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Dunpar Developments Inc. 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 Etobicoke Zoning Code and By-law 717-2006, of the former City of Toronto to rezone lands respecting 4187 Dundas Street West and 567, 569 and 571 Prince Edward Drive from CG-AV-H and R2 to CG-AV zone with site-specific exception in order to allow for a 10-storey apartment building with 118 units residential development
O.M.B. File No. Z070008

Dunpar Developments Inc. 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 respecting 4187 Dundas Street West and 567, 569 and 571 Prince Edward Drive
O.M.B. File No. M070027

APPEARANCES:

Parties

Counsel

Dunpar Developments Inc.

A. Brown

City of Toronto

S. Bradley

Kingsway Residents Against Poor Planning L. Longo

DECISION OF THE BOARD DELIVERED BY SUSAN B. CAMPBELL

Background

In this matter, the Board originally had before it the appeals of Dunpar Developments Inc. ("Dunpar") with respect to an Official Plan Amendment and a Zoning By-law Amendment and a referral of a site plan in respect of a property at 4187 Dundas St. W. and 567, 569 and 571 Prince Edward Dr., in the City of Toronto (the "City"). The applications were filed on February 1, 2006.

A party to this hearing, the Kingsway Residents Against Poor Planning (the "Kingsway Group") brought a Motion seeking an Order of the Board determining that the Board was without jurisdiction to hear the appeal with respect to the Official Plan

Amendment. Another panel of this Board heard the Motion and determined that the Board did not have jurisdiction to hear the Official Plan Amendment appeal with respect to either the Etobicoke Official Plan (the "Etobicoke OP") or the Toronto Official Plan (the "Toronto OP"). Therefore, only the Zoning By-law Amendment and the site plan are now before the Board.

Proposal

The subject property is comprised of four lots at the intersection of Dundas St. W. and Prince Edward Dr. The property at 4187 Dundas St. W. is located at the corner of the intersection and has an 11.65m wide "tail" extending behind the three lots on Prince Edward Dr. The properties at 567, 569 and 571 Prince Edward Dr. were previously occupied by single-family houses, which Dunpar has demolished. The frontage of the property is 51.9m on Dundas St. W., the depth is 72.8m on Prince Edward Dr.

Dunpar proposes to develop the property with a residential building of seven storeys, containing 83 units. A mechanical penthouse and some indoor amenity space are located on the roof of the building and the City and the Kingsway Group take the position that this constitutes an eighth floor. The proposed building is L-shaped with the seven or eight-storey portion fronting on Dundas St. W. The building is to step down to two storeys on the lot at 567 Prince Edward Dr.

The Neighbourhood

There is a mix of land uses surrounding the subject property. The north and south sides of Dundas St. W. in the vicinity of the subject property is currently predominately occupied by commercial buildings. However, as Robert Glover who was qualified by the Board to provide expert urban design evidence on behalf of Dunpar said in his witness statement, Exhibit # 11, "the urban design character of Dundas St. W. between the Humber River and Royal York Road is currently in transition between two different personalities". It is apparent from Mr. Glover's evidence and the evidence of other witnesses, that the area was developed as an automobile oriented, commercial and industrial strip on a busy, wide, arterial road. However, Mr. Glover described its "emerging building pattern and character" as "that of development containing street-related mixed-use, residential and Main Street character". In the Toronto OP this portion of Dundas St. W. is designated as an "Avenue" which Mr. Glover indicated,

"anticipates a greater scale and intensity of development than currently characterizes a majority of the street".

Immediately to the east of the subject property is an example of the evolving character of Dundas St. W., a development of recently constructed three-storey condominium townhouses. Further east at the next intersection, is a recently completed six-storey, 130 unit residential condominium building. To the west of the site, across Prince Edward Dr., is a three storey commercial building, abutting houses on Prince Edward Dr. To the north, on the other side of Dundas St. W., are two to three-storey commercial buildings and a recently constructed six-storey residential building.

Immediately to the south of the site is the well-established Kingsway neighbourhood. The members of the Kingsway Group, who object to this proposal, live in this neighbourhood. The Board heard evidence that another Kingsway neighbourhood association does not object to the proposal. As Warren Sorenson, who was qualified by the Board to provide expert land use planning evidence on behalf of the Kingsway Group, noted in his witness statement, Exhibit # 47: "the homes are detached dwellings of varying size, some single-storey but most being two or two-and-a-half storeys. By my observation, this neighbourhood is a highly desirable area for low-density housing, and shows evidence of significant re-investment occurring through expansions, upgrades and replacement home construction".

Evidence of Dunpar

Peter Smith was qualified by the Board to provide expert land use planning evidence on behalf of Dunpar. As noted above, Robert Glover provided expert urban design evidence on behalf of Dunpar.

Filed as Exhibit # 10 was the Witness Statement of Mr. Smith, including an extensive Planning Rationale Report (the "Report"). At the time that the Witness Statement and the Report were prepared, the official plan amendment was before the Board. However, the Board notes section 2.2 of the Report, Required Approvals. Mr. Smith states:

Pursuant to the Etobicoke Official Plan in force at the time of the application, an Official Plan Amendment was required in order to increase

the permitted height from six storeys to seven storeys. However, in our opinion, there was sufficient flexibility provided by the Plan's policies to allow for the adjustment to the boundary between the Low Density residential and Commercial-Residential Strip designations without the need for an official plan amendment.

Pursuant to the new Toronto Official Plan, an official plan amendment is being sought out of an abundance of caution to redesignate the southerly portion of the site from Neighbourhoods to Mixed Use Areas and to adjust the boundaries of Area-Specific Policy 277. However, it is our opinion that the requested adjustment to the boundaries of the Mixed Use Areas and Area-Specific Policy 277 would fall within the ambit of the Plan's interpretation policies.

Mr. Smith reviewed the relevant policy framework with the Board. The Provincial Policy Statement (2005) (the "PPS") is applicable to this application. Mr. Smith noted that one of the three key policy directions of the PPS "is to build strong communities by promoting efficient land use and development patterns". Of particular relevance, in Mr. Smith's opinion, is section 1.1.3, Settlement Areas. Policy 1.1.3.2 mandates land use patterns in areas like the City, based on densities and a mix of land uses which "efficiently use land and resources" and which "efficiently use the infrastructure and public service facilities which are planned or available..." Policy 1.1.3.3 provides "planning authorities shall identify and promote opportunities for intensification and redevelopment where this can be accommodated taking into account existing building stock or areas...and the availability of suitable existing or planned infrastructure..." Further, Policies 1.1.3.5 and 1.1.3.6 require planning authorities to establish and implement minimum targets for intensification and redevelopment in built-up urban areas.

Policy 1.4.3 provides that planning authorities shall provide for the appropriate range of housing types and densities to meet current and projected needs, by, *inter alia*, "permitting and facilitating...all forms of residential intensification and redevelopment in accordance with Policy 1.1.3.3".

Finally, Policy 1.6.5.4, in dealing with transportation systems, promotes a land use pattern, density and mix of uses "that minimize the length and number of vehicle trips and supports the development of viable choices and plans for public transit..."

It was Mr. Smith's opinion that the proposed development is consistent with the policy direction found in the PPS. The proposed building represents appropriate residential intensification on a site well-served by transit and other municipal infrastructure. In Part 3.3 of his Report, Mr. Smith described the site as "well-located in relation to the City's road network". Dundas St. W. is classified as a "Major Arterial", while Prince Edward Dr. is classified as a "Collector". In close proximity to the site is Royal York Road, classified as a "Minor Arterial".

In Mr. Smith's opinion, the site is "well-served by public transit. The 30 Lambton bus runs along Dundas Street West, serving the High Park subway station to the east and the Kipling subway station to the west. It provides seven day/week service, with 20 minute headways during rush hours and 30 minute service at off-peak times...The site is also located close to the Bloor and Kipling GO Stations".

In Mr. Smith's opinion, residential intensification on the site is "consistent with the housing policies of the Provincial Policy Statement which encourage a variety of housing types and densities, in order to offer current and future residents a range of housing choices".

Mr. Smith briefly reviewed the Growth Plan for the Greater Golden Horseshoe, 2006 (the "Growth Plan"), acknowledging that it came into effect after the applications were filed. Therefore, in his opinion, the applications are to be evaluated as if the Growth Plan were not in place. The Board finds that this document is in no way determinative of these appeals. Its only relevance is the fact that its language reinforces the language of the in effect PPS when it speaks to intensification. The Growth Plan notes that, "better use of land and infrastructure can be made by directing growth to existing urban areas. This Plan envisions increasing intensification of the existing built-up areas, with a focus on urban growth centres and intensification corridors..."

