

ISSUE DATE:

**January 15, 2014**



PL130585

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

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

Appellant (Jointly): Mario Gasperetti, Sylvio Granger, Gemma O'Sullivan,  
et al  
Appellant: Nancy Miller-Chenier  
Subject: By-law No. 2013-110  
Municipality: City of Ottawa  
OMB Case No.: PL130585  
OMB File No.: PL130585

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

Appellant (Jointly): Mario Gasperetti, Sylvio Granger, Gemma O'Sullivan,  
et al  
Subject: By-law No. 2013-111  
Municipality: City of Ottawa  
OMB Case No.: PL130585  
OMB File No.: PL130586

**APPEARANCES:**

**Parties**

**Counsel\*/Agent**

Sylvio Granger

M. Aubin

City of Ottawa

T. Marc\*

Claridge (321 Dalhousie) Inc.  
Claridge (George St.) Inc.

J. Bradley\*

**DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD**

**INTRODUCTION**

[1] This zoning dispute, over a pair of distinct projects, arose on the edge of a Heritage Conservation District ("HCD") in the City of Ottawa ("the City").

[2] Two related companies, Claridge (321 Dalhousie) Inc. and Claridge (George St.) Inc. (collectively called "the developer") proposed two highrises on three abutting lots:

- One lot, within the HCD, had an existing 1960's 11-storey "anomalous" office building, called the Union du Canada Building ("UC"); the developer proposed to change it to a hotel, and increase its height by several storeys.
- Two adjoining lots were on the other side of the HCD boundary (together called the "condo site", abutting the HCD). They were already zoned for 17-storey development; the developer sought 22, for a condominium tower.

[3] These proposals had the support of the City's Heritage Advisory Committee (called the Built Heritage Subcommittee, or "BHSC") and planning staff. Council agreed:

- It adopted By-law 2013-110 to rezone the UC lot in accordance with the proposal.
- It adopted By-law 2013-111 for the condo site, rezoning it for 22-storeys.

[4] Sylvio Granger filed appeals, for each By-law, to the Ontario Municipal Board ("the Board"), on behalf of himself and a group of individuals listed at Exhibit 4 ("the neighbours"). Another appellant, Nancy Miller-Chenier, withdrew her appeal.

[5] At the week-long bilingual hearing, the City and developer were each represented by counsel. The City had the support of Bliss Edwards (planner) and Sally Coutts (heritage planner). The developer had the support of Katherine Grechuta (planner). The neighbours were represented by their agent, Marc Aubin, and had the support of Dr. Jeffrey Hedenquist (mapping), Mario Gasparetti (architect), and Caroline Ramirez (doctoral student in geography). Stuart Lazear, a retired heritage planner from the City, also testified, under summons from the neighbours.

[6] There were significant shifts during the hearing. The developer announced a reduction in proposed height at the UC site – but also announced that it had already obtained separate City approval to demolish the existing building (of which the neighbours appeared unaware). Following a Motion by the developer, the neighbours "accepted" the new height there (though not at the proposed condo site); however, they

called on the Board to implement what they called their six-point "request", including amendments to other planning documents.

[7] The Board has carefully considered all the evidence, as well as the submissions of both sides. The neighbours' concerns were presented lucidly and eloquently. At the UC site, however, the Board has no statutory authority to intervene in demolition of the existing building. As for the replacement building, the only discussion at the hearing was about its height. The neighbours conceded that point, though they proposed conditions, notably amendment of other unappealed planning documents – which is beyond the Board's powers. The Board dismisses the zoning appeal, pertaining to the UC site.

[8] During that discussion, however, the Board heard problematic opinions about "conservation", "intensification", "design excellence", and aesthetic discretion. Though arguably parenthetical to the strict questions in these zoning appeals, they touched on fundamentals of the Ontario planning system, and/or could colour the forthcoming Site Plan process. The Board finds that clarifications are warranted accordingly. In particular, the Board has comments about the "fit" of the project and hopes they will assist the forthcoming Site Plan process and Ottawa's accompanying Urban Design Review Panel process ("Design Panel").

[9] At the adjacent condo site, there was debate not only about height, but also shape and fit. Like the UC site, the Board finds the height anomalous – but an anomaly that was anticipated by the governing documents, which the Board is expected nonetheless to apply. The question was whether the *incremental* height in this rezoning was inappropriate; the Board concludes that in a context where planning documents already anticipated such a discordant juxtaposition, the incremental height could not be isolated as a decisive factor warranting Board intervention. That appeal too is dismissed.

[10] The Board has more concerns about shape and fit, which it describes in this decision, notably the "wall affect." The Board agrees with the neighbours that it would be preferable for the visual impression of mass to be "broken up." However, those are matters which can be addressed during the Site Plan and Design Panel process. The Board was not persuaded to intervene in the exterior dimensions specified in the

rezoning; the appeal pertaining to the condo site is dismissed accordingly. The details and reasons are set out below.

## **PROJECT AND HISTORY**

### **The Area and Property**

[11] The Byward Market HCD is at the entrance of a larger district called Lowertown. It is in what the City's Official Plan ("OP") calls its "Central Area," on the East side of the Rideau Canal, a short distance from Parliament Hill.

