback of the immediately adjoining townhouse development is 7.2 m and that this will appear very similar and compatible.

[60] There is also a functional difference between the proposal and the townhouse development. The townhouse units have been designed with integral garages and they are served by driveways to the abutting street. In order to allow adequate depth on the lot for a vehicle to be parked in front of the garage (and thereby effectively creating two on-site parking spaces), the suggestion by Ms. Anderson is that the setback was fixed at this distance.

[61] In the case of the proposal, as parking will be organized in the interior of the site, the dwellings do not have their own garages and therefore, no driveways. This creates the opportunity to employ terraces in front of each unit and landscaping across the full frontage. The effect of this is that there is the opportunity for a landscaped and animated streetscape, with built form which is at a depth generally consistent with other buildings in the neighbourhood.
These factors are relevant to the last main policy area. Clause (c) of s. 11.1.8 of the OP subjects any intensification proposal to the requirements in s. 11.1.9 of the OP. This policy section, which is reproduced above, is designed to set out evaluation factors to review any development proposal to ensure that it will tend to the maintenance and preservation of the character of the neighbourhood.

All of the planning witnesses, and most of the participants, addressed the factors which are enumerated in s. 11.1.9 of the OP.

It is fair to group the discussion of clauses (a) and (b) together as they are both directed at the question of the compatibility of the proposed structure with the built form and positioning of the other buildings which lie within the surrounding neighbourhood.

Compatible, by the terms of the OP, means the development or redevelopment of uses which may not necessarily be the same as, or similar to, the existing development, but can coexist with the surrounding area without unacceptable adverse impact.

Ms. Anderson avers that the four-storey form will appropriately fit in with the adjacent three-storey form and the nearby buildings up to 22 storeys as the character of the area is marked by this diversity in scale and there are no evident unacceptable impacts simply by virtue of the variable heights.

With respect to the positioning on the lot, she asserts that the proposed siting, and configuration of the structure, will result in what will appear to be individual units with front yard amenity areas that will improve the streetscape and provide better connection with the street. There is adequate separation from adjoining uses so as to avoid any negative influence and the setbacks from those adjoining properties are appropriate.

On the question of setbacks, Mr. Rendl testifies that the resultant front yard setback is not appropriate as it will be less than the setbacks elsewhere in the neighbourhood. The setback will be different, but based upon the photographic evidence which was produced, and due especially to the arc of the road in front of the Property, it appeared to the Tribunal that the proposed building will not be visually read
as being significantly forward of surrounding buildings. The Tribunal is satisfied that the proposed front yard setback is appropriate, will be compatible with surrounding development and not out of keeping with the character of the area. The advice from the Town urban design planner during processing review of the application, as responded to by the Appellants, was not shown by the Town planning witnesses as creating an urban streetscape outcome lacking conformity with the OP.

[69] With respect to clause (c), there is indeed a transition here from the Medium Density designation to the west to the High Density designation of the Property. The Tribunal finds persuasive Ms. Anderson’s view that the four-storey component is entirely appropriate and compatible with the three-storey townhouse development and therefore successfully addresses the matter of transition.

[70] Regarding clause (d), there will be no change to the lotting pattern of the surrounding neighbourhood.

[71] Clause (e) declares that roads and/or municipal infrastructure shall be adequate to provide water and wastewater service, waste management services and fire protection. The evidence before the Tribunal indicated that there would be full service availability here. Also, as noted earlier in the Decision, the Traffic Impact Assessment produced for the Appellants indicated that the local road system has more than adequate capacity and that there are no expected operational issues.

[72] Although there were comments from the Town Engineering Services Department seeking further clarification with respect to aspects of the Functional Servicing Report, it appeared to the Tribunal that the matters raised were in the nature of normal course exchanges to bring the Report into a form acceptable to Town staff. There was no basis for the Tribunal to conclude that the proposed development could not be properly serviced despite the fact that those clarification matters may still be extant.

[73] Clause (f) declares that surface parking shall be minimized on the site. The site is already providing a combination of surface and underground parking. The proposal will have the effect of extending the underground parking, altering the surface parking
and incidentally screening the bulk of the surface parking from view from the street due to the inter-positioning of the new building.

[74] Clause (g) does not apply in this instance as there is no proposal to extend the public street network.

[75] Clause (h) calls for impacts on adjacent properties to be minimized as it relates to grading, drainage, location of service areas, access and circulation, privacy and microclimatic conditions such as shadowing.

[76] No evidence was called to indicate an expectation that the lands cannot be properly graded so as to drain to the municipal storm drainage system and not onto adjoining properties. Site access will be by way of the existing driveway, which is understood to function adequately. Internal circulation will essentially follow the existing pattern.

[77] The Appellants’ architects prepared Shadow Studies. Those studies, in the spring and fall equinoxes, do show some incremental shadow impact on the Marine Drive right-of-way in the late morning and early afternoon, which in April appears to be negligible and in September reaches somewhat further but not in any way dominating the right-of-way. The summer solstice impact is almost non-existent. The winter solstice is marked by long shadows from all of the buildings in the area with far greater impact from the surrounding towers than the proposal.

[78] Clause (i) deals with Heritage Conservation Districts, which is not applicable here.

[79] Clause (j) speaks to development maintaining access to amenities. There would be no impairment of access to any local amenities by virtue of the proposal.

[80] Clause (k) indicates that the transportation system should adequately accommodate anticipated traffic volumes. This is addressed above in connection with clause (e) and is not an issue.

[81] Finally, clause (l) requires that utilities shall be adequate to provide an appropriate level of service for new and existing residents. There was no evidence
before the Tribunal to suggest that there would not be a full provision of the usual utilities.

[82] Accordingly, based upon the clause by clause assessment expressed above, the Tribunal finds that the proposal in this instance does meet the specific criteria required in order to warrant the proposed development. Bearing in mind the objective declared at the outset of s. 11.1.9, the Tribunal is satisfied that the proposal will be in keeping with, and maintain, the existing neighbourhood character.

[83] The Tribunal heard from the following local residents: Harry Shea, Patricia Johnson, Kenneth Moffat, John Simpson, Micki Clemens, Robert Mark and Nancy Henderson. Each lives in the immediate area and has their own history in this area. Each spoke with conviction that they enjoy the neighbourhood and have greater or lesser fears that the proposed development will unacceptably alter the character of the area.

[84] Many took up the Town planners’ approach that there was in place a very rigid growth management policy framework and that this proposal was never anticipated within it and should therefore not be approved.

[85] A number of them spoke about the current open space as an area that is utilized by residents of the Property. The Tribunal saw a winter photo which suggested that there was much circular walking within this open space, which was ascribed to dog walkers. The Tribunal is also aware from the photographic evidence that there is much dog walking space in the general vicinity apart from this front yard.

[86] Many spoke about the green space as a sort of oasis to be enjoyed from their Ennisclare balconies or on walks along the street. The perception of the Tribunal is that this is indeed, strictly speaking, green open space but that it makes no discernible contribution to the streetscape. It is clearly maintained in the sense of the grass being cut but it is not being treated as an actively curated landscaped area to behold. There is no evidence of it being used for leisure or recreational purposes as there are no seats or benches or furnishings for active or passive use.
[87] The Tribunal recognizes the mature trees which are located immediately adjacent to the front lot line, and although the Tribunal heard no arboricultural evidence, the photographic evidence suggests that the deciduous trees may be fine but the coniferous trees do not present in good condition.

[88] The front yard space is presently merely mute space mandated as a setback area and the Tribunal sees no community value in that. It is not public space. It is not, despite the attempt at so characterizing it, pastoral. The proposal would serve to make a contribution to the housing supply in the Town and create an improvement to the streetscape.

[89] Even with the removal of the area for the new structure from the open space calculation, the Tribunal is advised that landscaped open space will be provided on the Property at 43% of lot area, which is in excess of the minimum standard of 10% under the zoning by-law for the RH zoning category.

Summary of Findings

[90] In his closing submissions, counsel for the Appellants exhorts the Tribunal to avoid allowing policy to restrict opportunity.

[91] What the Tribunal finds in the evidence is that the Property does indeed represent an opportunity to convert space now serving no necessary purpose into the provision of housing which would be compatible with the surrounding neighbourhood and add to the rental housing stock of the municipality.

[92] This is not a case of allowing policy to restrict opportunity. It is a case of understanding that the obligation in s. 2.2.2.3 of the Growth Plan is not complete or concluded simply by incorporation in a municipal official plan. There is absolutely an obligation for the policy imperative of intensification to be grafted into municipal official plans and it can be susceptible of local considerations.

[93] The broad obligation to encourage intensification generally throughout the delineated built-up area, as expressed in s. 2.2.2.3(c), is brought to bear in every decision of the municipal council as well as of this Tribunal.
[94] This panel of the Tribunal does not see the OP as having closed the door on the proper consideration of that policy obligation in each and every case, as s. 3(5) of the Act requires. The Tribunal does not accept the proposition of the Town that the growth management strategy as embodied in the OP forecloses consideration of these kinds of opportunities.

[95] The growth management strategy in the OP may be considered as a type of ordering of the levels of intensification but it should not be understood as a preclusion of the legitimate consideration of sites that have development or redevelopment potential which is compatible with the immediate neighbourhood. The Tribunal finds no necessary conclusion that the OP represents a rigid box that cannot accommodate workable opportunities to use land efficiently and assist in building out a complete community, even if those opportunities may not have been specifically envisaged at the time of OP adoption.

[96] As described in the reasons above, the Tribunal in this case finds that the proposal is consistent with the PPS, conforms with the Growth Plan and does comply with the OP policy, expressly relating to s. 4.3, 11.1.8 and 11.1.9, which the Tribunal treats as the relevant sections for this matter.

Disposition

[97] On the basis of the evidence and the conclusions drawn therefrom by the Tribunal as expressed herein, the Tribunal will allow the appeals, in part, and approve the requested OP amendment to authorize a density on the Property up to 239 units per hectare and an amendment of Zoning By-law No. 2014 - 014, as amended, to permit the construction and use of the proposed structure as generally detailed on the site plan included as Figure 3 of Exhibit 7 and the architectural drawings entered as Exhibit 8.

[98] It is understood by the Tribunal that, in connection with accommodating appropriate landscaping and general layout of the site features to accord with the Town’s design standards, the Appellants and the Town will require further review and settlement of a site plan for the project.
[99] Once that site plan is finalized, the calibration of zoning standards can be achieved more accurately and incorporated in a form of zoning amendment by-law that would authorize the finally settled proposal.

[100] Consequently, the Tribunal will withhold its final Order with respect to the two amendments until it has received advice from the Appellants and the Town that these documents have been developed in satisfactory form. Once the final versions of the amendments have been forwarded to the Tribunal by the Parties, the Order of the Tribunal will issue.

[101] In the event that there are any issues which develop in completing the necessary amendment documents which may require the assistance of the Tribunal, the Parties may contact the Case Coordinator at the Tribunal to advise this Member and obtain direction on how those issues may be further addressed.

“Gerald S. Swinkin”

GERALD S. SWINKIN
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.
The Ontario Municipal Board has received appeals under subsection 17(36) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from a decision of the Minister of Municipal Affairs and Housing to modify and approve the new Official Plan for the City of Ottawa as adopted by By-law 2003-203 from the appellants listed in Attachment “1”

Emparrado Corporation, Ottawa Carleton Home Builders' Association and others have appealed to the Ontario Municipal Board under subsection 17(24) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from a decision of the City of Ottawa to approve Proposed Amendment No. 28 to the Official Plan (2003) for the City of Ottawa

Loblaw Properties Limited has appealed to the Ontario Municipal Board under subsection 22(7) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed Official Plan Amendment No. 26 for the City of Ottawa to redesignate land at 1920 Walkley Road from Section 3.6.8 Employment Area, Schedule B to a site specific exception to section 3.6.8 in the New City of Ottawa Official Plan

Loblaw Properties Limited has appealed to the Ontario Municipal Board under subsection 22(7) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed Official Plan Amendment No. 67 to the former City of Ottawa's Official Plan to redesignate land at 1920 Walkley Road from Business Employment Area, Schedule A to extend the adjacent Secondary Employment Area in the former City of Ottawa Official Plan

Loblaw Properties Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 93-98 of the City of Ottawa to rezone lands respecting 1920 Walkley Road from IPF(1.0) Industrial Business Park/CE[360] Schedule 58, Employment Centre to CE[360] Schedule 58, Employment Centre to permit the development of a 14,864 square metre Loblaw retail store, a 2,332 square metre separate retail store and a gas bar with car wash
Loblaw Properties Limited has referred to the Ontario Municipal Board under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, determination and settlement of details of a site plan for lands known municipally as 1920 Walkeley Road, in the City of Ottawa

OMB File No. M050079
OMB Case No. PL050584

**APPEARANCES:**

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<tr>
<th>Parties</th>
<th>Counsel*/Agent</th>
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<tr>
<td>City of Ottawa</td>
<td>T. Marc*</td>
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<td>Loblaw Properties Limited and Emparrado Corporation</td>
<td>A. K. Cohen* and K. Elgazzar (Student at law)</td>
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<td>156621 Canada and Bridgewater Properties Inc.</td>
<td>P. Webber*</td>
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<td>Canadian Tire Real Estate Ltd.</td>
<td>G. Meeds*</td>
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<td>Canadian Tire Corporation</td>
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<td>North American Acquisition Corporation</td>
<td>G. Meeds* as Agent for P. Devine*</td>
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<td>First Capital (Eagleson Copeland Drive)</td>
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<td>Corporation Inc.</td>
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<td>Eagleson South Centre Inc.</td>
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<td>Barrhaven Town Centre Inc.</td>
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<td>Barrhaven Developments Inc.</td>
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<td>Kestrel Properties Inc.</td>
<td>M. Chown</td>
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<td>Luigi Mion</td>
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<td>Federation of Citizens’ Associations Inc.</td>
<td>R. Brocklebank</td>
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**DECISION DELIVERED BY R. G. M. MAKUCH AND ORDER OF THE BOARD**

The Board will, on consent of the parties, adjourn the appeals by Emparrado Corporation and 156621 Canada Limited to September 5, 2006 at 11:00 AM, the
scheduled commencement of the “Urban Boundary” Phase. The adjournments are on
the condition that these appeals will be restricted in the case of 156621 Canada Limited,
to policies 2.2.3 and 4.1 of the 2003 Official Plan and OPA 28 policy 3.6.5 as these
relate to the appellant’s lands at Canotek Road and Rainbow Road, and, in the case of
Emparrado Corporation to OPA 28, policy 3.6.5 respecting its site on Innes Road.

The hearing of the Luigi Mion appeal respecting policy 1.6 is also adjourned to
September 5, 2006 at 11:00 AM.

Loblaw Properties Limited Appeal Re: Walkley/Conroy lands

At the commencement of the hearing counsel for the City brought a Motion for an
Order:

1) modifying the Official Plan, adopted on May 14, 2003, and,

2) abridging the time for the hearing of the Motion.

The modification is sought by the City following issuance of the Board's
Decision/Order No. 1090 dated April 12, 2006, which found the subject site at 1890,
1900, 1920 Walkley Road; 2980, 3000 Conroy Road; 2500, 2502, 2510 St-Laurent
Boulevard and 2425 Don Reid Drive, to be suitable for retail development. The Board
allowed the appeal to the former City of Ottawa 1991 Official Plan and Official Plan
Amendment No. 67, to designate the subject property from “Business Employment” to
“Secondary Employment Area”. The appeal against the 2003 Official Plan was referred
to this panel hearing the retail policy appeals. On May 10, 2006, City Council approved
a modification to the Official Plan, in accordance with the above referred to Board
decision re-designating the subject site to “General Urban Area”.

The City seeks to modify “Schedule “B”, Urban Policy Plan, to the 2003 Official
Plan to change the designation of the subject property at 1890,1900, 1920 Walkley
Road; 2980, 3000 Conroy Road; 2500, 2502, 2510 St-Laurent Boulevard and 2425 Don
Reid Drive, from “Employment Area” to “General Urban Area”, and Section 3.6.1 would
be modified by adding the following Policy 8:
“The stand-alone retail store permitted on the lands known municipally as 1890, 1900, 1920 Walkley Road; 2980, 3000 Conroy Road; 2500, 2502, 2510 St-Laurent Boulevard and 2425 Don Reid Drive, will be limited to a maximum of 17,500-metres$^2$.”

No one is opposed to the Motion and the Board is satisfied based on the uncontradicted affidavit evidence of the City planner, Louise Sweet-Lindsay, sworn May 24, 2006, that the proposed modification is consistent with the policies in the Plan as well as with the current practice followed by the Planning and Growth Department. The Board finds that it is also consistent with the Provincial Policy Statement and represents good planning practice. Furthermore, the owner has agreed to develop the site in a manner consistent with the design guidelines for this area known as the Ottawa Business Park.

Accordingly, the Board Orders that the 2003 City of Ottawa Official Plan is amended in accordance with Attachment “2” hereto. (Exhibit “B” to the affidavit of Louise Sweet-Lindsay – Ex 3).

Retail/Commercial Appeals

The Board in its Decision/Order No. 0197 issued on January 20, 2006 divided the hearing of all appeals to the Official Plan into phases according to subject matter, with the “Intensification/Retail/Commercial Policies” Phase scheduled to commence on May 29, 2006 being the subject matter of this decision.

The Board notes that following the approval of the new City of Ottawa Official Plan by City Council in May 2003, some 26 appeals were filed against the retail/commercial policies contained in this new plan and that the City initiated a facilitation process to deal with these appeals. The facilitation process was initiated with the City retaining two professionals, Robert Webster, Architect and Larry Spencer, a land use planner, whose function was to guide three sets of participants through a series of discussions related to the retail policies and was intended to allow the participants to reach a consensus on these retail/commercial policies in order to avoid a long and costly hearing. The participants consisted of City planning staff, ratepayer groups and several retailers. One can state that the process was largely successful.
resulting in many settlements and/or withdrawals of appeals. There are, however, some outstanding appeals which were not resolved and are to proceed to hearing.

Following the issuance of the Facilitators’ Final Report on June 16, 2004, and after following the prescribed process under the Planning Act, City Council enacted Official Plan Amendment No. 28 (OPA 28) on July 13, 2005. A number of appeals were filed against the enactment of OPA 28, these were consolidated with the hearing of the appeals against the 2003 Official Plan.

**Segment I - Loblaw Properties Limited, Canadian Tire Real Estate Ltd. and Canadian Tire Corporation Appeals**

The parties to this segment of this phase of the hearing are the appellants, Loblaw Properties Limited, Canadian Tire Real Estate Ltd., Canadian Tire Corporation, the City as well as the Federation of Citizens’ Associations.

Prior to the Planning and Environment Committee meeting of May 24, 2005, where draft Official Plan Amendment No. 28 was to be considered, one of the parties to the facilitation process, the Federation of Citizens’ Associations Inc., without notice to any of the parties to the facilitation exercise, tendered a written critique of the facilitators’ report to Planning and Environment Committee suggesting a number of changes to draft Official Plan Amendment No. 28 as prepared by City staff. A number of these suggested changes were eventually adopted by the Planning Committee and later by City Council.

The appellants, Loblaw Properties Limited, Canadian Tire Real Estate Ltd. and Canadian Tire Corporation all appear in opposition to Official Plan Amendment No. 28, particularly policies 2.3.1, 3.6.1(5) and 4.11. These parties were also appellants to the 2003 City Official Plan and also filed appeals against certain portions of OPA 28 on the grounds that the policies referred to above did not reflect the consensus that had been reached by the participants to the facilitation process and that the changes made by City Council did not represent appropriate land use planning. The appellant called three witnesses, Ted Fobert, a professional land use planning consultant, Hermann Kircher, a market analyst, and Larry Spencer, one of the facilitators engaged by the City. It is noted that Mr. Spencer appeared under summons.
Counsel for the City appears in opposition to the appeals and argues that it was well within City Council’s planning policy making power to adopt the changes it did to OPA No. 28. The City called one witness, Robert Clarke, a professional land use planning consultant. The Federation of Citizens Associations Inc. appears in support of the City’s position to retain Official Plan Amendment No. 28 as approved by City Council but did not call any evidence.

The Board has carefully considered all of the evidence and finds that the appeals should be allowed for the reasons that follow:

The Board prefers the evidence of Ted Fobert, the land use planning consultant for the appellant over the evidence of Robert Clarke, the land use planning consultant retained by the City to provide evidence in opposition to this appeal. Mr. Fobert was clearly very knowledgeable and well informed concerning the evolution of the City’s planning documents, on the other hand, Mr. Clarke showed that he had a limited understanding of the City’s planning framework and while under cross-examination had to recant from general planning opinions he had given in his evidence in chief.

The issues under consideration in this segment of the hearing are as follows:

1) Are the references to "big-box" retail and the applicable size limitation and location in section 2.3.1 of OPA 28 - policy 3.6.1 (5) appropriate?

2) Whether large format retail should be a permitted use on a site that fronts on a collector road - section 2.3.1 of OPA 28 - policy 3.6.1 (5).

3) Whether large format retail should be a permitted use on a site that fronts on an arterial road, but also on a collector road - section 2.3.1 of OPA 28 - policy 3.6.1 (5).

4) Whether the presence of "flexible wording" such as "generally" and "whenever possible" from policies 2 a), b), c), g), h) and i) of section 2.4.2 of OPA 28 (proposed section 4.11) is appropriate.

The evidence is undisputed that the participants to the facilitation process had reached a consensus following a number of meetings and workshops attended by the participants and it is also undisputed that Official Plan Amendment No. 28 does not
reflect that consensus. As was explained by Mr. Fobert, his client Loblaw Properties Limited did not get everything it wanted out of the process but, nevertheless, bought into the settlement because the process involved a series of “give and take” from all of the participants and the result was a good consensus solution. A series of compromises made, the retailers did not get everything they wanted but nevertheless bought into compromise.

The facilitation exercise referred to above was a process that was initiated at the instance of the City to avoid a long and costly hearing before this Board. The evidence before the Board suggests that a consensus was achieved amongst the participants and that the official plan amendment resulting from this process was expected to be consistent with the recommendations set out in the facilitator’s report, including the expectation that retail uses would continue to be permitted in “Employment” and “Enterprise” areas.

Policy 3.6.1.5 read as follows in the Draft OPA No. 28:

“The General Urban Area permits uses that may generate traffic, noise or other impacts that have the potential to create conflicts with the surrounding residential community. These types of uses are often large and serve or draw from broader areas. The City will ensure that anticipated impacts can be adequately mitigated or otherwise addressed. Such uses will be directed to:

a) Locations along the rapid transit system, or an arterial or major collector road with sufficient capacity to accommodate the anticipated traffic generated and where frequent, all-day transit service can be provided;

b) Suitable locations on the perimeter of, or isolated from, established residential neighborhoods. In this regard, existing or proposed building orientation, massing and design, and the presence of mitigating circumstances such as distance, changes in topography, or the presence of features such as significant depths of mature forest may be taken into account.”

The appellants are specifically concerned with the following additional paragraph (b) added to policy 3.6.1.5:
“In the case of large-scale "big-box" retail stores (i.e. over 8,000-metres²) and shopping centers under 50,000-metres² and over 10,000-metres², locations along the rapid transit system or an arterial road with sufficient capacity to accommodate the anticipated traffic generated and where frequent, all-day transit service can be provided."

Loblaw Properties Limited, according to Mr. Fobert, is very concerned with this policy and its implications for large format retail stores. The policy introduces a reference to "big-box retail stores", and establishes an arbitrary minimum size of 8,000 metres² for such uses, while also restricting them from collector roads. He indicated that all references to "big-box retail stores" found previously in the May 2003 Official Plan, had been deleted by City staff in OPA 28, this in keeping with the consensus reached through the facilitated discussions, initiated by the City, to resolve the outstanding appeals to the 2003 Official Plan. Mr. Fobert opined that introduction of this Council initiated change to policy 3.6.1.5 represents:

a) a significant departure from the consensus reached at the above noted facilitated meetings, which included all key stakeholders - retailers, ratepayers, and City staff;

b) an approach contrary to the recommendations of staff for OPA 28;

c) an unsubstantiated land use bias against larger retail stores, and the re-introduction of the term "big-box", which is negative in connotation;

d) an unnecessary restriction of larger format retail stores on major collector roads, contrary to accepted planning practice;

e) a planning control with no land-use rationale or any retail analysis or rationale to substantiate it.

The facilitator's report contains no reference to the need to segregate "big-box retail stores" in the Official Plan policies. Rather it is recommended that retail commercial facilities should be developed and located based on meeting "context or location sensitive" guidelines, and not by arbitrarily distinguishing one type of use i.e. "big-box retail stores".
Hermann Kircher, the retail analyst who gave evidence in support of the appeals suggested that one of the major deficiencies of the 2003 Official Plan is that the City did not undertake relevant research to identify the future of retail space demand or retail structure requirements to serve its residents or to determine how best to serve the public's retail needs. He added that this deficiency has not been addressed in OPA 28. His evidence was not seriously challenged on cross-examination and the City did not adduce any contrary evidence.

Mr. Fobert also provided the Board with an overview of the evolution of the new 2003 Official Plan 2003 by referring to the various drafts of the plan, all of which contained policies that address the provision of non-residential uses in “General Urban Areas”. All had similar criteria that direct uses with the potential to impact on adjacent residential communities to appropriate locations. These policies focused on the scale or operating characteristic of the use, and not on the specific use or size, such as big-box retail stores” greater than 8,000-metres². Mr. Fobert maintained that the policies should continue to focus on the scale or operating characteristics of the use, and not on the specific use or size, for the following reasons:

- the City's determination of the size i.e. greater than 8,000-metres², is both arbitrary and inappropriately discriminatory since it is directed only at a very limited number of retailers. There are many retail stores less than 8,000-metres² in size that have a greater potential to impact adjacent residential areas;

- similarly, there are many non-residential uses greater than 8,000-metres² that are permitted in “General Urban Areas”, such as large offices or institutional uses, with the potential to impact adjacent residential areas, that are not addressed by the Council initiated change to the policy;

- furthermore, a grouping of smaller stores less than 8000 m² each could generate more traffic and create more of an impact than one store greater than 8,000-metres²;

- the policy limiting "big-box retail stores" to locations along the rapid transit system or on an arterial road and not permitting these on collector roads, limits the number of potential sites that may be appropriate for such uses.
and it is undisputed that no research has been conducted by the City to
determine whether an adequate supply of sites is available to meet the
retail needs of a growing population;

- the prohibition against “big box retail stores” locating on collector roads is
  inappropriate and unjustified since there are locations along the collector
  road, or where arterial and collector roads intersect, where it would make
  good planning sense to permit a retail store greater than 8,000-metres²
  along such a road.

The Board finds that Mr. Fobert’s recommendations are well supported and are
reasonable under the circumstances. Furthermore, these represent good land use
planning.

The Board notes that all the witnesses agreed that the term "big-box" retail
should be replaced by the term "large-format retail" and it would be appropriate to
amend/remove the definition "big-box retail".

With respect to the appeal as it relates to the deleted words in section 4.11 of the
Plan, the Board notes that the City’s land use planning consultant, Robert Clarke,
agreed that the language deleted in that section was neutral and could be left in. Mr.
Fobert, on the other hand was of the view that the Council initiated changes resulting in
prescriptive language that will unnecessarily restrict potential future development that
may be totally appropriate. He maintains that the words deleted by City Council in
adopting OPA No. 28, provide flexibility to address site-specific circumstances and
neighborhood context, and would avoid the need for an Official Plan Amendment in
those appropriate circumstances.

The Board is compelled to share in the disappointment expressed by Larry
Spencer, one of the facilitators retained by the City, and by the parties to the facilitation
as it relates to the approach adopted by the Federation of Citizens’ Association, when it
blindsided the other parties by writing to Council in May 2005 requesting amendments
to draft OPA No. 28, prior to its consideration by the Planning and Environment
Committee. The Federation had participated throughout the facilitation exercise and it
is clear from the evidence that extensive notes were taken during these sessions and
that these notes were circulated to all of the parties so that everyone was fully informed
as to what was agreed to and where there was still disagreement. This is a matter of credibility for the Federation, and one has to question whether such exercises would be possible in the future cases, where the Federation is involved. This would be an unfortunate result because the Federation offers a unique perspective in the resolution of appeals before this Board.

Accordingly, the appeals are allowed and OPA 28 is amended in accordance with Attachment “3” hereto.

**Segment II – Plan Modifications**

In this segment of the hearing, the City requested that the Board approve some modifications to the Official Plan following compromises with some of the appellants as well as the approval of policies, which had been appealed but where the appellants were not pursuing their appeals. The City served copies of the draft document (Exhibit 21, Tab 9) on those appellants, well in advance of the hearing and it is noted that no one appeared in opposition.

The Board is therefore satisfied based on the uncontested evidence of Dennis Jacobs, Director of the Planning, Environment and Infrastructure Policy Branch, Planning and Growth Management Department, City of Ottawa, that the subject policies have regard to the 1997 and 2005 Provincial Policy Statements and represent appropriate land use planning.

Accordingly, the appeals are dismissed and the Board hereby modifies/amends the 2003 Official Plan in accordance with Attachment “4” (Tab 9, Exhibit 21, attached) hereto.

The Board notes that there were certain policies in the 2003 City Official Plan, which were under appeal and were subsequently repealed and/or replaced by the enactment of Official Plan Amendment No. 28. Those original appeals to the extent that these have been repealed and/or replaced by OPA No. 28, are hereby dismissed.

**Segment III - Bridgewater Properties Inc. Appeal**

OPA 28 designates the lands, which are the subject matter of this appeal as "Employment Area". These are located in the Taylor Creek Business Park in the former
City of Cumberland and are bounded by Regional Road 174 to the north, and are immediately north of Dairy Drive at Trim Road. The lands under appeal have an area of approximately 2.67-hectares and include a parcel owned by the City, which is immediately to the North of the property owned by the appellant, Bridgewater Properties Inc., and which had been developed as a “park and ride facility”, the first phase of the eastern terminus for the bus transit way serving Orleans and the rural community to the east. The East Transitway rapid transit bus system is to be extended from Place d’Orleans to Trim Road in the future. A property owned by Loblaw Properties Limited located immediately across Dairy Drive to the south at the northeast corner of Queen Street (St-Joseph Boulevard) and Trim Road is designated “General Urban Area” under OPA 28. Planning approvals were previously given by the Council of the former City of Cumberland for the development of a grocery store on the Loblaw lands, and OPA No. 28 designates these as "General Urban Area".

The subject lands form part of a larger business/industrial park complex consisting of the Cardinal Creek Business Park, the Taylor Creek Business Park, and the Cumberland Business Sector North.

The appellant is seeking a "General Urban Area" designation on the subject lands and argues that this designation allows for a greater range of uses including commercial, retail and service uses than is permitted by the policies in the "Employment Area" designation.

The City argues that these lands are appropriately designated under OPA 28 as "Employment Lands" because they are part of a larger employment area and the City needs to protect employment lands because there has been a decline in the supply of vacant industrial lands in the City.

The Board has carefully considered all of the evidence and finds that the Bridgewater Properties Inc. appeal should be allowed for the reasons that follow.

The Board prefers the evidence of Murray Chown, the professional land use planning consultant for the appellant, over the evidence of Dennis Jacobs, the City’s land use planner.
Mr. Jacobs in expressing his opinion on this matter put much weight on the City's policy intentions of preserving vacant industrial land but it became clear under cross-examination that this parcel represents a very small percentage of “Employment Lands” in the City and are not significant. Mr. Chown referred to a number of examples where City Council following the recommendation of City planning staff, re-designated much larger and more significant parcels of “Employment Lands” to other designations.

The Board accepts Mr. Chown's opinion that these lands should be designated "General Urban Area", a designation that will permit a wider range of uses including retail and commercial offices, which will be more beneficial to the overall development of the bus transit system by encouraging the development of a small retail/service node at the eastern terminus of the transit way. A greater range of commercial, retail and service uses is appropriate for these lands to achieve the goals/objectives of the City in promoting public transit use and would not have a detrimental effect on employment opportunities in the east and in the City generally. The Board notes that retail uses had previously been permitted under the former “Employment Area” designation pursuant to the former Regional Municipality of Ottawa-Carleton (RMOC) and City of Cumberland official plans.

The transitway system developed by the former RMOC, and currently being extended by the amalgamated City of Ottawa, relies heavily on the interaction between the transit system and retail/service nodes. The current transitway system terminates at the South Keys Shopping Centre in the “General Urban Area” in the south, and Place d’Orleans, a “Mixed-Use Centre” in the east, it will also expand to Kanata Centrum also a “Mixed-Use Centre” in the west and to the Barrhaven Town Centre a “Mixed-Use Centre” in the southwest.

These corridors all terminate at a retail/service node and many of the stations along the transitway system are also located at retail/service nodes, including Lincoln Heights (General Urban Area), Bayshore (General Urban Area), College Square (Mixed-Use Centre), Billings Bridge (Mixed-Use Centre), St-Laurent Shopping Centre (General Urban Area) and the Rideau Centre (Central Area).

From the earliest stages of the development of the bus transitway system, it was recognized that there were significant benefits to integrating the transit way with existing
and proposed retail nodes. The two uses (transit/retail) are compatible and could support each other with the activity generated by each. The retail facilities provide an eye on the transitway system, giving greater safety to transit riders and the transitway provides convenience for the customers of the retail facilities.

The opportunity exists to continue this approach of integrating the transitway with retail/service nodes by providing a small retail/service node at the terminus of the Eastern Transitway. This opportunity is lost if the subject lands are designated as "Employment Area".

The plans for the expansion of the future transit station show that the subject lands will be isolated from the balance of the designated “Employment Area” by road infrastructure.

Accordingly, the appeal is allowed in part and the lands owned by the appellant will be designated “General Urban Area”. The appeal is dismissed with respect to the lands owned by the City as the Board is not prepared to re-designate those lands against the wishes of the City.

Segment IV – TDL Group Ltd. Appeal

TDL Group Ltd. (Tim Horton's) is one of the original retail/commercial appellants to the 2003 City Official Plan and was one of the participants in the facilitation process referred to extensively earlier in this decision. It now appeals Policy 6 of Section 3.6.3, which prohibits the establishment of new Drive-Through Facilities on “Traditional Mainstreets” as well as the designation of five streets designated as “Traditional Mainstreets” as set out in Schedule “B”, Urban Policy Plan. The appellant was initially seeking a “General Urban Area” designation for the specific streets under appeal, counsel for the parties agreed, however, during the course of the hearing that the “Arterial Mainstreet” designation would also be appropriate if the Board were inclined to allow this part of the appeal.