Mr. Smith reviewed the provisions of the Etobicoke OP which was in effect at the time the applications were made, and the Toronto OP which is now in effect. In considering which official plan is determinative of these applications, the Board must have regard to a number of cases cited by Counsel. Of particular relevance is *Clergy Properties Ltd. v. Mississauga (City)* (1996), 34 O.M.B.R. 277 in which the "Clergy

Principle" was enunciated. The Board in that case said "the Board in determining the policy framework under which an application should be examined has consistently stated that an application must be tested against the policy documents in place at the date of the application. It has done so in order to lend some certainty to the land use planning process".

As recently as November 2007, this panel of the Board thoroughly reviewed the "Clergy Principle" and Board decisions which seem to stand for the proposition that the choice of the policy regime to be applied to an application is merely a matter of Board procedure, in *SunLife Assurance Company of Canada v. City of Burlington*, OMB Case PL060707, November 29, 2007. This panel of the Board said in that case, and reiterates here: "both private parties and representatives of the public interest are entitled to understand the 'rules of the game' from the outset". Neither an applicant nor a planning authority has the ability independently to "choose" the policy regime against which an application will be tested. An applicant or a planning authority may choose to "hedge its bets" and address both policy documents in effect at the time of the application, and policy documents which have subsequently come into effect. Dunpar did so in this case; its witnesses and Counsel dealt with both policy regimes. The City focused almost exclusively on a policy regime, which came into effect after the date of the filing of the applications.

Neither "choice" by either the applicant or the municipality is determinative for the Board. If all parties agree that a policy regime which came into effect after the date of an application should be applied in considering the application, the Board will give considerable deference to that agreement. However, generally following the principles of natural justice, the Board will evaluate an application against the policy regime in effect at the time the application was made.

Therefore, the Board finds that only one official plan may be determinative of an application. It is the official plan, which was in effect at the date of the application. In this case the application for a zoning by-law amendment and the site plan referral will be considered in light of the policies found in the Etobicoke OP.

Mr. Smith reviewed the relevant portions of the Etobicoke OP with the Board. Map 4, Land Use, designates the portion of the site fronting on Dundas St. W. as Commercial-Residential Strip. The lands to the rear are designated Low Density Residential. Section 4.4 of the OP deals with the Commercial-Residential Strip designation. Such a designation is "intended to recognize the traditional commercial and mixed use areas that have developed in linear form along arterial roads". The designation permits a full range of commercial uses. The policy also provides "these areas also contain a wide mix of non-commercial uses such as residential, institutional and community facilities reflecting their original role as the main concentration of activities for the residential development around them. These characteristics are encouraged to continue and intensify in the future". (emphasis added)

Section 4.4.4 provides that a maximum height of six storeys is permitted, which shall be stepped down to a lower height or separated by distance or buffers where necessary to respect the proximity of nearby low-density residences.

Section 4.2 deals with the Residential designations. The Low Density Residential designation is "intended to be areas of ground oriented housing together with local institutions, amenities and minor commercial uses which serve the local population".

Mr. Smith drew the Board's attention to a number of sections of the Etobicoke OP, which allow for the minor adjustment of boundaries among land use designations without the need for an official plan amendment. Section 12.1.6 provides "the boundaries between Land Use designations on Map 4 are approximate except where they coincide with roads, railway lines or other clearly defined physical features. Where the general intent of this Plan is maintained, minor adjustments to boundaries will not require an amendment". (emphasis added)

Section 4.4.7 specifically allows for the incorporation of adjacent residential properties into the Commercial-Residential Strip by way of rezoning without an amendment to the OP:

In Commercial-Residential Strip designations, where existing commercial development directly abuts residential uses to the rear without the benefit of a service lane, consolidation may be required in order to achieve satisfactory development standards. In such cases amendments to the Zoning Code may be

considered, on a comprehensive basis, without amendment to this Plan in order to:

incorporate the residential properties into an integrated redevelopment to achieve better access, site design and a larger redevelopment parcel.

Such zoning amendments may be made subject to the criteria in section 4.4.6 provided that:

adequate landscaping and screening is provided to buffer the parking, loading and other such areas from the residential uses on the opposite side of the street; and

the height and form of any new development does not create undue adverse impacts in terms of over shadowing or loss of amenity.

Section 4.4.6 refers to criteria set out in section 4.3.16, the criteria for permitting residential intensification. The criteria are as follows:

- a) the proximity of the site to Medium or High Density Residential Designations;
- b) the adequacy of local social and educational services;
- c) the level of accessibility and the proximity of the site to collector roads, arterial roads, transit and expressways, and the capacity of those facilities;
- d) the suitability of the site in terms of size and shape to accommodate the proposed additional uses and density including on-site parking, access and traffic circulation for all uses, and landscaping and recreational facilities for the residents;
- e) the desire to provide a range of dwelling types and building heights on sites of sufficient size as indicated in section 2.2.6;
- f) the effect of increased traffic, so that no undue adverse impacts are created for local residential uses;
- g) the effect of the height and form of development so that no undue adverse impacts in terms of overshadowing or loss of amenity are created for existing residential buildings or neighbouring residential uses;
- h) the relationship of the site to nearby lower density residential uses, if any, in view of the desire to provide a gradual transition in height and density wherever possible, or other buffering measures;

- i) the degree to which the site is proximate or exposed to significant open space amenities such as valleylands or the waterfront;
- j) the ability to meet the housing targets in section 2.2;
- k) the desire to stay within the population ranges outlined in sections 2.2.1 and 2.2.2;
- l) the availability of alternative undeveloped or underdeveloped retail lands to accommodate the proposed use; and
- m) the potential for adverse impact on the planned function of other Retail or Commercial-Retail designations.

Finally, Mr. Smith considered the intensification policies of the Etobicoke OP. Section 2.2.3 provides "the City shall encourage the integration of an initial level of intensification of at least 14,000 additional units during the planning process ending in 2006". Section 2.2.8 provides "housing targets will be met primarily through housing intensification in residential, retail and institutional designations, but also may be met through redesignation and redevelopment of other land use designations".

It was Mr. Smith's opinion that it would be appropriate to utilize sections 12.1.6. and 4.4.7 of the Etobicoke OP to incorporate the Low Density Residential area of the subject property into the Commercial-Residential Strip. Mr. Smith had regard to the criteria set out in section 4.4.6 and 4.3.16 of the OP in coming to this conclusion. In section 5.2 and Appendix 1 of his Planning Report, Mr. Smith considers what he terms "the rounding out of the intensification area boundary along Dundas Street West to include the two additional residential properties at 567 and 569 Prince Edward Drive". The property at 571 Prince Edward Dr. was made part of the "Avenue" for the purposes of the Toronto OP by the Avenues By-law to be discussed below. In Mr. Smith's opinion "the proposed rounding out of the boundaries would result in a more regular and logical southern boundary for the intensification area, would allow for better site development, and would be consistent with the policies and interpretation provisions of both the Etobicoke Official Plan and the New Official Plan". Mr. Smith notes that the current boundary is "irregular...it 'jogs' north along the east side of Prince Edward Drive to include 564 Prince Edward Drive. With the inclusion of 567 and 569 Prince Edward Drive, the south boundary of the intensification area on the subject property would be

generally in line with, but slightly to the north of, the south limit of the Brownstone Lane townhouse development".

Mr. Smith went on to note "the configuration of the individual property boundaries in the specific circumstances (i.e. the 1' shape of the 4187 Dundas West Street property wrapping around the three properties fronting on Prince Edward Drive) means that the consolidation of the four properties would create a larger and more regular development site which can better accommodate site access, site design and servicing". Therefore, in his opinion, the proposed expansion of the boundary of the Commercial-Residential Strip satisfies the conditions set out in section 4.4.7, specifically:

the proposed development plan provides adequate landscaping and screening to buffer parking, loading, and service areas from adjacent low density residential uses; and

the resulting height and built form will not create any unacceptable adverse impacts.

It was the evidence of Mr. Smith, reinforced by the urban design evidence of Mr. Glover, that all parking would be located below grade; the proposed loading area would be internal to the site, well-separated from the low density area, with a 3.0m landscaping buffer along the south property limit. The height and built form will, in his opinion, maintain a 45-degree angular plane measured from the low-density residential area, such that no adverse impacts in terms of privacy, shadowing or overlook are anticipated. In this context, Mr. Smith's Planning Report contains a shadow study that "demonstrates that there would be no shadowing impacts on the low-density residential area to the south at any time of day or year".

Further, in Mr. Smith's opinion, the proposal to expand the boundaries of the Commercial-Residential Strip satisfies the criteria set out in sections 4.4.6 and 4.4.16 of the Etobicoke OP. Appendix 1 of his Report addresses the criteria in some detail. The Board, in considering whether the proposal represents good planning and whether it can proceed without an amendment to the Etobicoke OP, must have particular regard to whether these criteria are met.