[12] The HCD has been called Ottawa's second-largest tourist attraction, after Parliament Hill. Walking eastward from the Parliamentary Precinct, pedestrians can enter the HCD at George Street, by descending a National Capital Commission staircase, between Mackenzie and Sussex Streets. The focal point of the HCD is then a block east along George, namely the Byward Market building itself, toward the geographic centre of the HCD. The subject property lies about another block further east along George, straddling the eastern boundary of the HCD.

[13] There are several layers of relevant City planning documents:

- The Byward Market HCD was designated under the *Ontario Heritage Act* ("OHA") in 1991, based on a preparatory report by Julian Smith ("preparatory study").
- The HCD includes a "Heritage Overlay", which essentially restricts the zoning to the physical shape of what currently exists.
- The Official Plan ("OP") designates the location as part of the "Central Area".
- A "Central Area Secondary Plan", dating from 1991, is also part of the OP.
- Although the 2005 amendments to the OHA authorized "Heritage Conservation District Plans" (at s. 41.1 and 41.2), no such HCD Plan has yet been adopted by Council. However, Council did adopt "District Guidelines", stemming from the preparatory study.
- There are also several other "design guidelines" for major projects such as this.

[14] The subject property itself is one block north of Rideau Street, and two blocks west of King Edward Avenue. It is irregularly shaped, and was called a "sideways Z":

- The condo site is comprised of two lots at 137 and 141 George Street, one of which is vacant, and the other has a one-storey building, The Honest Lawyer Bar & Grill, to be demolished.
- That site partially backs onto the UC site (facing a cross street, Dalhousie Street), with a street address of 321 Dalhousie.

[15] The HCD boundary runs north-south behind the UC building – so that the HCD includes the UC site, but not the condo site, immediately on the other side of the boundary. In short, the boundary runs through the middle of the combined site.

[16] Both proposed buildings were designed by out-of-province architects, reflecting an unambiguous Modernist inspiration: they are primarily of glass, with white spandrels. This was said to look "light." The City staff report called the two buildings "sensitive" to their context: there would be a masonry podium facing George Street, and the Board was told the condo project would reflect its context via red tabs on its balconies. In the opinion of the developer's planner, "while accommodating intensification, we'll pay due respect to heritage."

### **The UC Site**

[17] The existing UC building, 42.1 metres high (11 storeys), is at 321 Dalhousie Street, on the southeast corner of Dalhousie and York Streets. Other buildings along this side of Dalhousie are 2-3 storeys. Indeed, only two buildings in the entire HCD exceed 21 metres: the castle-like headquarters of the Department of National Revenue, and the UC building.

[18] The UC building was built in 1968. Its concrete Modernist architecture, with modestly Brutalist overtones, was said to be "true to the spirit of its age." One of the neighbours' witnesses, architect Mario Gasparetti, had written that "growing up, I thought the Union du Canada building was the ugliest in Lowertown." The preparatory study said it was "not consistent with the district." However, the Union du Canada itself

was an institution that played an important role in the life of the Franco-Ontarian community, and which the City proposed to honour with a plaque.

[19] The developer had first proposed reusing the UC building, adding extra storeys on top. That approach was later dropped, in favour of demolishing it and rebuilding.

### **The Condo Site**

[20] The 1991 preparatory study (132 pages) had anticipated 50-metre buildings along George Street east of Dalhousie ("Area D"), including the condo site. Since 1984, the zoning had already allowed a maximum height of 35 metres (12 storeys); in 1998, the area was rezoned for 50 metres (17 storeys).

[21] The condo site was still zoned that way. However, slightly to the east (at 90, 160 and 179 George Street), there are already three buildings over 60 metres. Counsel for the developer observed wryly that most of the neighbour appellants live in those buildings.

[22] Although the condo project would be built (in two stages) to 69 metres, the new By-law rounded permissible height to 70 metres. The project would have 22 storeys in a T-shaped structure, said to be characterized by "clean glass lines", though there would be a three-storey masonry podium facing George Street. That podium, said the developer's consultants, would represent its integration with the context of the area. There would be some modest terracing at the upper levels.

### **The By-laws, Appeals and Positions**

[23] The City adopted two By-laws:

- At the UC site, By-law 2013-110 approved a hotel, with a height of up to 60 metres, along with various provisions pertaining to parking and the hotel lobby.
- At the condo site, By-law 2013-111 approved an apartment building, with a height of up to 70 metres.

[24] Though Council rezoned the UC site for up to 60 metres, the developer announced, at the start of the hearing, that it now proposed a height maximum there of 48 metres – subject to the proviso that this would nonetheless allow certain accessory uses (notably washrooms) above that height, to accommodate a rooftop patio. The developer and the City redrafted By-law 2013-110 accordingly (calling the new draft the “Replacement” to Tab 30 of Exhibit 2A).

[25] The appellants, for their part, stated at the beginning of the hearing that they were "not discussing" the new By-law's provisions pertaining to parking and the lobby. In short, the only issue at the UC site was now the proposed replacement of the existing 42.1-metre UC building with a new 48-metre hotel.