The five specific streets under appeal are the following:

- Richmond Road, west of Cleary to the Ottawa River Parkway
- Scott Street, from Churchill Avenue to Island Park Drive
- Merivale Road, from Caldwell Avenue to Carling Avenue
- Bronson Avenue, from Highway 417 to Carling Avenue
- McArthur Avenue, from Vanier Parkway to St.-Laurent Blvd.

Tim Horton’s is opposed to this prohibition on the grounds that it represents bad land use planning in so far as there is no planning justification by the City in adopting such a prohibition. It also maintains, and it was not disputed, that the 2003 Official Plan did not contain a prohibition on drive-through facilities and that this issue was never brought up during the above referred to facilitation process. It first appeared, to use the vernacular, “out of left field” in the draft of OPA 28, released in the fall 2004.

The City’s position is that it is justified in imposing a prohibition against “drive-thrus” on “Traditional Mainstreets” in order to protect and enhance the pedestrian environment on such streets. The City also maintains that even though the specific streets under appeal designated as “Traditional Mainstreets” may not currently exhibit the characteristics of a “Traditional Mainstreet” as described in the Official Plan, it is its duty to plan and protect for the future. The Federation of Citizens’ Associations supports the City’s position.

The Board has carefully considered all of the evidence and is satisfied that the appeal should be allowed for the reasons that follow.

On the whole, the Board prefers the evidence proffered in support of the appeal over the evidence proffered by the City.

The appellant called two witnesses, Murray Chown, a land use planning consultant and Michael Tedesco, a transportation/traffic engineer. They provided the Board with a detailed analysis of the issues and applicable planning policies. Both were forthright and were not shaken on cross-examination. The City did not call any evidence to contradict the analysis carried out by Mr. Tedesco’s and his resulting opinions.

The only witness called by the City was Dennis Jacobs, Director of the Planning, Environment and Infrastructure Policy Branch in the City’s Planning and Growth Management Department. Mr. Jacobs made a number of assertions in his witness
statement and in his evidence in chief, which at first, appeared to be reasonable and sensible, however, under cross-examination, it became evident that appropriate background studies were not carried out and there was no proper basis upon which he could support his opinions.

Mr. Tedesco referred to the text of the amendment and drew attention to the distinction between “Traditional Mainstreets” and “Arterial Main Streets” in OPA No. 28:

“Traditional Mainstreets” are described as:

- generally developed prior to 1945;
- typically set within a tightly knit urban fabric, with buildings that are often small scale, with narrow frontage and set close to and addressing the street;
- pedestrian oriented and transit friendly environment;
- generally have four-lane cross-section;
- generally have on street parking or the potential to provide it;
- land uses are often mixed, with commercial uses at the street-level and residential uses on the upper levels.

OPA 28 also recognizes that there are stretches of “Traditional Mainstreets” that do not entirely reflect the above noted prewar description and for these areas, the plan promotes redevelopment in a fashion that is compact and buildings located close to the street in a more pedestrian oriented environment.

“Arterial Mainstreets” on the other hand, are described as:

- generally developed after 1945;
- typically present an urban fabric of larger lots, larger buildings, varied setbacks and lower densities;
- a more automobile oriented environment;
- often within a divided cross-section of four or more lanes;
- generally do not provide on street parking;
- parking lots are often located between the buildings and the street; and
- the predominant existing land-use is single purpose commercial.

On “Arterial Mainstreets”, development will occur in a way that facilitates a gradual transition to a more urban pattern of land use. This means that over time more residential uses will be introduced, where appropriate.

OPA 28 also states that “The common feature of all “Mainstreets” is their function as a mixed-use corridor with the ability to provide a wide range of goods and services for neighboring communities and beyond. Because a high percentage of housing, employment, retail and civic functions lie within easy reach of one another, the vitality of the area is sustained

The specific policies under appeal are in Section 3.6.3, Policies 6 and 7, which read as follows:

“6. New gas bars, service stations, automobile sales and drive-through facilities will not be permitted on “Traditional Mainstreets” in order to protect and enhance the pedestrian environment. Existing gas bars, service stations, automobile sales, and drive-through facilities located on Traditional Mainstreets that are permitted under the zoning existing on the date of adoption of this Plan, will continue to be permitted in the Zoning By-law as permitted uses and encouraged to re-develop over time in a manner that achieves the street’s planned function and character. New gas bars, service stations, automobile sales, and drive-through facilities are permitted on “Arterial Mainstreets” and will be evaluated on the basis of the Design Objectives and Principles in section 2.5.1, any applicable Council approved design guidelines and the Compatibility policies set out in section 4.11.”

“7. On “Traditional Mainstreets” surface parking will not be permitted between the building and street. The location of surface parking will avoid
interrupts of building continuity along the “Traditional Mainstreet” street frontage and will minimize impacts on pedestrians. However, there may be exceptional circumstances where locating parking adjacent to the street frontage is unavoidable. In these cases, appropriate means such as coordinated tree planting and landscaping, pedestrian amenities and the dimension, location and number of vehicular access will be used to minimize the interruption of the “Traditional Mainstreet” street frontage and to ameliorate the impact on the pedestrian environment. On “Arterial Mainstreets”, the location of surface parking will be evaluated in the context of section 2.5.2 and section 4.11.”

These two policies according to Mr. Tedesco, have at their heart, the protection of the pedestrian environment, which suggests that there is a need to protect higher levels of pedestrian activity on “Traditional Mainstreets”.

He suggests that Policy 6 permits a situation, where a “quick service restaurant” such as a Tim Horton’s without a drive-through (but with a parking lot) would be permitted "as of right", but the same restaurant with a drive-through would be prohibited in order to "enhance pedestrian safety".

Mr. Tedesco’s evidence is largely unchallenged and uncontradicted that drive-through trips are not typically destination trips, but rather, are drawn from pass by traffic that is already on the road such as driving to a commuter transit station irrespective of the drive-through use being there, hence, drive-throughs do not promote auto dependency, and furthermore, that drive-through facilities reduce the parking requirements for a quick service restaurant.

It is noted that, in the decision of the Ontario Municipal Board in what is commonly referred to as the “Toronto Drive-Through” case (Decision/Order No. 0154, issued January 23, 2004), the traffic experts for all parties were in agreement on several key points regarding the transportation characteristics of drive-throughs, specifically:

- the demand for drive-throughs for other land uses, such as banks, is different;
- banning drive-throughs would be disadvantageous for elderly, handicapped persons, parents of young children etc.; and

- drive-throughs reduce parking demand.

With respect to Policy 7, the appellant’s evidence suggests that a compatible "urban drive-through" can be designed for a “Traditional Main Street” environment and that this has been done in the City of Ottawa, specifically on Montréal Road a designated “Traditional Mainstreet” at the intersection of Hannah Street, where a “Burger King” restaurant with drive-through facility was developed. It is interesting to note that this particular development is referred to by the City in its recently released Urban Design Guidelines for Drive-Throughs (May /06) as a good example of how to develop such a restaurant.

The Board agrees that the policy as it exists gives no consideration to the possibility of minimizing any possible effect on the pedestrian environment through design for the unique characteristics of specific locations and that there are a number of ways to develop drive-through facilities on “Traditional Mainstreets”, while protecting and enhancing the pedestrian environment. The evidence proffered by the appellant shows that “drive-through facilities” in appropriate circumstances, can be designed to have minimal impact on traffic and the pedestrian environment. Mr. Tedesco and Mr. Chown, both, acknowledged that there are very limited opportunities to do so on “Traditional Mainstreets”.

The Board finds that drive-through facilities need to be carefully controlled and that the proper approach for controlling these is the one adopted by the City of Toronto, which prohibits these facilities through its zoning by-law and not in its official plan. Official plans do not need to be prescriptive like zoning by-laws. Counsel for the appellant advised the Board during the course of the hearing that his client would not object to a zoning by-law prohibiting drive-through facilities on “Traditional Mainstreets”, provided that one would have the ability to make an application for a zoning by-law amendment to permit such a use, if a proponent was able to show that such a use could conform to urban design and compatibility policies as is the case in the City of Toronto.
With respect to that part of the appeal related to the five specific streets, which the appellant contends should not be designated “Traditional Mainstreets”, the Board is not prepared to allow the appeal.

While the Board accepts the evidence of Mr. Tedesco and Mr. Chown that these streets do not currently meet the criteria for being designated “Traditional Mainstreets”, the Board finds that it is nevertheless appropriate for the City as part of its long range planning responsibilities, to implement this designation with the hope and intention that these evolve as such in the future.

The City should be given the opportunity to put into effect zoning controls that will assist in this evolution and should perhaps pay attention to Mr. Tedesco’s observations and recommendations. Mr. Tedesco opined that “traditional Mainstreets” primarily distinguish themselves by virtue of their high pedestrian activity and that this arises in large part from the fact that “Traditional Mainstreets” -by definition - have a substantial reliance on off-site parking (on street and elsewhere) to satisfy parking demands generated by the land uses along “Traditional Mainstreets”.

According to Mr. Tedesco, the people who are usually walking along a “Traditional Mainstreet” have typically parked somewhere else and are now (by necessity) walking to their ultimate destinations. It is not a case where the pedestrian activity along a successful “Traditional Mainstreet” arises solely from local residents walking to/from home or public transit. He suggests that an abundance of (off-site) parking is critical for the success of “Traditional Mainstreets”, such as is the case with Ottawa's Westboro Village, as an example.

By contrast, if adequate parking is provided on-site for all or most uses along a street, then there will be substantially less pedestrian activity and, it is Mr. Tedesco's contention, that such a section of road would not be nor would ever become a “Traditional Main Street”.

The amendment ordered by the Board removing the prohibition against drive through facilities on “Traditional Mainstreets”, will allow any landowner on such a street to make application for a zoning by-law amendment to permit such a use if it can be otherwise justified as referred to above.
The Board feels compelled to comment on the process leading up to this phase of the hearing. The facilitation exercise referred to above was initiated at the instance of the City to avoid a long and costly hearing. The Planning Department’s recommendation to impose a ban on “drive-through facilities” after completion of the facilitation exercise, especially when it had never been brought up during the process is “bizarre” at best. The issue should have been put on the table as part of the facilitation exercise, where extensive discussions could have taken place so that all interested participants would have had an opportunity to make their concerns known and perhaps a negotiated consensus solution would have been found to resolve the issue. The City’s conduct in this case does not reflect well on it and could impact on the willingness of other parties to participate in future similar exercises.

Accordingly, the appeal is allowed in part and the Board Orders as follows:

1) Section 3.6.3 “Mainstreets” of the Official Plan will be amended in accordance with Attachment “5” (Exhibit 32), hereto.

The appeal is otherwise dismissed.

It is so Ordered.

“R. G. M. Makuch”

R. G. M. MAKUCH
MEMBER
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Attachment 3

1) Section 3.6.1 Policy 5 is hereby amended to read as follows:

“The General Urban Area permits uses that may generate traffic, noise or other impacts that have the potential to create conflicts with the surrounding residential community. These types of uses are often large and serve or draw from broader areas. The city will ensure that anticipated impacts can be adequately mitigated or otherwise addressed.”

Such uses will be directed to:

c) locations along the rapid transit system, or an arterial or major collector road with sufficient capacity to accommodate the anticipated traffic generated and where frequent, all-day transit service can be provided;

d) suitable locations on the perimeter of, or isolated from, established residential neighborhoods. In this regard, existing or proposed building orientation, massing and design, and the presence of mitigating circumstances such as distance, changes in topography, or the presence of features such as significant debts of mature forest may be taken into account.”

2) Section 4.11.2 is hereby amended to read as follows:

“in addition to those matters set out in section 4.11.1 above, the City will evaluate the compatibility of development applications on the basis of the following compatibility criteria. The measures of compatibility will vary depending on the use proposed and the planning context. Hence, in any given situation individual criteria may not apply and/or maybe evaluated and weighted on the basis of site circumstances:

a) Traffic: roads should adequately serve the development, with sufficient capacity to accommodate the anticipated traffic generated. Generally, development that has the potential to generate significant amounts of vehicular traffic should be located on arterial or major collector roadways
so as to minimize the potential for traffic infiltration on minor collector roadways and local streets.

b) Vehicular Access: The location and orientation of vehicle access and egress should address matters such as the impact of noise, headlight glare and loss of privacy on development adjacent or immediately opposite. Vehicular access and egress for development that has the potential to generate a significant amount of vehicular traffic should be oriented on streets other than local streets, where ever the opportunity exists, considering traffic safety and other transportation objectives of this plan.

c) Parking Requirements: The development should have adequate on-site parking to minimize the potential for spillover parking on adjacent areas. A range of parking forms, including surface, decked, and underground, should be considered taking into account the area context and character. Opportunities to reduce parking requirements and promote increased usage of walking, cycling and transit should be considered, where appropriate, particularly in the vicinity of transit stations or major transit stops in accordance with the provisions of Section 4.3.

d) Loading Areas, Service areas, and Outdoor Storage: The operational characteristics and visual appearance of loading facilities, service areas (including garbage), parking and areas for the outdoor storage of goods or materials should be mitigated using a variety of methods (e.g., location, containment, screening, berms, and/or landscaping). These uses and activities should be located away from residences, wherever possible.

e) Lighting: the potential for light spill over or glare onto adjacent light-sensitive areas should be avoided or mitigated.

f) Sunlight: The development should minimize shadowing on adjacent properties, to the extent practicable, particularly on outdoor amenity areas, through the siting of buildings or other design measures
IN THE MATTER OF Section 22(1) of the Planning Act, 1983

AND IN THE MATTER OF a referral to this Board by the Honourable John Sweeney, Minister of Municipal Affairs, on a request by Green Road Developments Ltd. to redesignate the lands located on the east side of Drakes Drive between Frances Avenue and North Service Road in the City of Stoney Creek from "Residential" to "General Commercial" to permit a commercial Development.

Minister's File No. 25-OP-SCR2

AND IN THE MATTER OF Section 34(11) of the Planning Act, 1983

AND IN THE MATTER OF an appeal to this Board by Green Road Developments Ltd. for an order amending By-law 2175 of the City of Stoney Creek to rezone the lands located on Lot 22, Concession BFC, Drakes Drive from "Residential Neighbourhood Development" to "General Commercial" to permit a general commercial plaza.

O.M. B. File No. Z 890221

COUNSEL:

M. Rudolph - for Green Road Developments Ltd

R. M. Plant Q.C. - for City of Stoney Creek

DECISION delivered by J.A. FRASER and ORDER OF THE BOARD

MOTION

At the commencement of the hearing, Mr. Rudolph brought a motion requesting that directions be given by the Board.

The hearing involved an appeal by Green Road Development Ltd. against the refusal of Stoney Creek Council to rezone the subject property from "Residential Neighbourhood Development" [ND] to
"General Commercial" [C3] and a referral by the Minister of Municipal Affairs arising from a request by Green Road to redesignate the lands from "Residential" to "General Commercial" in the Official Plan. The purpose of the requests was to permit the eventual development of the subject property as a general commercial plaza.

The planning staff of the City of Stoney Creek had supported the Green Road applications and had written their reports accordingly. Council of the City of Stoney Creek refused to rezone the property or to alter the designation within the Official Plan.

For purposes of the appeal before the Ontario Municipal Board, Council retained the services of a planning witness who is not a member of their planning staff. Mr. Rudolph, on behalf of Green Road, not surprisingly, compelled the attendance of the local planner by having a summons to witness served upon him.

Mr. Rudolph brought the motion for directions to the Board to have the Board give guidance on the appropriate role for Mr. Marini, the local planner.

It had been suggested to Mr. Marini by the City of Stoney Creek through its solicitor, Mr. Plant, that Mr. Marini limit his evidentiary role before the Board. The facts of these suggestions made to Mr. Marini are not in dispute and are generally agreed to by Mr. Plant, Mr. Marini and Mr. Rudolph. Verbally and by letter Mr. Marini was instructed that "your evidence will be confined to the basis of your report and your recommendations". He was instructed not to review the reports of the consultant planner hired by the City or the other consultants' reports. Mr. Plant suggested that Mr. Marini should attend at the Board as an "independent" witness and requested that the Board consider withdrawing the summons to witness that had been served upon Mr. Marini in the usual fashion. He said that it could be interpreted that Mr. Marini supported the person or
party who had summoned him. It was put to Marini that as the local planner he should consider, "who his employer is" and govern himself accordingly. Mr. Marini was instructed to seek independent legal advice on the appropriate role of a witness before the Board.

Mr. Marini retained counsel and was advised by his solicitor to seek the guidance of the Board and to abide by the Board's ruling and directions regarding his role.

The Board was informed that Mr. Marini had not been permitted to review the various consultants' reports that would be used in the course of hearing and if he were requested by the Board to give evidence, he would like an opportunity to review those reports.

The decision and directions of the Board were given orally at the conclusion of the motion. When a summons to witness has been properly served, the witness has an obligation to appear before the Board and to give his or her evidence in an honest, unfettered manner. A professional person such as a planner is required to give as evidence his honest opinion on the matters on which he has expertise. His evidence is not to be fettered or limited by himself, fear of his employer or contrary instructions received from any person or organization.

In our democratic system of municipal government, Council has the right and discretion to accept or reject the advice of staff and to vote accordingly. Council does not, however, have the right to order an employee to tailor his evidence before any tribunal, whether the Board or a court.

The Board reviewed Section 52 of the Ontario Municipal Board Act regarding the power to summon witnesses and enforce their attendance. It was pointed out to all present at the Board hearing that a witness before the Board pursuant to a summons has no choice in the matter
and can, indeed, be compelled to give evidence. No party is to think
that such a witness is being partisan in telling the truth. Section
14 of the Statutory Powers Procedure Act was also referred to by the
Board. Section 14 provides for protection to witnesses and, while
it is more commonly viewed as protecting witnesses in criminal
proceedings it can also be seen to give protection to witnesses in
matters before the Board especially where it is stated, "...... and
that no answer given by a witness at a hearing shall be used to be
receivable in evidence against him in any trial or other proceedings
against him thereafter taking place, other than a prosecution for
perjury in giving such evidence." (Emphasis added). This section
guides us in considering the immunity, and the breadth of that
immunity, that is to be accorded a witness properly compelled to
appear before the Board.

The Board ordered Mr. Marini to comply with the terms of the
summons to witness, to speak truthfully and not to fetter his honest
opinions. It was further ordered that all materials and summaries
of all witnesses before the Board be exchanged between the parties
and Mr. Marini was to be given uninterrupted time between the recess
at the end of the first day of the hearing and the recommencement on
the next day to review the consultants’ reports that had been kept
from him.

The Board finds that the role of Mr. Plant, whether or not it
was carried out pursuant to instructions received from his client,
the City of Stoney Creek, in attempting to curtail the planner’s
evidence before the Board was improper and was an attempt to impair
the Board’s ability to carry out its function mandated by the
legislature in the Planning Act in that the Board must rely on good,
sound and frank evidence from all witnesses, including and perhaps
especially that of the municipal planner, to make decisions in the
public interest.
The Board further orders that the City of Stoney Creek pay the reasonable costs incurred by Mr. Marini in retaining independent counsel to obtain legal advice in this matter. These costs are to be on a solicitor/client basis.

THE PLANNING ISSUES

The issue causing the greatest concern is that of traffic. While there was some concern expressed about the appropriateness of an amendment to the Official Plan and the Zoning by-law, it is fair to say that the focus continually returned to the traffic issue. A secondary issue was whether or not the proposal was premature as there was no neighbourhood, or secondary, plan. The third issue was whether or not the proposed uses were appropriate for the site and the neighbourhood.

The Green Road property of approximately .6 hectare (1.5 acres) is located on the east side of Drakes Drive, south of Frances Avenue and north of the North Service Road which provides access to the Queen Elizabeth Way. The boundary between Stoney Creek and the City of Hamilton runs north/south between Gray Road to the west and Drakes Drive. A large traditional industrial area is located to the south of the Queen Elizabeth Way. A residential neighbourhood is located to the north and east of the site.

As referred to above, Green Road applied to the City of Stoney Creek to amend the Official Plan from a "Residential" designation to a "General Commercial" designation. It had also applied to amend the zoning by-law from Neighbourhood Development [ND] to General Commercial [C3]. The purpose of these amendments was to permit the development of the lands as a commercial plaza with 1,228 square metres (13,200 square feet). A portion of the site is affected by an open drainage channel which Green Road was proposing to enclose in order to maximise the amount of developable land. It drains an
area of approximately 1.25 square kilometres of the Hamilton-Stoney Creek Industrial area located to the south of the Queen Elizabeth Way. The property is abutted by residential development to the east beyond the drainage channel.

The owner is proposing to build what one witness describes as a fairly small standard commercial plaza. If permitted, the owner expressed willingness to agree to limit the maximum size to 1,209 square metres, a maximum of 330 square metres to be used for restaurant use and the balance of 879 square metres for other uses. Depending on the area required for each use, it is anticipated that four uses would locate in the plaza to be chosen from the restricted uses proposed: retail stores, food stores, retail outlets, banks, bakery shops, personal service shops, medical centre, offices and service shops. Parking would be provided on the site between the front wall of the plaza and Drakes Drive. The owner wishes to provide for eight additional parking spaces to the rear of the plaza to be reserved exclusively for employees.

**TRAFFIC CONCERNS**

The Board had evidence presented to it by traffic specialists retained by the proponent as well as by the Municipality. Several residents from the area gave evidence of their first-hand experience with the traffic difficulties. It was agreed, by each person commenting on traffic, that the immediate local road network surrounding the site and serving the local residential community actually functions as an on-ramp to the Queen Elizabeth Way. In the morning and afternoon rush periods, traffic made up of private automobiles and heavy trucks forms an almost unbroken line-up in a loop pattern as it proceeds north from the industrial district along Gray Road, where it passes over the Q.E.W. turning right, east onto Frances Avenue and then almost immediately south along Drakes Drive, where again it turns right, to proceed westerly along the North
Service Road until it can gain access to the Q.E.W. Typically the large trucks find the west bound turn onto the North Service Road difficult to achieve as each waits in turn for a break in the other traffic along that road. The remainder of the stream of traffic behind forms a platoon or queue, as the vehicles slowly trundle toward the intersection.

The residential neighbours vividly described the existing traffic congestion and their lay impressions of the traffic were corroborated by the analysis of the traffic consultants. Each of the traffic consultants stated that Frances Avenue would become more important in its role as a collector, despite what the residential neighbours want. Since the local road pattern forms the loop ramp to the Queen Elizabeth Way this continuing function is unavoidable. The issue for the Board to consider with regards to this matter is whether the proposal before it would have a perceptible impact aggravating the existing traffic situation.

Exhibits 19 and 26 were the traffic reports and analysis of, respectively, the traffic consultant retained by the proponent and by the Municipality. The methodology used by each consultant was similar. There was, however, some difference in terms of the estimate of impact arising from the commercial plaza should it be developed.

It was the opinion of Mr. Ross, called by the proponent, that there would be no net impact arising from the proposed development. His report was reviewed at length and he testified extensively before the Board. In summary, he described a very difficult existing traffic situation with some limited residual capacity for additional traffic. It was his opinion that whether or not the land was developed for this or any other proposal, there would be some resulting traffic. In any event over three years or so the
background traffic growth would result in the reserve capacity being used up.

While Mr. Copeland, called by the Municipality, disagreed on the calculation of some of the impact analysis, he too agreed that there was some reserve capacity. It was significant to the Board that he conceded that the maximum potential traffic resulting from the proposal in a worst case scenario would be limited perhaps to 15 - 20 extra vehicles for each rush hour period, Monday through Friday of most weeks. It was his opinion that this was not enough of an impact to recommend stopping this project.

The Board accepts and finds that the projected and reasonable anticipated traffic arising from the proposal before the Board would not create a significant or perceptible impact on the existing traffic conditions. Having said that the Board acknowledges that the configuration of the Gray Road, Frances Avenue, Drakes Drive and North Service Road loop formation providing access to the Queen Elizabeth Way is a most undesirable, even though existing, pattern of traffic use through an area abutting residential neighbours. It also appeared to the Board that a re-alignment of the North Service Road as proposed by the consultants as part of studies carried out by the Ministry of Transport for service roads along the Q.E.W. would go a long way toward alleviating the situation, when it is implemented. According to the evidence before the Board the re-alignment will result in the north service road no longer being a direct access to the Q.E.W. and the trucks would be banned from utilizing the existing road network as a loop on-ramp.

The Board was advised that several contracts for the re-alignment of the service roads are in the process of being completed and some of the work is included within the 5 year capital plan of the Ministry. As the Board accepts that there is no significant impact to the already existing traffic situation from the
proposal, it did not find it necessary to suggest delaying approval until the re-alignment of the service roads has been implemented.

OFFICIAL PLAN

The Board heard from three professional land use planners: the City planner gave evidence pursuant to a subpoena, the proponent retained its own consultant planner, and the municipality also retained an outside consultant planner.

The lands at present are designated "Residential" within the Official Plan, while the applicant has requested an amendment to a "General Commercial" designation.

The site is located within the Lakeshore neighbourhood of the City of Stoney Creek lying to the north of Queen Elizabeth Way and the North Service Road, which as discussed above, acts as a collector for the Queen Elizabeth Way. Between the site and Lake Ontario to the north lies a well developed residential neighbourhood composed primarily of detached single family homes developed some years ago in plans of subdivision. The boundaries of the City of Hamilton lie approximately 150 feet to the east of Gray Road. To the south of the Q.E.W. lies a large industrial area occupying part of the east end of the City of Hamilton. To the east of the site the lands are occupied by more detached residential units and further to the east behind the houses located along the Teal Avenue frontage, lies an extensive area of lands which although designated and zoned are for the most part vacant. To the south and east of the intersection of Church Street and Teal Avenue lies a portion of land designated for public open space use. North of Church Street to the lake, the lands have been recently developed with a new residential subdivision and to the east of that subdivision is an area developed with high density apartment buildings overlooking the lake. There is some
existing commercial development at the intersection of Green Road and the North Service Road.

The applicant is proposing to develop the lands to contain a small commercial plaza that would be limited in its use both by size constraints and by the uses that are considered for approval within the site specific by-law. The attention of the Board was drawn to certain general policies within the Official Plan that are to be recognized when considering amending the Plan to the general commercial designation. These policies included the following:

Objective A.3.1.1 encourages the provision of a sufficient level and variety of retail activity to accommodate the demands of residents.

Objective A.3.2 is included to ensure that commercial development not have adverse effects on adjacent land uses and that such development occurs in an orderly and highly aesthetic manner, readily and safely accessible to local residents.

Based on the evidence before it, the Board accepts that the uses in the proposed commercial plaza would comply with the objectives of these sections of the Official Plan. The uses can be restricted within the by-law to ensure compatibility and the Board accepts the evidence of Mr. Marini that the proposed restrictions would be adequate to ensure such compatibility with the residential neighbourhood. Initially the applicant had requested a broader range of uses with which Mr. Marini and his staff did not agree. Aesthetic compatibility can be ensured via the site plan for the site as this is an area designated under Section 40 of the Planning Act for site plan control.

Policy A.3.3.2.1 provides that the general commercial designation applies to certain existing and proposed individually
managed commercial establishments located along highways and arterial roads. The planner retained by the Municipality took the position that the subject site being located on Drakes Drive, a local road, at the intersection with the North Service Road was not on a highway or arterial road. The Board prefers and accepts the evidence of Mr. Marini that he views the site as being adjacent to a major road system, the Queen Elizabeth Way, and is located on what for all practical purposes is an on-ramp or collector for the Q.E.W. and therefore views that factor as bringing the proposal within the intent of the Official Plan of locating such uses nearby heavier traffic routes.

Policy A.3.3.2.7 states that where commercial uses are proposed to be developed adjacent to lands designated residential, Council shall ensure that access drives, parking and service areas will be screened and/or buffered, so that noise, light or undesirable visual effects emanating from the commercial use are reduced.

The Board was satisfied that there will no problem in achieving compliance with this objective of the Official Plan. The evidence adduced through Mr. Marini regarding restrictions on the use of the site and constraints to be imposed on the site plan are designed to ensure compliance with this section.

Objective A.3.2.14 directs that in the consideration of commercial development, Council shall be satisfied that the proposal will enhance the character and function of the Planning District and will not have a detrimental effect on abutting land uses. It was the opinion of Mr. Marini that this proposal will add to the diversity of uses and will be useful and functional within the neighbourhood. He said that it was a difficult site due to its configuration and that the proposal is appropriate especially with proper site planning and the proposed site specific zoning controls so as not to intrude in an unpleasant way into the neighbourhood.
It was pointed out to the Board that Section A.3.3.1.4 defines shopping centres and the Green Road proposal is sufficiently small that it does not qualify as the smallest of the three categories of shopping centres. A "neighbourhood shopping centre", the smallest, is defined as having a gross leasable floor area of at least 1,400 square metres up to a maximum of 14,000 square metres. The proposal before the Board is for a commercial plaza of 1,228 square metres. For a project of this small size, the Official Plan does not require market studies. Notwithstanding the small size of the proposal, the Planning staff of the City thought it advisable to recommend restricting the uses so that compatibility with neighbouring uses could be ensured and high traffic producing uses would be avoided. The Board accepts that it is appropriate to restrict the uses and accepts the opinion of Mr. Marini that the Official Plan provides the opportunity via the zoning by-law to limit the uses thereby ensuring such compatibility.

Having heard the evidence of the planners before it, the traffic specialists and the residents, the Board finds that the small plaza proposed by Green Road with a restricted range of uses will be a suitable one for the relatively small subject site located as it is between residential uses and heavily travelled traffic thoroughfares. The Board accepts the evidence of Mr. Marini that it will be a useful addition and enhance the function and character of the neighbourhood. The Board accepts that the site is not a suitable one for residential development.

Traffic concerns were those most urgently expressed by the local residents. From all of the evidence before it and discussed in the decision, the Board finds that the proposal will not have a detrimental effect on abutting land uses from the traffic generated by it. The Board accepts that the use as a small commercial plaza will not have a detrimental effect and that site concerns can be
adequately dealt with through the site plan review under Section 40 of the Planning Act.

It was the opinion of the consultant planner retained by the Municipality that Sections F.3.1 through to Section F.3.5 encourage secondary plans which he said were not absolutely necessary. It was, however, his opinion that a secondary plan must be prepared for the Urban Lakeshore neighbourhood and until that secondary plan was done, the proposal before the Board was premature. The Board prefers the opinion and analysis of Mr. Marini who said that this proposal is not a secondary plan matter, it is a primary land use matter and it is appropriate to consider an amendment to the designation on Schedule "A" of the Official Plan. Until such time as a secondary plan for a neighbourhood is prepared, the Official Plan is to guide development and amendments to the plan. Mr. Marini is satisfied that this proposal is fully within the intent of the Official Plan as approved.

The Board finds that it is appropriate to approve an amendment to the Official Plan from "Residential" to "General Commercial" designation.

ZONING BY-LAW

The site is currently zoned "ND" Neighbourhood Development and the applicant has requested that that be rezoned to "C3" General Commercial. Due to the relatively small size of the site and the irregular configuration, planning staff for the City were concerned that any proposal for the land be compatible with the abutting residential neighbours to the east. As a result, the staff considered restrictions on use, yard requirements, location of parking, overall size of the development, noise and smells.
It was the position of Mr. Marini that restricting the permitted uses and the size of those permitted uses would contribute to compatibility. This was generally agreed to as were the following restricted uses: retail stores, food stores, restaurants, retail outlets, banks, bakery shops, personal service shops, medical centres, offices and service shops.

It was stressed before the Board that the size of lot and yard setbacks would dictate the overall size of the proposed development. The restricted size of the development will, in turn restrict the number of uses that would fit into the proposal. According to the evidence before it, in all probability there would be one restaurant use and perhaps as many as four other uses depending on the market available.

A proposed site plan, not before the Board during the course of the hearing, was presented as Exhibit 15 to indicate the desired site plan on the part of the applicant. That site plan would result in a maximum gross leasable area of 1,209 square metres.

It was agreed that a restriction on the size on any permitted restaurant use was important. The applicant was prepared to live with the restriction to a maximum of 330 square metres for restaurant use. From the planning and traffic evidence before the Board, the Board was satisfied that this would not result in a traffic level that would result in a negative impact into an already difficult traffic situation. This 330 square metres area could be utilized for one sit-down restaurant, or for what the Board was told was a traditional apportioning between a doughnut shop of about 125 square metres with the balance being a small sit-down restaurant of 205 square metres.

The parking standard recommended by City planning staff and agreed to by the applicant of 5 parking spaces of each 93 square
metres of gross leasable floor area is above the general standard required in the parent zoning by-law and will result in approximately 61 to 66 parking spaces. The Board accepts that this is adequate for the anticipated use. The consultant planner retained by the municipality said that this standard would not be adequate and read to the Board extracts from Exhibit 24, a report entitled "Commercial Parking - a Planner's Handbook" produced by the Ministry of Municipal Affairs. He read from pages 10, 11 and 12 of that Handbook and chose not to read into evidence those portions of the report on "shared" use principles. As it turns out, if he had chosen to observe the shared use principles, the parking standard as presented to the Board by the applicant and planner for the City would have been more than adequate. The Board regrets this omission on the part of the witness, as a professional witness qualified to give opinion evidence before the Board should not pick and choose only those parts of a report that serve his client.

The owner of a small site on Frances, directly opposite the subject property, appeared before the Board in opposition. Commercial development is permitted on her site. She said she intends to apply for a building permit in the near future and fears that approval of the Green Road proposal would negatively affect the value of her property. The Board does not accept her fears that a reduction in value would result, and in any event, does not find that it would have an impact on the planning matters within the scope of the Board.

There was some difference of opinion between the planner retained by the applicant and Mr. Marini as to the size of the appropriate sideyard abutting Drakes Drive. Mr. Marini was of the opinion that this should be a six-metre sideyard while the applicant said in order to accommodate the comfortable 61 to 66 parking spaces on the site, a three metre sideyard is necessary. It was pointed out to the Board that there are no residential uses on the lands on the
west side of Drakes Drive and that this reduced sideyard would not have any negative impact on the aesthetic appeal within the community.

As the Board accepts the opinion of the planners before it that the site is not appropriate for future residential development, being located on what is, to all intents and purposes a collector lane for the Queen Elizabeth Way, and even in the event of re-alignment of that North Service Road, would still be within very close proximity to the Q.E.W., the Board is satisfied that the use of a relatively small general commercial plaza restricted as it would be by the site and use constraints, is an appropriate use and that the 3 metre sideyard setback is also appropriate.

The Board finds that it is appropriate to amend the zoning by-law and rezone the property to the General Commercial "C3" Zone specifically as provided for in Schedule "A" to this decision.