In discussing the use of section 4.4.7 to consolidate residential properties into the Commercial-Residential Strip designation, Mr. Smith drew the Board's attention to Exhibit # 18, which contains the staff report on the development application which led to the construction of the Brownstone townhouses immediately adjacent to the subject property. In that case, City staff was satisfied that, although the proposal did not meet all the criteria of section 4.4.6, it did "meet the overall intent of the policies for residential development within a Commercial-Residential Strip". The boundary adjustment which was permitted in that case resulted in the extension of the Commercial-Residential Strip further south into the single-family residential neighbourhood than would be the situation in the case at hand.

Mr. Smith testified that his understanding of how section 4.4.7 is to operate is informed by how City staff dealt with the Brownstone property.

Mr. Smith reviewed the current zoning applicable to the subject property. Pursuant to By-law 717-2006 (Exhibit # 14, TAB 10) (the "ZBL"), the portion of the site comprised of 4187 Dundas St. W. and 571 Prince Edward Dr. is now zoned CG-AV-H, while 567 and 569 Prince Edward Drive are zoned R2.

The CG-AV (General Commercial-Avenues) zoning permits a range of residential uses, including apartment houses, as well as all business, institutional and public uses permitted in a CG zone. The maximum permitted floor space index ("FSI") is 2.5, which may be increased to 3.0 provided the owner enters into a satisfactory section 37 agreement with the City, while Dunpar seeks an FSI of 3.3. The maximum permitted building height for the first 60m in depth from Dundas St. W. is five storeys and 14m, which may be increased to six storeys and 18.5m, provided the owner enters into a satisfactory s. 37 agreement, while Dunpar seeks seven storeys and 24.5m. A mechanical penthouse of 25m² is permitted while Dunpar seeks a roof top structure, including the mechanical penthouse, of 225m².

Mr. Smith addressed issues of height, massing and density in section 5.3 of his Planning Report. Further evidence on these issues was adduced by Mr. Glover from an urban design perspective. In Mr. Smith's opinion the design of the proposed building is generally consistent with the ZBL and the Dundas Street West Avenue Study and its design guidelines. In his opinion the only significant deviation from the ZBL is the

overall height of the proposed building. The Avenues Study, which was the foundation for the ZBL envisioned six storeys and 18.5m (with the section 37 "bonus"), while the proposal is for seven storeys and 24.15m. Mr. Smith notes that neither the Avenues Study, nor the supporting staff report included any analysis of the basis for the recommended six-storey height limit. Mr. Smith considered this to be "unusual".

In Mr. Smith's opinion the greater height proposed can be supported on the subject site as it is at the important intersection of Dundas St. W. and Prince Edward Dr. Dundas St. W. is an arterial road and Prince Edward Dr. is a designated collector. Mr. Smith is of the opinion that "as a planning and urban design principle, it is appropriate to allow for higher landmark buildings at these strategic locations so as to differentiate such sites from an otherwise uniform and potentially monotonous height regime. Such an approach has been adopted by the City in other Avenue Studies, e.g. The Queensway and Wilson Avenue, allowing heights of up to eight storeys on corner sites within the six storey height regime".

Mr. Smith also opined that a building height of up to 27m could be supported at this location based on the width of Dundas St. W. The proposed building would be within the 1:1 height to right-of-way width ratio, which has generally been accepted in the City to establish a height for mid-rise buildings.

Having regard to the shadow impact study, Mr. Smith was of the opinion that the proposed building, at the proposed height, would have no adverse impact on the low-density residential neighbourhood to the south at any time of the day or year.

Finally, in Mr. Smith's opinion, "the increased height would better achieve the planning objectives for residential intensification on the site".

Having reviewed the relevant policy documents and the issues list in this matter, Mr Smith concluded that the proposal represents good planning; it provides for appropriate residential intensification at an appropriate location with no unacceptable impacts on surrounding land uses.

Mr. Smith addressed Issue 7 from the issues list, the appropriateness of securing facilities, services or matters through the use of an agreement made pursuant to section 37 of the *Planning Act*. Section 11.8.1 of the Etobicoke OP provides that Council may

undertake bonus zoning. Section 11.8.6 provides "Secondary Plans and Area-Wide Land Use Studies shall provide a more explicit list of facilities, services and matters which will be considered...and the general ratio of bonus to public benefit to be applied..."

Mr. Smith testified that section 37 agreements are not mentioned either explicitly or implicitly in the Avenues Study. The ZBL contains in Clause "N" a requirement for a developer to enter into a section 37 agreement if it requires an increase in height or density. No rationale is provided in any document for how the section 37 benefits are to be quantified.

In this case, City staff first addressed the issue of section 37 benefits with respect to the proposed development in a staff report dated March 12, 2007 (Exhibit # 14, TAB 19). The report says, "the section 37 benefits have not yet been discussed with the Applicant. City staff have determined that the appropriate amount for these benefits to improve the Dundas Street West streetscape should equal \$15,000 per unit above the fifth floor". Mr. Smith testified that there has been no attempt made by the City to provide any background analysis demonstrating how this figure was reached. Therefore in his opinion, it would not be appropriate for facilities, services and matters to be secured through the use of a section 37 agreement.

Mr. Glover reviewed the details of the subject property and its immediate neighbourhood, testifying that the area is in "a period of transition". The area has "two different personalities"; the older personality reflects the wide arterial nature of Dundas St. W., while the new personality reflects the new "Avenues" designation (Toronto OP) with a more intense, mixed-use, "main street character".

Mr. Glover reviewed with the Board Exhibit # 13, 66 photographs of the site and the immediate area. The photographs show the subject site and the Brownstone townhouses immediately adjacent, the low-rise retail-commercial uses along Dundas St. W., the new six-storey condominium buildings at 4196 and 4159 Dundas St. W., the residential neighbourhood immediately adjacent to the subject site, and the greater Kingsway neighbourhood further to the south.

Mr. Glover described the proposed building as a "terraced seven-storey residential condominium...The urban design for the site development consists of

creating a street-related, mid-rise building of seven-storeys along Dundas Street West, which turns the corner at Prince Edward Drive and steps down in height to the neighbourhood scale of two storeys". In his opinion, the appropriate transition to the neighbourhood is achieved as the "step back conforms to a 45-degree angular plane measured from the property directly to the south at 565 Prince Edward Drive". Exhibit # 12, page 10, West Elevation depicts the proposed building, showing the stepping down within the 45 degree angular plane.

The proposed building is setback 2.0m along the Dundas St. W. frontage and 3.0m along the Prince Edward Dr. frontage. Along both frontages, the building would be stepped back at the three-storey level by 1.5m "to create a lower street-related building scale along Dundas Street West and Prince Edward Drive before rising to seven storeys". The intersection of the streets is marked by the highest point of the building, at the mechanical penthouse (27.650m). The building height to street width on Dundas St. W. would be approximately 0.82:1. In Mr. Glover's opinion this is appropriate as it is within the generally accepted 1:1 height to street width ratio.

At the southerly end of the property the building would be set back 10.7m from the property line. In that setback would be a 3m landscaped area and a 7m driveway. Vehicle access would be from Prince Edward Dr., the loading area would be within the site, not visible from the street and screened from the adjacent house. Parking would be underground, accessed from a ramp on the east side of the building. Abutting the three-storey townhouse development, the building steps down to six storeys.

Mr Glover considered the provisions of the Etobicoke OP from an urban design perspective. In his opinion "with the exception of proposing a seven-storey building height instead of the six-storey height maximum contained in the policies, the proposed residential form of development is entirely consistent with the urban design parameters set out in the Plan". Further, in his opinion "the building form reinforces the Commercial-Residential Strip character of Dundas Street West by creating a continuous mid-rise building frontage along (the street) including a major lobby entrance at the corner of (the street) and Prince Edward Drive. The building frontage is scaled and articulated at the three-storey height, before stepping up to six and seven storeys".

As for the seven-storey height, it is Mr. Glover's opinion that a building of such a height is appropriate, "creating no unacceptable shadow or visual impacts on the amenity of Dundas Street West and has no impact on the character or amenity of the Kingsway Neighbourhood to the south of the site".

In Mr. Glover's opinion the policies of the Etobicoke OP that allow for the expansion of the Commercial-Residential Strip without an OPA are complied with, from an urban design perspective. The proposed design appropriately "buffers the residential uses" and "does not create any adverse impacts in terms of overshadowing or loss of amenity on the directly adjacent house forms".

Mr. Glover reviewed the Dundas Street West Avenues Study (the "Study") (Exhibit # 15), which formed the basis for the ZBL. He noted that the Study deals very briefly with the appropriate height for buildings on Dundas St. W. The Study recommends a maximum building height of 6 storeys, referring back to the Etobicoke OP, rather than forward to the policies of the Toronto OP. The Study notes that, "while there was considerable debate on appropriate heights and density for the area, consensus was found in the wish to improve the pedestrian environment". The study contains no explicit discussion about the impact of height on properties either on the Avenue or in adjacent low-rise residential neighbourhoods. In fact, the Board observes, the discussion of potential impact of new development focuses on traffic and schools. Traffic and schools were not issues in this hearing.