[26] The developer had applied for two sets of approvals:

- It applied under the *Planning Act* for rezoning of both the UC site and condo site.
- It also applied under the OHA for permission to “alter” the UC site (this was later modified, to also request permission to demolish the existing UC building).

[27] The project had the support of City planning staff. As for heritage aspects, the BHSC recommended approval of the "alteration", and later the application to demolish and replace the building. Council did approve the demolition under the OHA.

[28] The neighbours came prepared to challenge that decision on demolition. They cited the historical importance of the institution that built it, namely the Union du Canada. Counsel for the developer, Ms. Bradley, formally objected to relevance of this line of evidence, saying Council's decision to demolish was not before the Board: the approval for the demolition, she said, was a "*fait accompli*." Counsel for the City supported that objection, saying "the issue of demolition is final and binding."

[29] The Board was compelled to sustain the objection, on jurisdictional grounds: the City's approval of the demolition, under the OHA, was legally outside the current *Planning Act* appeal before the Board. The Board was shown no authority on which it could intervene in that demolition.

[30] That was not the only major procedural event. At the end of the neighbours' evidence, counsel for the developer brought a Motion, calling on the Board to dismiss their appeal – specifically for the UC site – on the ground that they had presented no apparent land-use planning ground, on which the Board could allow their appeal of that site's By-law 2013-110 (as modified by the "Replacement"). The City supported the Motion.

[31] Speaking for the neighbours, Mr. Aubin chose not to contest the Motion. Instead, the neighbours responded with a "request" to the Board (Exhibit 12), as follows:

1. For the UC site, the neighbours "accepted" By-law 2013-110, subject to the modifications reducing maximum height to 48 metres.
2. For the condo site, the neighbours continued to oppose By-law 2013-111's increase in height from 50 metres to 70 metres.

If the Board were to disagree with them on the subject of the condo site, then as a fall-back, Mr. Aubin initially suggested an "alternative" involving modifications to the condo project (e.g. for setbacks and angular plane). On further discussion, however, this "alternative" was withdrawn.

The neighbours nonetheless maintained that even for a 50-metre building, the mass should be "broken up".

3. The neighbours added that the preparatory study (presumably meaning its Design Guidelines) should be "recognized" as an HCD Plan "as defined in the *Ontario Heritage Act*, Section 41.2."
4. The neighbours called for OP amendments (and related documents) to recognize "transitions" in Area D (in the sense of buildings rising to different heights according to a graduated pattern).
5. The neighbours called for similar OP amendments to "recognize the primacy of the Heritage Conservation District Guidelines in considering development proposals adjacent to... a cultural heritage resource."



6. Finally, the neighbours called for the commemoration of the Union du Canada by more than a plaque, notably a "public installation."

[32] In response, counsel for the City reminded the Board that the latter's jurisdiction is dependent on the appeal before it. In the current case, there were *two rezoning By-laws* before it – not Official Plans, or HCD Plans, let alone "public installations." The Board had no authority to rewrite planning documents not under appeal. He added that the Design Guidelines could not be transformed verbatim into an HCD Plan, because they did not meet all the statutory requirements for HCD Plans under s. 41.1(5) of the OHA, notably subsection (e), which essentially pre-approves certain defined categories of work. Finally, he said the Board does not normally have jurisdiction to order "public installations," but he added that he would convey that part of the request to proper authorities within the City administration.

[33] The Board was again compelled to agree. It was not the Board's prerogative to amend statutory documents not under appeal.

[34] As for whether the proposed building should be "broken up", a large part of the ensuing debate focused on whether the visual impact of the overall development would look like a "wall" at the eastern boundary of the HCD and, in combination with surrounding highrises in other directions, convey the visual impression that the HCD was in a "bowl." That topic is addressed later in this decision.

### **APPLICABLE CRITERIA**

[35] A challenge to such By-laws may involve several factors, notably whether they comply with the *Planning Act*, the Provincial Policy Statement ("PPS"), the applicable Official Plan(s), and the fundamentals of good planning.

[36] Section 3(5) of the *Planning Act* specifies that a decision of a Council, or of this Board, "shall be consistent" with the Provincial Policy Statement (PPS). The PPS, in turn, calls Ontario's planning framework "policy-led." Though the PPS contains 19 references to intensification, it also has policies to "conserve" heritage:

- 2.6.1 Significant built heritage resources and significant cultural heritage landscapes shall be conserved.
- 2.6.3 Development and site alteration may be permitted on adjacent lands to protected heritage property where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved.
- Mitigative measures and/or alternative development approaches may be required in order to conserve the heritage attributes of the protected heritage property affected by the adjacent development or site alteration.

## **ANALYSIS**

### **Introduction**

[37] Though the UC and condo sites abut each other, and were called a single "subject property", the Board considers them two distinct projects: they have different proposed by-laws, heights, and uses, facing different streets, with different planning regimes.

[38] They do, however, have elements in common. At least part of the policy framework does apply to both sites. Furthermore, a large part of the debate focused on the visual impact that they would have together. The Board will first address the overall policy framework. It will then consider the individual UC site and condo site in turn. Finally, it will consider them in tandem.