DRAINAGE CHANNEL

The applicant proposes closing part of Drainage Course Number 14 located on the eastern portion of the site. The Hamilton Region Conservation Authority has advised the municipal planning staff that it has no objections to this suggestion provided that the appropriate permit will be issued to the applicant by the authority pursuant to Ontario Regulations 617-86. (which are the Fill and Construction Regulations of the Conservation Authority). The Board is satisfied that this environmental matter can be appropriately dealt with by the Authority.

CONCLUSION

For the reasons outlined in this decision, the Board will amend the Official Plan of the City of Stoney Creek in accordance with
Tab 15 of Exhibit 2 before the Board attached to this decision as Schedule "A". The Board will allow the appeal and will amend By-law 2175 of the City of Stoney Creek in accordance with Schedule "B" to this decision. The Board so orders.

DATED at TORONTO this 4th day of December, 1941

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

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

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

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

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

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

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

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

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<th>Parties</th>
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<td>PROUD (Port Recognizing Our Unique Heritage)</td>
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**DECISION DELIVERED BY SUSAN B. CAMPBELL AND ORDER OF THE BOARD**

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

The site is currently developed with a number of buildings: the Austin House hotel, Erskine’s Pharmacy and the Hydro Building on Lock St., the Rum Jungle and the Jail House on Main St. and the Port Mansion (McGrath and Union House Hotels) on
Lakeport Rd. E. The buildings and all the open spaces within the subject site are part of the Port Dalhousie Heritage Conservation District (the “PDHCD”).

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

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

The History of These Applications:

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

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

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

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

City Council then held public meetings on June 13, 14, 15, 20, 21 and 26, 2006. Council heard 65 people speak in opposition to the proposal and 53 people, including
PDVC representatives speak in favour of the proposal. After these public meetings a further staff report was prepared for Council’s consideration (Exhibit # 5e, TAB 7).

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

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

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

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

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

Staff then gave Council options on how to proceed:

1. ask the OMB to dismiss the appeals; that is, support the original decision of Council;
2. recognize the appeals as valid and repeal By-laws 2006-227 and 2006-228. Staff noted that Council would be required to have a public meeting before repealing the by-laws (emphasis added);

3. direct staff to seek to have the appeals dismissed as they are "insufficient to justify a hearing";

4. do nothing, direct staff to attend the hearing only under subpoena.

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

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

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

With respect to Counsel’s submission that the public interest to which the Board must have regard, is expressed through a vote in a municipal election, the Board finds that this is not the case. The public interest to which this Board must have regard is expressed through planning documents like the Provincial Policy Statement, the Growth Plan for the Greater Golden Horseshoe, municipal official plans and secondary plans and regional official plans. These documents result from a thoughtful and
comprehensive consideration of the long term health and viability of this Province and the municipality in question. Public opinion as expressed in the heat of municipal elections or passionately contested Board hearings is not necessarily synonymous with the public interest.

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

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

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

With respect to the heritage permit and site plan applications, Council decided to request that PDVC submit these applications although staff had made no recommendation on the issue. The previous Council had received advice that such applications were not required to make a decision on the OPA and zoning by-law applications (Exhibit # 5e, p.508).
Finally, when Council made its decision on the heritage permit application it decided that it did not want to receive a report from its planning staff. This was the uncontradicted evidence of Paul Chapman, Director of Planning Services for the City. Rather, it chose to receive a “flow-through report’ from the Acting Chief Administrative Officer of the City (Exhibit # 5f, TAB 26). This report set out only the conclusions of the St. Catharines Heritage Committee and the PDHDAC, both of which recommended denying the application. Council refused the heritage permit.

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

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

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

During the course of the hearing the Board specifically asked Council for the City, the City Solicitor, why Council did not repeal the By-laws if it did not support the PDVC
proposal and agreed with the appellants. The City Solicitor displayed admirable candour when she replied “who can say why politicians do what they do”. Council for PROUD attempted to proffer reasons for Council’s actions, but the Board indicated that as she did not represent the City, her conjecture on this subject was irrelevant.

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

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

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

The Board finds that the process of the new Council does not bear scrutiny. Put colloquially, it does not pass the “smell test”. The waiver of the provisions of a procedural by-law which is undoubtedly intended to guarantee fairness is extremely troubling to this Board. A process which avoided a mandatory public meeting in which all voices could have been heard, and which would have required Council to consider
comprehensive reports, including that of its expert staff, is **not** a process in keeping with the intent of the *Planning Act*. It is not a process giving rise to a decision to which this Board will have much regard.

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

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

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

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

The District Guidelines, also referred to during this hearing as the “Port Dalhousie District Plan”, “follows on from the Port Dalhousie Heritage Conservation District Heritage Assessment Report that described the heritage characteristics of this Welland Canal port lakeside community in the City of St. Catharines. The report also provided a rationale for the boundary of the proposed district” (Exhibit # 5d, TAB 5, p 156).
The District Guidelines contain an explicit statement of purpose: “the purpose of this document...is to provide guidance in the care and protection of the heritage character of the Port Dalhousie Heritage Conservation District”. The document went on to state “it is worth emphasizing that these are ‘guidelines’. They are intended to provide an objective minimum level of appropriateness for physical change over the coming years” (Exhibit # 5d, TAB 5, p.156.).

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

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

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

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

The Board has reviewed the December 2003 decision of the Board carefully; there is no indication in this decision that the District Guidelines or “District Plan” was before the Board or that the Board in any way considered the merits of that document. The Board considered and made a decision only on By-law 2002-180 which designated a mapped area as a heritage conservation district.
The history of this designation of the PDHCD is germane as the legislature enacted significant changes to the *Heritage Act* in 2005 (the “New Heritage Act”).

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

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

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

It is the position of PDVC that the District Guidelines, created under the old *Heritage Act*, do not have the same status as a heritage conservation district plan as required by the new *Heritage Act*. Counsel for PDVC did not argue that district plans which predate the new *Heritage Act* by definition lack the elevated status. Rather he argues that as the new *Heritage Act* sets out a process by which a municipality may adopt such a district plan for the purposes of the new *Heritage Act*, that process must be followed by a municipality for the district plan to be afforded the elevated status. The City has not followed this process with respect to the District Guidelines; therefore the District guidelines do not constitute a district plan for the purposes of the new *Heritage Act*. 
The process by which an existing district plan may become a district plan for the purposes of the new *Heritage Act* is set out in section 41.1 of that Act. Section 41.1(2) provides “if, on or before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, the council of a municipality had passed a by-law designating one or more heritage conservation districts, it may pass a by-law adopting a heritage conservation district plan for any of the designated districts”.

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

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

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

(a) a statement of the objectives to be achieved in designating the area as a heritage conservation district;

(b) a statement explaining the cultural heritage value or interest of the heritage conservation district;

(c) a description of the heritage attributes of the heritage conservation district;

(d) policy statements, guidelines and procedures for achieving the stated objectives and managing change in the heritage conservation district ; and

(e) a description of the alterations or classes of alteration that are minor in nature and that the owner of property in a heritage conservation district may carry out or permit to be carried out on any part of the property other than the interior of any structure or building on the property, without obtaining a permit under section 42.

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

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

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

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

Mr. Blozowski confirmed that the City was aware of section 41.2(1)(b) of the new Heritage Act when it passed the by-laws which are now the subject of appeal. He
confirmed that there is no record of Council having received any legal advice at the time of passage that the by-laws would offend that section of the new Heritage Act.

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

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

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

The City Solicitor argued that “evidence of the adoption of the guidelines as a district plan are (sic) found in the second recital of By-law 2002-180, and in the Minutes approved by Council”. Further, she argued that the Board decision on the appeal of the
designating by-law was somehow evidence that the District Guidelines had been adopted as a district plan by the City.

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

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

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

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

Having reviewed Counsel’s submissions and the provisions of the new Heritage Act the Board finds that the District Guidelines do not constitute a district plan for the specific purposes of section 41.2(1) and (2). This does not mean that the alarmist claim of Counsel for PROUD that all pre-2005 heritage district plans or guidelines are
rendered “ineffective and useless” is correct. Specifically, in the City of St. Catharines, pursuant to policy 7.10.7 of the OP, in reviewing proposals for change in the Port Dalhousie Heritage Conservation District, the City “will be guided by the applicable heritage conservation district plan”. The District Guidelines are neither ineffective nor useless; they have a specific status under the City’s OP.

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

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

The Board finds that the process for adopting a pre-2005 district plan is not a mere technical procedure; it affords substantive rights to owners of property in a heritage conservation district. The preservation of built heritage is vitally important in this province. Because of that the new Heritage Act, allowing for district designation and the adoption of a district plan can result in the loss of property rights. That loss of rights is justifiable as the preservation of built heritage is of such consequence. However, the loss of such property rights can only happen after a transparent public process has taken place. Section 41.1 guarantees such a process. If a designated heritage conservation district is to be subject to a district plan which requires by-law
consistency and in fact makes a district plan determinative, the required fair public process must be followed. Otherwise district guidelines or a district plan retain the status afforded by the OP. In St. Catharines the District Guidelines are intended to “guide” City Council (and this Board) in reviewing proposals for change in the heritage district.

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

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

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

The Board must note that if the City believed it had a “moral contract” with its citizens, reflected in the District Guidelines, the new Heritage Act gave it a mechanism to ensure that this “moral contract” was affirmed and in fact afforded superior legal status. This Board has been given no authority through any statute to enforce “moral contracts”. If the City believes that the District Guidelines constitute a “moral contract” it
should have followed the provisions of section 41.1 of the new *Heritage Act* and adopted the District Guidelines through a by-law.

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

**The Relevant Planning Policy Regime**

The *Planning Act*:

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

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

The Provincial Policy Statement:

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

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

Mr. Martindale on behalf of the City and Mr. Morgan on behalf of PROUD did not seem to read the PPS with this direction in mind. Exhibit # 20, Mr. Martindale’s witness
statement and Exhibit # 225, Mr. Morgan’s witness statement make reference only to one section of the PPS: Policy 2.6, Cultural Heritage and Archaeology. In his oral evidence, Mr. Martindale spoke to Policy 1.1.3.3, concerning intensification, but dismissed it as irrelevant as Port Dalhousie “has not been formally identified as an area of intensification”.

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

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

Policy 1.0 – Building Strong Communities

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

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

Policy 1.1.3.1 provides “settlement areas shall be the focus of growth and their vitality and regeneration shall be promoted”. “Settlement areas” are defined as “urban
areas...within municipalities that are (a) built up areas where development is concentrated and which have a mix of land uses”. The Board finds that the subject property is located within a settlement area.

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

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

Policy 2.6 – Cultural Heritage and Archaeology:

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

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

“Significant” means “in regard to cultural heritage and archaeology, resources that are valued for the important contribution they make to our understanding of the history of a place, an event, or a people. Criteria for determining significance of resources...are recommended by the Province, but municipal approaches that achieve or exceed the same objectives may also be used”.
All parties acknowledge that the Port Dalhousie Heritage Conservation District, as a district designated under the *Ontario Heritage Act* constitutes a cultural heritage landscape for the purposes of the PPS. Further, all parties agree that the Heritage District contains significant built heritage resources.

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

The Board notes that in *Birchgrove* the Board was dealing with individual structures, designated under Part IV of the *Ontario Heritage Act*, not a Part V designated heritage district. However, the Board finds that the logic in that decision is applicable to the consideration of proposed alterations in a heritage district. As with a heritage structure, not every element of a heritage district is of equal significance. The significant attributes of the heritage district should be identified in the district plan or in the case at hand, the District Guidelines. The PPS in defining “significant” necessarily calls for judgment to be used in determining significance. In calling for the conservation of “significant built heritage resources” and “significant cultural heritage landscapes”, the PPS implicitly acknowledges that there may be built heritage resources and cultural heritage landscapes which are not significant and which do not warrant conservation. Such an interpretation allows for the balancing of a variety of provincial interests as mandated by the PPS.
Counsel for PROUD argues based on the evidence of Mr. Morgan that the Port Dalhousie Heritage District is a “significant cultural heritage landscape” in its entirety for the purposes of Policy 2.6.1. Therefore the entire district must be conserved. The only question to be asked is whether the PDVC proposal does “conserve” the District as required by the PPS.

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

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

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

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

The Growth Plan for the Greater Golden Horseshoe:

The Growth Plan came into effect on July 31, 2006. Ontario Regulation 311/06 deals with transitional matters for the purposes of the Growth Plan. Section 2 sets out deemed day of commencement. If one is dealing with an application for an OPA or zoning by-law amendment, the deemed day of commencement for the purposes of conformity with the Growth Plan is the date of the application. If one is dealing with an
adopted OPA and an enacted by-law, the deemed day of commencement is the day the by-laws were enacted. In the case at hand the by-laws were enacted after the Growth Plan came into effect. Therefore the Board’s decision on all matters before it must conform with the Growth Plan.

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

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

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

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

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

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

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

The Niagara Region Policy Plan:

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

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

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

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


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

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

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

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

Counsel for PROUD submitted that nowhere in the Region’s strategic objectives is economic revitalization given “priority status”. In its report to Regional Council, Regional planning staff acknowledged that revitalization or growth is not determinative. Staff acknowledged that balance is necessary: “while economic development is an important part of the framework, the purpose is to guide change by providing a balance that will preserve and enhance what is special about Niagara while accommodating growth and new development” (Exhibit # 5f, TAB 17).
It was the opinion of Regional staff that the proper balance was not achieved by the PDVC proposal and that alternatives should be considered. Regional Council did not agree; it approved OPA 31 (Exhibit # 5f, TAB 18). Mr. Cambray who was responsible for the report of Regional staff was Commissioner of Planning and Development at the time the report was prepared. He has retired from the Region and he testified on behalf of PROUD at the hearing. The Region continues to support the PDVC proposal.

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

City of St. Catharines Official Plan:

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

In determining whether a development proposal conforms to the provisions of an official plan the Board must consider all relevant policies. Counsel for PDVC cited a number of cases which the Board finds instructive on this point. In Belle Himmell Investments Ltd. v. Mississauga (City) (1982), 13 O.M.B.R. 17 (Ont. Div. Ct.) the Court said “official plans are not statutes and should not be construed as such...in such a document there will almost inevitably be inconsistencies and uncertainties when considered in the light of a specific proposal. It is the function of the Board in the course of considering whether to approve a by-law to make sure it conforms with the Official Plan. In doing so, the Board should give the Official Plan a broad liberal interpretation with a view to furthering its policy objectives”. In Friends of Eden Mills v. Eramosa (Township), [1998] O.J. No. 2604 (Ont. Div. Ct.) the Court considered the above words
of Belle Himmell and went on to say “the policy objectives of an official plan are not restricted to heritage concerns; thus the ‘broad liberal interpretation’ cuts both ways…there must be a weighing and balancing of interests where there is no detailed and specific direction in the OP. The Council in dealing with the OP must not only deal with the heritage aspects contained therein but with the other non-heritage aspects; this will involve considering the guidelines which are set out very generally, not only as to heritage matters, but the non-heritage ones as well – and where there are inconsistencies and uncertainties to harmonize and rationalize in a reasonable way” (emphasis added).

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

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

1. quality of life: “create a physical, economic and social environment that gives the residents and employees…an ideal place for living, working and recreating and promoting a sense of history and identity”;

2. citizen participation: “provide opportunities for citizen participation in all aspects of planning and development within the municipality”;

3. economy: “create a community development pattern that fosters a vigorous and diverse local economy by supporting the existing business community and promoting new business opportunities”;

4. heritage: “preserve, promote and foster awareness that our heritage and diverse cultural institutions, man-made and otherwise, are vital to our community life and economic and social health”;

5. land use: “arrange land uses and organize urban growth so as to promote economy, efficiency, order, aesthetics, compatibility and flexibility for future change”.

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

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

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

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

(a) the continued growth, expansion and revitalization of a diversified commercial land use mix;

(b) appropriate access to and through commercial areas for pedestrians, cyclists, and automobiles and transit vehicles; and

(c) adequate and appropriately located parking facilities”.

This policy goes on to say “it is also an objective of this Plan to increase tourism opportunities throughout the City to provide greater economic and social benefit to the community”.
Policy 4.2.5.1, Design Criteria, provides “in order to conserve and strengthen the special identity and character of the historic commercial areas (including) Port Dalhousie, the zoning by-laws are to reflect the built form in those areas to ensure new construction within these areas will be compatible to the existing built environment in terms of height, bulk and building materials”. Proposals for commercial development are to be evaluated in terms of factors like adequacy of site size and shape; availability of municipal services; adequacy of public transit; adequacy of parking; compatibility; and the rehabilitation and preservation of existing buildings of historical or architectural significance.

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

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

Policy 7.9.2 speaks specifically to areas where “the streetscape pattern is relatively weak or there is no established pattern”. Design is to create “a more attractive urban form”. Certain criteria should be followed: overall massing should be broken up and if it cannot be, methods to achieve design articulation should be used. These include using materials, textures and colours which do not contrast with the surrounding landscape; avoiding single continuous rooflines; and breaking up continuous expanses of façade walls visually and physically.
Policy 7.10, Heritage Conservation is especially germane to development in the Port Dalhousie Heritage Conservation District. Section 7.10.1 provides that “cultural heritage resources” include buildings of historical, architectural, and contextual value and “human-made…urban districts or landscapes of historic and scenic interest”. Policy 7.10.4 allows for the designation under the *Ontario Heritage Act* of heritage conservation districts. Policy 7.10.6 provides “within a designated district it is the intent of Council to conserve and enhance the unique heritage character of the area”. In reviewing proposals for the construction, demolition or removal of buildings and structures or the alteration of existing buildings, Policy 7.10.7 provide “the City will be guided by the applicable heritage conservation district plan and the following general principles:

(a) heritage buildings, associated landscape features and archaeological sites including their surroundings should be protected from any adverse effects of change;

(b) original building fabric and architectural features such as doors, windows, mouldings, vergeboards, walling materials and roofs should be retained and repaired rather than replaced wherever possible;

(c) new additions and features should generally be no higher than the existing building and wherever possible be placed to the rear of the building or set back substantially from the principle façade;

(d) new construction and/or infilling should be compatible with surrounding buildings and streetscape by: being generally of the same height, width and orientation as adjacent buildings; being of similar setback; and using similarly proportioned windows, doors and roof shapes;

(e) design, style, materials and colours for new construction will be considered on an individual basis on the premise that contemporary styles can be more appropriate in certain cases than using design styles and motifs from previous periods”.

Policy 16 of the OP sets out the Neighbourhood Plan. It provides that the purpose of the Neighbourhood Plan is “to provide a framework for the development and redevelopment of the Port Dalhousie Neighbourhood”. Obviously, the Board finds,
change and development are contemplated for Port Dalhousie. However, the policy establishes objectives in support of the goal of “the development of an orderly and attractive urban pattern”, which seek to protect the character of Port Dalhousie. These objectives include to ensure that the character of the Commercial Core is maintained and protected at the same time, to ensure that the Commercial Core does not encroach on the adjacent residential areas; to maintain and reinforce the atmosphere and character which has developed in the Commercial Core; to enhance the streetscapes and the pedestrian amenities of the Commercial Core; to increase the supply of recreational facilities; to maintain a safe and orderly flow of traffic on the major arterial roads; to maintain the privacy and amenity of residential areas; to provide adequate parking facilities; to conserve individual buildings of historic or architectural value; and to protect areas of historic or architectural interest.

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

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

Policy 16.4 calls for “regional retail uses” to be concentrated in the Commercial Core. Policy 16.23 follows on this, directing commercial uses which serve a “city-wide function” for the Commercial Core. It is to be regarded as a “primarily commercial core characterized by retail and service commercial uses located at grade with a minimum setback from the lot line, and with a limited number of apartments located above (Policy 16.25). Residential uses are permitted in the commercial core “provided there is a commercial component and that such residential uses are located above or behind commercial establishments” (Policy 16.28.1). Policy 16.29 requires the provision of off-street parking for new development in the Commercial Core.
The significance of the historic character of the Commercial Core is highlighted in Policy 16.30: “in order to conserve and strengthen the special identity and character of the Commercial Core, encouragement shall be given to the protection and enhancement of those properties, buildings and features of architectural, historic and/or landscape value which are located in the Commercial Core. Any new construction, particularly infill development, within the Commercial Core should be sympathetic to the existing built environment in terms of height, mass, colour and materials”.

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

(a) improve the environment by the elimination of congestion, decay, noise and the retention of positive attributes of the environment such as buildings of architectural significance, pleasing scale or material, public open spaces and landscape features such as trees, walkways, fences, etc.;

(b) maintain the character of the townscape and building groups within the area;

(c) direct growth in a manner compatible with the existing scale and character of the area;

(d) prevent the incursion of elements which would detract from the character of the area and prevent unsympathetic alterations to buildings that would detract from the area’s character;

(e) ensure that attention is given to the details of the design of new buildings so that those buildings are harmonious with the historic character of the district; and

(f) ensure that the renovation and restoration of older buildings within Heritage Conservation Districts carefully preserve the character and the interest of the original building.

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

(a) The Heritage Conservation District designation shall not be considered to be a freeze on development in the designated area. The Heritage Conservation District designation shall be considered to be a statement made by the municipality, that a special effort will be made within the chosen area to conserve and enhance the built character of that area;

(b) The features within a designated district which give the area its distinctive character and, as such, contribute to the area’s merit as a Heritage Conservation District shall be
conserved. These features may include the placement and relationship of buildings; the scale and character of the townscape and building groups; the architectural details of the buildings; the height and density of buildings; vistas, views and streetscapes. These features should be identified for Port Dalhousie and included in the Heritage Conservation District Plan.

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

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

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

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

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

The revitalization or economic viability imperative is focused, through this policy, on the Commercial Core. Therefore, for development proposals for lands situated in the
Commercial Core of Port Dalhousie, this Board must do as it was directed in *Eden Mills*: it must “weigh and balance interests”. Further, “where there are inconsistencies and uncertainties”, the Board must “harmonize and rationalize (them) in a reasonable way”.

Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change:

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

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

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

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

A conservation intent is set out in the District Plan:

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

1. protect all remnants of the Welland Canal as significant elements of industrial archaeology in the landscape;

2. encourage the current vitality of the Commercial area by promoting its unique architecture and contemporary adaptive reuse as well as continuing to protect its distinct heritage fabric;

3. maintaining the low profile, compact building forms of the cottage and residential areas; and

4. maintaining and enhancing open space areas in a manner consistent with protecting distinguishing heritage features.

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

The Board finds that there is nothing in the District Study or Guidelines which indicates that the one-storey, mid-twentieth century Erskine’s Pharmacy and Hydro Building form part of the “heritage fabric” of the Commercial Core. That fabric is explicitly described as being comprised of nineteenth and early twentieth century two- and three-storey terrace blocks and individual hotels, of red and buff brick in the Italianate style. This type of building forms the streetscape. The “open space” behind
the Lock and Lakeport frontages is not included in any description of the heritage or cultural fabric.

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

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

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

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

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

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

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

Mr. Cuming gave what the Board finds to be interesting evidence on why this sixth conservation priority was included in the District Guidelines while it was not in the District Study. He testified that it was included as it was necessary to spell out the test of “no adverse impact”. There was to be no adverse impact on heritage attributes as well as heritage buildings. The Board finds that a straightforward reading of the sixth priority demonstrates that it does more than set out a test for “no adverse impact”. It
explicitly states that new development and construction are encouraged so long as there is no adverse impact on heritage attributes and the development will positively contribute to the character of the area. This demonstrates why the Board prefers to rely on the words of the Guidelines in seeking guidance on how to consider the applications, rather than on the testimony of the “author” of the Guidelines. The District Guidelines include, as a conservation priority, encouragement of new development and construction in appropriate circumstances. The Board does not accept Mr. Cuming’s evidence on why the sixth guideline was added to the District Guidelines.

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

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

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

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

The Guidelines acknowledge in section 4.3.1 that commercial structures in heritage districts “present different conservation issues” and therefore certain guidelines directed at commercial structures are set out in section 4.3.2. This section focuses on
Lock Street and Lakeport Road, with no mention made of Main Street or the street with no name. The Board can only take this to mean that the significant heritage resources of the Commercial Core are located primarily on the referenced streets. In fact, the Board notes, the only heritage building located on those other two streets is the Jail House.

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

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

1. fully inspecting the façade to note proportions, materials, details and cumulative changes;

2. maintaining and repairing rather than replacing existing storefronts, which are physically sound and compatible with the overall façade, even if they are later additions;

3. maintaining the character of a storefront by removing extraneous additions unless they are restoration work based on historical evidence;

4. consider replacing an existing storefront which does not fit the historical character of the structure;

5. retaining and repairing the original architectural detailing of the upper façades; and

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

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

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

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

1. Placement of building mass on the street and setbacks should place emphasis on pedestrian rather than vehicular approaches and access. Parking and loading spaces should be located to the rear wherever possible;

2. Signage should be sympathetic in size, shape, materials, placement and lighting to traditional motifs;
3. In multi-storey buildings contrasts between street level...and upper second and third floor facades should be emphasized through design treatments such as fenestration, floor to floor height and material selection;

4. Flat or low slope roof forms with parapets are preferable to the predominantly pitched roof forms of residential structures; and

5. Required mechanical equipment should be ideally placed well out of public view, either set back on roofs or at the rear of buildings, and suitably screened.

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

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

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

The fact that the Guidelines include this particular restricted characterization of the District, the recommendation that the height permission be reduced to 9m, and such
a limited discussion of the Commercial Core causes the Board to conclude that the primary focus of the Guidelines is the residential area. This is not necessarily in keeping with the policy imperative of the Port Dalhousie Neighbourhood Plan which does speak to the crucial role the Commercial Core plays in Neighbourhood.

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

**Board’s Findings:**

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

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

The Board heard evidence from witnesses who both support and oppose the PDVC proposal about the current condition of the Commercial Core. The Board accepts the evidence that the Core has become a centre for the consumption of alcohol, especially between Victoria Day and Labour Day. On the subject site alone, there are over 2700 licensed bar seats. The Board heard evidence that the “bar scene” brings
with it attendant problems of noise, public drunkenness, parking conflicts and destruction of private property.

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

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

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

Mr. Chapman also noted “the economic climate in Port Dalhousie is volatile because the vast majority of businesses are not sustainable over the long term. There is not a reliable customer base to provide stability to businesses from one year to the next. Without an improvement in the critical mass of commercial space, the area is expected to continue to suffer economically”. These concerns of Mr. Chapman were echoed by the Chamber of Commerce, the BIA, and a number of participants who support the proposal.
Mr. Chapman opined that “continuing economic decline will inevitably threaten the existing heritage resources. Without a viable economic environment, the objectives of the Comprehensive Development Strategy regarding community renewal will be difficult, if not impossible to achieve”.

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

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

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

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

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

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

In the face of PROUD’s argument that the economic feasibility of the theatre must be demonstrated, Counsel for PDVC submitted that there is no onus on his client to demonstrate economic feasibility and further “it is inappropriate for an approval authority to concern itself with the economic feasibility of a private project, as the subject matter is beyond its jurisdiction and area of expertise”. Counsel cited Jannock Properties Limited v. The City of Mississauga, O.M.B.D. No. 0363 in which the Board was asked to consider pro forma financial statements. The Board noted “that it is unusual for either a municipality or this Board to receive evidence regarding the financial viability of a development proposal…Decisions regarding the timing and implementation of development proposals are traditionally left in the hands of private landowners, acting in
the free market”. The Board went on to say “the issue of the economic viability of developing this site solely for employment uses...is not a valid basis upon which to determine the planning issue before the Board...The Board makes decisions about what type of use should be planned for over the long term, in accordance with the principles of good planning which reflect the public interest”.

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

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

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

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

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

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

As a corollary of this finding the Board is unable at the same time to accept PROUD’s submission that “in describing the character of the Commercial Core, the District Study opted to mention a few examples in an effort to capture the ‘essence’ of what constitutes the commercial core”. Either the Study and the Guidelines contain the content required by section 41.1(5) or they “capture an essence”; the Board finds that they cannot do both. If the Board accepted this submission, the significant heritage attributes would not be as set out in the Study and the Guidelines; they would be a
moving target. Counsel for PROUD attempted to buttress PROUD’s position on this point by using an example cited by Mr. Cuming during testimony. He pointed out that the McGrath Hotel was not mentioned by name in the Study or Guidelines, but it is significant to the character of the Commercial Core. The Board finds this evidence and any argument based on it to be disingenuous.

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

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

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

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

Of these nine alleged heritage attributes, only Hogan’s Alley is mentioned in the Study or Guidelines. It is part of a locational reference: the Commercial Core area is centred on Lakeport Road, Lock Street and Hogan’s Alley.
The Board finds that the significant heritage attributes of both the Port Dalhousie Conservation District, in general, and the Commercial Core, in particular are as set out in the District Guidelines. PROUD and the City argued that PDVC attempted to substitute the analysis of Mr. Higgins, its expert in architectural conservation, of the District’s heritage attributes, for that of the Guidelines. The Board has thoroughly reviewed the work of Mr. Higgins and all the heritage experts who testified in the hearing and cannot conclude that PDVC attempted any such substitution. Rather, the Board finds that Mr. Higgins prepared a conservation plan as directed by the PPS. He comprehensively reviewed in his Heritage Assessment Report, February 2006 (Exhibit #13, TAB 5) the significant heritage attributes of the Commercial Core and the impact of the proposed development on these attributes.

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

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

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

Main Street in the Commercial Core and the unnamed road are not mentioned in the District Study or Guidelines. The evidence was that these streets have historically been the backside of the Commercial Core, providing a service area. On the evidence, they do not have a distinguishable streetscape. The open area bounded by these
streets contains the Rum Jungle and associated drinking areas. This area is not mentioned in the Study or Guidelines and even some witnesses for PROUD agreed that the Rum Jungle has no heritage value. To suggest that it does, strains credulity.

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

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

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

The Board heard considerable evidence about Port Mansion, located where the Union House and McGrath Hotel were originally situated. The Union House is specifically mentioned in the Guidelines’ description of the Commercial Core, and both buildings were two or three storey nineteenth or early twentieth century hotels. All witnesses acknowledged that the Port Mansion, as it exists today, is the result of an extensive renovation undertaken in the 1980’s. Mr. Higgins, the only witness who has systematically reviewed the interior and exterior renovations, testified that the two original buildings were entirely “gutted” in that renovation. Roof lines were changed, windows were replaced, and, most importantly, the Board finds, a nineteenth century façade was imported from Pennsylvania and iron railings were ordered from an American catalogue. It was the opinion of both Mr. Higgins and Mr. McClelland that these additions have no connection to the heritage of Port Dalhousie.
Mr. Higgins testified that the only elements of the original hotels which remain are the foundation footprint, an elevation difference between the two structures, sections of the south wall and some fragments of a party wall. He has extensively examined the fabric of the building and was of the opinion that due to severe disturbance during the 1980 renovation, and the use of inappropriate materials, the front façade is “doomed to structural failure and is nearly impossible to repair”. Mr. McClelland agreed that there are inherent problems in the building’s façade.

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

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

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

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

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

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

In his opinion the proposal results in no negative impact on the heritage attributes of Port Dalhousie as the significant heritage attributes are conserved.
The open space afforded by the project in Hogan’s Court, is in Mr. Kirkland’s opinion a major benefit for Port Dalhousie. It opens a commercial area; it provides an effective path to Lakeside Park; and it can facilitate year-round animation.

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

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

Mr. Goldsmith specifically addressed the visual impact of the proposed development through a massing study, Exhibit # 237. The Board finds that this study undoubtedly informs all of his opinions about the PDVC proposal. Under cross-examination Mr. Goldsmith acknowledged that his massing model focuses exclusively on massing; it provides no details of the proposed buildings, the surrounding buildings or the general foreground and background. He acknowledged that because his models were just that, massing models, Mr. Kirkland’s models and images were more representative of what a person would actually see. He agreed that his opinion on “compatibility” or “lack of fit” of the proposal was informed strictly by the massing issue, and he further agreed that compatibility cannot simply be determined by considering mass.
The Board has reviewed the evidence and work of all the qualified heritage experts on the vital issue of heritage conservation. Their evidence is informed by considerable expertise, exhaustive work and a good deal of passion, none of which this Board can fairly summarize in this decision. The Board finds that the fairest, most balanced and most persuasive evidence on the heritage issue was given by Michael McClelland. Mr. McClelland’s work was not done on behalf of a proponent of development, nor on behalf of an opponent focused on heritage conservation. Rather his work was done on behalf of the City, the public authority charged with having regard to the adopted policy regime and the public interest.

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

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

The Board finds that the work of Messrs. McClelland and Chapman provided a firm basis upon which City Council made its decision with respect to OPA 31 and the zoning by-law amendment in June 2006. Section 2.1 of the Planning Act directs this Board to have regard to the decision of municipal council and any supporting information and material on which it relied in making its decision on a planning matter. As the Board found above, Council’s decision was made following a thorough, fair and open public process in which the voices of all interested were heard, and after Council had the benefit of the comprehensive work of Messrs Chapman and McClelland.
In his peer review Mr. McClelland considered Mr. Kirkland’s design and his supporting work including a visual impact assessment and shadow studies. As requested by the City, he had regard to the District Guidelines and the Region’s Model Urban Design Guidelines (2005) and he provided an opinion on the “fit” or compatibility of the proposal in the context of the Port Dalhousie Heritage Conservation District. He specifically considered the proposed design for Hogan’s Court in terms of “the integration of the project with Lock Street, Lakeport Road, Main Street and Lakeside Park”. At the request of the City, he looked ahead to the site plan and heritage permit applications to consider how design and architectural elements could be secured. Finally, he considered the Heritage Assessment Report of Mr. Higgins to determine “the appropriateness of the criteria applied and the evaluation completed”.

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

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

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

Mr. McClelland considered the District Guidelines and opined that they “recognize the nineteenth and early twentieth century architecture as a defining feature of the commercial core...” He looked in detail at the design considerations for new non-residential construction in the Guidelines and judged the proposed development. He opined that the podium base of the proposal around the perimeter of the development “establishes a positive relationship with the existing heritage fabric of the streetscapes along Lock and Lakeport...the use of decorative awnings and banners add visual
interest to the street wall...While the existing Guidelines assume 3 storey facades, it is our opinion that the proposed development’s use of additional storeys at the base present an acceptable interpretation of these Guidelines. The setbacks along Lock Street and Lakeport Road create sensitive connections between the new construction and incorporate heritage buildings...the new development successfully respects the established scale of Lock and Lakeport and allows the historic three-storey façade pattern to remain as the defining feature of the commercial streetscape”.