The Study also notes in "Constraints to Redevelopment" that "any new development on the south side of Dundas Street will have to step down and provide a buffer to the adjacent low-density residential area".

The Study's most detailed discussion of building height and potential impacts is found in Section 3.3, Guiding Principles:

3. Select an appropriate building scale and density for the street width and neighbourhood context.

The scale of buildings along Dundas Street should enhance and support a positive pedestrian environment and assist in transforming the current character of the strip. The proportion of building height to street width should be appropriate to enhance the look of the street and to maintain sunlight access. On the south side, buildings should

transition in scale to the adjoining low-rise residential neighbourhood. The effects of potential development on traffic and schools within adjacent neighbourhoods should be considered.

Mr. Glover had regard to the Dundas Street West Urban Design Guidelines which resulted from the Study. It was his evidence that the Guidelines set out three general categories of design guidelines: the location and organization of buildings relative to streets and open spaces; building massing; and landscape elements and pedestrian amenities. It was Mr. Glover's evidence, uncontradicted by any other witness with his expertise, that "the proposed site planning, building mass and design and improvements to the pedestrian realm are substantially in keeping with the recommendations of the guidelines".

Mr. Glover considered the issues on the issues list in reaching his conclusion that the urban design of the proposal is appropriate for the site's urban design context, and is consistent with the policies of the Etobicoke OP. In his opinion, the proposal "has minimal and acceptable impacts on adjacent areas and creates an appropriate relationship to its neighbours, and represents good urban design on the site".

Messrs. Smith and Glover were cross-examined at length by Counsel for the City and Counsel for the Kingsway Group. Much of the cross-examination focused on two areas: whether the proposal conforms with the Toronto OP and what the Board will term "process", or why Dunpar did not appeal the OPA and ZBL that arose out of the Avenues Study. As the Board noted above, the Etobicoke OP, not the Toronto OP is determinative of this application. While the City and the Kingsway Group may wish to test the application against the Toronto OP, evidence in this area is of limited relevance.

With respect to evidence about "process", it is important that the Board, in reaching a decision in this matter, focus on substance, not process. The Board accepts the evidence adduced that Dunpar did not appeal the Avenues By-law, although it could have. However, nothing in any statute or policy document requires that as a precondition to this application and appeal, Dunpar had to appeal either the Avenues By-law or the relevant OPA. A failure to appeal either of those instruments does not cause the Board to conclude that Dunpar was "waiting in the weeds" as was implied by Counsel for the Kingsway Group. Further, even if Dunpar were "waiting in the weeds",

whatever that may mean, the Board does not find that relevant in this hearing. If a party chooses to exercise some statutory rights and not others, the party cannot be penalized by this Board.

Counsel also cross-examined Mr. Smith on his opinion with respect to sections 12.1.6 and 4.4.7 of the Etobicoke OP. The Board finds that Mr. Smith was not shaken in his opinion by the cross-examination. He thoroughly justified his opinion that the Etobicoke OP allows for the incorporation of adjacent residential properties into the Commercial-Residential Strip designation via amendment only to the zoning by-law. He remained of the opinion that the criteria set out in the Etobicoke OP, which must be met for such incorporation, have been met in this case.

Under cross-examination, Mr. Glover remained of the opinion that, from an urban design perspective, the proposal is appropriate for the site and the context of the site.

Evidence of the City

Wendy Johncox was qualified by the Board to provide expert land use planning evidence on behalf of the City. She has extensive experience with the neighbourhood of the subject property as she co-ordinated the final staff report on the Avenues Study. In her Witness Statement, Exhibit # 26 and her Reply Witness Statements, Exhibits #27 and #28, she considered the proposal only against the policies of the Toronto OP. She did this despite acknowledging in her Witness Statement "the former City of Etobicoke Official Plan was in force at the time of the subject application".

Ms Johncox reviewed the policies of the Toronto OP and concluded that the proposal does not meet the policies relevant to "Neighbourhoods" as the proposed building "does not reinforce the existing physical pattern of one and two-storey houses in the Neighbourhood with respect to height, massing and scale". In her opinion:

The proposed intrusion into the Neighbourhoods Area threatens the fabric and character of the street. The inclusion of this part of the site within the Neighbourhood Area is of critical importance to preserving the low-rise residential character of this part of Prince Edward Drive. The significant intrusion of the apartment building, as proposed by the applicant, would seriously erode this character. This erosion would be exacerbated if mimicked on properties, including those of the applicant, on the west side of Prince Edward Drive.

In Ms Johncox's opinion the proposal does not provide an adequate transition to the neighbourhood and it does not meet the angular plane criteria if the angular plane is properly measured from the properties in the Neighbourhood Area.

Ms Johncox provided considerable evidence on the Avenues Study. The Study has a "vision" for the street: "a tree-lined street in keeping with the character of the Kingsway neighbourhood where people can walk safely, shop conveniently, and easily access the Humber River". Following on this vision, a number of guiding principles were set out which, as the Study says, "are designed to inform the recommendations, urban design guidelines and future zoning for the Dundas Street West Avenues Study area". The principles are:

Create a safe and enjoyable pedestrian environment;

Encourage a diversity of uses;

Select an appropriate building scale and density for the street width and neighbourhood context:

Encourage high quality architecture and diversity of building form;

Enable efficient vehicle movement and ease of transit and cyclist access;

Encourage opportunities for new open space and improve access to existing open space;

Protect the natural environment and enhance its enjoyment.

In Ms Johncox's opinion the proposal fails "to adequately fulfill the key recommendations of the study"; the mid-rise building is not massed to the Avenue; it does not respect the study boundary; it does not create a safe and enjoyable pedestrian environment and the building is inappropriate in scale and density. In her opinion the building is massed on Prince Edward Dr., making up 43% of the block. The building is located so close to the street that it encroaches on the public realm. At the proposed height, the building would offend the stipulated six-storey height limit for the Study Area.

Ms Johncox, in her Witness Statement, noted "the height limit also brought certainty to the existing residents as to the scale and potential impact of future developments. Every new development must prove that the impacts to the area are acceptable". (emphasis added)

The Board notes that while Ms Johncox made the link between height or scale of the building and impact on the neighbourhood, the City did not adduce specific evidence about the alleged negative impact of the proposed building. The only shadow impact study introduced was that of Dunpar, which shows that there will be no negative impact on the neighbourhood to the south. As the Board noted above, the Study, in discussing impact, mandates the transition in scale of new buildings to the adjoining low-rise residential neighbourhood, and focuses on impact in two areas: traffic and schools. Neither the City nor the Kingsway Group adduced any evidence to demonstrate any negative impact on the neighbourhood in terms of traffic or schools. In fact, the Board understands that Dunpar prepared a traffic study with which the City has no concerns.

Ms Johncox addressed the issue of inappropriate precedent. In her opinion, if the proposal is permitted by the Board, it would set "a precedent for the applicant to request the same densities, heights and setbacks for his other properties. Two of these are located on the south side of Dundas St. W. and would present similar issues to the Kingsway Park East neighbourhood to the south. They would also create an eight storey condition on the south side of Dundas St. W. that is inconsistent with the recent six-storey developments in the area and further exacerbate the poor pedestrian environment he proposes for the site".

Ms Johncox was also of the opinion that the proposal does not meet the objectives of the zoning by-law. The building is too tall; the mechanical penthouse and amenity space are so large that they constitute a storey and would be visible from the street, the 45-degree angular plane requirement is breached when it is properly measured from the R2 zone, the density is too great, more outdoor amenity space is necessary, the first story at a height of 3.4m is too low and would not accommodate live/work space, and the building would encroach on the public realm.

In considering the issue of extending the boundary of the Avenue into the Neighbourhood or the Commercial-Residential Strip into the Low-Rise Residential, Ms

Johncox had regard only to the Toronto OP. In her opinion, the inclusion of the lots on Prince Edward Dr. would inappropriately change the character of the street and would destabilize the Kingsway Park neighbourhood.

On the issue of section 37 benefits, Ms Johncox confirmed, under cross-examination, that a figure of \$300,000 or \$15,000 per unit above the fifth floor is requested by the City. She confirmed that she does not know how those figures were determined. She also confirmed under cross-examination, that in her opinion, the Toronto OP is determinative of the application.

A second planner, David Oikawa, was qualified by the Board to provide expert land use planning evidence on behalf of the City. Exhibit #23 is his Witness Statement and Exhibit #39 is his Reply Witness Statement. Like Ms Johncox, Mr. Oikawa is of the opinion that the Toronto OP is determinative of the application and he did not ask his staff to test the application against the Etobicoke OP. Therefore, Mr. Oikawa's opinion reflected the opinion of Ms Johncox on the proposal's lack of compliance with the Toronto OP, the Avenues Study and the ZBL.