[39] The developer and the City argued that this whole matter was straightforward. The revised height for the UC site had been conceded by the neighbours. The various conditions in their "request" were largely unenforceable. The neighbours had no lawyer; they did not hire their own "independent planning experts"; and in any event, the *incremental* public impact, of raising the condo project height, from 17 storeys to 22, was said to be negligible. The developer and the City added that the outcome was in the public interest: the project enjoyed "excellence of design", and as a bonus, would eliminate surface parking lots (labeled "eyesores"), in favour of underground parking – an improvement at both an aesthetic and functional level.

[40] In a "policy-led" system, however, the Board retains residual responsibility to satisfy itself that projects comply with the statutory framework. The Board is also mindful that the areas in and around the Byward Market have a particularly important role in

defining the character of the city. Finally, there were propositions advanced by both sides, involving the fundamentals of the planning process in Ontario, which deserve comment. These were questions of both law and policy.

### **Jurisdiction, Scope, and Governing Documents**

[41] From a legal perspective, one may start with the topic of jurisdiction:

- As mentioned earlier, the Board exercises authority within the parameters of the appeal before it – not unappealed documents.
- The Province has also created separate arrangements for other questions, e.g. the City's OHA permission for demolition of the existing UC building.
- Similarly, some questions are usually reserved for the separate Site Plan process (under s. 41 of the *Planning Act*), as opposed to the zoning process, e.g. most questions of site layout and architecture.

[42] That explains why the Board cannot accede to most of the neighbours' "request". Furthermore, a typical zoning appeal, on volumetric dimensions, does not usually focus on architecture. For that matter, the neighbours indicated no architectural objections to glass highrises – not surprisingly, since (as counsel for the developer observed) most of them live in the same kind of building.

[43] There are nonetheless related aspects of the projects that are open to comment in this zoning appeal. One is "massing". That question is distinct from "architecture": whereas much of the latter is stylistic, much of the former is volumetric, involving deployment of three-dimensional shapes.

[44] The massing debate focused on three related but not synonymous phrases: "cliff effect", "wall effect", and "bowl effect". "Cliff effect" is a function of vertical height, whereas "wall effect" is a function of horizontal continuity. "Bowl effect" resembles "wall effect", plus the connotation that it surrounds something. This project was accused of contributing to all three – leading to the neighbours' call that it be "broken up."

[45] The Board considers massing relevant to zoning. That is not to say that such questions cannot also be addressed at the Site Plan process which, in Ottawa's case, further involves the Design Panel. However, the Board offers comments which, it hopes, will cast light on the intent of the governing documents.

[46] There are several such documents. The foremost are the *Planning Act* and the PPS, followed by the OP (including the Secondary Plan). Although an HCD Plan (under ss. 41.1 and 41.2 of the OHA) might have been helpful, no such statutory document has been adopted by Council, for reasons which were not explained.

[47] The Board was also shown multiple sets of "design guidelines" – with the caveat that none were binding; indeed, the planners expressed little expectation of full compliance. "That's why they're called *guidelines*." The Board was told that if anything, the trend in Ottawa's recent OP amendments was away from pre-specified directions, in favour of providing planners with more flexibility to facilitate "good design."

### **"Whether to Conserve or Intensify"**

[48] Turning to overarching policy, the neighbours' witness Ms. Ramirez spoke to her co-authored journal article<sup>1</sup> (Exhibit 3, Tab 45), claiming there was an inherent "contradiction" between "intensification" and heritage "conservation". She said the prioritization of intensification (by the City and Province) was often at the expense of heritage; her article added that in this conflict (conservation vs. intensification), both sides ironically invoked sustainability:

OP Policy 2.2 specifies that when an area targeted for intensification is also a Heritage Conservation District, designated under the *Ontario Heritage Act*, the City should specify the limits of intensification in light of the district plans approved by Council.... Granted, it is appropriate for buildings which intensify the urban scene to wear an outer shell which blends into the landscape of heritage districts, but it appears that the latter take second place to the imperative of intensification....

As difficult as it is to achieve in an urban context, sustainable development is rendered even more challenging, by its apparent contradictions.... Though the City of Ottawa's narrative is mindful to address the various elements which define sustainable urban development, application of this policy is confronted by players intent on prioritizing either preservation of the built environment, or intensification of core areas. These players, whether citizens' groups or developers, nonetheless both invoke a rationale

---

<sup>1</sup> "Les luttes patrimoniales à l'heure de la densification urbaine : Le cas de la Basse-Ville Est d'Ottawa", *Canadian Journal of Urban Research*, 2012, p. 109.

under the same rubric of sustainable development. [Translation]

[49] Counsel for the City replied that Ms. Ramirez appeared to be calling on the Board to suspend (or discount) intensification policies in an HCD; but there was no such thing as an exemption from Provincial policy. Intensification, he said, was as much of a planning priority within HCD's as elsewhere.

[50] This is hardly the first allegation that there is a collision course between PPS and OP policies on conservation and intensification, and that intensification "trumps" other policies. This supposed paradox deserves clarification.