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

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

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

Mr. McClelland faced intense cross-examination in this hearing, dealing with the suggestion that his retainer by the City limited him in considering the impact of the proposed development would have on the heritage attributes of Port Dalhousie. The
Board finds that Mr. McClelland’s nuanced, well-reasoned opinions were unshaken on cross-examination.

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

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

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

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

The Board finds that Mr. McClelland’s work was one part of the exemplary foundation upon which City Council based its decision on June 2006. It performs the same function for this Board. Mr. McClelland’s work was nuanced and even-handed, something vital to the cause of heritage conservation in this Province.
The second part of the strong foundation upon which City Council based its decision was the work of Mr. Chapman as set out in his reports to Council of May 15 and June 26, 2006.

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

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

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

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

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

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

On the issue of use, Mr. Chapman was satisfied that the proposed uses “are in keeping with the purpose and intent of the Official Plan”. Servicing was not an issue from the City’s perspective. The parking and traffic issues as raised by Hank Beekhuis, a party to this matter will be considered below.
On the issue of heritage and design, Mr. Chapman reviewed the OP policies which the Board has set out above. He considered these policies, bringing his expertise on planning in the City, together with the opinions Mr. McClelland provided in his peer review. Fit, compatibility, heritage, height, adverse impacts, revitalization and use were all considered. Mr. Chapman concluded that the height of the residential component “remains the key issue”. In this context he said the following:

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

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

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

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

Parking and Traffic:

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

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

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

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

The parking issue was also addressed by Mr. Beekhuis, some participants and experts on behalf of PDVC and the City. The City’s position on the parking issue, like its position on the entire PDVC proposal, changed radically between May/June of 2006 and the time of the hearing. At the hearing the City took the position that the parking standard used by the City’s Planning Services Department based on the recommendation of the Transportation and Environmental Services Department (“TES”), of one parking space for four theatre seats, is inadequate. The City’s position at the hearing was that the PDVC proposal would result in a parking deficiency of between 120 and 145 spaces.
Parking was considered in some depth in Mr. Chapman’s May 2006 Report. TES reviewed existing parking demand on summer weekend afternoons and summer evenings and projected demand with the PDVC proposal. TES determined that the deficiency would increase by 195 spaces on a summer weekend afternoon and decrease by some 870 spaces on a summer night.

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

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

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

PDVC argued that the 104 parking spaces required to meet the demand of a 415 seat theatre could be located off-site. In 2005 Paradigm, the City’s parking consultant completed the Port Dalhousie Parking Study (Exhibit # 110) in which a variety of potential parking sites outside the Commercial Core were identified. These include sites in the east harbour area. The use of the east harbour area for parking would involve a walk of in excess of 15 minutes to the Commercial or the use of a water taxi.
PDVC confirmed through Counsel that it would work with the City to reconfigure the parking lot in Lakeside Park to provide 35 to 50 additional spaces and would provide the balance of the required spaces off-site to the City’s satisfaction.

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

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

**Alternative Proposals:**

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

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

Disposition:

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

(a) **Appeals of OPA 31** – The appeals of PROUD et al. are denied. The Board approves OPA 31 with the modifications contained in Exhibit # 289 and any further modifications arising from item e(ii) below;

(b) **Appeals of Zoning By-law No. 2006-228** – The appeals of PROUD et al. are denied. The Board approves Zoning By-law 2006-228, with the amendments contained in Exhibits # 120 and # 287, any further modifications arising from item e(ii) below and the following modification to section 3(ii)(e) parking: Minimum required parking for the theatre shall be provided by either or both of the following: i) on-site underground parking; ii) off-site parking in the public parking lot in Lakeside Park, satisfactory to the Municipality;

(c) **Site Plan Appeal** – The appeal of PDVC is allowed. The site plan drawings (Drawings A-002, A-101 to A-107 inclusive, A-B01 to A-B04 inclusive, A-301 to A-303 inclusive, A-401 to A-404 inclusive) and landscape drawings (Drawings SPL-1 to SPL-4 inclusive (Exhibit # 7, Sections 5.1 and 5.3, as modified by drawings contained in Exhibit # 5f, pp.319-349) are approved subject to any revisions and conditions of approval arising from item e(iii) below and any
revisions arising from the necessity to provide additional on-site parking in the parking garage;

(d) **Heritage Permit Appeal** – The appeal of PDVC is allowed. The Board directs that a heritage permit issue for the demolition, alteration and new construction proposed in PDVC’s heritage permit application, subject to such demolition, alteration and new construction being undertaken in accordance with the submitted Heritage Conservation Strategy (Exhibit # 7, section 6.0) and with the Heritage Easement Agreements to be entered into between PDVC and the City pursuant to item e(iv) below, and subject to all excavation being undertaken in accordance with the requirements of the Ministry of Culture as set forth in Exhibit # 175;

(e) **Order Withheld** – The Final Order of the Board is withheld pending the following:

(i) The City has decided whether to close and convey the required portions of Hogan’s Alley and the unnamed road allowance to PDVC;

(ii) Any technical modifications and amendments to OPA 31 and Zoning By-law 2006-228 flowing from the City’s decision on whether to close and convey the required portions of Hogan’s Alley and the unnamed road allowance;

(iii) The site plan requirements of the City, including those identified in Exhibit # 43, are addressed to the City’s satisfaction, and incorporated into a Site plan Agreement; and

(iv) The City and PDVC have settled the terms of the Heritage Easement Agreements.

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

This is the Order of the Board.

“Susan B. Campbell”

SUSAN B. CAMPBELL
VICE CHAIR
Introduction: Planning Ethics in the 21st Century

Lisa A. Schweitzer


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Introduction: Planning Ethics in the 21st Century

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I became frustrated that my half-semester course on planning theory left no time to work through planning ethics; I decided therefore in fall of 2013 to develop a class on planning ethics for the spring. I surveyed the academic literature and found the discussion on professional ethics dated, in some instances by decades. The academic research focused more on public ethics and macro issues, such as normative theory about what roles and epistemological bases should govern the profession and what constitutes the just city (Campbell, 2012; Feinstein, 2010; Harvey, 2009; Sandercock, 2004; Thomas, 2008; Thorngren, 2003). Practitioners associated with the APA during the same period, in contrast, had written detailed cases about individuals facing difficult choices in contemporary planning contexts. The gaps between the APA cases and academic writing suggested that bringing academics and practitioners together to write about professional ethics today might yield insights for both research and practice. That idea led to the call for papers for this special section.

A dated literature on ethics does not necessarily mean that older ideas no longer apply. The difficulties confronting professionals tend to center on choices between doing what advances one’s own career, the interests of the agency or firm one works for, the public good rationales of the profession itself, or empowering others, such as community members (Wächs, 1985). Perennial tensions tend not to change.

Contexts nonetheless can alter the various concerns that individuals weigh with these decisions; the articles presented here highlight new concerns that have arisen for the profession as the U.S. context for planning has changed.

An obvious change concerns technology. Nadler Azfalian and I explore the problems looming for planning and democratic action given technological changes from Big Data, fast processing, and widely deployed, automated data collection in “09 F9 11 02 9D 74 E3 5B D8 41 56 C5 63 56 88 C0: Four Reasons Why AICP Needs an Open Data Ethic.” Control over sensor technology and mobile app data will likely reside with private firms rather than public agencies, unless those agencies and planners within them act strategically to leverage opportunities for data sharing and open data. We point out four reasons why the American Institute of Certified Planners (AICP) should adopt an open data ethic based on the ways that technology has altered data, communications, and knowledge structures. Big Data poses a steep learning curve so that experts and nonexperts may experience different benefits from new urban informatics. Control over data collection and use can lead to anticompetitive behavior that undermines what new technologies might deliver for both public and private sector applications. Algorithms have become increasingly important in government, and these have consequences for the distributive justice of urban service provision and neighborhood environmental quality. Informatics and access influence the urban experience just as much street design, land use, mobility, or other domains for which planners readily see standards. Ubiquitous computing and data-sharing innovations also erode the idea that individuals consent to data collection and use so that community standards for data collection may make more sense in determining what data planners should collect, share, and use via urban informatics.

Planners should not cede new technology and data systems to for-profit firms seeking information products in cities simply because commercial applications may move first in implementing new sensor technology.

A second change in the past 30 years concerns privatization and private sector participation in urban planning. These forces have raised new challenges, such as who is ultimately accountable for plans and designs produced by private, for-profit firms in collaboration with the public on behalf of public agencies governed by elected officials. As a younger planner entering the profession in 1995, first with a state agency and then as a private consultant in a for-profit firm, even I was shocked that AICP had one code of ethics meant to cover all planners in private-for-profit, nonprofit, and public contexts. The AICP Code of Ethics does so remarkably well, and yet we have had little information on precisely how ethical choice differs for planners ensconced within private firms from planners working for local governments. In this issue, Loh and Arroyo in “Special Ethical Considerations for Planners in Private Practice” conduct in-depth interviews with a small sample of private consultants to discuss the issues most germane to their practice. Many issues that private sector planners raise within the wide-ranging discussion overlap with those of planners working for public agencies or nonprofits, such as how to work ethically with communities when their expressed democratic preferences run counter to good planning and development practices.

Unique to private firms, however, are questions about how far consultants should go to retain or attract clients. Loh and Arroyo’s interviewees were confident generally of their ethical judgments. Their answers, of course, might represent social desirability bias, which is a concern in surveys about moral conduct. People hesitate to disclose their own lapses and flaws, and for good reasons. This problem may be especially acute for professionals who reputations govern their economic livelihood. Loh and Arroyo’s interviews suggest that private sector planners were suspicious about the behavior of their competitors. These suspicions themselves may reflect little more than internecine shade throwing. They may also attest, however, to unclear delineation in the field about what constitutes “virtuous competition” among planning consultants. Virtuous competition is a term used among business ethicists to connote the fair bases of competition among firms and individuals that can yield both profits for firms and pro-social benefits. Planning firms share some of the same potential for virtuous competition as other types of businesses. Market competition can discipline those who cut corners with clients and encourage innovation in service design and delivery under the right circumstances. The problem remains in defining what constitutes good service design and delivery with services rendered by private firms, ostensibly to the public but paid for by governments. The AICP Code might benefit from more explicit exploration of what constitutes fair bases of competition among private planning firms.
Linovski, in her Planning Note, "Pro Bono Practices and Government Agencies," highlights how important it is to seek some clarity about fair competition in business development. Planning as a field does not have many traditions governing pro bono work, perhaps because so many planning professionals are predominantly situated in public agencies. Pro bono work, as Linovski notes, has traditionally entailed professional skills deployed in direct service provision to individuals for philanthropic purposes. Linovski describes the difficulties associated with offers of pro bono services to municipalities from architecture and urban design firms. Private firms make these offers from many motivations: Creative professions enjoy experimentation and audiences, so offers for free displays or installations can amount simply to self-expression and democratic engagement. The offers of pro bono planning work can also, however, amount to a means of business development and getting a foot in the door. Every professional, including those in the visual arts and design professions, requires networking and business development opportunities. The problem comes in distinguishing when pro bono work crosses the line into circumventing standard procurement procedures designed to keep public agencies honest. The answers here are not clear, but Linovski's discussion creates a nice starting point for exploring how planning ethics might set acceptable parameters for pro bono work.

Linovski's concern overbroad with those raised by Johnson, Peck, and Preston in their contribution, "City Managers Have Ethics Too? Comparing Planning and City Management Codes of Ethics." Johnson et al. compare the formal codes of ethics for both city managers and urban planners and find that these two professions hold many principles in common for individual conduct regarding competency, fairness, and confidentiality. There is a central difference about to whom or what each profession holds accountable. City managers, by necessity, stress accountability to elected officials. The planning code, by contrast, emphasizes external accountabilities to communities over that of representative public officials. These differences mean that city managers' and planners' professions are likely to come into conflict over what a "good" city is and what roles professionals have when attempting to achieve such a city.

The final article in this special section highlights another reason that planners need ethical inquiry on what technology, data, and analysis means to cities and human life. Lauria and Long update and redo an analysis of how practitioners planners think about their roles and ethical decision-making based on a similar survey done by Howe and Kaufman in 1979. One difference between the APA member planners in 1979 and 2015 is especially striking: More practitioners in the later sample identify their roles as technical rather than political or even hybrid, a combination of political and technical. The changes in technologies and data collection opportunities between 1979 and 2015 are legion. The cities in which planners seek to influence development have become more data rich, more connected, and more cyberkinetic. The fact that the profession itself remains attached to technical analysis should perhaps come as no surprise. Lauria and Long themselves attribute their findings to the fact that most of the APA members they surveyed had not been educated as planners and had not been exposed to planning theorists who argued for taking a more advocacy-based role. They also suggest that playing a technical role may be the most useful approach for planners who must operate in increasingly politically conservative environments. The authors, in short, suggest that planners may play a technical role because they find it more effective than other approaches, although their answers may also reflect social desirability bias, giving the answers they felt were the "correct" ones whether accurate or not.

Lauria and Long also find, however, planners engaged in technical roles share strong core ethical commitments with planners in other roles. Planners, regardless of the type of work they do, care consistently about personal morality (virtue ethics) and rules (deontic ethics), and they apply their judgments supported with the AICP Code depending on the problems confronting them. In sum, the world may have changed cities and the profession, but planners themselves across time show remarkably consistent commitments to justice, serving communities, and good conduct.

Many interesting points emerge from our conversation in this special section, but perhaps the most reassuring is the abiding decency evident in the responses from the practitioners both in 1979 and four decades later. Meaning well can fall far short of doing well, but it is hard to believe that the latter is possible at all without the former. The articles also show that bringing together practitioners and researchers to write about ethics knits across theory and practice in insightful ways. These articles raise as many questions as they answer, however; they confront us with new ethical and intellectual puzzles to address. They also shed some new light on the ethical problems and complexities planners face as cities and society change. We may now consider new conversations about planning ethics well begun.

References


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Special Ethical Considerations for Planners in Private Practice

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Planners must constantly consider the ethics of their professional behavior, both within the systems in which they work, and occasionally by stepping back and critiquing those systems themselves. Most essays and studies of planning ethics have glossed over the differences in experience between planners employed in public agencies and those in private practice, assuming that all members of the profession are subject to similar ethical considerations (Birch, 2001; Campbell & Marshall, 1998, 1999; Howe, 1994). Yet more than 25% of practicing planners work for private firms (Dalton, 2007).

Planners in private practice must deal with questions of accountability, transparency, fairness, and moral judgment, just as do planners who work for public agencies and nonprofit organizations. However, unlike those planners, senior planners in private practice are also business owners or members of partnerships, with a responsibility to create profit for the firm and maintain the firm’s long-term financial health. Although planners are expected to give “independent professional judgment” regardless of the consequences (APA, 2009; Marcuse, 1976), their firms’ continued existence depends on client satisfaction. While it may be true that there is no consensus as to who any planner’s client really is, as Hillier (1993) asserts, private sector planners have concrete client service relationships, yet, according to the American Institute of Certified Planners (AICP) Code of Ethics they must still imagine the public interest to be their ultimate client (APA, 2009). In addition, private sector planners are nonpublic actors involved in public processes (Linovski, 2015): They are not public employees and usually do not maintain offices in a client’s community’s municipal building. Depending on how extensive the public participation process is, the private practice planners may not have much

Problem, research strategy, and findings: Planners must constantly consider the ethics of their professional behavior, yet few studies have specifically investigated the ethical landscape for those planners working in private practice, assuming that all members of the profession are subject to similar ethical considerations. We investigate the particular ethical considerations faced by planners in private practice by interviewing owners of 10 planning consulting firms. Our sample size is very small and limited to three states, which limits the generalizability of the study. We find that private practice planners routinely experience ethical conflicts related to disclosure of information, balancing uneven benefits among stakeholders, interests of the client, and ethics of firm competition. Although planners mostly navigate everyday ethical concerns with confidence, they face ethical challenges in managing client relationships when values conflict, and in competing with other firms.

Takeaway for practice: We find that challenging ethical situations arise for private sector planners on a routine basis. The planners we interview feel that they are able to identify ethical pitfalls and choose the correct course of action, but more research is needed to understand the scope and nature of private practice ethical challenges, and to determine whether more education or enforcement would be effective solutions to between-firm conflicts.

Keywords: planning ethics, planning consultants, AICP Code of Ethics, professional services firms, public interest

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contact with the public. Their involvement may potentially lengthen the “chain of accountability” between the public and decision makers as even more of the typical bureaucratic discretion planners engage in takes place out of the public eye (Forsyth, 1999, p. 9). Finally, planners in private practice may work for both public sector and private sector clients, and must carefully consider which cases and clients they will take on to avoid a conflict of interest. For example, a planner would not work for a developer in a city in which he or she was currently working as a consultant, but might consider doing so after the public client relationship had ended. Therefore, planners who are firm owners find themselves at the intersection of ethical considerations for planners and professional services firms.

We use an inductive approach to explore the particular ethical considerations faced by planners in private practice by interviewing owners of 10 planning consulting firms in Michigan, Florida, and New Jersey to find out what are their most pressing ethical concerns and how they handle them. We find that although planners in private practice frequently encounter potentially unethical situations in their daily practice, for the most part they feel confident in navigating an ethical path. However, they face particular difficulties in managing client relationships when client values contradict established planning values. They also face difficulties in negotiating the competitive landscape with other planning firms. We hope and intend this study to contribute some practical considerations for planners in private practice as they go about their work, such as how to manage their clients’ ethical behavior. We also hope to raise larger questions about the structure of the professional context in which many of our colleagues practice; for example, we recommend that APA create a private practice-specific ethics training program to address some of the ethical issues raised in this study, such as that of business ethics between firms.

What Do We Know About Private Sector Planners?

The literature shows that planning consulting firms share many similarities with others that provide professional services such as law, accounting, and engineering firms in their business structure, their relationships with clients, the nature of their means of production, and their internal relationships between employees and employers. Yet we find that the AICP Code emphasizes serving the public interest to such a greater extent and in different ways than do other professional services firms’ codes of ethics that the ethical expectations for planning firms are unique among professional services firms. In this section, we first review the relevant literature that explores structural ethical considerations that planning firms share with other professional services firms, then explain the ethical responsibilities that are unique to planners and how these two realities intersect.

Specialized Knowledge and Information Asymmetry in Professional Services Firms

The business literature on professional services firms, such as accounting, engineering, law, and planning firms, tells us that such firms are distinct from other businesses because their “product” is specialized knowledge that clients are willing to pay for (Anand, Gardner, & Morris, 2007; Malhotra & Morris, 2009; Teece, 2003). Therefore, there is usually an information asymmetry between the consultant and the client: The consultant usually knows much more about the topic than does the client “either in terms of expertise or in terms of experience in similar problem-solving situations” (Lawendahl, 2005, p. 35). In fact, it is in the interest of such professionals to maintain some level of “mystique” around their expert knowledge, as the value of that knowledge is to some degree socially constructed (Linowski, 2015; Malhotra & Morris, 2009). This information asymmetry, in addition to the potentially idiosyncratic nature of each contract, makes it difficult for the client to judge how well the consultant has completed the task he or she was hired to do, and even to evaluate how well the consultant’s performance on other work would translate to the client’s own needs (Lawendahl, 2005; Maister, 2007). In addition, the interests of the principal (in this case, the client) may not be aligned with those of the agent (in this case, a consultant; Stein, 1990). The principal must then always be concerned about opportunities for shirking and moral hazard, as the agent has more information about what he or she is doing than does the principal (Brehm & Gates, 1997; Holmstrom, 1979; Waterman & Meier, 1998). Information asymmetry leading to client concerns about moral hazard and the socially constructed value of professional services firms’ specialized knowledge means that firms must find ways to signal the quality of their work and the value of that knowledge to potential clients.

In planning, local governments and private landowners and developers hire planning consulting firms for their specialized planning knowledge. This is especially true when client communities lack their own planning staff and hire consultants on retainer to provide planning services, which is a common type of planning consultant–client relationship (Loh & Norton, 2013). This asymmetry in knowledge is likely smaller when a unit of local government hires a consulting firm to work with and supplement
the activities of permanent staff to complete a certain task, which is another very common arrangement. However, this might be akin to a company with in-house counsel hiring an external litigation firm to handle a lawsuit, since the planning firm may still have more expertise in that particular aspect of planning (Loh & Norton, 2013).

Professional Services Firms’ Codes of Ethics

The difficulty clients have in judging the quality and ethics of professional services firms’ work means that these firms largely trade on their reputations. One important way to signal firm quality is for its employees to join a professional organization and sign on to its code of ethics (Von Nordenflycht, 2010). Many professional services firms use codes of ethics to encourage high standards, signal those high standards to members of the public and to potential clients, and provide a framework for disciplinary action against those who violate the code (Jamal & Bowie, 1995). For example, an engineer who violates his or her state’s code of professional conduct may be sanctioned or have his or her license put on probation, suspended, or even revoked (McDonald & Lawson, 2005). The court may sanction, suspend, or disbar a lawyer who violates his or her state’s code of professional conduct (American Bar Association Center for Professional Responsibility, 2016). The APA’s professional arm is the AICP; planners with a certain number of years of professional experience may apply for the AICP credential by taking an exam. Planners who achieve AICP status are bound by the AICP Code of Ethics and Professional Conduct. The AICP Code of Ethics and Professional Conduct consists of four parts: a set of “aspirational principals that constitute a set of ideals to which we are committed,” but a violation of which cannot be grounds for a charge of misconduct; a set of rules of conduct to which we are held accountable; a description of procedures that apply when a planner violates the rules; and the procedure for when a planner is accused of a serious crime (APA, 2009). Thus, the AICP Code of Ethics is both aspirational, describing the ideals to which planners should adhere, and boundary setting, describing what forms of professional behavior should be considered unacceptable (Campbell, 2012; Hendler, 2005). Those who commit violations of the AICP Code may lose their AICP designation and have their names and revocation publicized (APA, 2009). The executive director of APA/AICP is the organization’s Ethics Officer. Planners may consult the Ethics Officer for informal or formal advice. It is also with the Ethics Officer that charges of misconduct are filed. Achieving AICP designation, and signing on to the AICP Code of Ethics, is thus a highly visible signal to clients that a planning consulting firm’s owners and employees have achieved a certain level of proficiency and ethical behavior that meets accepted professional standards (McClendon, Erber, McCoy, & Stollman, 2003).

Professional Codes of Ethics and the Public Interest

It is common for professional codes of ethics to include “provisions that define the public interest” (Jamal & Bowic, 1995, p. 704), as does the AICP Code of Ethics (APA, 2009). Among the professional services fields with which planners commonly interact, the American Bar Association Model Code calls on lawyers to work to educate others about the law, engage in pro bono work, and “help the bar regulate itself in the public interest”; still, the lawyer’s primary responsibility is to zealously represent his or her client within the principles of the law (American Bar Association Center for Professional Responsibility, 2016). “Public interest lawyers,” who advocate for low-income clients or champion progressive causes, make a strong commitment to social justice and serving the public interest, but make up a tiny percentage of all lawyers (Luban, 2003). The National Society of Professional Engineers Rules of Conduct states that “engineers must at all times strive to serve the public interest,” which they define as being involved in public life and engineering education, adhering to engineering standards, and advancing principles of sustainable development when possible (National Society of Professional Engineers, 2016).

AICP’s conceptualization of planners’ responsibility to the public interest is more extensive and detailed than in the codes of ethics of either engineering or law, placing greater emphasis on working for social justice, inclusion, and civil rights than in other professions (Barrett & Joice, 2001; Campbell & Marshall, 1998). Although Part B, the Rules of Conduct, does not explicitly mention the public interest, Part A, the set of aspirations, refers to it many times. The first “Principle to Which We Aspire” begins, “Our primary obligation is to serve the public interest and we, therefore, owe our allegiance to a conscientiously attained concept of the public interest that is formulated through continuous and open debate” (APA, 2009). This service to the public interest includes the following obligations:

a) We shall always be conscious of the rights of others.
b) We shall have special concern for the long-range consequences of present actions.
c) We shall pay special attention to the interrelatedness of decisions.
d) We shall provide timely, adequate, clear, and accurate information on planning issues to all affected persons and to governmental decision makers.
e) We shall give people the opportunity to have a meaningful impact on the development of plans and programs that may affect them. Participation should be broad enough to include those who lack formal organization or influence.

f) We shall seek social justice by working to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration. We shall urge the alteration of policies, institutions, and decisions that oppose such needs.

The AICP Code goes on to say explicitly that in instances where the client's interests conflict with the public interest, the planner's "primary obligation" is to the public interest. Again, this contrasts with other professional codes of conduct. Engineers are also bound by a primary obligation to the public interest, but this is much more narrowly defined as relating to health and safety. A lawyer's primary obligation is to the client, even when the client's interest conflicts with the public interest. For example, a lawyer may still defend a client he or she suspects or knows has committed a crime even if it is clearly in the interest of the general public to have that person convicted of the crime (Asimow & Weisberg, 2008). Planners are therefore obligated to aspire to a much wider range of public interest commitments than are other professionals, even when those commitments conflict with responsibilities to the client. It is indicative of how seriously the field takes the issue of the public interest that some planners even feel that the code does not go far enough to emphasize planners' obligation to seek social justice (Marcuse, 2014). It is important to point out that planners who are not AICP members are nevertheless expected to follow the APA's Ethical Principals in Planning, although there is no enforcement arm as for those with AICP membership (Weitz, 2016).

How the AICP Code of Ethics May Present Particular Challenges for Planners in Private Practice

For planners in private practice, client service may come into conflict with the public interest in particular ways with both public sector and private sector clients. Situations that demand ethical consideration are often "predicaments: they have no easy solutions, and sometimes no satisfactory ones" (Baum, 1998, p. 412). Planning consultants advise elected and appointed officials on planning decisions; these officials are the final decision makers on adopting plans and regulations (Howe, 1994). Planners may find themselves in a situation where the decision makers wish to take action that, in the planner's view, runs contrary to the AICP Code of Ethics. If the consultant pushes back too hard against the client's unethical behavior, the firm may be fired (Marcuse, 1976). If hired on a per-project basis, the consultant may have difficulty expanding the scope of the work to include either concern for the long-range consequences of present actions or the interrelatedness of decisions, that is, responding to items (b) and (c) of the AICP Code. Clients, rather than planning consultants, may set the terms of disclosure of information to affected parties, as required by item (d) of the AICP Code. Clients and their budgets, rather than the preferences and values of the consultant, may set the terms of public participation processes, as required by item (e) of the AICP Code. Clients may not make seeking social justice a priority, leaving consultants to decide how hard to push for its inclusion in planning processes and products (Wolf-Powers, 2009). Finally, consultants and clients may not even agree on how to define and serve the public interest (Campbell & Marshall, 2002; Howe, 1994).

In Section B, Rules of Conduct, the AICP Code of Ethics also describes specifically how planners should behave. This section is clearly written with both publicly and privately employed planners in mind, as most of the rules reference interactions with employers or clients. The Rules of Conduct cover conflict of interest situations, transparency in communication, and relationships with employers and with other planning firms. How should we think about the relationship between the two sections? Planners with AICP status are required to follow the Rules of Conduct, but we hypothesize that most planners take the aspirational section of the AICP Code of Ethics seriously and try to meet the expectations of both sections. The amount of clarity on how to meet those expectations and the degree of difficulty or ease with which they may be met varies considerably, and it is helpful to have a framework with which to categorize the types of ethical situations and decisions planners encounter.

Categorizing Ethical Considerations

The AICP Code of Ethics describes a wide variety of ethical considerations for planners, with varying degrees of concreteness and prescriptiveness. We find the work of Martin Wachs particularly useful in categorizing these ethical judgments by both the frequency with which planners likely encounter them and the complexity of the judgment they involve. In this section, we explain how the sections of the AICP Code of Ethics fit into Wachs's typology, and how they might apply in particular to ethical considerations planning firm owners must make. In the sections below, we describe how a sample of senior private sector planners describe the ethical issues they face in terms of the insights Wachs provides.
Wachs (1985) identifies four categories of ethical considerations that planners face. His first category, the “ethics of everyday behavior,” includes common decisions planners make about to whom to disclose information and when, how to avoid conflicts of interest, and how to make decisions that the planner knows would benefit one party over another. By and large, these are the types of situations that the AICP Rules of Conduct, Section B, addresses, and it is interesting that the bulk of the Code covers what are arguably the easiest decisions to handle, where the moral issues at stake are least ambiguous. For example, most people are aware that accepting a bribe or recommending a policy decision that benefits them personally is unethical and would know to avoid taking such actions. We expect that because planning firm owners manage multiple public and private sector clients over time, they likely encounter situations where there is a real or apparent conflict of interest quite often.

Wachs’s (1985) second category of ethical consideration, the “ethics of administrative discretion,” encompasses all of the detailed decisions that elected and appointed officials leave up to planners. Elected and appointed officials set parameters through laws, but planners are often responsible for implementation and must use their own judgment to decide, for example, what concessions to make on either the public or private side of a public unit development (PUD) negotiation, depending on the client, or whether a project meets the intent of an ambiguous ordinance. Wachs points out that the decisions planners make, even small ones, can create winners and losers, and thus involve ethical consideration on the part of the planner. The AICP Code recognizes these opportunities for discretion, saying in Section A that planners “shall exercise independent professional judgment on behalf of our clients and employers” (APA, 2009). The ethical consideration here for a planner in private practice is how to make decisions that the planner believes to be in line with the client’s intent, while, as the code requires, fulfilling the obligation to serve the public interest.

Wachs’s (1985) third category, the “ethics of planning techniques,” demands that planners acknowledge and account for all the assumptions that underlie their planning analysis and modeling techniques, since none are completely value neutral. The AICP Code of Ethics acknowledges this issue obliquely, stating in Section A.2.e that planners shall “examine the applicability of planning theories, methods, research and practice and standards to the facts and analysis of each particular situation and shall not accept the applicability of a customary solution without first establishing its appropriateness to the situation” (APA, 2009). This aspiration does not explicitly call on planners to be transparent about assumptions, however. Planners in private practice, who are often brought in to be the “objective” voice in a difficult situation (Loh & Norton, 2013), may have a special responsibility to make the assumptions of their research explicit and transparent.

Wachs’s (1985) fourth category of ethical considerations, the “ethics of plans and policies,” requires planners to be cognizant of the fact that every plan makes choices about policies, land uses, and priorities that may or may not reflect their own values, those of participants in the planning process, and those of other community stakeholders. Plans and policies create winners and losers and force planners and officials to explicitly balance the relationship between the present and the future (Beattley, 1991). This category is where Section A.1 of the AICP Code, “Our Overall Responsibility to the Public,” comes in. The code asks planners to work to expand opportunity for disadvantaged people, to preserve natural areas and the built environment, to be fair and equitable, and above all to serve the public interest. Private practice planners’ public clients may or may not share the values the AICP Code of Ethics espouses, and if not, the planner must balance his or her own ethics with the need to run a profitable firm when deciding how strongly to push the client to include these values when making long-range planning or regulatory decisions. We do have some evidence that planning consultants may nudge their clients toward planning decisions that adhere to the smart growth principles, but we do not completely understand the process by which that might happen (Loh & Norton, 2015). It may be even more difficult for the private practice planner to balance a developer’s interests (making a profit) with his or her obligation to the public interest, since developers vary in their commitment to building community context-sensitive projects. Private practice planners who do not have ongoing retainer relationships with a particular public client and are hired on a temporary basis for project-based work may have to take extra steps to understand the community context and to determine whether the client’s agenda is truly fair for all participants.

Each of Wachs’s (1985) ethical categories requires planners to be thoughtful, balanced, and explicit about their assumptions, the way they assign weights to different considerations and priorities, and how they acknowledge and account for the influence of interested parties. All of Wachs’s categories, however, presume a “morally demanding ethics,” in which the actor must resolve obligations to competing interests or loyalties (Verma, 2009). Yet there is another category of “cognitively demanding ethics,” which requires much more self-awareness about possibly deliberate but mostly accidental intellectual limitations or blind...
spots. These may include “falling in love with pet ideas,” “too accepting of conventional wisdom,” “being seduced by rigor,” “disregarding relevance,” “ignoring problems that one is not trained to handle,” and other similar concerns” (Verma, 2009, p. 42). These types of ethical considerations are much less obvious to actors themselves, and therefore are more difficult to research. We do not address these cognitively demanding types of ethical considerations here, although we hope to do so in the future. In the next section, we describe how we gathered information about ethical considerations from planning consultancy firm owners, and then present our findings.

Determining the Ethical Concerns of Private Planners

Our primary interest was to learn from planners in private practice which issues are at the forefront of their ethical concerns, and how they and their firms respond to those issues. We evaluate the issues they raise both in terms of the AICP Code of Ethics and in terms of Wacht’s (1985) categories of different levels of ethical concerns. While we are not explicitly trying to compare ethical issues that private sector planners and public sector planners face, our interviewees did make those comparisons on occasion, which we report and discuss. Our research fits squarely into the category of “bottom-up” orientation, where we emphasize “learning from practice” (Campbell, 2012, p. 385). We interviewed firm owners and equity partners of 10 planning consulting firms in Michigan, Florida, and New Jersey to find out what they considered the most salient ethical issues for private practice planners, how they have handled those issues, and what policies their firms have in place to reduce ethical problems. We chose to interview firm owners because we wanted to get the perspective of planners who are responsible for managing their businesses as well as conducting planning practice, and because we wanted to hear from planners who set policy for and would hear ethical concerns raised by their employees. We were asking questions of our respondents both as individuals and as representatives of their entire firm.

We drew our sample from the 2010 membership roster of the APA Private Practice Division. We used an older list because we wanted to interview owners of firms that had been in business for at least five years. We chose Michigan, Florida, and New Jersey because each state had a large number of planning firms but differed in important ways. Michigan is a weak mandate state—in other words, it permits local governments to plan and suggests that they do so, but plans are advisory only (Loh & Sami, 2013)—that is experiencing population decline. Florida has traditionally had a strong state-level regulatory framework where local governments were required to plan and plans had a strong regulatory role, although in recent years the legislature has weakened these mandates (Linkous, 2016). Florida is growing quickly, adding more than 200,000 people between 2013 and 2014 (U.S. Census Bureau, 2014). New Jersey is the only state that requires licensing for planners (Meek, 1998). From the list, we selected those planners that reported their title as president, CEO, owner, or principal, and were AICP. We eliminated firms whose primary business was not planning (mainly engineering and law firms).