Mr. Oikawa proffered the interesting opinion that the implementing by-laws arising from Avenues studies "were meant to establish maximums and not a new base from which applicants can then apply for additional heights and densities". Therefore landowners and neighbours know "with certainty" what size or height or density of development will be permitted. The Board, having regard to the provisions of section 34 of the *Planning Act*, cannot accept Mr. Oikawa's proposition. A party has the right to make an application to City Council for an amendment to a by-law. If City Council refused the application, or refuses to make a decision on the application, the applicant has a right to appeal to this Board. The Board has the authority to order an amendment to the by-law. For example, this was done in the 1050 The Queensway case, (discussed below). An applicant with a right to build a six-storey building made an application for a zoning by-law amendment to permit the construction of a twelve-storey building. In that case, City staff and the local councillor apparently did not take the position that the zoning by-law enshrines maximum building standards which may not be varied. Before the Board they supported a proposal for a ten-storey building. One would assume that the residents living in the single-storey, low-rise neighbourhood immediately to the north of 1050 The Queensway would have had a similar "certainty"

about what height building could be built adjacent to them as the residents in the Kingsway now have. Briefly, if a zoning by-law amendment, properly tested against relevant policy documents constitutes good planning, it may be amended by the Board.

Having reiterated Ms Johncox's evidence, Mr. Oikawa, in his Reply Witness Statement and testimony addressed three specific issues: the boundary adjustment under the Etobicoke OP, population targets for the City, and transit in the vicinity of the subject property.

In Mr. Oikawa's opinion as there are specific policies which apply to the Commercial-Residential Strip boundary (Policy 4.4.7), general Policy 12.1.8 cannot be applied to the case at hand. In his opinion, having regard to Policy 4.4.7, the proposal does not comply as any amendment must be taken on a "comprehensive basis". In his view that means that there must be an area-wide consideration and extension of the boundary. In this case there is only a site-specific proposal. Mr. Oikawa's interpretation of policy 4.4.7 is that 4.4.6 is not relevant as it is "more general" and the "specific outweighs the general".

With respect to the population issue, it was Mr. Oikawa's opinion that Toronto has exceeded its population objectives and therefore the dwelling units which would be generated by the proposed building are not necessary to achieve population targets.

Finally, Mr. Oikawa was of the opinion that the proposal should not be approved on the basis that it is transit supportive as the property is not well-served by transit. It was his evidence that the bus service is not good, the 30 Lambton bus is not well-utilized and Dundas St. W. is not a transit priority for the City. Mr. Oikawa took the interesting position that the underutilization of the bus was a reason not to approve the proposal. He did acknowledge, in response to a question from the Board, that more residential development along Dundas St. W. in fact could result in the 30 Lambton bus being more efficiently utilized. The Board notes that the efficient use of public infrastructure is a goal of the PPS and supposedly a goal of the City.

Counsel for Dunpar cross-examined Mr. Oikawa at length about other developments which have been approved in the former City of Etobicoke. Of particular note, from the Board's perspective, in considering the consistent application by the City of its policies, is 1050 The Queensway and 1061/1193 The Queensway.

The Queensway was subject to an avenues study, but 1050 The Queensway was excluded from the study as it was subject to an appeal to the Board. The Staff report on this project, Exhibit # 42, reviewed the application, even considering the Etobicoke OP, which designated the site Commercial-Residential Strip, with a maximum building height of six storeys. The proposal was originally for 12 storeys but the proponent and the City reached a settlement whereby City Staff and City Council supported the development of a ten-storey building at 3.48 FSI, before the Board. The City agreed with the evidence of Mr. Glover in that case that the building, which abuts a single-storey residential neighbourhood, constituted good planning and represented good urban design. Exhibit # 43, a series of photographs depicts the relationship between 1050 The Queensway and the adjacent low-density residential neighbourhood.

In Mr. Oikawa's opinion, 1050 The Queensway differs from the subject proposal as The Queensway is included in the City's Surface Transit Priority Network map and will enjoy access to improved transit service.

Mr. Oikawa was also asked about a development at 1061 and 1193 The Queensway. In that case the Committee of Adjustment approved ten variances allowing for the construction of a 12-storey building (six storeys permitted) with a mechanical penthouse of 250m² (23m² permitted) and an FSI of 8.4 (3.0 permitted). Again, the Queensway was subject to an avenues study and an area specific policy in the Toronto OP but City Staff opined in its staff report "the variances requested...enable the proposed residential/commercial building to achieve an appropriate and desirable built form that expresses continuity along The Queensway (Exhibit # 45). The Board must note that City staff did not take the position in that case, which Mr. Oikawa now takes, that the ZBL sets standards in terms of height and density and therefore should not be altered.

Under cross-examination, Mr. Oikawa acknowledged that on the 1061 The Queensway application, City Staff did not discuss growth or population targets or the transit issue. He felt that the variances from the permitted six storeys and 3.0 FSI to 12 storeys and 8.4 FSI were appropriate. City Staff and the Committee of Adjustment apparently also felt that the variances were minor and maintained the general intent and purpose of the official plan and the zoning by-law. Mr. Oikawa also confirmed that no section 37 contribution in return for the increased height and density was sought by the

City for a building of twice the permitted height and more than twice the permitted density.

Evidence of the Kingsway Residents Against Poor Planning

Warren Sorenson was qualified by the Board to provide expert land use planning evidence on behalf of the Kingsway Group. Exhibit # 47 is Mr. Sorenson's Witness Statement. In reaching his opinion on the appropriateness of the proposed development, Mr. Sorenson had regard to the PPS, the Growth Plan, Metro Plan, the Etobicoke OP and the Toronto OP. In his opinion:

There is a significant degree of consistency in terms of basic planning parameters for the redevelopment of Dundas-fronting properties in this area, commencing with the Minister's approval of the Etobicoke Official Plan in 1992 and continuing to the provisions of By-law 717-2006. The Commercial-Residential Strip designation of the Etobicoke Official Plan limited the height of development by a maximum six-storey limit as well as a 45-degree angular plane from the abutting low density residential lands to the south. While these numerical parameters were not brought forward in the new Toronto Official Plan, the more general provisions of that Plan continue to create a gradual transition of scale and density, through the stepping down of buildings towards and setbacks from neighbourhoods.

In having regard to the provisions of the Etobicoke OP, which allow for boundary adjustments without an OPA, Mr. Sorenson was of the opinion that these provisions should be utilized only to facilitate a consolidation necessary to achieve satisfactory development standards. Such a consolidation is not required in this case as the subject property can effectively be developed as it stands. The irregular boundary of the Commercial-Residential or Avenue strip reflects the history of the area. The lot at 571 Prince Edward Dr. was only recently included in the mixed-use area as it had split zoning so its inclusion "made sense".

Mr. Sorenson's conclusions on the appropriateness of the proposal are well-enunciated in his consideration of the issues list (Exhibit # 47, section 7). The height, mass and built form are inappropriate in his opinion as the proposed building encroaches into the neighbourhood via the lots on Prince Edward Dr. In his opinion, the level of intensification proposed is inappropriate when one considers that "transit

services are rather basic in terms of level of transit service, and there is no likelihood of significant improvements in that level". To support his opinion he prepared Exhibit # 48, Avenue Intersections as Potential Locations for Higher Landmark Buildings. Using this exhibit he drew a correlation between number of buses serving a site and permissible height.

Having regard to the applicable policy documents, the ZBL and the urban design guidelines, it was Mr. Sorenson's opinion that the proposed development should be confined to the north portion of the subject lands; it should be limited to six storeys and the 45-degree angular plane should be related to the south lot line of 571 Prince Edward Dr., accurately reflecting the beginning of the low-rise residential neighbourhood.

The proposed development, in his opinion, does not adequately address issues like setback, transition, stepback, shadowing or impact on the public realm. An urban designer did not testify on behalf of the Kingsway Group or the City to support this opinion.

The approval of the proposed development would, Mr. Sorenson testified, constitute an inappropriate precedent for development along the south side of Dundas St. W. If the boundary between the mixed use and residential areas is shifted the area will be destabilized.

It was therefore Mr. Sorenson's opinion that the development of the north portion of the subject lands should be limited by a maximum height of six storeys and by a 45-degree angular plane related to the land use boundary with the abutting neighbourhood, being at the south limit of the 571 Prince Edward Drive.

Evidence of the Participants

The Board held an evening session to afford neighbours of the subject property an opportunity to speak to the proposal. A number of residents spoke in opposition to the proposal and two submissions were filed. The residents believe that the proposed building would constitute an encroachment of inappropriate mid-density housing into a low-density residential neighbourhood. They are particularly concerned that this

encroachment could be so extensive as a result of Dunpar's demolition of three single-family homes on the Prince Edward Dr. lots.