[51] First, the City is correct that the Board cannot render decisions inconsistent with the PPS. "Intensification" is to occur across urban Ontario, including HCD's. The OP is similar. The Board nonetheless adds that, unless otherwise specified, one PPS policy does not trump another: the PPS says it is intended to be "read as a whole."

[52] For the reasons below, it is equally erroneous to presume that "heritage conservation" and "intensification" are "contradictory", and that the Province and City were incoherent (or hypocritical) in advocating both. This supposed paradox can be explained, on closer analysis of the terms "heritage conservation" and "intensification."

[53] The first common mistake in this false dichotomy pertains to "conserving heritage." Some litigants have equated it to "pickling in formaldehyde." However, "conserving heritage" does not imply the same hands-off, frozen-in-time approach as people associate with "conserving nature", or "conserving food". That is not what the OHA says: the word "conservation" is not synonymous with either "protection" or "preservation" (the OHA uses the words distinctly). As the Board has noted before, "conservation" of buildings is not the antonym of "development"; on the contrary, "rehabilitation" ("rehab") – to maintain buildings, and improve their systems and livability – contributes billions of dollars to the construction industry annually. HCD's across Ontario have been planned not only to accommodate but to foster vigorous development – of a particular kind, rehab. In the Byward Market and other HCD's, "conservation" of buildings not only anticipates ongoing upgrades; it counts on them.

[54] There are also popular misconceptions about "intensification." Some developers and officials presume that it means one thing: replacement of existing buildings with larger ones. That is not how it is defined; the PPS says it includes work to re-use existing buildings, via "conversions" and "additions." It adds that far from being synonymous, "intensification" and "redevelopment" are distinct terms and concepts.

[55] Furthermore, the concept of "intensification" has a much longer (and broader) history than the PPS. The word "intensify" dates from the 19th century (attributed to poet Samuel Taylor Coleridge), and it originally had nothing to do with real estate. The *Concise Oxford Dictionary* defines it as "to make or become more intense." When applied to broad public principle, the common denominator of all intensification is that it makes better ("more intense") use of finite resources.

[56] By that reasoning, most rehab in HCD's (and in the building stock generally) would be equated with intensification. Indeed, extending the economic lifespan of existing investments might be considered the quintessential intensification.

[57] However, when the PPS was introduced in 1996 by the government of the day, that was not the definition adopted. Aside from conversions and additions, construction work on re-using existing buildings appeared excluded not only from "intensification" but even "development."

[58] Some people considered that omission so striking that it must have been intentional. For a decade, Canadians were investing billions more dollars on e.g. home improvements (rehab, renovations and additions) than on homebuilding (today, the figure is \$1.25 for every \$1 spent on new housing – over \$50 billion of Canadian construction annually, on the residential side alone). It is a key contributor to the tax base. The exclusion of such a conspicuous part of the industry, said some observers, *must* have meant that the Province intended rehab and renovation *not* to be supported by Provincial policy.

[59] By that inference, heritage properties might be "conserved" (whatever that meant), and perhaps "added to" or "converted", but it was Provincial policy that they be otherwise ignored. Elsewhere, the general building stock was expendable, and its ongoing use or re-use were outside the realm of public policy. It could just as well fall

into the ground. In this supposedly lopsided policy dichotomy of “intensification versus conservation”, according to Ms. Ramirez, redevelopment usually wins.

[60] The above may be conventional wisdom in some circles, but the Board is persuaded by none of it. In particular, the above is not a proper explanation for the absence of rehab and renovation from the PPS definition of "intensification", let alone "development", for a more elementary reason:

- The PPS definition of "intensification" refers to it as a form of "development";
- but the PPS confines its definition of "development", in turn, to projects "*requiring approval under the Planning Act.*"
- Therefore, since rehab and renovation do not typically “require approval under the *Planning Act*”, they are not addressed by these PPS policies on "development" or, by extension, "intensification."

[61] The City's OP follows suit. It is improper to jump to the conclusion that either the Province or City thereby signaled their intent to withdraw support from the re-use of the existing building stock, or to turn their backs on such a large part of the industry. For that matter, although PPS intensification policies are confined to projects "requiring approval under the *Planning Act*", there is no evidence the Province intended Ontarians to ignore "intensification" in the broader sense, including rehab.

[62] There is therefore no inherent "contradiction" in Provincial and OP policy, between the objectives of "conservation" and "intensification." The key is that "conservation" does include projects of various kinds, and that "intensification" is hardly confined to redevelopment for larger replacement buildings. The two policies can and do overlap.

### **The UC Site**

[63] As mentioned, the neighbour appellants said they "accepted" the proposed height of the new building at the UC site. Nonetheless, the proposal to erect a 48-metre building in an HCD would initially appear counterintuitive. Although the preparatory

study had acknowledged that the HCD was relatively eclectic (compared to some other HCD's in Ontario), it nonetheless insisted on "continuity... of scale and height":

1. The evolution, diversity and layering that characterize the landscape are also the most important qualities of the building stock.
2. That diversity has within it certain elements of continuity, of which the most important are building scale and height....
3. Because of the evolution of the area, which has resulted in the reworking of many of the properties over time, unity of style is not an objective. It would be historically incorrect, and destructive of genuine historic fabric.
4. New work in an area like this must respect the existing scale, material and form of the district. However, it should be of its own time, designed in a contemporary vernacular consistent with the traditions of the area.