We contacted 12 firms in Florida, 16 in Michigan, and 15 in New Jersey. Three firms in Florida and four firms in New Jersey had closed since 2010. Ultimately, we surveyed 10 people representing 10 firms: 7 firms in Michigan, 1 in Florida, and 2 in New Jersey. There were seven men and three women in our sample. Each was a firm owner or equity partner, and all had AICP status. We did not collect race and age data. The average length of time the firms had been in business was 27 years. The firms we describe here provide a range of services to their clients, including retainer services where they provide the full range of planning and zoning services to client communities without their own planning staff, consulting on housing plans, comprehensive planning, expert witness testimony, traffic studies, and consulting for developers.

We sent each person on the list a recruitment email, then followed up with a phone or in-person interview. The interviews lasted a minimum of 30 minutes, although most were far longer. One of the planners preferred to write the answers to the interview questions in an email and did not want to speak over the phone. Five of the remaining respondents allowed us to record their interviews; these we had transcribed. We took extensive notes during the other interviews. To avoid conflict of interest in our study, Carolyn Loh, who is an academic and no longer a practicing planner, contacted all of the people in the sample. She also conducted all the interviews and made the interview transcripts anonymous before sharing them with Rod Arroyo, who is currently a practicing planner. We made this procedure clear to all participants when we contacted them initially.1

We used largely open-ended questions; rather than imposing categories and concepts on the interviewees, we allowed them to guide the discussions so that the topics and categories would most accurately reflect their own priorities. We asked the planners about their firms’ policies on ethics, difficult ethical situations they or others in the firm had encountered and how they handled situations, how they balanced the interests of different stakeholders, conflict of interest issues, and how they handled unethical
behavior by clients. The full list of interview questions can be found in the online Technical Appendix.

We analyzed their responses in light of Wach’s (1985) four categories of ethical considerations, coding the interview transcripts for evidence of thinking or acting on ethical issues in each category. For example, we coded statements about how planners handled conflict of interest situations and compiled them into one section of our coding spreadsheet. We also counted those situations as falling into Wach’s first category, the ethics of everyday behavior. We also coded concepts that emerged as important, in that they were mentioned by multiple interviewees. In our analysis, we also examined the use of the AICP Code of Ethics, both when people mentioned it explicitly and when they talked about issues covered in the aspirational or rules-setting sections of the code. Although we split up the interview coding, we both read each interview and created a shared spreadsheet where we each checked the results of the other’s analysis. In the next sections, we first present the results of this analysis of Wach’s categories, then we present the results of the analysis of how planners use the AICP Code of Ethics.

Wach’s Four Categories of Ethical Considerations for Planners in Private Practice

The Ethics of Everyday Behavior

The owners of planning firms most commonly referenced issues falling into the category of the ethics of everyday behavior, which includes conflict of interest issues, managing disclosure of information, and making decisions that unequally benefit different stakeholders. Conflict of interest issues were common for planning firm owners, although they seemed confident of their ability to navigate them ethically. Several assumed that conflict of interest was more of a problem when working for developer clients, and said that they solved that problem by only taking public sector clients. One Florida firm owner said, “I am old enough to feel confident in my own discretion and honor and so forth.” Many interviewees skipped right over our question on actual conflict of interest, which they considered easy to handle, to the issue of apparent conflict of interest, where there may not be actual financial gain for parties involved, but the situation might look unethical on its face. One New Jersey planning firm owner said,

If I believe it is an appearance of a conflict then I divulge to all parties and we determine as a group with full disclosure whether or not it makes sense for us to proceed. That is when I perceive that there is not a conflict of interest but only an appearance of a conflict of interest. If I believe that there is a true conflict of interest, I will obviously not take the work.

Another New Jersey firm owner said that she consulted the AICP Ethics Officer if she was not sure about a conflict of interest situation. A Michigan firm owner said that he referenced the AICP Code of Ethics with clients when conflict of interest issues arose; he viewed it as “an opportunity to explain” his professional obligations.

Ethical decisions regarding disclosure of information can involve dealing directly with the public during a planning process or procedural issues with the client. Most firm owners emphasized transparency in their work with public clients, especially during public participation processes. One New Jersey firm owner said that her firm recorded all of their public meetings. A Michigan firm owner said that during a recent master planning process “every sticky vote someone wrote we put up on the website.” Planners at another Michigan firm scan the comment sheets from public participation sessions and put them into a plan so people can see how their comments translated into the plan’s goals and objectives. Yet several planners also said that it was up to the client and the client’s budget how much community engagement they would carry out during a given planning process; the consultants did not make that decision.

Planning consultants are privy to information that, if disclosed, could benefit certain stakeholders. Most planners we interviewed did not mention being asked to behave unethically in using such information, but did insist on transparency with and by their clients, who seemed to be more likely to ask planning consultants not to provide information. For example, a mayor asked one planner not to answer questions from city council members, and a city planning director asked another planner not to talk to certain members of the community who were going to be displaced by a project under review. However, one Michigan planner lived in and consulted for the same small town, and found that

…neighbors would call me all the time. Most of the time I would say, make an appointment and we’ll talk about it at the counter. That was usually pretty effective…. I’d be out planting flowers and people would ask, do you think this council person is going to vote this way, etc. I would say I can’t tell you, they are an independent body. They are in the phone book, you can call them. I would treat everybody like they were
coming into the office. People would come up to me and say, I know you can't tell me this, but then they'd ask anyway.

This planner also said that she would remind her public sector clients not to "have the meeting at McDonald's," and that "giving the impression of having made a decision ahead of time is as bad as actually doing it." Thus, planning consultants' ethical considerations included both providing information when appropriate and keeping information confidential, or at least only providing that information in an official setting.

Planning firm owners were aware that when they recommended certain decisions to elected or appointed officials, those decisions might benefit some stakeholders more than others. One Michigan planner described the difficulty of balancing competing interests in a planning process, which he thought was particularly difficult for private practice planners:

You have the desires and the expectations of the city administration or township administration and you have the desires and expectations of the public and you have the desires and expectations of the political, the elected officials. And you have to kind of walk that balancing beam in terms of making sure that everybody is fairly represented but at the same time making sure that your values and principles are pretty much intact because you can get into a situation where those different groups do not agree with each other and that is where kind of the snarly and the squirrely things start to happen.

Although the planners we spoke to seemed to feel that simply following the ordinance to the letter protected them from being in a position to pick winners and losers, many planners described being asked to violate the AICP Code of Ethics in such situations. Planners recounted being asked to recommend decisions specifically to benefit a particular party, including being asked to choose a particular contractor, bend zoning rules, fast-track a particular proposal, and evaluate a particular traffic study more favorably. These stories encompass an astonishing range of opportunities to behave unethically. In all cases, the planner recounting the episode recalled easily recognizing the ethical pitfall and refusing to compromise his or her principles: The potential violations in this category of everyday behavior were obvious, as were the correct courses of action.

The Ethics of Planning Techniques

The ethics of planning techniques requires that planners acknowledge that plans and models are built on assumptions that reflect particular values, and that they make those assumptions explicit. When we asked questions about transparency in public planning processes, though, only one planner talked about the underlying assumptions of planning recommendations, saying that his firm used and communicated standard ratios when recommending provision of parks and open space, "how many acres per thousand people there should be versus how much there is. And then we will advocate for a more appropriate ratio of open spaces to the population." The planners we interviewed did not seem to view situations that fall into this category as particularly salient when they were thinking about ethics.

The Ethics of Plans and Policies

Wachs's (1985) last and most complex and challenging ethical consideration is the ethics of plans and policies, which requires planners to reflect on their own values and those of other participants when creating plans and carrying out planning processes. The planning firm owners we interviewed reported that it was here that they found the most gray areas. One Michigan planner said, "I think that, candidly, the issue that is always confronted in the private
firm is how willing are you to bend your values and your principles to retain a client?"

Many planners spoke of their desire to reform unethical client behavior toward planning values; thus, many were willing to bend their values for a time. In other words, they would keep working for a client that behaved unethically with the hope that they could guide that client to ethical behavior. Only if they believed they could never convince the client to adopt appropriate planning values would they fire the client, but all said they would do this if necessary, and most had done it in one or two circumstances. One New Jersey planner explained,

I have a municipality who really does not want to see a single additional affordable housing unit in its town.

...[A]nd, they asked me to do as much as I can to keep them out of trouble with the state but as little as I have to...

...[W]hat they are saying is, “We hate this and we do not want to get in trouble and we do not want to get sued so please do the minimum.” Now that goes against—I mean, I am a big advocate of affordable housing—there is a huge shortage in Jersey and I would really like to facilitate this at a greater pace. But for the last two years I have been working at their pace. And I think slowly it is starting to pay off.

The client had recently authorized the planner to put together an affordable housing plan “with teeth.” For this planner, it was worth keeping the client if he could see them moving in the right direction with his guidance.

For one Michigan planner, however, attempts to get the community to do the right thing ultimately failed:

There were a couple of places where I couldn’t go back. I had a seasonal community that wanted to hold all its meetings in the winter, didn’t want to notify second homeowners because they said they didn’t have standing, even though they paid non-homestead taxes which were the majority of township revenue. I couldn’t make them do it the right way. That was the only place I walked out mid-project. I even gave them back some money.

This planner was up front with competitors who asked her why she had left the client, saying, “These were the things I couldn’t abide.”

Several planners spoke about making sure they were not so desperate for work that they would be tempted to compromise on ethics to keep a client. One Michigan firm owner said that she and her partner “try not to ever rely on one client, so that they can’t put that pressure on you and threaten your livelihood.” Another Michigan firm owner admitted that in the situation where she refused to help a client ask for a sign that she personally did not like, she might have helped them if she had been “hungry” enough for work.

Implications for Theory and Practice

The planners we spoke with were thoughtful about ethical issues and comfortable talking about them. As we expected, most of the ethical considerations these private practice planners encounter most often fall into Wachs’s (1985) category of the ethics of everyday behavior. All of the planners referenced the AICP Code of Ethics as a guide for ensuring their own and their employees’ ethical behavior. As an organization, AICP appears to have succeeded in encouraging planners to identify with this code. More than one planner contrasted the AICP Code of Ethics with those of other related fields, such as landscape architecture and engineering, characterizing the other codes as being less concerned with equity issues and social justice. Most of the planners we interviewed talked about the importance of the public interest. One Michigan planner said, “We are not experts in everything, but we are experts in terms of weighing a whole variety of input into a subject in terms of ultimately rendering an opinion in terms of what is in the best interest of the community.” So, these planners are aware of both the rules of the code and the aspirational sections, and report at least trying to adhere to all of the sections. Over time, these professionals also build up an ethical compass that they rely upon to guide their behavior. Some recalled episodes from early in their careers that they learned from and would have handled differently had they occurred in the present day. As one Michigan planner put it, “I tell these young planners, ‘You can review the AICP and understand the AICP Code of Ethics, but then you also have to review and understand what your personal ethics are.’”

Although planning consultants are agents in the principal–agent model, most do not seem to see themselves that way. Rather, they see themselves as autonomous actors managing relationships. In fact, many of the planners we spoke with described using their powers of persuasion and the AICP Code of Ethics to get their clients to do what the consultants thought was right. Initially, we had also thought that consultants might be in a more vulnerable position relative to public sector planners because clients can easily terminate their contracts. While the firm owners we interviewed acknowledged their reliance on maintaining client relationships, it was clear that consultants have a
significant amount of autonomy and may just as easily fire
their clients if needed. So a planner in a successful private
practice may in fact be able to push clients more strongly
to behave ethically than can a public employee.

The planners also explicitly linked ethics with business
success. One Michigan firm owner said, “We are in a trust
business, a caring business, and we have to be careful that
we protect that trust. Because basically that is all we have.
That is what we are selling.” Another Michigan principal
said, “The one thing that you do not want to do is ever get
yourself into a position where people start perceiving you
and your firm as being unethical.” This emphasis on ethics
makes it somewhat concerning because many firm owners,
when asked to name an ethical issue that they thought
mattered particularly for planners in private practice, said
that unethical practices by competing firms were the big-
gest ethical problem they faced. A frustrated Florida firm
owner said, “I do not like being the only one who works
this hard. Let us put it that way. Because you wind up
losing clients to people who are a little more accessible
ethically, and I find that very troubling.” A Michigan firm
owner said,

I think there is a code within the profession of people
that have been around a while, and that is to treat each
other with respect and to treat each other’s relationships
with clients with respect, especially when there is a
contractual relationship. Unfortunately there are some
who do not abide by that code, and...let us face it, there
are elected officials that do not always play by the rules.
And frequently you will be contacted or you know
someone else is contractually involved, and we just do
not get involved in those kinds of situations. But I
cannot say that that is a universal practice, frankly.

Another Michigan firm owner echoed this concern,
saying,

I’ve seen some firms do unethical steps to get the work
or hold onto the client. There was a township we had
heard was interested in changing consultants. They
invited us to a meeting and then went to a formal
interview process. The other firm gave the client a list of
questions to ask us. I thought that was pretty low. The
client isn’t smart enough to ask their own questions.
Stuff like that happens.... I’d like to think that the
work we do and the work other planning firms do
stands on its own and you get work because of the work
you do and not because you out-hustle other firms.

The planners we interviewed all believed themselves to be
ethical planners and their firms to engage in ethical
planning behavior. Yet they contrasted their own behavior
with that of others. It is human nature to ascribe lofier
principles to oneself than to others, so we view these con-
cerns with some skepticism. But a profession where many
firm owners believe themselves to be the lone good guy in a
field rife with unethical practices may need to take a closer
look at some of its norms. State APA chapters already
provide some training and discussion about ethics issues
facing planners in private practice (Burkhart, Buchheit,
Williams, Desmond, & Gerhart-Fritz, 2011; Burris,
Melhoff, Rothstein, & Rhodeside, 2015); they could take
the lead in facilitating exploration of these issues. For
example, state APA chapters could investigate whether
local planners act unethically toward other firms because
they are unaware of the rules, or whether they are deliber-
ately trying to steal business from more ethical firms (and
whether the perceptions of unethical competitive behavior
we heard in this study are shared by a larger group). The
Michigan Association of Planning (MAP), the Michigan
chapter of APA, like many other state chapters of APA, has
a Planners in Private Practice group that promotes access to
information about local planning firms, provides a forum
for exchange of ideas and concerns related to private prac-
tice, strives to improve practice, and includes participation
of MAP staff in meetings and activities. The Private
Practice Division of APA, at the national level, also strives
to provide for an exchange of ideas and to promote the quality
of private practice. The Division’s recent publication,
Private Planning Practice Handbook, addresses project
management, organization, ethics, and more. APA should
consider developing a case study–based training program
on ethics aimed just at planners in private practice that
focuses on the issues raised by the planners in this study to
supplement its existing publications on ethics for practitio-
ners in general, including one just published in early 2016
(Weitz, 2016). The AICP certification maintenance pro-
gram would be an excellent vehicle for such an initiative.

The Ethical Challenges of Private
Practice

We interviewed planning firm owners to understand
how they experience issues of planning ethics and how those
issues intersect with their roles as business owners, given
the AICP Code of Ethics’ strong aspirational emphasis on
serving the public interest. We used both the AICP Code of
Ethics and Wachs’s (1985) categories of ethical behavior
to help categorize their responses. We find that challenging
ethical situations arise for these planners on a routine basis,
involving conflict of interest, disclosure of information,
and balancing uneven benefits among stakeholders, but that most of those fall into the category of the ethics of everyday behavior. The planners we interviewed felt that they were able to identify ethical pitfalls and choose the correct course of action. The less straightforward ethical situations often dealt with the aspirational sections of the AICP Code of Ethics, where planners had to balance competing ethical goals and persuade clients to take the ethical course of action. These planners viewed this management of client ethics as an important part of their job. The private practice planners we spoke with strongly identify with both the aspirational and the rules-based sections of the AICP Code, and use it on a regular basis to guide their decision making, but often felt that other planning firms did not exhibit ethical behavior.

Our study sample was limited to a small group of planning firm owners in three states, so we hope that we or others are able to conduct further research with a much larger group of private practice planners to see if they share the views on ethics of the planners we interviewed for our exploratory study. We also believe that, given the concerns our respondents raised about business ethics, more research is needed to understand the scope and nature of this problem, and whether more education or more enforcement would be effective solutions. Finally, all of the questions we asked our interviewees for this project dealt with Verma’s (2009) “morally demanding ethics.” Future research should investigate questions of “cognitively demanding ethics,” which we suspect would be much less straightforward to discern.

Supplemental Material
Supplemental data for this article can be accessed on the publisher's website.

Note
1. We should add that this potential issue initially occurred neither to us nor to the university’s Institutional Review Board, but that one of the planners we contacted very early on brought it up as a concern. We immediately changed our interview protocol.

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Planning Experience and Planners' Ethics

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Planning Experience and Planners’ Ethics

Mickey Lauria and Mellone Long

Ethical considerations are integral to most aspects of planning, from the smaller decisions such as determining the location of a public meeting to the larger decisions involved in planning for affordable housing or a new industrial site. Planners should use a good evaluation strategy that incorporates ethical considerations, not their personal preferences, to make policy recommendations (Anderson, 1985). As Elizabeth Howe and Jerome Kaufman observe in their seminal 1979 JAPA article:

For planners, ethics set the boundaries of acceptable behavior. In theory, a set of commonly held behavioral norms make up the body of professional ethics. [...] Whether codified or not, these norms represent guidelines for planners to adhere to in conducting themselves as professionals. More importantly, they represent the basis for assuring the public who uses planning services that planners will act responsibly in exercising their professional judgment and in applying it. (pp. 243–244)

In the complex world of plural politics, planners charged with serving the public interest are often challenged by the frequently competing demands of various stakeholders: their employers, clients, public officials, developers, community activists, neighborhood associations, and many more public and private constituencies. Planning activities are intended to serve an entire community, but in reality can and do affect various constituencies differently, which poses multiple ethical challenges.

We revisit the seminal 1979 Howe and Kaufman study. Howe and Kaufman asked planners to explain what they would do in a variety of challenging situations; based on those responses, these researchers categorized the ethical frameworks that planners use to undertake their professional duties. Howe and Kaufman find that planners fall into three roles: politicians, technicians, or hybrids, although most fall into the last category.

Keywords: planners’ ethics, planner’s roles, ethical frameworks
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In this context our broad question is: If ethics forms a commonly held body of behavioral norms that sets the boundaries of prescribed acceptable action (Howe & Kaufman, 1979), what frameworks are practicing planners using today? More specifically, using similar methods, we ask:

- What roles do planners assume today?
- How well do today’s practicing planners conform to their prescribed code of ethics, the AICP Code of Ethics and Professional Conduct (American Planning Association [APA], 2009)?
- How does a planner’s role influence their ethical choices?
- How does experience influence the ethical choice and/or roles of planners?

To do so, we conducted a survey of a large number of 2015 members of the APA, building on Howe and Kaufman’s work but making important changes to represent contemporary planning practice.

We organize this article into four sections, beginning with a discussion of planners’ roles and ethical frameworks. First, we explain Howe and Kaufman’s (1979) research and the necessity of reevaluating that work. Second, we explain our perspective on the ethical dilemmas in contemporary planning practice and the ethical frameworks that practicing planners might use to resolve them. Third, we explain our research questions, research design, and survey methods. Fourth, we describe our findings and conclude from our survey.

Many of our findings confirm Howe and Kaufman’s (1979) work, but there are important differences between our work and theirs. Our first major finding is that there are meaningful differences in the roles planners assume today and those they assumed in the mid-1970s. Planners today conform more often to a technical role, in which planners see themselves as value neutral, relying on objective information, and less to a political role, where planners see themselves as advocates for specific values or policies. Planners today are also less likely to conform to a hybrid role, where they pragmatically use the tools most appropriate for the situation, either political or technical. We also find that today’s planners tend to make virtuous choices, aspirational decisions based on their own moral codes, when concerned with ideological and legal issues. Planners revert, however, to deontic ethics—that is, rule-based decisions—or utilitarian ethics, those concerned only with the impact or outcomes of those decisions, when faced with the dissemination and quality of information and segments of the population receiving special advantages. Finally, we find that planners at all stages of their careers today maintain a mixture of virtuous or aspirational choices and deontic- or rule-based ethical choices while affirming the profession’s core values.

Planners’ Roles and Ethical Frameworks

Revisiting the Howe and Kaufman (1979) work is necessary for two major reasons. First, planning and planners have changed in the last 37 years. While there has been some writing on the subject of planners’ roles and their ethics since Howe and Kaufman’s original survey, there has been no follow-up to that seminal work. One significant change since 1979 is the demographic makeup of planners. Today planners are younger, more educated, and less likely to be male and White. Each of these demographic changes has the potential to affect how and why planners make role choices and ethical decisions (Howe, 1980). Second, since Howe and Kaufman’s original survey of APA members was conducted, the planning accreditation process has required a curriculum component to cover ethics. Thus, we expect that recent professionally trained planners will have received this ethical training and be more familiar with ethical dilemmas.

Howe and Kaufman (1979) surveyed respondents on what planners think is ethical and what factors influence their views. They find that the role assumed by planners greatly influences their ethical views and that these role choices are related to planners’ political views. Howe and Kaufman do not, however, explore the ethical bases of these planners’ views. Ethical theory (as we discuss below) in fact has provided a basis for very different ethical perspectives. Thus, our question is not whether a particular action is ethical, but rather the bases on which planners consider that action to be ethical or not. Our work is designed to simultaneously evaluate the ethical bases of planners’ views and the influence of practical experience on those role and ethical choices.

Howe and Kaufman’s 1979 survey provides 15 ethics scenarios. They use a 5-point Likert scale to develop their classification of planner roles, asking the respondent if the situation was ethical (5) or not ethical (1). They provide a second set of 15 planning scenarios, asking their respondent whether they would make the same choices as did the planner described in the scenario, also using a 5-point Likert scale. These scenarios are not comprehensive and, more important, they did not provide a political or social setting, thus creating potential measurement error (i.e., it is difficult to know if all the respondents were answering the same question). To correct these potential deficiencies, we use focus groups to modernize the scenarios in our survey.

Howe and Kaufman classify their respondents into three roles (Howe, 1980) based on their attitudes toward technical analysis and political behavior in planning.
following the debate at the time reflected in the prior literature by Walker (1950), Meyerson (1956), and Beckman (1964) versus Banfield (1961), Rabinovitz (1969), Benveniste (1972), Needleman and Needleman (1974), Cantanese (1974), and Melzner (1976). The technical role, according to Howe and Kaufman (1979), is that of a value-neutral advisor. This planner is an advisor to both the decision makers and the public. As a trained and educated professional with expertise and experience, a planner assuming the technical role provides information (often the pros and cons of specific alternatives) and knowledge of the legal rules and procedures without displaying a personally preferred policy position. They classify 26% of their respondents as technicians.

The political role is different from the technical role in that it is value committed (Howe & Kaufman, 1979). Planners may be activists or advocates for particular policies using their expertise and position to ensure that their preferred policies and programs are implemented. Much of the literature on this subject, from, for example, Davidoff (1965), Benveniste (1972), Cantanese (1974), and later Forster (1989, 1999) and Flyvbjerg (1998), has suggested that the political role is much more effective than the traditional technical role. Political planners use their professional, personal, and community's values to determine their planning objectives (see also Harper & Stein, 2006; Innes, 1995, 1996). Howe and Kaufman classify 18.2% of their respondents as politicians.

Howe and Kaufman (1979) suggest that the roles that planners adopt fall on a continuum and cannot always be categorized as solely traditional and technical or political. Their research suggests that there is a hybrid role, a mixture of both the technical and the political roles. Such planners are pragmatic, using whatever approach they deem most appropriate for a particular situation (Howe & Kaufman, 1979). Howe and Kaufman classify more than half the planners (50.8%) in their sample as taking a hybrid role based on their responses to the survey.

Howe and Kaufman (1979) do not include responses that scored low on both the political and technical scales due to a low response rate. Only 4.5% of their respondents would have been classified in this category. Following Melzner's (1976) ideas, we suggest that discarding these respondents may have been in error because the planner who scores low on both the political and technical scales chooses neither a political nor technical role. Instead, this type of planner may be considered bureaucratically pragmatic, not solely technically pragmatic and politically pragmatic as implied in the hybrid role.

Following Howe and Kaufman (1979), we posit that ethical dilemmas today can be attributed to a central conflict in planning practice: the role of expertise in planning recommendations (legitimacy) and the role of plural politics in decision making (democratic legitimacy) and in the implementation of those decisions. Out of this dilemma we pose a new delineation of strategic planning roles. Planners as technicians in our approach lean heavily on their expertise (and therefore legitimacy) using science and objective analysis to steer clear of the supposed quagmire of plural politics and leaving democratic legitimacy to actors in the political sphere. The planner as politician is more overtly “value committed” and leans more heavily on discovering, or helping to construct, the political requirements for a recommendation’s approval and the potential collaborative relationships necessary for its implementation. The political planner leans more heavily on interpersonal skills of communication and collaborative relationship building than on technical expertise to achieve strategic agreement. As with Howe and Kaufman (1979), we define a hybrid planner as placing a high value on expertise, but recognizing that planning recommendations that are technically and scientifically accurate but politically unsupported are unlikely to be implemented. These planners ascribe to a role that combines aspects of both technical and political strategies to achieve viable or implementable recommendations.

Finally, we find that for some planners a planning position is merely a vocation, perhaps to support some other avocation. The strategic decisions and role assumption of these practicing planners are designed first and foremost to maintain that vocation; we create a new role and style these planners as careerists. Careerists are not concerned with the integrity of their expertise or the legitimacy of a democratically constructed government apparatus and its collective decision making. Their strategic decisions are based only on the technical requirements of their functions within the bureaucracy. Melzner (1976) labels these planners “pretenders” (p. 15).

Ethical Frameworks and the AICP Code

Most professional occupations have a code of ethics, something they need to engender trust between their professionals and the public. Martin Wachs (1985) notes, “The historical role of professionalism is to seal a social bargain between the members of a profession and the society in which its members work” (p. 20). This promise is significant, since the majority of a planner's work is either for or with the public. The professional code of ethics for planners is the AICP Code of Ethics and Professional Conduct, revised in 2009 (see https://www.planning.org/ethics/ethicscode.htm).
The AICP Code of Ethics and Professional Conduct reflects a combination of three theories of ethics about how planning decisions should be made:

- virtue ethics, which are aspirational and based on the moral character of the decision maker and not on the outcome of the decision;
- deontic ethics, which stress following accepted rules of behavior and are not based on the outcome of the decision; and
- utilitarian ethics, which depend solely on the outcomes or consequences of the decision (Long, 2017, ch. 2).

Daniel Wueste (2005) argues that a convergence of ethical theories creates confidence in the ethical basis of a decision. In the planning profession, if these three theories confirm the same decision, planners can know that the decision is ethical. We use these ethical theories to examine the particular ethical frameworks professional planners may use in their decision making. Note that these three theories depend on different perspectives: on either the personal or organizational rules that the decision maker follows or the outcomes, as we explain in greater detail below.

Virtue ethics is aspirational, and does not rely on a set of rules; rather, this concept focuses on what people should do to be the best people they can be, “striving for excellence in life” and doing what someone they respect would do (Wueste, 2005, p. 20). We use the term virtue ethics to refer to decisions that make decision makers appear to have the best character because we cannot infer their true character by the decisions they make. Planners making decisions using a virtuous framework will do as they perceive someone who they respect would do. This would include the principles outlined in the aspirational section (Section A: “Principles to Which We Aspire”) of the AICP Code of Ethics. In the section on planners’ “overall responsibility to the public,” for example, the AICP Code tells planners that “we aspire to the following principles: c) we shall give people the opportunity to have a meaningful impact on the development of plans and programs that may affect them. Participation should be broad enough to include those who lack formal organization or influence.”

Virtue ethics suggests that the planner does the ethical thing because it is moral, not because of the impact on others. “The rightness of an action in a given set of circumstances is to be derived from is being one that a fully informed and virtuous agent would perform in those circumstances (if acting in character)” (Cullity, 1999, p. 283). But the impact on others also has moral ramifications. The rightness of an action is dependent on who is judging and under what circumstance. What might be virtuous to a 60-year-old woman in the United States and a 20-year-old man in Malaysia is different. This leaves virtue ethics open to interpretation. Thus, in our analysis and interpretation, we focus on responses that demonstrate that planners are “striving for excellence” as an indicator that they are trying to act virtuously.

A deontic theory of ethics, the second framework on which the AICP Code is built, is based on an accepted set of rules. For AICP-certified planners, these rules are provided by Section B: “Our Rules of Conduct” of the AICP Code of Ethics. Not all planners are members of AICP and cannot be held accountable by its adjudication and disciplinary process, but non-AICP professional planners work hand in hand with and often are supervised by AICP planners. Thus, non-AICP planners often adopt the AICP Code as their accepted rules of conduct.

Le Bar (2009) uses a second-person account to explain a deontological standpoint, the gist of which is “our recognition of others as having the status to make claims upon us and hold us accountable for our treatment of them” (p. 648). The rule created by the second-person argument is summed up with the golden rule: Treat others as you would want to be treated. But more clearly it is: Do not treat anyone in a way you would not want to be treated.

Deontic ethics are easy to understand, but also easy to criticize. Using a clear set of rules helps planners decide on the best course of action but does not address situations in which that decision leads to a negative outcome. Strict code enforcement of minor violations in low-income neighborhoods, for example, can lead to household displacement, more abandoned structures, dangerous and illicit land uses, increasing housing-cost burdens, more neighborhood decline, and associated reductions in tax revenue. Thus, while situations can be examined for their morality by using a deontological approach, making deontic decisions does not ensure a collective benefit (outcome).

Utilitarian ethics, on the other hand, are all about outcome. This ethical theory holds that the proper course of action is the one that maximizes utility, usually defined as maximizing happiness and reducing suffering. The ethical thing to do is the thing that results in, unit for unit, more good than harm. Utilitarianism focuses on maximizing utility and reducing suffering for the entire community, but community may be defined in the particular context. The preamble to the AICP Ethical Principles in Planning (as adopted May 1992) provides an example of this paradigm:

The planning process exists to serve the public interest. While the public interest is a question of continuous debate, both in its general principles and in its case-by-case applications, it requires a conscientiously held
view of the policies and actions that best serve the entire community.

This is consistent with how Rachels and Rachels (2012) define a conscientious moral agent:

...someone who is concerned impartially with the interests of everyone affected by what he or she does; who carefully sifts facts and examines their implications; who accepts principles of conduct only after scrutinizing them to make sure they are justified; who is willing to "listen to reason" even when it means revising prior convictions; and who, finally is willing to act on the results of this deliberation. (p. 13)

Hedonism, or ethical egoism, is a fourth philosophy of some interest in our research, although not contained in the AICP Code of Ethics. As Becker and Becker (2001) note, hedonism finds it ethical to act in one's self-interest, ignoring the interests of others unless they happen to merge or conflict with the interests of the self. Hedonism does not measure either the impact on others or the pain to others as long as the decision maker has pleasure (see also Rachels, 2008). This ethical theory is clearly focused on the individual and not the community. We doubt most planners think that they use self-serving ethics to make decisions, but we examine the possibility that hedonism, or a focus on self-interest, does motivate some planners.

We conclude that the AICP Code of Ethics strives for the convergence of virtue ethics, deontic ethics, and utilitarian ethics in many of its rules of conduct. We use these three ethical theories and a fourth, hedonism, to examine the particular ethical frameworks professional planners may use in their decision making. The scenario in Question 31 of our survey provides an example of how we accomplish this, allowing respondents to provide only one response:

Policy says "advertise in a newspaper of general circulation." You know the residents in the rezoning area generally don't read the newspaper and the newspaper has a low circulation rate in the area. You:

- Just follow policy.
- Find additional ways to advertise.
- Don't bother advertising at all.
- Follow policy as written, but use this as an example to public officials to recommend a change to the policy.
- Follow the policy and note in staff report that it was only advertised in the newspaper and therefore notice may not have reached all concerned.

We classify the first response option, "Just follow policy," as based in deontological ethics because planners selecting this option are just following policy. The second possible option, "Find additional ways to advertise," is based in utilitarian ethics because it demonstrates an effort to increase the effectiveness of the outcome. We classify the third response option, "Don't bother advertising at all," as based in hedonistic ethics because it expresses an unwillingness to follow the rules because of the "bother" or work it imposes on the planner. We classify the fourth response option, "Follow policy as written, but use this as an example to public officials to recommend a change to the policy," as based in virtue ethics because the planner decides to follow the specific rules but goes further with the intent to change that policy and improve the rules. Finally, we classify the fifth response option, "Follow the policy and note in staff report that it was only advertised in the newspaper and therefore notice may not have reached all concerned," as based in both deontological ethics because planners choosing this response indicate that they would follow the rules, and in utilitarian ethics because their concern for the outcome requires they note that deficiency of the decision.

The AICP Code of Ethics may be interpreted to prescribe decisions that conflict with those that political and/or community interests expect planners to recommend, and our survey focuses on this issue as well. Such political pressures are often a reason planners use to explain ethical inconsistencies (see Long, 2017). This is consistent with Vasu's (1979) work, which finds that planners recognize that the social and political realities of practice often conflict with their technical role. The perceived conflict between political pressures and ethical choices is also consistent with Hoch's (1988) survey of American planners that finds that many planners think politics are often pitted against planning and, moreover, that politics are dangerous.

Our research also seeks to characterize differences in ethics that are associated with differences in professional experience. We specifically question how experience, the context in which planners work, and their assumed role influence their ethical principles. As planners acquire experience, their decision-making process may change. No one has evaluated whether planners will learn to make better decisions over time, although it is often assumed so. In fact, one can imagine that the quality or ethical basis of a planner's decision making may decline if poor or unethical decisions are rewarded. We hypothesize that the longer a planner is on the job, and the more challenges faced, the more a planner learns, and there is a greater chance of differences in the ethical choices planners make at different career stages.
A Survey of the Ethics of Professional Planners

To answer our research question (What ethical frameworks are practicing planners using today?), we surveyed professional planners in the United States to determine which ethical frameworks practicing planners use today to structure their work. More specifically, we asked: How well do today's practicing planners conform to the AICP Code of Ethics? How do the roles planners feel comfortable performing influence their ethical choices? How does professional experience (in years) influence the ethical choice and/or roles of planners?

In the spring of 2015, we conducted focus groups and a pilot survey to replicate but also modernize the Howe and Kaufman (1979) scenarios to reflect current planning practice. We held two focus groups with participants of various ages, experience levels, and job experience. The focus group members were given each scenario in the survey and asked to evaluate it for accuracy and relevance to planning practice today. They were also asked to volunteer any scenarios they might have encountered and to explain the importance of ethics to their decision making. We then revised the scenarios in our survey instrument in response to the comments of the focus group participants. We shared the revised survey instrument with the pilot survey respondents to allow us to more carefully scrutinize the survey instrument and make corrections before the official survey was sent to a larger sample of members of the APA.