The neighbours who appeared in opposition are of the opinion that the six storeys which the by-law permits is an appropriate height for the lot on Dundas St. W. They are very concerned about the precedent that they fear would be created if the application is approved, as Dunpar owns other property in the vicinity.

A number of the neighbours raised concerns about shadowing, overlook, traffic and impact on schools, submitting that the proposed development would have an adverse impact on them and their neighbourhood. In this regard the Board must once again note that, the only shadow study in evidence demonstrates that there would be no shadow impact on the neighbourhood at any time of the day, at any time of the year; no urban designer testified on behalf of the City or the Kingsway Group about negative impact in terms of overlook or privacy; Dunpar prepared a traffic study which apparently satisfies the City; and neither the City nor the Kingsway Group adduced any evidence to demonstrate that the proposed development would have an adverse impact on community facilities like schools.

Two individuals who own properties on Dundas St. W. spoke in support of the application. They wish to see Dundas St. W. developed with attractive buildings that will enhance the neighbourhood.

Board's Findings

The Board makes the following findings in the context of the issues set out in the issues list:

Issue 1 – Are the height, mass and built form of the proposed building appropriate given principles of good planning and the issues set out below?

The Board finds that the height, mass and built form of the proposed building are appropriate given the principles of good planning and urban design, having regard to the evidence and submissions received, in the context of the remaining issues on the issues list.

Issue 2 – Is the proposed development appropriate having regard to the *Planning Act*, the PPS, the applicable OP; the Dundas Street West Avenue Study; the applicable zoning by-laws, including the Dundas Street West Avenues By-law and the relevant urban design guidelines, including the Dundas Street West Urban Design Guidelines?

The PPS

The Board finds that the proposed development is consistent with the relevant provisions of the PPS. The PPS mandates the building of strong communities, providing "efficient land use and development patterns support strong, liveable and healthy communities, protect the environment and public health and safety, and facilitate economic growth". To this end, Policy 1.1.2 requires that sufficient land be made available through intensification and redevelopment in areas like the City, to meet the demand over the next 20 years for, *inter alia*, housing. Policy 1.1.3, Settlement Areas focuses on intensification which efficiently uses land and resources, and provides for a range of housing types and densities. Policy 1.4.3(d) requires the promotion of densities for new housing "which efficiently use land, resources, infrastructure and public service facilities, and support the use of alternative transportation modes and public transit in areas where it exists".

The Board finds that the subject property is an appropriate site for residential intensification. It is located at the intersection of a busy arterial road and a designated collector road. Prince Edward Dr. is a collector providing through access from Dundas St. W. to Bloor St. W. The witnesses disagreed about whether the site is well-served by transit, but all agreed that the 30 Lambton bus runs along Dundas St. W., connecting directly to the subway system. Mr. Oikawa's evidence that the 30 Lambton bus is underutilized and therefore the site is not well served by transit does not bear scrutiny. The Board finds that if the City is providing underutilized transit service in the vicinity of the subject property, efficiency dictated by the PPS mandates development, which will increase utilization. Publicly funded resources like transit should be optimally utilized.

The Board heard no persuasive evidence that the proposal would place a burden on any public facility like schools or roads. Costly public infrastructure services the subject site and the PPS encourages intensification on sites so serviced.

The PPS is a clear expression of provincial policy, which mandates the protection of open green space and natural heritage resources in this province. This policy document also acknowledges that the province must continue to grow, and it directs growth, through intensification and redevelopment, to already developed areas. Residents in such developed areas must expect intensification and redevelopment in accordance with applicable municipal policy documents.

The Etobicoke Official Plan

For the reasons set out above, the Board finds that for the purposes of this application the determinative official plan is the Etobicoke OP which was in effect at the time the application was filed. Section 2.2.8 of the Etobicoke OP provides that housing targets set out, "will be met primarily through housing intensification in residential...designations, but may also be met through the redesignation and redevelopment of other land use designations in limited circumstances subject to the relevant policies of this Plan. Potential housing opportunities also exist...in locations with high accessibility to existing transit". The Board therefore finds that appropriate intensification meets the goals of the Etobicoke OP.

In this case the Board must have particular regard to the provisions of the Etobicoke OP, which Dunpar argues permits the incorporation of the properties located on Prince Edward Dr. into the Commercial-Residential Strip without an official plan amendment. Section 12.1.6 is a general provision, which allows for minor adjustments to boundaries between land use designations. However, the adjustment of the boundary of a Commercial-Residential Strip is more particularly dealt with in sections 4.4.6, 4.4.7, and by reference, 4.3.16. These sections the Board finds are determinative in this case. If the criteria set out in these sections for boundary adjustment are satisfied, the adjustment may be made with only an amendment to the zoning by-law.

Section 4.4.7 permits, through a by-law amendment, the incorporation of adjacent residential properties into the Commercial-Residential Strip only if detailed criteria are met and certain conditions obtain. The Board will review these conditions and criteria in some detail:

Section 4.4.7(a) - Does the incorporation of the residential properties into an integrated redevelopment achieve better access, site design, servicing and a larger development parcel?

The Board received expert urban design evidence only from Mr. Glover on behalf of Dunpar. It was his opinion, having regard to issues like access, site design, servicing and size of development parcel, that the proposed boundary change "is appropriate as the larger site allows for and would result in a form of development that is anticipated along Dundas Street West; it is compatible with and has acceptable impacts on the neighbouring properties to the south; and constitutes a more logical boundary condition between the two areas in light of the existing pattern of development immediately to the east". Given that Mr. Glover's opinion on what is an urban design matter was unchallenged by anyone with his qualifications, the Board must accept his opinion on this issue.

Section 4.4.7(a) - Is adequate landscaping and screening provided to buffer the parking, loading and other such areas from the residential uses on the opposite side of the street?

Again, Mr. Glover was of the opinion that adequate landscaping, screening and buffering would be provided. The City and the Kingsway Group adduced little, if any, evidence to contradict this opinion. Therefore the Board finds that adequate landscaping, screening and buffering would be provided.

Section 4.4.7(b) - The height and form of any new development does not create undue adverse impacts in terms of overshadowing or loss of amenity.

The Board heard considerable testimony from witnesses for the City, the Kingsway Group and the neighbours, that the proposed building is too tall and would therefore have a negative impact on the neighbourhood. The Board finds that "too tall" does not exist in a vacuum for the purposes of the determinative official plan, the Etobicoke OP, or the much-discussed Dundas Street West Avenues Study. The Etobicoke OP provides, in the context of a boundary adjustment, that height and form of development are relevant considerations. However they are relevant in that height and form of new development should not "create undue adverse impacts in terms of overshadowing or loss of amenity".

The only shadow studies presented to the Board demonstrate that the building, at its proposed height and mass, with the proposed step downs and setbacks, would have no shadow impact on the residential properties to the south at any time of the day or year. Similarly, the studies show that the Brownstones, to the east, would receive no more shadow than they create themselves. With respect to loss of amenity, the Board heard no substantiated evidence that the proposed building would result in overlook or lack of privacy. The Board cannot find that the evidence of neighbours that they do not want a "tall" building "encroaching" into their neighbourhood constitutes evidence of loss of amenity.

The Avenues Study considers height and massing surprisingly briefly. Section 2.4 provides "any new development on the south side of Dundas Street will have to step down and provide a buffer to adjacent low-density residential areas". In section 3.3, Guiding Principles, in considering an "appropriate building scale and density for the street width and the neighbourhood context", the Study says "...on the south side of Dundas Street West, buildings should transition in scale to the adjoining low-rise residential neighbourhood. The effects of potential development on traffic and schools within the adjacent neighbourhoods should be considered". The Board finds that the Study does not consider height or density of a proposed development in isolation from impact, specifically appropriate transition and potential effect on public infrastructure like roads and schools.

As noted above, the City is apparently satisfied that the proposed development would have no adverse traffic impact and no evidence was adduced to demonstrate that there would be any adverse impact on any other public facility like schools.

With respect to appropriate transition, the only urban design evidence the Board received, that of Mr. Glover, was that the building is designed such that the transition to the low-density neighbourhood is appropriate. If the boundary adjustment is permitted as requested, the 45-degree angular plane taken from the southern boundary of 567 Prince Edward Dr., the beginning of the neighbourhood, is respected by the massing of the building.

Section 4.3.16(a) - The proximity of the site to Medium or High Density Residential designations.

In the Commercial-Residential Strip, in the immediate vicinity of the subject property, are six storey residential buildings which are comparable to what is permitted in a Medium-Density Residential Designation. Therefore, the Board finds this criterion is met.

Section 4.3.16(b) - The adequacy of social and educational services.

For the reasons set out above the Board finds this criterion is met.

Section 4.3.16(c) - The level of accessibility and proximity of the site to collector roads, arterial roads, transit and expressways, and the capacity of those facilities.