[64] No one would suggest that a 48-metre building here was "continuous in scale and height" with its HCD neighbours.

[65] However, the existing UC building had already been recognized as "anomalous." The question was therefore whether the replacement – notably with its extra 6 metres – would compound that height anomaly.

[66] In response, the City's retired heritage planner, Mr. Lazear, testified that it had been City practice to consider adding storeys here and there ("penthouses") to the tops of existing buildings in the HCD. Typically, these would have been terraced or set back from the main façade of the building, so as not to disrupt the view of the façade. Mr. Lazear found no objection to the height proposed at the UC site. The Board heard no evidence on which to base any different height than the one proposed. As for the prospect of a setback at the top, the Board notes that, in the absence of any existing façade, there was no similar rationale for terracing the top of the building; however, if the Site Plan and Design Panel process were to recommend some articulation near the roof, for stylistic reasons, that would remain their prerogative.

[67] However, questions at the UC site did not entirely end there. The PPS states that such projects must be designed in such a way that the attributes of adjoining heritage property will be conserved. Furthermore, under policy 1.5.3(f) of the Central Area Secondary Plan, it is OP policy that:



New infill buildings are sensitive to, and compatible with nearby heritage buildings, particularly with respect to scale, size, lot development patterns, setbacks, materials and details.

[68] Although the Board has dealt with "scale" and "size", that still leaves the question of "materials and details". The developer and the City asserted that the project, with its large glass surfaces and white detailing, was "respectful" of its heritage context; but in that context, the Board was not shown a single example of anything remotely similar to it. No other building within the entire HCD had that expanse of glass. More importantly, the Board's attention was not drawn to a single architectural feature of the hotel project, that gave any hint of its relationship to the HCD.

[69] It is not that Ottawa lacks conspicuous examples of how to build highrises that nonetheless relate to heritage buildings around them. Indeed, the view immediately out the window of the Board's hearing room, at City Hall's Heritage Building, is of a 20-storey project, called "The Merit", with pronounced Art Deco allusions. Similar recent examples abound. In contrast, the Board's attention was not drawn to anything comparable for the UC project. Though the developer emphasized how "light" the overall project looked, with its "clean glass lines" and its "clean glass façade", Mr. Lazear said he would have preferred "cladding that is more friendly and warm."

[70] Of course, materials and design are often addressed more fully at the Site Plan stage. The Board's purpose here is to signal the matter for attention, and to reiterate that the cited provisions of the PPS and OP remain binding.

[71] The City's primary argument, on that point, was the repeated assertion that the project was accommodated by staff, because of its "excellence of design." The Board takes no issue with the skill of the rendering, nor does it offer an opinion on "architectural excellence"; but from a policy perspective, that rationale itself was potentially problematic, for three reasons.

[72] First, and most importantly, it made little attempt to demonstrate compliance with planning policies on the subject of compatibility of design and materials with the HCD.

[73] Second, the Board inserts a note of caution, pertaining to the oft-heard argument that Modernist buildings deserve insertion into non-Modernist settings, in the name of "excellence of design." Sometimes, designs actually are excellent; but the challenge is to distinguish claims that are authentic from those that are formulaic.

[74] The historical record indicates that this argument has often had less to do with evidence than with rote. For a century, core doctrinal authorities of Modernist architecture have insisted on the intrinsic superiority of this style, and its need to supplant all others – including those found in most Ontario HCD's. Other styles were the work of "criminals and pathological cases."<sup>[1]</sup> One basic text, illustrating glass-and-concrete highrises like those still built across Ontario today, called all other approaches "moronic".<sup>[2]</sup> More importantly, this was said <sup>[3]</sup> to be not a matter of taste, but of "laws of design" (other opinions being the result of "perverted academic training"). For decades, those assertions were compulsory reading in architecture schools across Ontario and around the world. In some places, they still are, and routinely underpin proposals for new Modernist buildings in the name of "excellence of design", whether corroborated or not.

[75] The Board's caution is this: although glass rectangles have been claiming intrinsic design superiority for decades, doctrinal claims in favour of a given style do not take legal precedence over planning documents.

[76] That brings the Board to a third concern. There were allusions, at the hearing, to increasing emphasis on design judgment, as opposed to written preconditions in planning documents. The Board again inserts a word of caution.

[77] The longstanding objective of the planning process, in Ontario, has been to make the terms for development less subjective and more predictable – for the benefit of municipalities, developers, and the public alike. At the core of that approach lies the conviction that the evolution of Ontario's built environment should not depend on subjectivity, personal taste, or whim, but rather (in the language of the PPS) on a

---

<sup>[1]</sup> *Ornament and Crime*, by Adolf Loos, Vienna, 1908.

<sup>[2]</sup> *Manifesto of Futurist Architecture*, by Antonio Sant'Elia *et al.* Florence, 1914.