We surveyed the members of the APA, an organization of professional planners. In 2014, there were 37,750 members of the APA. Although most planners belong to the APA, not all planners do. Thus, our population comprises those who consider themselves professional planners and have joined this professional organization. We could not conduct a stratified random sample because the APA would not share their membership list. The APA, however, did email all members and requested that they participate in the survey and followed up with two reminder emails. The survey was also advertised in the APA Interact (the Association's member email blast) twice. The APA emails directed willing participants to participate in an online survey. The advantage of using email is that the vast majority of APA members (more than 98%) have an email address.

We may have introduced a small coverage error because a small number of APA members do not have email. This raises the possibility of self-selection bias as well as potential nonresponse error because some people might not respond to an email request. The APA made five email contacts to limit nonresponse (following Dillman, Smyth, & Christian, 2014). We needed 1,038 responses to achieve a confidence interval of 5% for a total population of 37,750 members. We received 1,334 complete responses.

Our Sample Respondents

Table 1 presents the demographic characteristics of our sample compared with sample data from the APA 2014 Salary Survey. Our respondents (n = 1,334) were 57% male and 88% White. Sixty percent held planning degrees, 72% held masters degrees (48% of those in planning). Sixty-seven percent worked in the public sector, while 22% worked in the private sector; 71% were AICP certified. Respondents averaged 20 years of work experience evenly distributed with a large (21-year) standard deviation. More respondents worked in the east (29%) than in the south (24%), Midwest (20%), mid-Atlantic and New England (17%), or southwest (8%), while 1.5% worked outside the United States. Roughly 9% were younger than 25, 31% were between 25 and 40, 46% were between 41 and 60, and 20% were older than 60. Forty-nine percent of the respondents were working at the executive level. Howe and Kaufman (1979) do not include demographic data about

Table 1. Sample demographic comparison.

<table>
<thead>
<tr>
<th></th>
<th>2015 ethics survey sample, %</th>
<th>2014 APA salary survey, %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>57</td>
<td>51</td>
</tr>
<tr>
<td>Female</td>
<td>43</td>
<td>49</td>
</tr>
<tr>
<td>Race</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>88</td>
<td>86</td>
</tr>
<tr>
<td>Non-White</td>
<td>12</td>
<td>14</td>
</tr>
<tr>
<td>Age, years</td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;25</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>25-40</td>
<td>31</td>
<td>40</td>
</tr>
<tr>
<td>41-60</td>
<td>48</td>
<td>49</td>
</tr>
<tr>
<td>&gt;60</td>
<td>20</td>
<td>11</td>
</tr>
<tr>
<td>Experience, years</td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;20</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>20-30</td>
<td>22</td>
<td>22</td>
</tr>
<tr>
<td>&gt;30</td>
<td>28</td>
<td>13</td>
</tr>
<tr>
<td>Median</td>
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<td>15</td>
</tr>
<tr>
<td>Education</td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;BS</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>BS/other</td>
<td>12</td>
<td>17</td>
</tr>
<tr>
<td>BS/Planning</td>
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<td>10</td>
</tr>
<tr>
<td>MS/other</td>
<td>24</td>
<td>21</td>
</tr>
<tr>
<td>MS/Planning</td>
<td>48</td>
<td>47</td>
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<tr>
<td>PhD/JD</td>
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<td>4</td>
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<tr>
<td>Employment sector</td>
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<td></td>
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<tr>
<td>Public</td>
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<td>71</td>
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<tr>
<td>Private</td>
<td>22</td>
<td>23</td>
</tr>
<tr>
<td>Non-profit</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>AICP</td>
<td>Yes</td>
<td>71</td>
</tr>
</tbody>
</table>
their sample; we do know, however, that that 53% of their sample worked in the public sector. Our sample’s demographic characteristics are similar to the APA’s 2014 Salary Survey data in terms of race, education, and employment. Our sample contains slightly more responses from female, older, more experienced planners, and more AICP respondents than those represented by the APA sample.  

Surveying APA Members

Our survey consists of three sections. The first section includes nine questions to collect background and demographic information to determine which attributes, such as education or years of service, have an impact on ethical decision-making. The second section is modeled directly on Howe and Kauffman’s (1979) survey to determine respondent role choices. The third section consists of ethical scenarios used to evaluate respondent ethical frameworks. We asked six questions to determine how respondents saw their role. Table 2 is a synopsis of the scenarios presented in the role choice portion of the survey. We use a 5-point Likert scale to determine degree of disagreement or agreement, as do Howe and Kauffman (1979). The scenarios include the tactic (the planner’s ethical choice) and who or what benefits from the issues being considered.

Table 3 contains the 18 ethical scenarios for which we provided a choice of responses that represent the AICP Code, but also vary according to an ethical framework: virtue, deontological, utilitarian, or hedonist. We provided these varied choices because we were interested in the ethical frameworks that might underpin a planner’s ethical perspective. We delve deeper into the ethical bases of respondent choices than do Howe and Kauffman (1979); we asked respondents to choose a response that was formulated within the particular ethical frameworks discussed above, rather than just asking them to determine if a scenario was ethical or not. Respondents were given 18 scenarios and asked how they would handle the situation. Table 3 provides a synopsis of the 18 scenarios presented to determine ethical framework. The figure includes the scenario, the central tactic, and which interests or stakeholders were addressed or benefited.

We gave respondents five choices corresponding to a combination of the different ethical frameworks discussed earlier: virtue, deontological, utilitarian, and hedonistic. Individuals (practicing planners included) do not consistently use a single ethical framework: What matters is context, tactical strategy, and to whom the ethical responsibility refers (consistent with Howe and Kauffman’s 1979 findings).

We developed a coding scheme to classify individual planner’s ethical frameworks (tendencies) to evaluate respondent choices. In developing this coding scheme, our logic is that if the choices of framework made by

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Tactic</th>
<th>Issue benefiting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q10: An economic planner initially criticized, on technical grounds, a proposal by a community development corporation to develop a small industrial park in a low-income area presented before the planning commission. Later, that same planner recommends the project to the commission after being told of the director’s support for the project.</td>
<td>Change technical judgment due to pressure</td>
<td>Low income</td>
</tr>
<tr>
<td>Q11: A city planner who is a member of the Chamber of Commerce gives information, without authorization, to the head of the Chamber on an agency study being prepared that will recommend reducing number of on-street parking meters in the central business district (CBD) to lessen traffic congestion.</td>
<td>Leak information</td>
<td>Development</td>
</tr>
<tr>
<td>Q12: A planning director undertakes a campaign to create a crisis atmosphere about the pollution and health hazards of the city’s waterways by holding press conferences next to the city’s most polluted waterways to get media coverage.</td>
<td>Dramatize problem to overcome apathy</td>
<td>Environment</td>
</tr>
<tr>
<td>Q13: A city planner gives draft recommendations on a scattered-site public housing plan to the representative of an affluent homeowners’ group who requests them; no agency policy exists about releasing such information.</td>
<td>Release draft recommendations upon request</td>
<td>Low income (anti)</td>
</tr>
<tr>
<td>Q14: A county planner, without authorization, gives information and advice on her own time to a citizen’s group trying to overturn in court a county rezoning decision. The county planning staff had opposed this rezoning, but it was approved by the County Council. The rezoning allows an oil company to build a refinery on a large, tree-covered waterfront property.</td>
<td>Assist group in overturning an official planning action</td>
<td>Environment</td>
</tr>
<tr>
<td>Q15: A planning director is preparing to interview prospective planners for her department. She has narrowed the applicants down to the five most qualified. She goes to each of the top five applicants and finds that one of the applicants is in a different political party than she and another has inappropriate posts on his Facebook page. She decides not to interview either of them and only interviews the remaining three.</td>
<td>Discriminate based on partisan politics and use of personal information</td>
<td>Organization</td>
</tr>
</tbody>
</table>
Table 3. Description of ethics scenarios, tactic, and beneficiary.

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Tactic</th>
<th>Issue benefiting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q16: You are a planner for a city and are invited to lunch by a developer who has an application before the City Council.</td>
<td>Accept bribe</td>
<td>Developer/personal benefit</td>
</tr>
<tr>
<td>Q17: A community group asks to see a development application, submitted but still under staff review; the city you work for has no policy.</td>
<td>Leak information</td>
<td>Community group</td>
</tr>
<tr>
<td>Q18: Your county is planning to vote on new transit fares. Regional planners have developed estimates that would recommend raising the fares. Each time in the past that the fares have been increased, ridership has decreased more than the revenue produced by the increased fares.</td>
<td>Distort information</td>
<td>Mass transit, low income</td>
</tr>
<tr>
<td>Q19: A project under review by your office will improve a neighborhood you own property in and will likely lead to a positive impact on property values.</td>
<td>Misuse professional position</td>
<td>Personal benefit</td>
</tr>
<tr>
<td>Q20: At the planning director for a city planning agency, you want to develop support for a new park &amp; ride facility. So far, less than half of the neighborhood groups you have consulted are in favor of this.</td>
<td>Distort information</td>
<td>Mass transit</td>
</tr>
<tr>
<td>Q21: Another department within the city recommends clearance of a substantial amount of land in a low-income neighborhood. You are the city planner for that neighborhood.</td>
<td>Leak information</td>
<td>Low income</td>
</tr>
<tr>
<td>Q22: The suburb you work for has exclusionary zoning.</td>
<td>Protect underrepresented groups</td>
<td>Low income</td>
</tr>
<tr>
<td>Q23: Your agency's director purposely left out certain documented findings because they do not support agency policy. An environmental group requests the findings.</td>
<td>Leak information</td>
<td>Environment</td>
</tr>
<tr>
<td>Q25: You know during the budget process you will have to negotiate all items in the new fair share housing plan.</td>
<td>Use expendables as tradeoff</td>
<td>Low income</td>
</tr>
<tr>
<td>Q26: A land developer requests the 'draft' recommendation for a development plan for a largely underdeveloped part of city. This draft has been vetted by city departments; it has not been reviewed by the Planning Commission. The city has no policy on providing drafts to public.</td>
<td>Release draft recommendation on request</td>
<td>Land developer/ development</td>
</tr>
<tr>
<td>Q27: Your brother-in-law brings in an application for development review.</td>
<td>Misuse professional position</td>
<td>Personal benefit</td>
</tr>
<tr>
<td>Q28: The IT director for the city you work for can get iPhones at the municipal rate (which is much less than the retail rate) and offers to get you one or more if you prepay in cash. This is not a city employee incentive; the IT director has just made this offer to you and the other directors.</td>
<td>Misuse professional position</td>
<td>Personal benefit</td>
</tr>
<tr>
<td>Q29: Every area in your city that has an adopted neighborhood plan has improved and the property values have increased. The neighborhood you live in is tenth on the list of area plans to be performed.</td>
<td>Misuse professional position</td>
<td>Personal benefit</td>
</tr>
<tr>
<td>Q30: Your supervisor asks you to approve a project regardless of its status.</td>
<td>Change technical judgment due to pressure</td>
<td>Politician</td>
</tr>
<tr>
<td>Q31: Policy says &quot;advertise in a newspaper of general circulation.&quot; You know the residents in the area for the rezoning have a low circulation rate and don't generally read the newspaper.</td>
<td>Provide adequate information</td>
<td>Residents</td>
</tr>
<tr>
<td>Q32: You are the note taker at a neighborhood meeting, and those who attend the meeting are expressing views different than you think many in the community believe.</td>
<td>Provide adequate information</td>
<td>Residents</td>
</tr>
<tr>
<td>Q33: You are a city planner and one of your responsibilities is to maintain the planning department content on the City's Facebook page. The City has just recently obtained a Facebook presence and currently has very few policies on its use. A citizen requests a copy of an application in for development approval.</td>
<td>Provide adequate information</td>
<td>Residents</td>
</tr>
</tbody>
</table>

respondents were random, their choices would not be significantly different than 25% in each category, or 4, 4, 4, 4, 4. We feel it is clearly not a random choice when planners choose one of the four more than 50% of the time; we can then infer that the category chosen more often is their primary preference framework (our dominant categories). If planners, after choosing that primary preference framework, were to choose randomly among the remaining categories, then those choices would not be significantly different than 33.3%, or 10, 3, 3, 3. So, if after choosing the primary preference framework, respondents choose one of the remaining three more than 50% of the time, five or greater (10, 5, 2, 1), that is clearly not a random choice and we can infer it is their secondary preference framework (our combined dominant categories). The remaining categories are mixed (no clear dominant preference choice).
But not all mixed frameworks are the same. There are mixed frameworks with a subdominant preference: those clearly significantly different than random, but with no one dominant framework (between 53% and 33%, still clearly greater than 25%), whose most frequently chosen framework is chosen seven to nine times, and if the second choice is less than five, it would be a mixed but with a subdominant category. Another differentiated mixed category would be one where there is no dominant choice, but two tied for subdominance, but not three tied (so 9, 9, 0, 0 or 8, 8, 2, 0, or 7, 7, 3, 0). This is a mixed but with dual subordinates category. Finally, if there is no clear preference of framework, no framework chosen more than six times (6, 6, 6, 0 or 6, 6, 5, 1, etc.), we can label them chaotic. Table 4 summarizes the categorization of ethical frameworks chosen in our sample.

Finally, we should note that our survey, as do all surveys, suffers from the potential biases of all self-reported data. First, respondents may answer questions in a fashion that they perceive professional planners should answer them, overemphasizing their use of the frameworks the AICP Code represents. Second, the use of hypothetical situations simplifies the difficulties and actual constraints involved in real planning situations. This could further exacerbate a planner's tendency to overemphasize the use of the frameworks consistent with the AICP Code because it is much easier to overcome or simplify these difficulties and constraints in hypothetical situations. We try to ameliorate these biases by providing only ethical choices plus one self-interested hedonistic response. Thus, respondents could indicate they would "do the right thing" but with different justifications based on the various ethical frameworks we are researching.

**Planners' Role and Ethical Frameworks in the New Millennial**

**Different Planner Roles Over Time**

Table 5 depicts our modification of Howe and Kaufman's (1979) planner roles based on our research. We find significant differences between the role orientation of planners in our sample and in Howe and Kaufman's mid-1970s sample. First, we find slightly more than four times the proportion (4.5% to 20.7%) of careerists (those 26 scoring low on both their political and technical scales who were disregarded in Howe and Kaufman's original survey), a slightly smaller proportion of politicians (18.2% to 15.3%), but twice the proportion of technicians (26.5% to 53.7%) and almost one-fifth the proportion of hybrids (50.8% to 10.3%). If both our findings and Howe and Kaufman's are comparable and accurate, Table 5 clearly shows that the political role of planners has diminished significantly: overtly in a drop in the politician role, but mostly by the decrease in the hybrid role offset by the corresponding increase in technicians.

| Table 4. Categorization of ethical frameworks chosen in the sample. |
|-------------------------|-------------------------------|-----------------------------|
| **Dominant categories** | **Solo dominant (4 possible, 2 in the sample)** |
| Virtue                 | 10 virtue choices, other choices each <5 |
| Deontological          | 10 deontological choices, other choices each <5 |
| Utilitarian            | 10 utilitarian choices, other choices each <5 |
| Hedonistic             | 10 hedonistic choices, other choices each <5 |
| Combined dominant (12 possible, 1 in the sample) | 10 deontological choices, 5 virtue |
| Deontological/virtue   | 10 deontological choices, 5 virtue |

| Table 5. Planner's role choice (n = 1,334). |
|-------------------------------------------|------------------------------------------|
| **Technical scale**                     | **Political scale**                      |
| **Low**                                  | **High**                                 |
| Low                                      | Careerists                              |
| Low                                      | Politicians                             |
| 20.70%                                   | 15.30%                                  |
| n = 276                                  | n = 204                                 |
| High                                     | Technicians                             |
| 53.70%                                   | Hybrids                                 |
| n = 716                                  | n = 138                                 |

Note: Respondents are categorized by role choice based on their response to five questions (Q10–Q14 on our survey) asked by Howe and Kaufman (1979). They are categorized if they answered these questions as follows in this order (strongly agree or agree, neither, disagree or strongly disagree): Political: if 5,0,0; 4,1,0; 4,0,1; 3,2,6; or 3,1,1; Technical: if 1,2,2; 1,1,3; 1,0,4; or 0,0,5; Hybrid: if 3,0,2; 2,1,2; or 2,0,3; and Careerist: if 2,3,0; 2,2,1; 1,4,0; or 1,3,1.
The low number of politically oriented planners in our sample runs counter to the large percentage of executive-level planners in our sample who are subject to higher levels of political influences. This unexpected finding suggests that our respondents may have been hesitant to admit to political influences on their professional ethics or that these professional planners were not planning educated. To evaluate this unexpected finding with the data we have, we cross-tabulate the roles that planners chose with their educational background; we find that 62% of the hybrid, and 63% of the political planners, were planning educated, while only 54% of the technicians were educated in planning programs (a statistically significant difference at the .05 level). Thus, the differences between the number of technical planners in our two samples may in fact be due partially to the increase in number of non-planning educated practitioners planners (e.g., civil engineers, economists, geospatial sciences, environmental engineers, etc.). Unfortunately, we do not ask in which non-planning fields they were educated.

We evaluate whether the roles chosen by planners are affected by personal attributes by cross-tabulating the role choices and the personal attributes of each respondent. If sociodemographic characteristics do not affect role choices, these characteristics would be proportionately distributed across the role choices. A comparison indicates where particular demographic characteristics are disproportionately represented in different planning role choices and suggests that those characteristics affected the respondents’ choices. Table 6 demonstrates that race and region of employment are not strong factors in role choice in our sample. Planners who indicate that they have chosen a technical role tend to be middle-aged (41–60 years old), executive-level planners, with fewer planning degrees. Interestingly, a higher proportion of non-AICP-certified and non-planning-educated practitioners assume a political role. Those who choose a political role tend to be young (less than 25 and 25–40 years old) and have less than 10 years of work experience; they are less likely to be executive-level or public sector planners. Political planners are also more likely to have planning degrees. Hybrid planners are less likely to be from the Midwest, and are more likely to be from the west, in entry-level positions, and with planning degrees (66.4%). Finally, careerists are more likely to be in entry- or mid-level positions with fewer years of experience.

We also conduct a factor analysis of the data, similar to the analysis undertaken by Howe and Kaufman (1979). Our analysis allows for significant factor categorization, as does Howe and Kaufman’s (see the Technical Appendix for the details of this analysis, including sampling adequacy tests, significance tests, factor loadings, and correlation coefficients). Figure 1 provides a visualization of our factor analyses of planners’ role choices. Our analyses show that role choice is solidified for older, more experienced, AICP-certified, and middle- and executive-level planners; note that age, experience, and position level correlate highly on the first component, labeled “experience,” for all four planning roles. This is not an earth-shattering finding: We are well aware that as we age and gain experience, our identity and sense of self solidifies. What is interesting about these results is their differences. The second, third, and fourth components of the roles vary greatly. Those choosing a technical role are more likely to be a well-educated, White, female, private sector planner with AICP certification. The political planner is more likely to be an experienced, White, not well-educated, AICP-certified planner in the public sector, whereas the hybrid planner is an experienced, well-educated, White, female planner in the private sector. Careerists are more likely to be experienced, well-educated, private sector planners, or experienced, well-educated, non-White, male AICP-certified planners. The hybrid planner is similar to the technician, but more highly concentrated in the private sector. And the careerist is similar to the politician but more highly concentrated in the private sector.

**Planners’ Ethical Choices**

Overall, a slight majority of our respondents use a mixed deontological framework (50.5%) to make planning decisions. The next most common framework used by planners is a dominant deontological framework (17.5%). The third and fourth most common frameworks are a combined deontological and virtue (12.7%) and a mixed and virtue (7.6%). Finally, few of our respondents (0.1%) use primarily an individually self-interested (hedonistic) framework.

Table 7 provides a cross-tabulation of planners’ role and ethical framework choices, while Figure 2 is a visualization of the ethical frameworks used by particular planner roles. If planners’ ethical frameworks are not affected by their role choice, then respondents would be proportionately distributed across those frameworks. However, we find that the ethical framework used by those who adopt a political or hybrid role are affected by their role choice. Planners following a political role clearly use more mixed frameworks (particularly mixed/virtue, mixed/utilitarian, and mixed/mixed), choosing a much lower percentage of deontological responses than the other planners. Planners following a hybrid role make a higher proportion of deontological choices, with a lower proportion of deontological or virtue and mixed or virtue choices than would be...
Table 6. Planner attributes and role choice (in percentages).

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Technician</th>
<th>Politician</th>
<th>Hybrid</th>
<th>Careerist</th>
<th>All planners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>Male</td>
<td>57.2</td>
<td>51.0</td>
<td>56.9</td>
<td>60.5</td>
</tr>
<tr>
<td></td>
<td>Female</td>
<td>42.8</td>
<td>49.0</td>
<td>43.1</td>
<td>39.5</td>
</tr>
<tr>
<td>Race</td>
<td>Non-White</td>
<td>11.8</td>
<td>11.3</td>
<td>12.3</td>
<td>12.4</td>
</tr>
<tr>
<td></td>
<td>White</td>
<td>88.2</td>
<td>88.7</td>
<td>87.7</td>
<td>87.6</td>
</tr>
<tr>
<td>AICP certification status</td>
<td>Non-AICP</td>
<td>27.8</td>
<td>33.8</td>
<td>27.5</td>
<td>30.8</td>
</tr>
<tr>
<td></td>
<td>AICP</td>
<td>72.2</td>
<td>66.2</td>
<td>72.5</td>
<td>69.2</td>
</tr>
<tr>
<td>Education</td>
<td>BS-planning</td>
<td>9.4</td>
<td>11.3</td>
<td>5.1</td>
<td>10.1</td>
</tr>
<tr>
<td></td>
<td>BS-other</td>
<td>14.3</td>
<td>7.8</td>
<td>8.8</td>
<td>9.8</td>
</tr>
<tr>
<td></td>
<td>MS-planning</td>
<td>43.6</td>
<td>52.0</td>
<td>57.0</td>
<td>50.0</td>
</tr>
<tr>
<td></td>
<td>MS-other</td>
<td>24.9</td>
<td>22.5</td>
<td>20.4</td>
<td>22.8</td>
</tr>
<tr>
<td></td>
<td>PhD-planning</td>
<td>0.6</td>
<td>0.0</td>
<td>0.7</td>
<td>1.1</td>
</tr>
<tr>
<td></td>
<td>PhD-other</td>
<td>1.4</td>
<td>2.9</td>
<td>2.2</td>
<td>1.4</td>
</tr>
<tr>
<td>Planning</td>
<td>56.6</td>
<td>64.7</td>
<td>66.4</td>
<td>63.4</td>
<td>60.3</td>
</tr>
<tr>
<td></td>
<td>Non-planning</td>
<td>43.4</td>
<td>35.3</td>
<td>33.6</td>
<td>36.6</td>
</tr>
<tr>
<td>Age, years</td>
<td>&lt;25</td>
<td>1.5</td>
<td>4.4</td>
<td>0.7</td>
<td>2.5</td>
</tr>
<tr>
<td></td>
<td>25-40</td>
<td>26.5</td>
<td>41.7</td>
<td>34.1</td>
<td>34.1</td>
</tr>
<tr>
<td></td>
<td>41-60</td>
<td>52.0</td>
<td>36.8</td>
<td>42.0</td>
<td>41.3</td>
</tr>
<tr>
<td></td>
<td>&gt;60</td>
<td>20.2</td>
<td>17.2</td>
<td>23.2</td>
<td>22.1</td>
</tr>
<tr>
<td>Experience, years</td>
<td>&lt;10</td>
<td>18.9</td>
<td>30.8</td>
<td>25.4</td>
<td>28.0</td>
</tr>
<tr>
<td></td>
<td>10-19</td>
<td>28.8</td>
<td>29.2</td>
<td>23.9</td>
<td>28.4</td>
</tr>
<tr>
<td></td>
<td>20-29</td>
<td>24.8</td>
<td>18.1</td>
<td>26.1</td>
<td>16.0</td>
</tr>
<tr>
<td></td>
<td>30-39</td>
<td>19.1</td>
<td>17.7</td>
<td>14.9</td>
<td>18.3</td>
</tr>
<tr>
<td></td>
<td>40+</td>
<td>8.4</td>
<td>4.0</td>
<td>9.7</td>
<td>9.3</td>
</tr>
<tr>
<td>Employment sector</td>
<td>Private</td>
<td>22.2</td>
<td>27.5</td>
<td>25.6</td>
<td>24.9</td>
</tr>
<tr>
<td></td>
<td>Public</td>
<td>75.2</td>
<td>68.7</td>
<td>70.5</td>
<td>70.4</td>
</tr>
<tr>
<td></td>
<td>Nonprofit</td>
<td>2.6</td>
<td>3.8</td>
<td>3.9</td>
<td>4.7</td>
</tr>
<tr>
<td>Position</td>
<td>Entry level</td>
<td>6.4</td>
<td>12.6</td>
<td>11.9</td>
<td>11.4</td>
</tr>
<tr>
<td></td>
<td>Mid-level</td>
<td>36.2</td>
<td>49.4</td>
<td>40.5</td>
<td>47.2</td>
</tr>
<tr>
<td></td>
<td>Executive</td>
<td>56.6</td>
<td>35.6</td>
<td>46.8</td>
<td>39.8</td>
</tr>
<tr>
<td></td>
<td>Public/official</td>
<td>0.8</td>
<td>2.3</td>
<td>0.8</td>
<td>1.6</td>
</tr>
<tr>
<td>Region</td>
<td>West</td>
<td>26.5</td>
<td>29.2</td>
<td>37.0</td>
<td>31.2</td>
</tr>
<tr>
<td></td>
<td>Southwest</td>
<td>9.0</td>
<td>8.4</td>
<td>7.2</td>
<td>7.1</td>
</tr>
<tr>
<td></td>
<td>South</td>
<td>24.1</td>
<td>23.3</td>
<td>26.1</td>
<td>23.0</td>
</tr>
<tr>
<td></td>
<td>Midwest</td>
<td>21.5</td>
<td>20.3</td>
<td>13.0</td>
<td>19.7</td>
</tr>
<tr>
<td></td>
<td>Mid-Atlantic</td>
<td>13.5</td>
<td>11.9</td>
<td>11.6</td>
<td>14.1</td>
</tr>
<tr>
<td></td>
<td>New England</td>
<td>4.2</td>
<td>4.5</td>
<td>3.6</td>
<td>4.1</td>
</tr>
<tr>
<td></td>
<td>Outside U.S.</td>
<td>1.1</td>
<td>2.5</td>
<td>1.4</td>
<td>0.7</td>
</tr>
</tbody>
</table>

Note: The proportions bolded are significantly different than those for all planners at the .05 level.

expected if distributed proportionally in our sample. Thus, planners assuming a hybrid role are more rule based and less aspirationally motivated, while political planners make a lower proportion of deontological choices than would be expected if those choices were random.

Finally, planning experience and ethical choice are significantly correlated, but the correlation coefficient is so small ($r = .076$, $p = .001$) that our hypothesized relationship is not theoretically significant. We suspect this is a result of the sample size. Thus, we cannot verify, as we
hypothesized, that planners are likely to use a deontological ethical framework early after receiving their certification, but as time goes by will begin to rely more on their experience to make decisions. In fact, it appears that planners maintain a mix of virtuous and rule-based ethical choices after they have gained experience.

Another way to examine the relationship between planners' role choice and ethical frameworks is to evaluate

Table 7. Planners' ethical framework and role choice.

<table>
<thead>
<tr>
<th>Ethical Framework</th>
<th>Technician, %</th>
<th>Political, %</th>
<th>Hybrid, %</th>
<th>Careerist, %</th>
<th>All Planners, %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deontological/virtue</td>
<td>15.6</td>
<td>12.7</td>
<td>6.5</td>
<td>10.1</td>
<td>13.1</td>
</tr>
<tr>
<td>Deontological</td>
<td>19.1</td>
<td>10.3</td>
<td>27.5</td>
<td>15.6</td>
<td>17.9</td>
</tr>
<tr>
<td>Mixed/deontological</td>
<td>47.5</td>
<td>52.9</td>
<td>52.9</td>
<td>51.8</td>
<td>49.8</td>
</tr>
<tr>
<td>Mixed/virtue</td>
<td>7.1</td>
<td>9.8</td>
<td>1.4</td>
<td>11.6</td>
<td>7.9</td>
</tr>
<tr>
<td>Mixed/utilitarian</td>
<td>0.4</td>
<td>2.9</td>
<td>1.4</td>
<td>1.4</td>
<td>1.1</td>
</tr>
<tr>
<td>Mixed/hedonistic</td>
<td>0.1</td>
<td>0.5</td>
<td>0.0</td>
<td>0.0</td>
<td>0.1</td>
</tr>
<tr>
<td>Hedonistic</td>
<td>0.0</td>
<td>0.0</td>
<td>0.7</td>
<td>0.0</td>
<td>0.1</td>
</tr>
<tr>
<td>Mixed/mixed</td>
<td>10.1</td>
<td>10.8</td>
<td>9.4</td>
<td>9.4</td>
<td>10.0</td>
</tr>
</tbody>
</table>

Note: The proportions bolded are significantly different than those for all planners at the .05 level.
the demographic characteristics of the planners that make choices within the various ethical frameworks. Here again factor analysis allows us to see these relationships in their complexity. Figure 3 is a visualization of the results of our factor analyses of the chosen ethical frameworks. The standalone frameworks of virtue, utilitarian, and hedonistic and the mixed frameworks of mixed virtue, mixed utilitarian, mixed hedonistic, and dual subdominant had too few responses for factor analysis to evaluate. Those that scored the highest on deontological choices are again White, male, well-educated public sector planners; older, experienced, AICP certified and promoted tend to choose the framework. The factors scoring the highest with the combined dominants deontological and virtue indicate that White, educated, experienced, mature, promoted planners and private sector planners with AICP certification tend to choose the deontological/virtue framework. Experienced mature, educated, promoted, White, female, public sector planners with AICP certification are more likely to give mixed deontological responses. Finally, White, educated, mature, experienced, promoted, AICP-certified, male public sector planners are most likely to give chaotic responses. The differences here are mostly in regard to sector. The private sector planners tend to choose deontological or virtue, while public sector planners purport to apply a more rule-based approach.

How Planners View Tactical Ethics

Howe and Kaufman (1979) find that the tactics, or how planners accomplished their goals, have an important effect on ethical choices. Table 8 lists the five tactical situations used in the scenarios, ranked by how respondents indicated the acceptability of the proposed actions. Fewer planners in our sample than in Howe and Kaufman's (67% vs. 75%) find "leaking information to the Chamber of Commerce" unethical. In contrast, more of our respondents than Howe and Kaufman's feel that "assisting a group to overturn official action" (65% vs. 24%), "changing a technical judgment due to pressure" (52% vs. 39%), and "dramatizing a problem to overcome apathy" (47% vs. 13%) are unethical. Planners in our sample are roughly as likely as those in the Howe and Kaufman sample (36% vs. 34%) to think that releasing draft information on request to homeowners groups" was unethical. These responses are consistent with the larger number of planners in our survey who assume a technical role, perhaps indicative of our more conservative political climate.
Figure 3. Planners' attribute factor loadings by ethical framework.

Table 8. Rank order of tactics by ethical acceptability.

<table>
<thead>
<tr>
<th>Rank</th>
<th>Tactic</th>
<th>Scenario</th>
<th>Percentage total response ethical</th>
<th>Percentage total response unethical</th>
<th>Percentage total response not sure</th>
<th>Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/3</td>
<td>Release draft information on request to homeowners group</td>
<td>13/14</td>
<td>38.4</td>
<td>36.0/34</td>
<td>25.5</td>
<td>3.03</td>
</tr>
<tr>
<td>2/1</td>
<td>Dramatize problem to overcome apathy</td>
<td>12/13</td>
<td>27.5</td>
<td>47.2/13</td>
<td>25.2</td>
<td>3.38</td>
</tr>
<tr>
<td>3/2</td>
<td>Assist group overturn official action</td>
<td>14/15</td>
<td>21.2</td>
<td>64.9/24</td>
<td>13.6</td>
<td>3.71</td>
</tr>
<tr>
<td>4/4</td>
<td>Change technical judgment due to pressure</td>
<td>10/11</td>
<td>11.3</td>
<td>51.5/39</td>
<td>37.6</td>
<td>3.65</td>
</tr>
<tr>
<td>5/5</td>
<td>Leak information to Charler of Commerce</td>
<td>11/12</td>
<td>11.8</td>
<td>67.4/75</td>
<td>20.8</td>
<td>3.83</td>
</tr>
</tbody>
</table>

Notes: The proportions bolded are significantly different at the .05 level.
*Our ranking is listed first, followed by Howe and Kaufman's 1979 ranking.
*Percentages for some scenarios are less than 100% due to rounding.
*Percentages in our sample is listed first; Howe and Kaufman's (1979) is listed second.
*The lower the mean score, the higher the number of ethical responses; the higher the mean score, the higher the number of unethical responses. The scale was (1) clearly ethical, (2) probably ethical, (3) not sure, (4) probably unethical, and (5) clearly unethical.
Table 9 demonstrates the proportion of survey responses by ethical framework for each of the 18 scenarios. Each scenario has five choices, each choice representing an ethical framework or a combination of frameworks. We discern the differences between the choices of ethical frameworks by sorting the table data by each ethical framework (largest to smallest) separately. Planners choose the virtue framework—basing a decision on a personal moral code or what a respected professional would do—most often in scenarios that concern protecting the unrepresented, responding (or not) to threats, accepting bribery, releasing draft recommendations on request, using expendables as tradeoffs, and changing technical judgment due to pressure. Planners make deontological choices, those based on formal rules, most often in scenarios that address distorting information, misuse of professional position, and giving special advantages to certain stakeholders. Planners make utilitarian choices, those based on the value of the outcome, less frequently than either virtue or deontological choices in general, but were chosen most often in scenarios involving leaking information, adequate information, release of draft recommendations, and changing technical judgment due to pressure. Finally, planners rarely make hedonistic, or self-interested, choices, but when they do, the tactics concerned are using expendables as tradeoffs and changing technical judgments due to pressure. Thus, it appears these planners are virtuous when dealing with ideological issues (protecting the unrepresented, releasing draft recommendations on request, and changing technical judgments due to pressure) and legal issues like bribery and threats. They are more likely to be rule based (make deontological choices) or make utilitarian tradeoffs when concerned with the distribution of information and conferring special advantage, to themselves and on certain stakeholders.