The site is located at the intersection of arterial and collector roads. The under-utilized 30 Lambton bus serves Dundas St. W. with a direct connection to the subway system. The Board finds that this criterion is met.

Section 4.3.16(d) - The suitability of the site in terms of size and shape to accommodate the proposed additional uses and density including on-site parking, access and circulation for all users, and landscaping and recreational facilities for the residents.

Messrs. Smith and Glover provided comprehensive evidence on the relative suitability of the site for the proposed building. The Board heard no evidence to demonstrate that the site could not accommodate the proposed building in an efficient manner in terms of access, circulation or servicing. The Board finds this criterion has been met.

Section 4.3.16(f) - The effect of increased traffic, so that no undue adverse impacts are created for local residential streets.

The Board finds, based on the evidence considered above, that this criterion is met.

Section 4.3.16(g) - The effect of height and form of the development so that no adverse impact in terms of shadowing or loss of amenity are created for neighbouring residential uses.

The Board finds, based on the evidence considered above, that this criterion is met.

Section 4.3.16(h) - The relationship of the site to nearby lower residential density uses, if any, in view of the desire to provide a gradual transition in height and density, wherever possible, or other buffering measures.

The Board finds, based on the evidence considered above, that this criterion is met.

Section 4.3.17(i) - The degree to which the site is proximate or exposed to significant open space amenities.

It was the evidence of both Dunpar and the City that the site is located in proximity to a number of parks and the open space system associated with the Humber River. The Board finds this criterion has been met.

Section 4.3.16(j) - The desire to stay within the population ranges outlined in sections 2.2.1 and 2.2.2.

The Board accepts Mr. Smith's evidence that the proposed 83 units would make a contribution to meeting the population targets set out in the Etobicoke OP. The Board finds this criterion has been met.

In considering the issue of adjusting the land use boundary, the Board finds that the policies and criteria in the Etobicoke OP are determinative. Having regard to the detailed criteria for incorporating adjacent residential properties into the Commercial-Residential Strip without an official plan amendment, the Board finds that it is appropriate in this case to allow for such an incorporation.

Such an adjustment will mean that the subject property, including the three lots on Prince Edward Dr., is entirely part of the Commercial-Residential Strip for the purposes of the Etobicoke OP and a Mixed Use Area for the purposes of the Toronto OP.

Section 4.4.4 of the Etobicoke OP sets a height limit of six storeys in the Commercial- Residential Strip. Given that the Board finds that the Etobicoke OP is

determinative of this application, this panel of the Board would normally find that, for the proposed development to be built at seven storeys, or eight storeys, if the mechanical penthouse and indoor amenity space constitute a storey, a site specific official plan amendment to section 4.4.4 would be necessary. However, in this particular case, the Board is bound by the decision of the panel who heard the motion prior to the commencement of the hearing. On the motion, the Board found "that at the time of Dunpar's Appeal under section 22 of the *Planning Act* the Etobicoke Official Plan had been repealed. The Appeal cannot revive an instrument that did not exist at the date of the Appeal. The Etobicoke Official Plan did exist on the date of the Application but that does not bring jurisdiction to the Board...the Board finds it does not have jurisdiction to hear an Appeal for an amendment to the former Etobicoke Official Plan".

Therefore, in this case, the Board apparently cannot amend an official plan that was in effect at the date of the application but not in effect at the date of the appeal as that would apparently revive an instrument "that did not exist at on the date of the appeal".

As section 4.4.4 of the Etobicoke OP is no longer in effect it does not exist and cannot and will not be amended. Simply put, as the section does not exist for the purposes of amendment in this case, an amendment is not possible or necessary. The six-storey height limitation is not found in the Toronto OP, which was in effect at the date of the appeal, so no official plan amendment is necessary to facilitate the proposed development of the subject property. The height restriction is now found only in the zoning by-law, which can be amended by this Board.

Issue 3 - Does the proposed development adequately address such matters as its context within the area; transition; setbacks; step backs; shadowing; the appropriate use of the Dundas Street main floor level; and impact on the public realm?

For the reasons set out above, the Board finds that these matters have been adequately addressed.

Issue 4 – Should the proposed development be permitted in that part of the site known as 567 and 569 Prince Edward Dr.?

For the reasons set out above, the land use boundary may be adjusted and the proposed development may be permitted on the properties located on Prince Edward Drive.

Issue 5 – Given that the appellant did not appeal the Dundas Street West Avenues By-law, is it appropriate to allow the appeals of the appellant's earlier application for an official plan and zoning amendment?

Having regard to the issue of "process", the Board finds that Dunpar was not required by any statute or policy to appeal the Dundas Street West Avenues By-law to allow its applications to be considered by either City Council or this Board. While Dunpar did not have to provide an explanation to this Board for its failure to appeal the Avenues By-law, it did provide a reasonable explanation: it did not want to delay the enactment of the Avenues By-law with what would be a site specific appeal.

This Board will not permit any focus on process to distract it from a proper consideration of the planning merits of an appeal. If a party exercises statutory rights or chooses not to exercise such rights, it will not be penalized by this Board. Exercising statutory rights does not constitute a manipulation of the process or amount to "waiting in the weeds". Therefore, the Board finds that Dunpar's failure to appeal the Avenues By-law is irrelevant to a determination of the planning merits of this appeal.

Issue 6 – Would the proposed development set an inappropriate precedent?

It is submitted by some party to almost every hearing before this Board, that its decision will create an inappropriate precedent. On this issue the Board must note that one panel of this Board is not bound by the decision of another panel; each case which comes before the Board has a unique set of facts; each case must be decided on its merits, taking into account the policy regime in effect at the time of the application. In the case at hand, the application was filed when the Etobicoke OP was in effect and was therefore considered in light of that policy document. The Etobicoke OP will not be in effect for future applications. The subject property is located at the signalized intersection of an arterial road and a collector road. The site is not located in the interior of a Neighbourhood; it is located adjacent to a Neighbourhood, in a Mixed Use Area.

Therefore, the Board finds that the approval of the proposed development would not create an inappropriate precedent.

Issue 7 – Is it appropriate to secure facilities, services and matters pursuant to section 37 of the *Planning Act* as a condition of approval of any additional height or density?

In her evidence Ms Johncox confirmed that she did not know how the \$300,000 or \$15,000 per unit proposed section 37 contribution had been calculated. In her Witness Statement she indicated that section 37 contributions would be in respect of "enhancements to the public realm, as identified in the Avenues Study". These include gateway features, streetscaping and trees, access road and parkette, recreational pathway, pedestrian connection to the Humber River, pedestrian activated signals and bicycle lanes.

The Board has considered the appropriateness of requiring an applicant to enter into a section 37 agreement in a number of cases cited by Counsel for Dunpar. In *Minto BYG Incorporated v. City of Toronto*, (2000) Decision/Order No.1585, the Board said "whether or not contributions should be authorized must be judged on the beneficial effects of such contributions to the development proposal and it lies with the municipality to demonstrate the connection between the proposal and the benefits".

More recently, in *Sunny Hill Gardens Inc. v. City of Toronto*, (2006) Decision/Order No.1547, the Board said, with respect to section 37 contributions "the question here is the degree of specificity regarding the matters to be funded that an applicant ought reasonably expect to be in the governing official plan". In that case the Board had before it section 37 benefits like specific improvements to specific parks. However, the Board adopted the analysis used in *Minto BYG* and found "the use of section 37 must be grounded in fair, clear, transparent, predictable requirements that are set out in the official plan and are not arbitrary in their application. An applicant should know what will be expected by way of section 37 benefits if increases in height and density are approved". (emphasis added)

Neither the City's witness in evidence, nor City's Counsel in submissions, satisfactorily set out any policies, either under the Etobicoke OP or the Toronto OP which, would permit the City to request \$300,000 or \$15,000 per unit without some

rationalization of the request. No connection was made between the amount requested and any improvement to the neighbourhood of the proposed development. If the City simply arrives at an amount, without anything justifying the amount, the Board has no choice but to conclude that the amount requested is arbitrary and therefore the application of any section 37 policies is arbitrary.

Further, the Board has regard to the evidence elicited by Counsel for Dunpar with respect to 1050 The Queensway. In that case, City Staff and City Council supported an increase in height from six to ten storeys with no suggestion that section 37 benefits should be forthcoming. Again, the Board can only conclude that the section 37 policies have been applied in an arbitrary fashion

Therefore, the Board finds that it is not appropriate to secure facilities, services and matters pursuant to section 37 as a condition of any additional height or density. The Board must note that it does not relish making such a finding. The authority of a municipality to use section 37 is extremely important. Applicants seeking additional height and density should make section 37 contributions, but only when section 37 policies are applied properly.