<sup>[3]</sup> *The New Architecture and the Bauhaus*, by Walter Gropius, Dessau, 1925.

framework that is "policy-led." If a project fits poorly within a municipality's approved policy framework, it is an inadequate response simply to invoke some officials' aesthetic opinion about "excellence of design", no matter how well-intentioned.

[78] To recap Board findings on the UC site and By-law 2013-110, the existing building's height was "anomalous" to start with. The height of the new building will be too. That is not ideal, but the *change* in height was not inconsistent with previous practice, and no planning experts (including Mr. Lazear) took issue with it. Accordingly, the Board finds no sufficient grounds to intervene in its height zoning. Other aspects of its zoning (hotel, lobby and parking) were not in issue at the hearing. As for "materials and details", there were parenthetical arguments which were unconvincing. The Board is mindful, however, that architecture is not the focus of this appeal, but of another process, i.e. the Site Plan process and Design Panel. The Board would expect the correct considerations to be applied there, based on established policy, not just stylistic inclinations.

### **The Condo Site**

[79] The Board divides the debate over the condo site into three related themes: height, shape, and compatibility:

- The height debate, on whether the building should be 17 storeys or 22 storeys, was based partly on planning theories pertaining to "transition", and partly on visual impacts, notably the supposed "cliff effect."
- The debate over shape centered on whether the alignment of the new buildings (characterized by a "slab" shape as opposed to a "point" shape) produced a "wall effect" (or "bowl effect").
- The question of compatibility or "fit" addressed possible adverse effects on the area, and "the experience of the Heritage Conservation District."

[80] On the height question, the issue focused on whether this rezoning took a bad situation, and made it worse. Here, the governing documents actually did appear to point in opposite directions. On one hand, OP policy 4.6.1.9 emphasized "compatible" massing, profile and character:

When reviewing applications for zoning amendments (or) Site Plan control approval... adjacent to or across the street from the boundary of a heritage conservation district, or within a heritage conservation district, the City will ensure that the proposal is compatible by:

- a) Respecting the massing, profile and character adjacent to or across the street from heritage buildings;
- b) Approximating the width of nearby heritage buildings when constructing new buildings facing the street...;
- f) Having minimal impact on heritage qualities of the street as a public space in heritage areas....

[81] The Secondary Plan, at policy 1.8.3(e), further specified the objective of "human scale":

Regardless of profile, residential development respects, and is sensitive to nearby heritage buildings and maintains a sense of human scale.

[82] Aside from its podium, there was no suggestion that the 22-storey building epitomized "human scale", or that it bore any resemblance to "the massing, profile and character" of the nearby heritage properties. It would be as anomalous as the UC site next door.

[83] But like the UC site next door, the pre-existing arrangements had also been anomalous. The planning documents had anticipated highrises in this "Area D", for at least 30 years – first to a maximum of 12 storeys, then up to 17.

[84] The 1991 preparatory study itself had anticipated highrises at 50 metres (17 storeys), immediately abutting the rear property line of buildings in the HCD facing Dalhousie Street (usually 2-3 storeys). The Secondary Plan, at Policy 1.8.3(c), further specified that although most of Lowertown should have "predominantly low-profile development", this particular location would be targeted for "medium" and "high-profile" development:

Medium, and where appropriate, limited high-profile development in the eastern and southern parts of Lowertown, which creates an edge along King Edward Avenue and complements the high-profile node in the vicinity of King Edward Avenue and Rideau Street.

[85] The Downtown Ottawa Urban Design Strategy said likewise:

The core focus for intensification should be within the blocks bounded by Dalhousie Street, King Edward Avenue, Clarence Street and Rideau Street. There may be potential for some new highrise residential building infill between Dalhousie and King Edward.

[86] In short, the planning documents appeared to advocate both a "human scale" and highrises simultaneously. To add to the confusion, the planners at the hearing used the word "transition" in two distinct contexts. One meaning was to equate "transition" with juxtaposition, as in "the transition from 3 storeys to 17 storeys." The other was the notion that the tops of buildings would rise in a slope ("angular plane", as in a "transition from York Street to Rideau Street." The planning documents themselves called for "transition" akin to angular planes:

- The preparatory study referred to a projected north-south slope, with its low point (16 metres) near York Street (still within the HCD), and rising southward across George Street to Rideau Street (50 metres). The Secondary Plan referred to the same concept at least twice (pages 31 and 33).
- References in other documents, to the "node" at King Edward, also hinted at a possible east-west slope, starting at the HCD boundary near Dalhousie, and rising eastward, until one reached the "node."

[87] So aside from the "cliff" argument, the neighbours said that if one projected the resulting angular planes, the condo project would puncture them on both the north-south axis and the east-west axis.

[88] The developer replied that tall buildings "were always part of the overall framework." Its planning report added that articulating a building can make it look less massive:

The distinguishing design reduces the overall mass of the building and creates visual interest on all sides of the building. The development proposes to incorporate (a) generous amount of glazing and light coloured materials reducing the visual impact of the tower and the existing building.

[89] The Board addresses the first question, height, from three standpoints: governing documents, what is visible to passers-by up close, and what is visible from a distance.