Howe and Kaufman (1979) find that "planners react more to tactic than to the beneficiary in making their ethical choice" (p. 247). However, as shown in Table 10, in 2015 our sample suggests that the beneficiary also affects the ethical choices that planners make. Resorting the data in Table 9 to create Table 10, we see that planners choose the virtue framework, making their choices based on what they think is moral or admirable, most often in scenarios where the issue benefits the environment and low-income communities or stakeholders, but also developers and land development issues and politicians. Planners make deontological or rule-based choices most often in scenarios where the issue being addressed is mass transit, personal benefits, or residents. Planners make utilitarian choices, those focused on the outcome, less frequently than either virtue or deontological choices in general. Planners do choose the utilitarian framework most often in scenarios where the scenario concerns benefits for a community group. Finally, hedonistic choices are very rare in general but planners make such choices when the scenario indicates that politicians would benefit.

The Contemporary Ethics of Professional Planners

We conclude by highlighting our major findings in terms of their significance for the planning profession and planning education. Our first research question concerns the roles that planners assume today in comparison with Howe and Kaufman's 1979 findings. We find a significantly larger proportion (4.5% to 20.7%) of careerists and technicians (26.5% to 53.7%) than do Howe and Kaufman, but a smaller proportion of politicians (18.2% to 15.3%) and hybrids (50.8% to 10.3%). Thus, a major difference between our findings and those of Howe and Kaufman is that most of our respondents choose a technician role, not Howe and Kaufman's hybrid role. Baum (1996), following Skon (1983) and Dalton (1986), suggests that planners affirm the technical role not only because it supports claims of their professional status but because experience has taught them it is effective. We feel that Howe and Kaufman's findings are contextually related to the political climate of the 1960s and 1970s, while our findings are just as contextually related to our recent and current political culture. Thus, as with the general population, professional planners have become more conservative.

Technical justifications and viewpoints might function, however, as a safe refuge for politically liberal planning policy perspectives. In fact, this interpretation is consistent with Howe and Kaufman's (1979) prescient prescription:

Our data indicate that the most effective way to ensure that planners have such a restrictive view of planning and of ethical behavior would be to train people as technicians, since, of our three roles, they have not only the narrowest view of the planners' range of discretion, but are even more restrictive in what they are actually willing to do in practice. (p. 253)

Taking a technical role over a political role is not, however, consistent with how ethics and planning roles have been taught in planning schools since Howe and Kaufman's prescription (Klosterman, 1981, 1992, 2000, 2011). Planning educators, in fact, have been professing to the contrary: that the traditional technical role is theoretically impossible and potentially distorting and that a political or hybrid role
Table 9. Tactic by ethical acceptability sorted by proportion of survey responses.

<table>
<thead>
<tr>
<th>Tactic</th>
<th>% Virtue</th>
<th>Tactic</th>
<th>% Deontological</th>
<th>Tactic</th>
<th>% Utilitarian</th>
<th>Tactic</th>
<th>% Hedonistic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protect</td>
<td>86.1</td>
<td>Distort information</td>
<td>92.1</td>
<td>Leak information</td>
<td>28.5</td>
<td>Use expendables as tradeoff</td>
<td>12.7</td>
</tr>
<tr>
<td>Threaten legal action</td>
<td>85.6</td>
<td>Misuse professional position</td>
<td>83.6</td>
<td>Provide adequate information</td>
<td>19.0</td>
<td>Change technical judgment due to pressure</td>
<td>12.4</td>
</tr>
<tr>
<td>Accept bribe</td>
<td>84.4</td>
<td>Provide adequate information</td>
<td>65.8</td>
<td>Release draft recommendation on request</td>
<td>17.0</td>
<td>Leak information</td>
<td>7.1</td>
</tr>
<tr>
<td>Release draft recommendation on request</td>
<td>76.5</td>
<td>Leak information</td>
<td>30.0</td>
<td>Change technical judgment due to pressure</td>
<td>15.2</td>
<td>Misuse professional position</td>
<td>5.4</td>
</tr>
<tr>
<td>Use expendables as tradeoff</td>
<td>66.0</td>
<td>Accept bribe</td>
<td>15.2</td>
<td>Use expendables as tradeoff</td>
<td>11.8</td>
<td>Provide adequate information</td>
<td>3.5</td>
</tr>
<tr>
<td>Change technical judgment due to pressure</td>
<td>57.0</td>
<td>Change technical judgment due to pressure</td>
<td>14.2</td>
<td>Misuse professional position</td>
<td>9.8</td>
<td>Distort information</td>
<td>1.8</td>
</tr>
<tr>
<td>Leak information</td>
<td>33.3</td>
<td>Threaten legal action</td>
<td>12.1</td>
<td>Distort information</td>
<td>6.0</td>
<td>Threaten legal action</td>
<td>1.4</td>
</tr>
<tr>
<td>Provide adequate information</td>
<td>10.3</td>
<td>Protect underrepresented</td>
<td>10.3</td>
<td>Protect underrepresented</td>
<td>2.5</td>
<td>Release draft recommendation on request</td>
<td>0.4</td>
</tr>
<tr>
<td>Misuse professional position</td>
<td>0.4</td>
<td>Use expendables as tradeoff</td>
<td>7.6</td>
<td>Accept bribe</td>
<td>0.0</td>
<td>Accept bribe</td>
<td>0.4</td>
</tr>
<tr>
<td>Distort information</td>
<td>0.0</td>
<td>Release draft recommendation on request</td>
<td>4.9</td>
<td>Threaten legal action</td>
<td>0.0</td>
<td>Protect underrepresented</td>
<td>0.1</td>
</tr>
</tbody>
</table>

Table 10. Issue benefiting by ethics acceptability sorted by proportion of survey responses.

<table>
<thead>
<tr>
<th>Issue benefiting</th>
<th>% Virtue</th>
<th>Issue benefiting</th>
<th>% Deontological</th>
<th>Issue benefiting</th>
<th>% Utilitarian</th>
<th>Issue benefiting</th>
<th>% Hedonistic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environment</td>
<td>77.3</td>
<td>Mass transit, low income</td>
<td>25.1</td>
<td>Community group</td>
<td>51.6</td>
<td>Politician</td>
<td>12.4</td>
</tr>
<tr>
<td>Land developer/development</td>
<td>76.5</td>
<td>Personal benefit</td>
<td>70.0</td>
<td>Residents</td>
<td>19.0</td>
<td>Environment</td>
<td>8.8</td>
</tr>
<tr>
<td>Politician</td>
<td>57.0</td>
<td>Residents</td>
<td>65.8</td>
<td>Land developer/ development</td>
<td>17.0</td>
<td>Community group</td>
<td>5.0</td>
</tr>
<tr>
<td>Low income</td>
<td>53.0</td>
<td>Low income</td>
<td>25.1</td>
<td>Low income</td>
<td>16.1</td>
<td>Low income</td>
<td>4.6</td>
</tr>
<tr>
<td>Community group</td>
<td>24.0</td>
<td>Community group</td>
<td>18.7</td>
<td>Politician</td>
<td>15.2</td>
<td>Personal benefit</td>
<td>4.4</td>
</tr>
<tr>
<td>Personal benefit</td>
<td>17.2</td>
<td>Politician</td>
<td>14.2</td>
<td>Personal benefit</td>
<td>7.8</td>
<td>Residents</td>
<td>3.5</td>
</tr>
<tr>
<td>Residents</td>
<td>10.3</td>
<td>Environment</td>
<td>13.1</td>
<td>Mass transit, low income</td>
<td>6.0</td>
<td>Mass transit, low income</td>
<td>1.8</td>
</tr>
<tr>
<td>Mass transit, low income</td>
<td>0</td>
<td>Land developer/ development</td>
<td>4.9</td>
<td>Environment</td>
<td>0</td>
<td>Land developer/ development</td>
<td>0.4</td>
</tr>
</tbody>
</table>
has proven to be more effective (Baum, 1996; Flyvbjerg, 1998; Forester, 1989, 1999; Innes, 1995, 1996). This may suggest that professional planners in recent and contemporary practical planning contexts have found, contrary to their education, that technical and hybrid roles have helped them achieve their planning goals. In addition, this might be an even more widespread tendency, since our data indicate that the practicing planners subscribing to a technician role were infrequently planning educated (28% compared with 60% in our sample as a whole). We doubt that planning educators can influence this tendency via our planning curriculum in part because so many practicing planners are not planning educated.

Those scholars and educators who continue to believe that planners will be more effective if they assume a political role may have to choose other ways to convince practitioners to consider doing so, in part because so many APA members are not planning educated. Those educators who wish to influence practitioners to consider becoming more political may have to make their case in professional planning outlets like Planning magazine and through the AICP certification maintenance program. Presenting positive case studies of projects or plans that were more effective and were implemented more quickly or fully may help sway those who continue to believe in the greater efficacy of the technical role.

Our second research question focuses on how well practicing planners conform to the ethical frameworks that drive the AICP Code. We reconfirm Howe and Kaufman’s (1979) finding that the planning profession’s core values (as represented in the 2009 AICP Code) are shared by a significant majority of practicing planners: 80% in our sample. We do admit that the share of planners who actually act according to the core values is probably smaller than either survey found because: people are likely to give socially acceptable responses. Our hypothetical scenarios, moreover, present situations that are simpler and more straightforward than they would be in practice. Our findings are significant, however, even if the response bias leads us to overestimate conformity to the AICP Code by 10 to 20 percentage points.

The third research question motivating our work is how the role that planners assume affects what they see as ethical behavior. We find that the ethical frameworks of planners who choose either a technical or careerist role are not affected by those role choices. The ethical frameworks of those choosing hybrid and political roles, in contrast, are. Hybrid planners make a higher proportion of deontological, or rule-based, choices with a lower proportion of deontological/ virtue and mixed/ virtue choices than would be expected in our sample. Political planners make a lower proportion of deontological choices than would be expected in our sample. Hybrid planners appear more pragmatic, making more rule-based choices and fewer virtuous or aspirational choices than expected, while political planners appear less willing to make rule-based choices.

Our fourth major research question is how job experience influences both the ethical frameworks that planners use and the roles they choose to play. We were limited in our ability to address that question; to begin, we conducted a cross-sectional study, so we cannot attribute differences in ethical choices or roles to changes over time in professional experience. Second, we expected to find that very experienced planners would be more likely to base their decisions on their personal experience, whereas younger, less-experienced planners would base their efforts on the AICP Code; that is, using a deontological, or rule-based, ethical framework. We find, in fact, that most planners, regardless of the stage of their career, use a mix of virtue and rule-based ethical frameworks. We suspect that experienced professional planners have found that using a mix of ethical frameworks, well represented in the AICP Code, is an effective approach in contemporary planning practice.

We conclude that our survey of APA members shows that the AICP Code of Ethics has value. Our conclusion contrasts with that of Howe and Kaufman (1979), who question the usefulness of the code. We attribute the greater importance of the code in the decisions made by the practicing planners in our survey to two factors: 1) important code revisions over time that respond to wider and more up-to-date ethical challenges and 2) improvements in planning curriculum due to changes in Planning Accreditation Board accreditation guidelines that have resulted in the revised AICP Code being used directly in the classroom with the kinds of ethical dilemmas posed in Howe and Kaufman’s scenarios for at least three decades.

It is crucial to both practitioners and academics to understand what planners currently consider ethical behavior and the basis on which they make ethical decisions. We find, in updating the seminal 1979 Howe and Kaufman survey of practicing planners, that most planners today reject a political role as an advocate for specific policies or stakeholders, and are more likely to adopt a technican role as an unbiased professional simply reporting data and information to a variety of stakeholders. Their behavior is largely consistent with deontic or rule-based ethical frameworks, many of which are embedded in the AICP Code. We find it surprising that this is independent of how long someone has been a planner or their rank or position, although we do find some differences by sociodemographic factors and professional experience. We believe that our respondents may assume (or report) playing a technican
role largely because they have found that role to be more effective, and perhaps less personally threatening.

Academics, however, feel that planners are more effective when they advocate for certain positions or stakeholders and when they take a more active part in bringing multiple stakeholders to the table while addressing barriers to their active participation in planning processes (see Brooks, 2002). The above role choice combined with the normative structuring that deontological frameworks play in contemporary professional planners’ espoused choices also suggests that the challenge posed by Campbell and Marshall (1999) that planning educators “need to find a way of giving prominence to universal values such as equity, environmental sensitivity and social justice without at the same time ignoring the situatedness of the socio-economic and institutional contexts with which planners are confronted” (p. 476) still stands.

We also accept that simply assessing answers to simple scenarios, and quantifying factors that may lose meaning when quantified, may have affected our results. We believe it is crucial to also interview a wide variety of planners, seeking deeper insights in what motivates their decisions, how they personally determine what is ethical behavior in the more contested and real-world situations that they face, and the skills needed to negotiate them successfully and ethically. Combining more qualitative work with our survey results will allow practitioners and academics to better understand how much more political planners can really be in today’s political climate and the rewards as well as problems of assuming a political role.

Notes
1. It is important to remember that: Howe and Kaufman’s (1979) role scale, like ours, only measures a planner’s attitudes, since respondents were not asked if they possessed the necessary skills for the role. Although planners may aspire to take a political, technical, or a hybrid role, without the necessary skills to perform their duties in a particular role, they will not succeed in assuming that role. This question of the skills necessary to be successful as a particular role is addressed in the interview portion of our research project.
2. Forester’s (1989) construction of the five types of planners (technician, incrementalist, liberal-advocate, structuralist, and progressive) is meant to explain how various planners confront different situations.
3. Johnson and Gore (2016) compare the historical changes in planning and architecture codes of ethics in terms of the values represented with an eye toward the potential for professional collaboration.
4. The development of many planning organizations gave planning a great sense of a legitimization. In 1959 the Association of Collegiate Schools of Planning (ACSP) was born when a few department heads of planning schools got together at the annual ASIP conference to confer on common problems and interests regarding the education of planners (Timeline of American Planning History). In 1971, the American Institute of Planners (AIP) adopted a Code of Ethics for professional planners. The AIP and American Society of Planning Officials (ASPO) merged to become the APA in 1978. At this time, the APA established a professional institute, the AICP to be responsible for the national certification of professional planners. The ACSP in its current incarnation was established to represent the academic branch of the planning profession in 1980 (Chatterjee, 1986). Prior to the creation of the Planning Accreditation Board (PAB) in 1984, the National Education Development Committee (NEDC) had a planning degree recognition program that began in 1950 to assess the qualifications of graduates to take the AIP exam. It was not until 1989 that the PAB was recognized by the Washington-based Council on Post-Secondary Education to be the sole accrediting agency in the field of professional planning education. Following that, PAB started a full-fledged accreditation, involving a much more detailed evaluation.
5. The AICP Code of Ethics is divided into four sections. The first two are of interest here. The first section (A) has the aspirational ethics. Planners are not held to these aspirations as they are to the Rules of Conduct, section (B). These rules are to be closely abided to and planners have the responsibility to follow them; if not, the planner can be charged with misconduct.
6. We also were able to compare our sample data with some incomplete data provided by the APA for 2015. This data is much less comprehensive, so we do not provide it here.
7. There are a varying number of respondents based on particular questions, but the number of missing responses is generally very low. It ranges from 39 for years of experience to 0 on sex. Thus, our sample sizes are still sufficient.
8. While we had expected to be able to test the representative nature of our respondents, to our surprise the APA does not collect demographic data on its members. Thus, we cannot assume our sample is representative of the membership of the APA, let alone professional planners more generally.
9. Our analysis used orthogonal (varimax) with Kaiser-Meyer-Olkin Measure of Sampling Adequacy greater than .6 (varying from .516 to .689 for individual runs). All four planning role categories were significant at the .001 level using Bartlett’s Test for Sphericity approximating Chi-Square.

Supplemental Material
Supplemental data for this article can be accessed on the publisher’s website.

References
Overview

On the recommendation of the Discipline Process Review Committee, OPPI’s Professional Practice and Development Committee has initiated a program to improve ethics and practice, in part through the development of Standards of Practice. These Standards of Practice are intended to promote higher professional standards and a better understanding of OPPI’s Professional Code of Practice.

The following Standards of Practice have been approved by Council:

- Independent Professional Judgment – September 2002, Revised 06/09, Revised 06/12
- Disclosure and the Public Interest – September 2003, Revised 06/09
- Trespass – September 2003
- Conflict of Interest – April 2005, Revised 06/09, Revised 06/12

Adopted Standards of Practice should be read collectively and should be considered a guide only. They are not intended to provide legal advice. Matters referred to the Discipline Committee will remain specific to OPPI’s Professional Code of Practice.
STANDARDS OF PRACTICE: Independent Professional Judgment

1. **Discussion**

Under our Professional Code of Practice, Members must provide diligent, creative, independent, and competent performance of work in pursuit of the client’s or employer’s interest and are required to: “impart independent professional opinion to clients, employers, the public, and tribunals.” (Section 2.1).

Professional Planners are subject to subtle pressures in the workplace. An employer or client may suggest that “in the past we have been working well together but lately we seem to be at odds and we cannot promote or continue to retain your services if we are not working together”. The comment may be expressed innocently as an expectation that the planner should advocate the position of the client or employer.

Independent professional judgment or opinion must be derived free of pressure, however subtle, or one cannot maintain the independence necessary to serve both the client and the public. Professional Planners need to distinguish an opinion from an administrative responsibility to implement directions by clients or designated authorities such as Councils.

One of the main misunderstandings of the public concerns a professional planner processing an approval earlier recommended against. Another misunderstanding is how a planner may have an opinion that is different to that of the public or council opinion. We have to constantly remind the public and employers that an independent professional opinion is an objective evaluation based on all the relevant information available and the planner’s professional judgment.

A professional planner cannot provide an independent professional opinion in any direct or indirect circumstance where there is a personal or financial interest including receiving consideration based on an outcome. The professional planner should consider the following before rendering an independent professional opinion:

- Do I have sufficient information and resources?
- Do I have sufficient training and experience?
- Am I professionally objective?

The goal of the profession is to promote a standard of excellence that distinguishes Registered Professional Planners in Ontario and warrants the respect of the public. The most important distinguishing character of all Registered Professional Planners in Ontario must be our commitment to the professional code of practice in the pursuit of planning excellence. The Ontario Professional Planners Institute has the responsibility, through education and discipline, to maintain the highest standards of practice and ethics. We should promote and distinguish the value of an independent professional planning opinion certified to by the use of the professional stamp. The stamp and signature represents the collective reputation of all Members of the Ontario Professional Planners Institute.

2. **Standard of Practice for Independent Professional Judgment**

The Professional Planner in applying independent professional judgment cannot be an advocate of any position other than his or her professional opinion. The role of an advocate is to “plead the cause of another”. The role of the planner is to provide independent professional judgment or opinion. It is therefore important to distinguish an opinion independently from the position of the employer or client even though they may be the same.

An opinion must be balanced and fair. Most issues have benefits and disadvantages or consequences. By stating both the benefits and impacts, a planner should present an opinion in a
manner which allows the reviewer to understand the basis and reasoning for the opinion. Conditions are often identified to qualify the opinion where more work is necessary to support any assumptions or to manage identified impacts.

Independent professional judgment should be the end product of an evaluation process, openly and freely entered into with the application of research techniques and professional evaluation. The professional planner must measure the gravity and necessity of the circumstances, the resources available upon which to draw and be thoughtful of the rights and privileges of others within the overall public interest.

While not exhaustive, the following principles are intended to provide a greater understanding of the meaning of the term - independent professional judgment:

Independent

- A planner shall not perform work if there is an actual, apparent or foreseeable conflict of interest, direct or indirect, or an appearance of impropriety, without full written disclosure including related work for current or past clients and subsequent written consent by the current client or employer.

- Zealously guard against conflict of interest or its appearance.

- While the primary responsibility is to provide a service to a client or employer, there is also a responsibility to the larger society (public interest) that may at times supersede a planner’s responsibility to a client or employer.

- Remain free of associations and activities that may compromise integrity and damage credibility.

- Disclose unavoidable conflicts.

- Deny favoured treatment to special interest groups (private and public).

- Resist collateral or irrelevant pressure to influence your planning opinion.

- Reject bribery in all forms. Do not accept commissions or allowances, directly or indirectly, from clients or other clients or employers in connection with planning work for which you are responsible.

- A member shall not provide personally or through an associated planning advisory firm over which the member exerts a controlling interest what purports to be "independent professional judgment", orally or in writing, regarding property in which he or she has an ownership or pecuniary interest, direct or indirect – for instance, regarding property that is owned, directly or indirectly, by the member or by his or her family. Disclosure by the member of the fact of an ownership or pecuniary interest cannot “cure” the conflict of interest adequately to render it even theoretically possible that the member could render an "independent professional judgment". (Note: this prohibition does not apply where a member’s pecuniary interests are sufficiently remote or insignificant.) Members may, however, pursue and argue in favour of legal measures regarding their own property (e.g., rezoning, minor variance, etc.), but in those cases members must explicitly and clearly state that they are not speaking as a professional planner, and that their opinions cannot be construed as independent professional judgment.

- A member is not prohibited from providing an “independent professional judgment” regarding property that is owned by the member’s employer or business organization, so long as the member is paid by salary only, not by way of profit-sharing, and the member does not receive a bonus dependent on the result of the decision-making process. A decision-maker may decide to place less weight on the "independent professional judgment" provided by an employee of the applicant, or may benefit from a peer review process regarding that opinion.

- A member may disagree with the independent professional judgment provided by another member
who is an employee of an applicant. But absent any evidence of bonuses, profit-sharing, or other benefit, inducement or pressure, that opinion should be accepted as independent professional judgment. Members should refrain from making the blanket assertion that, by definition, professional opinions offered by members in support of their employers’ applications are not based upon independent professional judgment.

**Professional**

- A planner must strive to provide full, clear and accurate information on planning issues to clients, citizens and governmental decision makers.
- A planner must systematically and critically analyze ethical issues in the practice of planning.
- A planner must act in accordance with the highest standards of professional integrity.
- Maintain a high quality of service and a reputation for honesty and fairness.
- Carry out tasks with honesty, provide accurate captions and never intentionally distort the truth.
- Express an opinion only when it is based on practical experience, education, judgment and honest conviction.
- Perform services only in areas of competence obtained through experience and/or formal education.
- Critically examine and keep current with emerging knowledge and fully use evaluation and research evidence in professional practice.
- Conduct yourself honourably, responsibly, ethically, and lawfully so as to enhance the honour, reputation and usefulness of the planning profession.
- Advise clients or employers when you believe a project does not meet basic planning principles or guidelines.
- All professional planners must promote professional excellence within the profession.

In summary, all professional planners must be aware of their professional responsibilities. The code of practice is intended to require a standard of excellence and practice to maintain the privilege of Members being exclusively referred to as a Registered Professional Planner in Ontario.

**Caveats**

The professional planner is reminded that in the event of conflicts or impediments to the pursuit of excellence in service and the promotion of the primacy of the public interest, the Professional Code of Practice of the Ontario Professional Planners Institute is to govern individual decision making.

In the event that the professional planner belongs to two or more professional organizations, compliance with the dictates and performance obligations of each where engaged, is expected. In acting in the capacity of a professional planner, whether in a direct or incidental capacity, the Member is obligated to respect all standards applicable in the circumstances, including any higher standard or obligation, in the case of overlaps or conflict. In all such cases, it is the duty of the professional planner to meet or exceed the requirements of the Ontario Professional Planners Institute Code of Professional Practice.
STANDARDS OF PRACTICE: Disclosure and the Public Interest

1. Discussion

The Preamble to OPPI's Professional Code of Practice, referring back to the Canadian Institute of Planners Statement of Values states:

"CIP Members seek to balance the interests of communities with the interests of individuals, and recognize that communities include both geographic communities and communities of interest."

Professional Code of Practice Sections 2.7 and 2.9 collectively require that the Member ensure full disclosure to a client or employer of a conflict between the values or actions of a client or employer and those of the Code and that the Member must provide their professional recommendation in situations that may adversely affect the public interest.

In addition, the first Standard of Practice regarding Independent Professional Judgment established that:

“While the primary responsibility is to provide a service to a client or employer, there is also a responsibility to the larger society (public interest) that may at times supersede a planner’s responsibility to a client or employer.”

Section 1.0 of OPPI’s Professional Code of Practice states that:

“Members have a primary responsibility to define and serve the interests of the public.”

Section 1.3 further provides that:

“[Members shall] acknowledge the inter-related nature of planning decisions and their consequences for individuals, the nature and built environment, and the broader public interest.”

Professional Code of Practice Section 2.6 requires that the Member respect the client or employer’s right to confidentiality of information gathered through a professional relationship.

There is no universally accepted definition of what constitutes the public interest. The ethical principles that define it come from two sources - the general values of society and the planner’s responsibility to serve the public interest. An individual Member’s morals, ethics and values reflect those of their community and professional training. The Member must also be cognizant of and respect the competing interests of individuals, corporations, municipalities and provincial ministries and agencies. Conflicts arise among competing obligations, which “prima facie” may all appear to be valid. At issue here is the dilemma between the Code's direction of disclosing and balancing public interest issues with the contractual duty to observe confidential client information.

The purpose of this Standard of Practice is to further OPPI’s commitment to ensuring that the highest standards of conduct and ethics are maintained, by increasing the awareness of Members’ obligation under the Code to maintain professional integrity and promote and enhance the public interest. This Standard of Practice is intended to assist Members by providing an outline of the steps that should be taken in the evaluation of cases when disclosure of
confidential information may be necessary in order to protect the public interest.

Guidance as to what matters are of a dimension to affect the public interest is embedded in statutes such as the Planning Act. For example, Section 2 of the Planning Act establishes that a lengthy list of public authorities, in carrying out their responsibilities under the Act, shall have regard to identified matters of provincial interest, including:

"... (h) the orderly development of safe and healthy communities; and (o) the protection of public health and safety; ..."

The "public interest" concept is continued throughout the Planning Act. It permeates all of the component sections (Official Plans, zoning by-laws, minor variance, site plans and subdivision/severance). It is the duty of a Member to identify any adverse impacts on the public interest and evaluate mitigative efforts that are appropriate. In some circumstances, this investigation may reveal information that is confidential or privileged. Before revealing or disclosing such information, the Member is advised to comply with the following directions.

2. **Standard of Practice regarding Disclosure and the Public Interest**

As set out in the Standard of Practice regarding Independent Professional Judgment, the professional planner should consider the following matters before rendering an independent professional opinion:

- Whether the Member has sufficient information and resources;
- Whether the Member has sufficient training and experience; and
- Whether the Member is professionally objective.

Assuming that the three conditions noted above have been met, the following section outlines the steps that a Member should pursue respecting the disclosure of information received that would normally or specifically be considered proprietary or confidential.

In providing independent professional judgment, the Member must be free to disclose confidential information that is contrary to the public interest in order to evaluate the issues and provide a professional recommendation. If a contractual commitment would be broken by such disclosure, generally such disclosure must be required by law or provided with the consent of the client. However, a Member is not entitled to hide behind a contract or refuse or neglect to reveal information that is relevant to the protection of the public interest. Disclosure guidelines are particularly relevant in the areas of the public interest related to public health or safety and respect for the rule of law. In those circumstances, the failure to disclose could negate the Member's duty to promote the primacy of the public interest and thereby constitute the basis of an offence under the Code of Practice.

Public disclosure must take place so as to preserve the standard of excellence that distinguishes Registered Professional Planners in Ontario and warrants the respect of the public. OPPI supports and recognizes that a professional planner has a responsibility to disclose matters that may have an adverse effect on the public interest, or where there is or is likely to be a violation of the law, without fear of professional disciplinary sanction. Further, if a Member is vested with, receives, or comes across information, whether received in confidence or not, the Member may have a legal or ethical responsibility to disclose this information if it could have an adverse effect on the public interest.

Major considerations to be carefully weighed must include – but are not necessarily limited to – the following:
• What is the level of risk to the public – is there an existing or imminent threat to public health or safety?
• Has there been, or is there likely to be a violation of the law?

If the answer to either one of the above is affirmative and the public interest is therefore potentially compromised in an adverse manner, then the Member must consider the following three questions:

a) Is there a positive duty in law requiring timely disclosure, e.g. an environmental spill of contaminant?

b) What are the disclosure terms of the employment contract? Do they include a mechanism for public disclosure, as part of an assessment, mitigation, conditions or a general due diligence requirement?

c) Are timely internal appeal procedures in place that allow for a speedy resolution of the matter?

In the case of the first, a Member is expected at all times to observe the law. In the other circumstances, where disclosure is not obligatory at law and there is no release by the employer, the Member is advised to pursue the following:

Step 1: If, following consultation with the employer, public disclosure is prohibited, the professional should consult with a trusted senior colleague of their choice who holds current, full OPPI membership in strict confidence. The independent Member consulted should have, or be provided with, significant knowledge of the subject matter at hand to render an independent perspective, but not be linked to any of the parties involved.

Step 2: Should the independent OPPI Member concur with the involved planning professional’s assessment of the gravity and urgency of the situation, the next step would be to contact OPPI’s Executive Director to obtain further counsel and assistance on proceeding with disclosure.

The communication with OPPI, whether oral or in writing, must be generic in nature and follow the standardized format below, outlining the situation without divulging any privileged information. Contents should include:

1) A concise explanation of how and why the professional has concluded that there is an imminent threat to public health or safety or a violation of the law, including the name and contact information of the Member who concurred with this professional opinion;

2) An affirmation that the employer in question has not provided a disclosure release and has neither a mechanism for public disclosure nor a timely internal appeal procedures in place to deal with the situation so as to avoid imminent danger to the public;

3) Confirmation that the Member has notified the employer/client first and provided a reasonable period for a local resolution, satisfactory to the Member; and

4) Any other information that could assist with avoiding or minimizing a potentially adverse public reaction against the Member or the planning profession in the event of public disclosure.
Step 3: Receive and act upon the counsel and assistance provided by OPPI in conjunction with other civil or criminal independent legal advice, if any, that the Member in his/her sole discretion considers appropriate in the circumstances.

The procedure outlined above should be followed in all cases so as to ensure a consistent approach in handling situations respecting disclosure of matters affecting the public interest going to issues of public health or safety or a violation of the law. Following this process will maintain the integrity and competence of the planning profession, and is proffered as due diligence on the part of the Member.

3. Caveats

a) In the case of a statutory obligation to disclose or protect information, the Member is expected to obey the law.

b) Where disclosed information received is germane to public health or safety or in violation of the law, the Member should notify the employer/client and then follow the above three step procedure if there is no action to effectively remedy the concern.

c) A departure from the approach suggested above is not recommended, it could be considered unprofessional and could be grounds for disciplinary action.

d) This Standard of Practice only covers the most serious cases of violations of the public interest – other means of redress should be sought for cases not involving imminent threats to public health or safety or a violation of the law.

e) Disclosure in order to protect the public interest should be strictly on a need-to-know basis and public information may be limited to the essentials required to recommend mitigation measures to prevent threats to public health or safety.

f) Independent legal advice should be considered before proceeding with disclosure in all circumstances where confidential information is shared which is or may be the subject of privilege.

g) A Member's contract for services or retainer letter should address that in the event that the Member's professional obligations conflict with the requirements of the owner, the Member's professional responsibility shall govern.

h) This Standard of Practice is not intended to substitute for a Member's obligation in law to do or refrain from doing any act or omission that he or she is required to perform by law. Where information is protected by laws of copyright, privilege, trespass, libel, slander, privity of contract or access to freedom of information, the Member must examine the confidentiality of information received in light of this Standard of Practice.

i) In the event that the professional planner belongs to two or more professional organizations, compliance with the dictates and performance obligations of each where engaged, is expected. In acting in the capacity of a professional planner, whether in a direct or incidental capacity, the Member is obligated to respect all standards applicable in the circumstances, including any higher standard or obligation, in the case of overlaps or conflict. In all such cases, it is the duty of the professional planner to meet or exceed the requirements of the Ontario Professional Planners Institute Code of Professional Practice.
1. **Discussion**

OPPI’s Professional Code of Practice states:

"Members have a primary responsibility to define and serve the interests of the public."

The purpose of this Standard of Practice is to provide advice to planners regarding the existence of restrictions on access to property. While it might appear to some Members that entering onto lands for investigatory purposes is in the public interest, it is not the case in most instances. For example, before entering into a woodlot to conduct a survey of native plant species that might be affected by an adjacent development that the Member is involved with, it is mandatory that planners respect the legal restrictions on access to property. While municipalities may pass by-laws allowing construction access from neighbouring lands and certain other professions such as surveyors have limited access rights to property, planners have no statutory rights to enter upon premises, including lands and buildings, in the conduct of undertaking their work. Members must therefore obtain the consent of the owner and or occupant before entering upon or into such premises.

OPPI’s Professional Code of Practice is silent on the specific issue of trespass. However, in consideration of the requirement for Members to recognize that resources are the property of individuals or private or public entities, planners must educate themselves as to the applicable restrictions on access to property. It is important that planners familiarize themselves with the provisions of the provincial Trespass to Property Act, R.S.O., 1990, Chapter T.21, as amended (the "Act") and the liability/risk assumption consequences under the Occupier’s Liability Act, R.S.O. 1990, c.0.2 (collectively, the "Acts"). Note that extracts from these two Acts cited below are from the Acts (September, 2006), which may be amended from time to time. Members should therefore consult the Acts directly when trespass issues arise. Both Acts are available on the Internet by name search.

The Trespass to Property Act provisions defining when an act of trespass has occurred are as follows:

"Trespass an offence

2. (1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or
(ii) engages in an activity on premises when the activity is prohibited under this Act;

or

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier, is guilty of an offence and on conviction is liable to a fine of not more than $2,000. R.S.O. 1990, c. T.21, s. 2 (1)."

Prohibition of entry is defined in the Act as follows:

"3. (1) Entry on premises may be prohibited by notice to that effect and entry is prohibited
without any notice on premises,

(a) that is a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or

(b) that is enclosed in a manner that indicates the occupier’s intention to keep persons off the premises or to keep animals on the premises. R.S.O. 1990, c. T.21, s. 3 (1)."

Premises is broadly defined as follows in the Act:

*1 (1) ‘premises’ means lands and structures, or either of them, and includes,

(a) water,
(b) ships and vessels,
(c) trailers and portable structures designed or used for residence, business or shelter,
(d) trains, railway cars, vehicles and aircraft, except while in operation. ("lieux") R.S.O. 1990, c. T.21, s. 1 (1)."

Occupier is also defined in the Act as follows:

*1 (1) In this Act,

‘occupier’ includes,

(a) a person who is in physical possession of premises, or
(b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

even if there is more than one occupier of the same premises ..."

As a general rule, Members should always seek consent from the occupier before entering on premises, whether owned by the client, or other interest. In addition to the offence of trespass, punishable by fine and damage awards under the Act, other consequences can follow.