In summary, the Board finds, having regard to the determinative policy documents, the PPS and the Etobicoke Official Plan, the proposal is an appropriate form of residential intensification at the subject site and constitutes good planning and is in the public interest. The site is located on an arterial road, at an intersection with a collector road. It is in an area which is changing and evolving to reflect a need for residential intensification in appropriate urban areas, a need to locate development in proximity to public transit and a desire to improve the urban environment along Dundas St. W., while, at the same time, preserving the character of stable neighbourhoods. As the Board notes above, having regard to the Etobicoke OP and the Avenues Study, the height and density of the proposed building is to be considered in terms of impact on the low-rise residential neighbourhood to the south. Some neighbours believe that the proposal represents too much height, density and change. The Board, having found that there would be no negative impact in terms of shadow, privacy, overlook, traffic or demand on public infrastructure, cannot find that the proposal will have a negative impact on the neighbourhood to the south.

The appeal with respect to the zoning by-law is allowed. The zoning by-law will be amended substantially in accordance with attachment Exhibit # 10, Attachment 1.

The holding designation is to be lifted in accordance with the agreement of the City.

The Board will withhold its final order with respect to the site plan until it is provided with a final site plan and site plan conditions. The Board expects to receive such site plan and conditions within six weeks of the date of issuance of this Decision.

This is the Order of the Board.

"Susan B. Campbell"

SUSAN B. CAMPBELL
VICE-CHAIR

CITY OF TORONTO

BY-LAW No. XXXX-2007

To amend Chapter 320 of the Etobicoke Zoning Code and By-law 717-2006 with respect to certain lands located on the south side of Dundas Street West, east of Prince Edward Drive, municipally known as 4187 Dundas Street West, 567, 569 and 571 Prince Edward Drive.

1. That the Zoning Map referred to in Section 320-5, Article II of the Zoning Code, originally attached to Township of Etobicoke By-law No. 11,737, be and the same is hereby amended by changing the classification of the lands located in the former Township of Etobicoke as described in Schedule "A" annexed hereto from General Commercial – Avenues (Holding) (CG-AV-H) and Second Density Residential (R2) to General Commercial – Avenues (CG-AV).
2. That Schedule "A1" of By-law 717-2006 is amended by expanding the boundaries of the outlined area to include the southerly portion of the lands municipally known as 4187 Dundas Street West and 567, 569, and 571 Prince Edward Drive and to zone the lands CG-AV, as described in Schedule "A" attached hereto.
3. That Schedule "A6" of By-law 717-2006 is amended by expanding the boundaries of the outlined area to include the southerly portion of the lands municipally known as 4187 Dundas Street West and 567, 569, and 571 Prince Edward Drive, as described in Schedule "A" attached hereto, and to specify a maximum Floor Space Index of 3.3 for the lands.
4. That Section 3 of By-law No. 717-2006 is amended by the addition of the following paragraph:

"Q. Notwithstanding the regulations set out in paragraphs B, D, H, L, N and O of By-law No. 717-2006, the following regulations apply to the lands described in Schedule 'A':

 - (1) The maximum building height shall not exceed 7 storeys and 24.5 metres, not including rooftop mechanical rooms, rooftop amenity space (indoor and outdoor), screen walls, railings, and architectural features.
 - (2) Rooftop structures, including mechanical penthouses, shall be permitted having a maximum of 225 square metres.

- (3) The maximum floor space index shall be 3.3, as shown on Schedule "A6".
 - (4) The minimum floor-to-ceiling height on the first floor shall be 3.4 metres.
 - (5) The building shall be set back 1.5 metres at a height above the 3rd storey and 11.0 metres in height.
 - (6) The minimum side yard setback abutting Prince Edward Drive shall be 1.5 metres.
 - (7) A minimum of 48 bicycle parking spaces shall be provided.
 - (8) Grade shall be defined as 118.55 metres CGD.
5. Notwithstanding the above By-law and Zoning Code standards, a sales trailer and/or construction trailer is permitted without restriction during the development of the lands.
6. Where the provisions of this By-law conflict with the provisions of the Etobicoke Zoning Code, the provisions of this By-law shall apply.
7. Chapter 324, Site Specifics, of the Etobicoke Zoning Code, is hereby amended to include reference to this By-law by adding the following to Section 324-1, Table of Site Specific By-laws:

BY-LAW NUMBER AND ADOPTION DATE	DESCRIPTION OF PROPERTY	PURPOSE OF BY-LAW
XXXX-2007 _____, 2007	Lands located on the southeast corner of Dundas Street West and Prince Edward Drive.	To rezone the lands from General Commercial – Avenues (Holding) (CG-AV-H) and Second Density Residential (R2) to General Commercial – Avenues (CG-AV) to permit a 7-storey apartment building with 83 residential dwelling units, subject to site specific development standards.

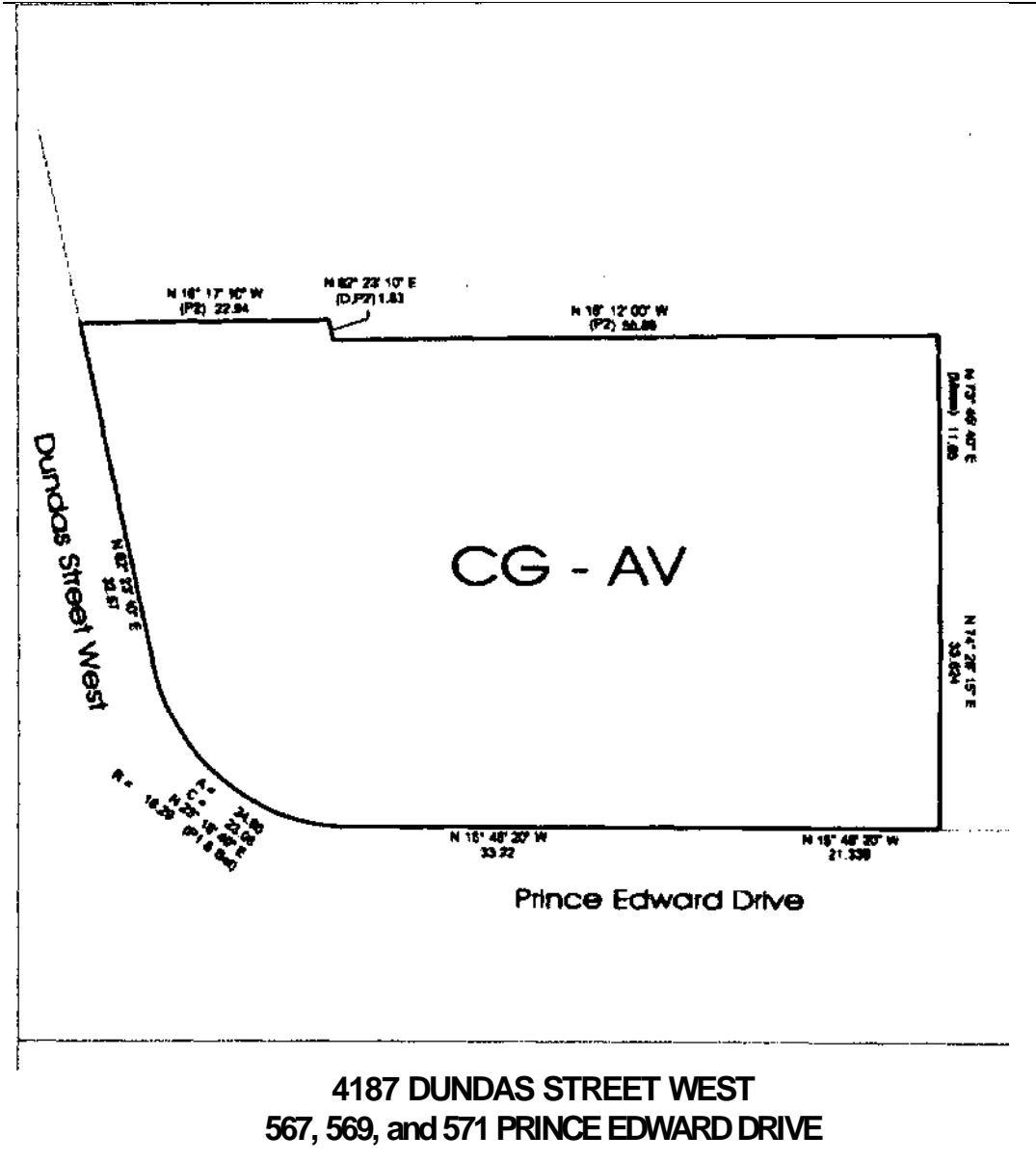
ENACTED AND PASSED this day of _____, A.D. 2007.

DAVID R. MILLER,
Mayor

ULLI S. WATKISS
City Clerk

(Corporate Seal)

Schedule 'A' BY-LAW



**4187 DUNDAS STREET WEST
567, 569, and 571 PRINCE EDWARD DRIVE**

Applicant's Name :
Assessor's Map :
File No. :

Zoning Map :
Comptrols :

MILLWORK LTD 0 5rv.