Under the provisions of the Occupiers’ Liability Act, R.S.O. 1990, c. O.2, in instances where the entry is prohibited under the Trespass to Property Act or the occupier has posted no consent notice with respect to entry and has not otherwise expressly permitted entry, a person who enters the premises is deemed to have willingly assumed all risks.

In the event that posted or written consent is not obtained, Members should in all cases consider alternatives to the act of committing trespass. For instance, raising the concern with interested parties such as the local planning department in order to facilitate agreement for access is one alternative.

This Standard of Practice should be read in conjunction with the Standard of Practice regarding Disclosure and the Public Interest to ensure that privileged information is not inadvertently disclosed.
In all cases, a written agreement for access to protected premises should be sought to protect the Member against possible prosecution for trespass and complaints of unprofessional conduct.

Public sector planners are encouraged to amend development application forms to provide that the property owner in submitting the application thereby provides consent to municipal and relevant external agency review staff to enter upon the premises during regular business hours over the time that the application is under consideration by the municipality. Specific legal advice should be obtained for the conditions of entry.

Private sector planners are encouraged to include in retainer letters an acknowledgement of the right to enter the client's premises during reasonable times over the term of the project.

All Members must seek the permission of owners and occupiers of premises not otherwise accessible to the public.

2. **Standard of Practice for Trespass**

In all cases, OPPI Members must not violate the prohibition against trespass nor assume the risks or potential liability for such action. In instances where a planner is uncertain about the legal restrictions, specific legal advice should be sought.

In addition to inviting the possibility of a complaint or legal action against themselves, Members must always be mindful that their conduct is a reflection on the profession as a whole and must ensure that their behaviour is perceived to be ethical, in accordance with Section 2.2 of OPPI's Professional Code of Practice which requires that:

"[A Member shall] work with integrity and professionalism."

Section 3.5 requires that: "[A Member shall] not in professional practice, extra-professional activities or private life, engage in dishonourable or questionable conduct that may cast doubt on the Member’s professional competence or integrity or that may reflect adversely on the integrity of the profession."

3. **Caveat**

A departure from the approach suggested above is not recommended. It could be considered unprofessional and could be grounds for disciplinary action.
STANDARDS OF PRACTICE: Conflict of Interest

1. Discussion

Section 1.0 of OPPI's Professional Code of Practice states:

"Members have a primary responsibility to define and serve the interests of the public."

Planners need to be aware that in carrying out their duties, they may become involved in situations where their duty to serve the public interest is compromised or perceived to be compromised by competing priorities and interests. A planner must always be aware of his/her responsibilities as set out in the Standard of Practice respecting Independent Professional Judgement:

"While the primary responsibility is to provide a service to a client or employer, there is also a responsibility to the larger society (public interest) that may at times supersede a planner’s responsibility to a client or employer."

- A planner shall not perform work if there is an actual, apparent or foreseeable conflict of interest, direct or indirect, or an appearance of impropriety, without full written disclosure including related work for current or past clients and subsequent written consent by the current client or employer.

- Zealously guard against conflict of interest or its appearance.

There is no universally accepted definition of what constitutes a conflict of interest. The ethical principle underlying it flows from the planner’s responsibility to perform his/her responsibilities freely without influence and to the best of the individual’s ability commensurate with the resources available to perform the task. When a planner becomes involved in a situation where there is a conflict of interest, which has not been disclosed, the planner effectively violates his/her obligation to the larger society and may violate a number of the provisions of the Professional Code of Practice.

The purpose of this Standard of Practice is to further OPPI's commitment to ensuring that the highest standards of practice and ethics are maintained, by increasing the awareness of Members’ obligation under the Code to maintain professional integrity. This Standard of Practice is intended to assist Members by providing an outline of the considerations that Members must evaluate to confirm that in undertaking certain responsibilities, no conflict of interest of a personal nature would occur that would have the effect of adversely impacting on the Members’ duties.

This Standard of Practice is to be applied in all situations in which a planner may find him or herself in an actual or perceived conflict of interest. It is not intended to supplant an employer’s internal policies or procedures regarding an actual or perceived conflict of interest. Planners must familiarize themselves with and work within these additional policies within their place of employment.

The Standard of Practice regarding Independent Professional Judgement sets out a number of matters that the professional planner should consider before rendering an independent professional opinion, including consideration of whether the Member is professionally objective with respect to his/her opinion. Reference must be had to the Standard of Practice: Independent Professional Judgment.
Specific instances where a personal conflict of interest would be involved include the following scenarios:

- when the Member, a spouse/partner, family Member or business entity with which the Member is associated is in a position to potentially benefit directly or indirectly from a certain outcome of a planning process; and

- when the Member is in a situation where personal or the member’s controlling business relationships may place improper influence on the outcome of a planning process.

A conflict arises when the perception or potential for the ability of the planner to exercise the required independent professional judgement is undermined. Simply recognizing a conflict does not eliminate it, and declaring it may not resolve the conflict.

Planners often assume different roles in the performance of their duties and as they function as professionals in society. In some instances, professional opinions are required to be given in oral or written form, while in instances of processing matters, they may not be required to be given. In exercising independent professional judgement, whether or not opinions are required, conflicts can arise. Planners must determine what role they are taking on in any given circumstance and assess potential conflicts accordingly. Regardless of the role, this Standard of Practice applies.

Specific Professional Code of Practice requirements, which would be violated in the above circumstances, are as follows:

Section 2.8

“[The Member shall] ensure full disclosure to a client or employer of a possible conflict of interest arising from the Member’s private or professional activities, in a timely manner;”

Sections 2.10 – 2.14

“[The Member shall] reject and not offer any financial or other inducements, including prospective employment, that could influence or affect professional opportunities or planning advice;

[The Member shall] not, as an employee of a public planning agency, give professional planning advice for compensation to a private client or employer within the jurisdiction of the public agency without written consent and disclosure to the agency;

[The Member shall] not, as a consultant to a public planning agency during the period of the contract with the agency, give professional planning advice for compensation to others within the jurisdiction of the agency without written consent and disclosure to the agency in situations where there is the possibility of a conflict of interest arising;

[The Member shall] not, as a salaried employee of or consultant to any public planning agency, directly or indirectly advise the agency on the granting or refusal of an application which the Member has submitted or has an interest in to the agency; however, the Member may appear to present the application;
[The Member shall] not accept anything of value, or the promise of anything of value, including prospective employment, from any person when it could appear that the offer is made for the purpose of influencing the Member's actions as an advisor to a public planning agency."

2. General Practice

Planners have an obligation to disclose matters in which they directly or indirectly have a personal interest. Personal interest for the purpose of this Standard of Practice is defined as:

“Any personal advantage, real or perceived, that constitutes a personal or pecuniary benefit, gain or profit that is neither nominal nor in kind and which accrues to a Member or person directly or indirectly related to the Member as a result of involvement in a work, commission, planning process or decision, excluding reasonable and related contract for service amounts with the employer to whom the services are rendered.”

Appropriate and timely disclosure must take place so as to preserve the standard of excellence that distinguishes Registered Professional Planners in Ontario and warrants the respect of the public. The nature of disclosure will be different in each circumstance. Verbal declarations are required in a public forum such as a Committee, Council, or tribunal charged with making a recommendation or decision on a matter related to the Members opinion; the declaration could be in the form of written correspondence to affected parties and/or participants in a planning process if sufficient opportunity exists to communicate effective knowledge of the personal interest. The nature of the conflict will guide the type and extent of disclosure required. It should be clear that disclosure of the specific nature of the conflict is not required if it would result in the disclosure of confidential information to which the Member is privy.

Reference should be made to the Caveats respecting disclosure set out in this Standard of Practice. Instances where a Member becomes aware that a fellow Member may have an undisclosed conflict of interest of a personal nature means it is incumbent for the Member to bring the matter to the attention of OPPI's Discipline Committee.

Immediately upon disclosure to the offending Member that there may be a real or perceived conflict of interest, the Member shall not hold himself or herself out as providing an independent professional opinion in respect of the particular matter.

The failure to disclose to all affected parties a personal interest is the basis for a complaint under the Professional Code of Practice.

OPPI is aware that despite best efforts, Members may inadvertently acquire personal interests that may interfere with their exercise of independent professional judgement. Examples of such conflicts might include property inheritance or personal relationships of or with a person in a position of decision-making authority.

Special measures may be required and available to ensure no conflict arises through devices to limit access to information, securing of documents or other isolation measures in larger organizations. Should an inadvertent conflict arise, the Member should immediately and carefully consider the following questions:

- what is the level of risk that the affected decision-making process has or could be influenced by non-disclosure of the Members’ conflict of interest – could the process be so unduly influenced that there could be an adverse effect on the public?
Has there been, or is there likely to be a violation of Code of Professional Practice, contract or applicable law?

Additionally, a Member must also consider the potential impact of non-disclosure on the profession as a whole, given the profession’s unique position of trust held by the public at large and in respect of the intended fairness of the planning process.

Step 1

Forthwith upon learning of a personal interest in the course of the Member's work, services or employment, the Member should consult with a trusted senior colleague of their choice who holds current, full OPPI membership in strict confidence. The independent Member consulted should have, or be provided with, significant knowledge of the subject matter at hand to render an independent perspective, but not be linked to any of the parties involved. This procedure is appropriate when the Member has any doubt as to whether or not he or she is in a conflict of interest circumstance.

Step 2

Should the independent OPPI Member conclude the existence of a potential conflict of interest, the next step would be to contact OPPI's Executive Director to obtain further counsel and assistance on proceeding with disclosure.

The communication with OPPI, whether oral or in writing, must be generic in nature and follow the standardized format below, outlining the situation without divulging any privileged information. Contents should include:

1. A concise explanation of how and why the professional has concluded that there is a potential conflict of interest, including the name and contact information of the Member who concurred with this professional opinion;

2. An explanation as to why disclosure to affected parties has not occurred.

Step 3

Receive and act upon the counsel and assistance provided by OPPI, which may involve consultation with an Ethics counsellor, in conjunction with other civil or criminal independent legal advice, if any, that the Member in his/her sole discretion considers appropriate in the circumstances.

The procedure outlined above should be followed in all cases so as to ensure a consistent approach in handling situations respecting disclosure of personal interests that have or may affect or be influenced by a Member's actions, presence or work.

Following this process will maintain the integrity and competence of the planning profession, and is proffered as due diligence on the part of the Member.

3. Caveats

a) A departure from the approach suggested above is not recommended, it could be considered unprofessional and could be grounds for disciplinary action.

b) Nothing herein shall diminish the requirement of compliance with the Professional Code of Practice of the Institute.
c) Disclosure in order to protect the public interest should be strictly on a need-to-know basis and public information may be limited to the essentials required to recommend mitigation measures and ensure awareness in persons who may wish to take remedial action.

d) A Member's contract for services or retainer letter should address that in the event that the Member's professional obligations conflict with the requirements of the client, the Member's professional responsibility shall govern.

e) In the event that the professional planner belongs to two or more professional organizations, compliance with the dictates and performance obligations of each where engaged, is expected. In acting in the capacity of a professional planner, whether in a direct or incidental capacity, the Member is obligated to respect all standards applicable in the circumstances, including any higher standard or obligation, in the case of overlaps or conflict. In all such cases, it is the duty of the professional planner to meet or exceed the requirements of the Ontario Professional Planners Institute Code of Professional Practice.
1. My name is……………………………………………………………………..(name)
   I live at the …………………………………………………………………………..(municipality)
   in the…………………………………………………………………………………..(county or region)
   in the ……………………………………………………………………………………..(province)

2. I have been engaged by or on behalf of………………………………………..(name of
   party/parties) to provide evidence in relation to the above-noted Board proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding
   as follows:

   a. to provide opinion evidence that is fair, objective and non-partisan;

   b. to provide opinion evidence that is related only to matters that are within my
      area of expertise; and

   c. to provide such additional assistance as the Board may reasonably require,
      to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I
   may owe to any party by whom or on whose behalf I am engaged.

Date………………………………. …………………………………………………………………
Signature
Rethinking the Public Interest as a Planning Concept

by Jill Grant

Summary

Planners traditionally turn to the public interest as a way of legitimating their advice and activities. Is that appropriate? Some authors say the concept is an illusory ideal. Some suggest that the public interest has typically been linked to the concerns of the powerful. Others believe that experts can define it. A few argue that meeting the needs of the most vulnerable serves the common good. What are planners to do?

Sommaire

Traditionnellement, les urbanistes invoquent « l’intérêt » public pour légitimer leurs conseils et les activités. Est-ce convenable? Selon certains auteurs, la notion même est un idéal illusoire. Certains laissent entendre que l’intérêt public a typiquement été lié aux préoccupations des puissants. D’autres sont d’avis que les experts peuvent le cerner. Quelques-uns affirment que la satisfaction des besoins des plus vulnérables sert le bien commun. Que doivent faire les urbanistes?

Our professional Code of Practice says that planners “acknowledge the inter-related nature of planning decisions and their consequences for individuals, the natural and built environment, and the broader public interest.” When prospective members of CIP take the oral entrance exam, they often face questions about the public interest. As planners, how do we understand and use the concept? While the question is fundamental to our profession, the answer is far from simple. In the early years of modern town planning, we enjoyed considerable consensus about the common good. We no longer find such certainty. Today we recognize and embrace diversity. The realities of contemporary practice make us rethink our understanding of the concept of the public interest. We increasingly see the public good as an abstraction: necessarily fluid, tenuous and context sensitive. Our conceptualization of the public interest is inevitably framed by a particular space and time. It reflects cultural, professional and personal values. What one generation defines as “the common good” may not hold for subsequent generations.

The Public Interest in History

Formal definitions describe the public interest as the objective of duly authorized governments carrying out activities necessary to the welfare of the community. Closely associated with the professionalization of the civil service, the term gives those working for government an ideal to serve. Although critics argue that government aims too often reflect the interests of capital or social elites, the machinery of the nation state alleges that decisions reflect the common good of all classes. The public interest means more than the sum of competing interests, or even some way of “balancing” competing interests. It provides the ultimate ethical justification for the demands of the state on the individual. The public interest becomes a unifying symbol and social myth.

By the 1960s, the profession faced challenges to particular definitions of the public interest. In recent years, we ask questions about the merits of the concept itself. Yet, in practice, the public interest remains rhetorically significant. Used in discourse and debate as a way to explain and justify recommendations and outcomes, the concept provides a theorem for expert advice, and a calculus for the distribution of benefits and costs. Unfortunately, we cannot demonstrate the public interest through any straightforward formula. The public interest is an essentially contested concept: people agree on its significance, but dispute its meaning and content. Some argue about how to identify the public interest while others claim it does not exist.

The Public Interest as Myth

Conceptualizations of the public interest appear within a particular constellation of values in time and space. In the 1950s, a broad popular consensus saw the public interest as growth and progress. Planners helped to redesign cities to accommodate rising affluence. We advised governments to tear down blighted neighbourhoods, rebuild civic...
centres and accommodate the poor in upgraded public housing. We separated pedestrian and vehicular traffic. Our profession praised the resulting projects. Today we recognize that those solutions spawned new problems: urban sprawl, traffic gridlock, sterile landscapes. The failure of urban renewal and public housing projects exposed the fallacy of the post-war conceptualization of the public interest. Values change.

Since Paul Davidoff introduced the idea of advocacy planning, planners have acknowledged multiple interests. The civil rights and feminist movements helped planners recognize the political context of our work. Advocacy planning involves the radical assertion of difference. It denies a single “public” interest while illuminating political choices. Each decade brings new players with their own views about what serves the public.

Although at one level planners accept competing interests as equally valid, we continue to appeal to the public interest when we need to offer advice or make decisions. As conventional conceptions of the public interest floundered, planning theory turned increasingly to examining the planning process. Mainstream planning theory worked toward developing a framework for articulating options that could serve the common good. If planners could no longer claim to have the skills to ferret out the public interest, then we would focus on helping community members to define it.

The Public Interest as Process

John Friedmann shifted attention to planning as a form of mutual learning where the process is as important as the outcome. Others have extensively developed and refined these ideas through the last three decades. Forester argues that planners serve the public interest by open, honest and transparent communication in their dealings with the public and decision makers. Planners have the responsibility to inform, illuminate and listen—to help people achieve their own ambitions, and to speak truth to power.

In recent years, collaborative planning theory has gained adherents. It suggests that stakeholders work together to define the public interest. Planning involves finding open and productive ways to resolve differences and find win-win scenarios. In this view, the consensus outcome represents the public interest.

Process views of the public interest define the role of the planner as facilitator. Strategic planning initiatives built on the concept as governments redefined their approach. However, in recent years we see concerns raised: if planners are merely facilitators, then what is our independent professional expertise? Planners’ desires to strengthen professional standing through title restriction and licensing has brought renewed concern about clarifying the public interest.

The Public Interest as Substance

Substantive theories assume that the public interest exists and that trained experts can recognize it. Such theories expound planning principles that promise good communities or healthier futures. As experts, planners define the public interest through applying the preferred planning principles.

The most popular of these normative planning theories are new urbanism and smart growth. They define good urban form as a common benefit. They see the public interest as served by designs that include mixed use, compact form, reduced concentrations of poverty, transit orientation, and pedestrian-friendly and connected streets. Such principles currently dominate new planning documents in Canada.

Substantive normative theories are popular with planners because they offer clear formulae for professional expertise and authority. As history has proven, however, they are subject to debate and displacement. Even where consensus makes them popular at one point, as times change they lose favour. Unexamined normative theories promote particular values as if they were universal values. In so doing, they elevate some interests while demonizing other views.

The Public Interest as Process and Substance

Planning has had a small radical theory movement within it for decades. Radical planning defines the public interest as overcoming the hegemony of the powerful by putting the needs of the most disadvantaged to the forefront. Creating a just society, some say, serves the public interest. Good communication and good form are not enough to overcome unequal power. The radical planner’s role is a controversial one: a guerrilla in the bureaucracy, fighting oppression. That few practitioners select this option is not surprising.

The Public Interest in Practice

Can planners serve the public interest? As community advisors, we must make our values explicit and illuminate the ethical choices embedded within planning outcomes. Planning involves political choices about the disposition of land, facilities and resources. The outcomes are not necessarily win-win. Consensus is not always possible. Resources are increasingly limited. Our role involves exposing issues and options for those who make decisions and to those affected by the decisions. Our professional credibility depends on openness about our assumptions and transparency in process. We do not serve anyone’s long-term interest by presuming that we know the formula for the good community.

Does this mean that planners cannot be leaders or visionaries, that we are stuck being process technicians? Not necessarily. But if we seek to implement a personal or professional agenda, then we are ethically obliged to do so explicitly, not behind a cloak of imputed “public interest.” We must be clear about why we believe particular strategies are timely to achieve explicit community aims—and we must prepare to have history prove us wrong.

Players in the planning process often advocate their own normative positions as the public interest. Ultimately, however, outcomes are political choices. Tearing down poor neighbourhoods for redevelopment seemed a popular political choice in 19th-century Europe and again in 20th-century North America. Planning organizations have recently awarded prizes to those who designed
new urbanist schemes to rejuvenate public housing projects by mixing in market housing. In the United States, new urbanist planning principles have created beautiful new districts while facilitating the net loss of some 60,000 public housing units. It is clear that neighbourhood renewal serves some interests, while hurting others. Planners who define the public interest in physical terms without considering the social repercussions of actions reap the whirlwind.

References and Notes
Are You Wearing Two Hats?

By the Professional Development and Practices Committee

Do you belong to more than one professional organization? Are you also a landscape architect, school trustee, engineer, lawyer, board member or member of a Committee of Adjustment? This “dual membership” can give rise to conflicting obligations between professional organizations or associations arising from their differing Codes of Conduct or Practice. You need to consider the following information.

Several years ago, OPPI’s Professional Practice and Development Committee began developing Standards of Practice. The purpose of these Standards is to further educate, advise and give direction to our members by expanding on how we should carry out our practice. To date, four Standards of Practice have been approved by Council.

The Discipline Committee has recently realized that Professional Planners may not fully understand how our Code of Practice applies when a member holds standing in two or more organizations. There may be instances where codes of practice differ or conflict. As a result, modifications to the Standards of Practice for Independent Professional Judgement, Disclosure and the Public Interest, and Conflicts of Interest have been prepared and approved by Council. These modifications act as an advisory for the member to consider the planner’s responsibility and to resolve conflicts by maintaining compliance with the OPPI code.

The directive for OPPI members of these modifications is to remind the professional planner of his or her obligation to provide excellence in service and observe the primacy of the public interest. As such, an OPPI member is required to observe OPPI’s Code of Conduct. When acting in the capacity of a professional planner, an OPPI member is obliged to respect the standards of both organizations. In the event of a conflict, the professional planner is to meet or exceed the requirements of the OPPI Code.

A planner holding membership in the Institute is subject to complaint and discipline proceedings under the OPPI Professional Code of Practice. To protect the member’s interests, he or she must meet or exceed that standard whether or not membership in another organization establishes a different standard.

For example, the OPPI Professional Code of Practice, Section 2.3 states that a planner must “not perform work outside of his/her professional competence.” The same planner may be a member of the Professional Engineers of Ontario or other organization with a code of conduct, such as an education, committee of adjustment or hospital board. If any of those organizations establish a standard of educational experience, such as a certificate, in a subject area of practice, the professional planner must consider his or her ability to offer advice or provide services in relation to that subject matter in issue. Requirement of a formal certificate of competency by one professional planner does not preclude the planner from acting in his or her professional capacity in respect of that subject matter in the absence of a certificate, unless the work is outside the realm of the members’ sphere of the professional competence. The advisory reminds members, in performing functions as a professional planner, to meet or exceed the standard defined by the Institute in the individual’s own training and with respect to peer performance levels.

Professional planners are being alerted to the responsibility and accountability they accept in holding membership in organizations with accountable standards. For the professional planner, while another organization may hold a standard higher or lower than that expected by the Institute, the revisions to the Standards of Practice require the planner to meet or exceed the professional Code of Practice of the Institute.

A conflict can occur only where the adherence to one standard negates that of another. The modifications clarify that the Institute’s standards apply when a professional planner is engaged in planning matters. The Standards of Practice give further direction as to how to mitigate real and apparent conflicts should they occur. The revised Standards of Practice can be found on the OPPI website.

Response to Letter to the Editor from Vladimir Matus

I wish to respond to the matter raised by Vladimir Matus regarding the renewal of OPPI/CIP membership for Retired Members. As I have attempted to clarify on several occasions in the past via e-newsletter, the Journal and private correspondence with numerous members, the process for the renewal of membership status by Retired Members resulted from complaints from members of the Institute regarding individuals who had applied for, and been granted, Retired Member status who were actively engaged in the practice of planning.

Our first approach was to speak to the individuals involved personally to request that they take the appropriate steps to resolve the matter. However, as the number of complaints increased, all members applying for the renewal of their Retired and Non-Practicing status were asked to certify by signature that they were not engaged in planning practice. The OPPI By-law is quite clear: Membership in any corporate class must be renewed on an annual basis. It is not automatic.

I appreciate the concerns raised by Mr. Matus and I understand the sense of inconvenience that many feel has resulted from this approach. Please accept that if this was an isolated matter the Institute would have responded by an entirely different means. Our preference certainly would have been to not have to deal with the issue at all.

Ronald M. Keeble, MCIP RPP
Registrar, OPPI
Summary of Determination and Decision

In the matter of a hearing under the Ontario Professional Planners Institute Act and in the matter of a complaint regarding the conduct of a MEMBER of the Ontario Professional Planners Institute and HOLDER of the Registered Professional Planner (RPP) designation.

This matter was addressed by a hearing of the Discipline Committee conducted according to Section 15.10.3 of By-law 1-86 as amended.

Pursuant to Section 2.3.14 of the Professional Code of Practice, a Member of the Institute brought an alleged breach to the attention of the Discipline Committee, which requires that any Member of OPPI report to the Institute the behaviour of any other Member believed to be in breach of the Code.

Specifically, the Complainant Member was concerned that the Member breached Section 2.2.1 of the Professional Code of Practice and was not in a position to impart independent professional opinion in respect of two projects, given the Member’s multiple roles as a professional planning consultant and partner in a local planning consulting firm, as an elected School Board official, as an appointed member of the Conservation Authority, and as a local developer/builder, all within the same geographic area of the Member’s practice.

In one project, the allegation involved having provided planning services and opinions in support of the project while also having an ownership interest in the project. In the second project, the allegation involved having provided planning services and opinions in support of the project while also serving on two local public interest boards, where the project property was located within the jurisdictions of both public agencies, where the school board had an ownership interest (it had been declared surplus and conditionally sold to a local developer) and where one of the planning issues included a Conservation Authority interest (the extent of an ESA).

There was no dispute as to facts and details about the two projects. The Member responded and maintained that there had been full disclosure to all parties of their interests and activities, that the declarations were sufficient to continue professional work on the projects and that in any event, no planning opinions were involved in either circumstance that breached the Code.

The Discipline Committee panel, on hearing the evidence and submissions, determined that the Member was not in a position to impart independent professional opinion in respect of the two projects, given the multiple roles involved, all within the same geographic area of the Member’s practice. The roles have competing interests, which affected the ability to provide independent professional opinions. The continuation of work on one of the projects ultimately led to subsequent questions about the independence of the Member’s work being raised in public forums, despite having provided interest declarations. It resulted in the public planning discussion unfortunately being clouded and distracted by conflict of interest discussions, taking away from a fulsome planning and public interest discussion.

The panel determined that there have been breaches of the Code that prevented the Member from providing independent professional opinions on two projects that the public could fully rely on. The panel directed that the Member complete an ethics course and that the Member be admonished from continuing the practice of professionally working on files that involve public agencies or boards on which the Member is appointed or elected and that are within the jurisdiction of that agency, or on files that involve any personal ownership interests. For such projects, following the appropriate disclosure, an independent project manager should assume day-to-day project responsibilities.
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<td><strong>1.1 Practice in a manner that respects the diversity, needs, values and aspirations of the public and encourages discussion on these matters.</strong></td>
<td>Module 5 of the PSB Ethics and Professionalism Course</td>
<td>This section of the course provides a review of the public interest – more specifically that there are multiple public interests.</td>
</tr>
<tr>
<td><strong>1.2 Provide full, clear and accurate information on planning matters to decision-makers and members of the public, while recognizing the employer or client’s right to confidentiality and the importance of timely reporting.</strong></td>
<td>Dear Dilemma – Public Interest Takes Precedence</td>
<td>This article provides a real-life example of how to address planning issues and changing circumstances. More specifically, it addresses how a planner is to approach fulfilling this section of the Code when circumstances change and professional opinions differ.</td>
</tr>
<tr>
<td></td>
<td>City of Ottawa Ontario Municipal Board Decision</td>
<td>Please read Part IV – TDL Limited. In particular, note pages 15/16 and 21 of the decision regarding the planner’s obligation to full, clear and accurate information as well as the need for thoroughly researched work to reach an independent opinion.</td>
</tr>
<tr>
<td><strong>1.3 Acknowledge the inter-related nature of planning decisions and the consequences for natural and human environments.</strong></td>
<td>City of St. Catharines OMB decision</td>
<td>Please read the entire decision. Pay particular attention to pages 48 (4th paragraph) and 56 (last paragraph) to understand the inter-related nature of planning issues and assessing multiple issue simultaneously.</td>
</tr>
<tr>
<td><strong>1.4 Provide opportunities for meaningful participation and education in the planning process to all interested parties.</strong></td>
<td>5 Things for Young Planners</td>
<td>Refer to the first part of the article on Communication and specifically the importance of the public and stakeholders.</td>
</tr>
<tr>
<td><strong>2.1 Provide independent professional opinion to clients, employers, the public, and tribunals; perform work only within their areas of professional competence.</strong></td>
<td>Dear Dilemma – Community Conduct</td>
<td>This article speaks to the importance of independent professional opinion and how to maintain independent opinion in our roles in community volunteerism.</td>
</tr>
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<td></td>
<td>Ontario Municipal Board Expert Witness Form</td>
<td>Pay attention to the requirements for an expert witness and the duty to provide impartial evidence with the planner’s area of expertise. This is an example of how this part of the Code has been translated into practice.</td>
</tr>
<tr>
<td></td>
<td>Town of Oakville Ontario Municipal Board Decision</td>
<td>Please refer specifically to Paragraphs 33-36 of the decision as well as Paragraph 79. The decision speaks to this component of the Code of Conduct and provides a real life example. Read the balance of the decision to understand how planners must provide independent advice even when their client/Council does not support the recommended approach.</td>
</tr>
<tr>
<td></td>
<td>City of Stoney Creek Ontario Municipal Board Case</td>
<td>Please refer to page 3 of the decision in the 4th paragraph. This decision is the first and still most directive on the planner’s responsibility for independent professional opinion and what must be done to achieve that.</td>
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<td>2.2 Undertake planning services with diligence and render services with appropriate preparation.</td>
<td>St. Catharines Ontario Municipal Board Decision</td>
<td>Please refer to pages 48 (4th paragraph) and 56 (last paragraph) to understand the importance of appropriate preparation and thoroughly documenting the planner’s opinion.</td>
</tr>
<tr>
<td>2.3 Acknowledge the values held by the client or employer in work performed, unless such values conflict with other aspects of this Code.</td>
<td>No specific reading provided</td>
<td></td>
</tr>
<tr>
<td>2.4 Respect the client of employer right to confidentiality of information gathered through a professional relationship, unless such right conflicts with other aspects of this Code.</td>
<td>No specific reading provided</td>
<td></td>
</tr>
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<td>2.5 Inform the client or employer in the event of a conflict between the values or actions of the client or employer and those of this Code in a timely manner.</td>
<td>Dear Dilemma – Under Pressure</td>
<td>This article describes how to address issues where there is a conflict between the employer’s perspective and the Code of Professional Conduct.</td>
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<td>2.6 Ensure timely and full disclosure to a client of employer of a possible conflict of interest arising from the Member’s private or professional activities.</td>
<td>Gifts and Other Inducements – Plan West Article</td>
<td>This article provides insights and practical choices for planners in avoiding conflict of interest relative to gifts and inducements.</td>
</tr>
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<td>2.7 Not offer or accept any financial or other inducements, including prospective employment, that could, or appear to, influence or affect professional opportunities or planning advice.</td>
<td>Gifts and Other Inducements – Plan West Article</td>
<td>This article provides insights and clear direction on how to address financial or other inducements.</td>
</tr>
<tr>
<td>2.8 Not, as an employee of a public agency, give professional planning advice for compensation to a private client or employer within the jurisdiction of the public agency without disclosure to the agency and written consent</td>
<td>Dear Dilemma – Advising previous clients</td>
<td>This article has information on how to manage changing client relationships when changing jobs and what the planner’s obligation to the public interest is in these circumstances.</td>
</tr>
<tr>
<td>2.9 Not, as a consultant to a public agency during the period of contract, give professional planning advice for compensation to others within the jurisdiction of the agency without disclosure to the agency and written consent</td>
<td>OPPI Summary of Decision</td>
<td>This reading includes information on how a professional planner conducted themselves while working in a volunteer capacity for multiple agencies. While not under contract to the public agency, the planner was under contract to private clients and provided advice to the public sector agencies. The relevance is the conflict created and impact on independent professional opinion.</td>
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<td>consent in situations where there is the possibility of a conflict of interest arising.</td>
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<td></td>
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<td>3.1 Maintain an appropriate awareness of contemporary planning philosophy, planning theory and practice by obtaining professional education throughout their planning career, including complying with the Institute's continuing professional learning requirements.</td>
<td>5 Things for Young Planners</td>
<td>Refer to the first part of the article on Understanding the Planning Framework</td>
</tr>
<tr>
<td>3.2 Not in professional practice, extra-professional activities or private life, engage in dishonourable or questionable conduct that may cast doubt on their professional competence or integrity or that may reflect adversely on the integrity of the profession.</td>
<td>Dear Dilemma – from Confused Member</td>
<td>This article addresses how planner's must address their commitment to the public interest when undertaking volunteer activities.</td>
</tr>
<tr>
<td>3.3 Ensure that advertising or promotional activities fairly and accurately communicate the expertise and skills offered, including professional qualifications and affiliations, education and experience.</td>
<td>No Reading</td>
<td></td>
</tr>
<tr>
<td>3.4 Act toward other Members and colleagues in a spirit of fairness and consideration and not falsely or maliciously injure the professional reputation, prospects or practice of another Member or other colleagues.</td>
<td>Oakville Ontario Municipal Board Case (Marine Drive)</td>
<td>Note the commentary of the Board Member on the professionalism of the planning witnesses and how the Board determined which planning opinion was preferred.</td>
</tr>
<tr>
<td>3.5 Respect colleagues in their professional capacity and when evaluating the work of another Member, show objectivity and fairness and avoid ill-considered or uninformed criticism of the competence, conduct or advice of the Member.</td>
<td>Oakville Ontario Municipal Board Case (Marine Drive)</td>
<td>Please refer to the summary of the planning opinions of the witnesses for the Town of Oakville and the applicant. The opinions clearly differ. How did each witness approach commentary on such differing opinions? How did each witness show objectivity?</td>
</tr>
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<td>3.6 Not attempt to supplant another Member once made aware that definite steps have been take toward the other member's employment.</td>
<td>Dear Dilemma – Crossing the Line</td>
<td>There are four examples in this article of situations where “supplanting” another planner could be a violation of the Code. The article provides approaches to maintain compliance with the Code.</td>
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<td>3.7 Only sign or seal a final drawing, specification, plan, report or other document actually prepared or checked by the Member</td>
<td>See Sample Question and explanation in Study Guide</td>
<td></td>
</tr>
<tr>
<td>3.8 Report to the Institute the behaviour of any Member believed to be in breach of this Code in a timely manner</td>
<td>OPPI Summary of Decision</td>
<td>Please read the decision to understand that the complaint was initiated by one member against another member relative to moonlighting, wearing two hats, and providing independent professional opinion.</td>
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<td>3.9 Only make public statements on behalf of the Institute if authorized to do so</td>
<td>No Reading</td>
<td></td>
</tr>
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<td>3.10 Comply with any reasonable request of the Institute for information or for the cooperation of the Member in pursuit of any Institute objective</td>
<td>Resolving Complaints – Dear Dilemma</td>
<td>This brief article describes in detail how to comply with a reasonable request for participation in a disciplinary process.</td>
</tr>
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<td>3.11 Respect the process and decision of any discipline proceeding affecting a Member</td>
<td>Resolving Complaints – Dear Dilemma</td>
<td>This brief article describes in detail how to comply with a reasonable request for participation in a disciplinary process.</td>
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