[90] For planning documents, an elementary rule of interpretation holds that when documents offer generalities – but then make special provision for a specific situation, it is the latter which usually applies. By that reasoning, and notwithstanding the references to "human scale" for the neighbourhood generally, the Board must conclude that if the governing documents identified this specific location for highrises, then that is what they intended. The preparatory study itself appeared to reach an identical conclusion about Area D:

It is recommended that this pattern of redevelopment be accepted as a given condition, and only reviewed to ensure that along the north edge of the area, adjacent to the York Street corridor, the allowable heights be stepped up gradually from north to south.

[91] That is not to suggest that juxtaposition of three-storey HCD buildings with highrises (whether of 17 storeys or 22 storeys), was optimal planning. Indeed, said Mr. Lazear, whether at 50 metres or 70 metres, "both have a cliff effect." In short, the Board is compelled to conclude that the "cliff" was already planned for; the only remaining question here was whether it would be increased from 17 storeys to 22.

[92] The Board begins by discounting the argument about architectural articulation. Granted, various *trompe-oeil* effects, known for centuries, can have mitigating effects; but it would be absurd to suggest that they can hide a 17-storey building, let alone a 22-storey one. The Board must agree with Mr. Lazear, when he said "it's still a cliff."

[93] On the other hand, the Board also discounts the notion that a 22-storey building would visually disrupt the north-south "transition." Although the documents said buildings could be higher near Rideau Street than near York Street, there was no proof that this meant a steady slope rising in a straight line. Indeed, the Board was shown no vantage point from which such a smooth angular plane would even have been visible to a passer-by. Furthermore, even if such a visual effect were discernible from a given location at ground level, it would have been interrupted by the UC building. The Board was not persuaded that the proposed height breached planning objectives on that account.

[94] The same conclusion applies to a supposed east-west transition. The Board found no evidence that this was intended as a smooth angular plane, which would be visible to passers-by. The Board could not conclude that the planning documents, pertaining to "transition", indicated a significant obstacle.

[95] As for visual impacts, the Board distinguishes those close up, from those at a distance. Close up (e.g. at ground level on this block of George Street), Mr. Lazear agreed that the passer-by's field of vision would be largely taken up by the three-story podium, where the developer "tried to do nice things." The Board heard no compelling evidence that, at the top of the building, the extra storeys would have significant adverse impacts – or, from that angle, would even be particularly noticeable to the passer-by.

[96] That left the issue of views from a distance. The Board must discount the question of views from the top of other highrises (where several of the neighbours live). Those views are not protected by the legal system in general, or the OP in particular.

[97] Views for passers-by in the HCD are different. Though it has been said many times that Ontario generally offers no legal protection for views, the Board has noted before that there is an exception in HCD's, when governing documents say so. If the Province and municipality went to the effort of enacting a special HCD framework, so that people could see cultural resources, it would be inconsistent (and contrary to the purpose of the legislation) to then infer that views of those same resources were irrelevant.

[98] Sight lines would be of particular interest for people entering the HCD (often from the west), or those in the core of the HCD (e.g. on George Street next to the Byward Market). Dr. Hedenquist's illustrations compared 50-metre and 70-metre projects. Mr. Lazear commented about juxtaposition with the HCD:

I would prefer a building that was not 70 metres . Transition from 50 metres to three storeys is hard enough; transition from 70 metres is harder....I would prefer that the tower be shorter. 50 metres is a height that's difficult to manage. So is 70 metres. It's difficult to transition.... 50 metres is still a cliff. I would prefer a drop that is smaller rather than higher.

[99] Though that argument sounded compelling in principle, the City's heritage planner Ms. Coutts countered that in practice, the *incremental* height would change very little in terms of overall visual impact.

[100] The Board is compelled to agree. As a backdrop to the HCD, the highrises have been planned for Area D for decades. There are already highrises of comparable height (to the project) in Area D today. The single question here is whether the incremental five storeys will have a significant adverse impact. The dilemma is that in a context where essentially nothing about Area D's planned character would be in keeping with the neighbouring district – not its shape, style, materials, massing, or anything else – then the Board was not persuaded that height should be isolated as a specifically offending factor, particularly for two reasons:

- one could consider many other factors, aside from height, that would improve the fit;
- inversely and more importantly, even if height were *reduced* to only 12 storeys (as it was zoned for, a generation ago), the Board would be hard-pressed to find a significant improvement.

[101] That led the Board to conclude that height alone was not as decisive a variable as one might otherwise expect. The Board was not persuaded to intervene in the height approved by the City.

[102] A related argument was raised by Dr. Hedenquist, concerning shadow that would be cast on the HCD. However, the Board is satisfied with the professional shadow studies (Exhibit 2B, Tabs 15 and 16).

[103] The next question focused on the shape of the condo project. In development parlance, large multi-residential buildings are often categorized as “slabs” or “point towers”. Slabs are characterized by length, and rely for internal access on a central corridor, whereas point towers, characterized by height, have relatively little corridor space beyond each floor's elevator lobby. This project would be categorized as a slab.



Most of the debate about shape addressed the cumulative visual effect, when seen next to the new hotel on the UC site. The Board addresses that question in the next section.

[104] Aside from the question of shape, there is again the question of “materials and details”, i.e. fit. PPS policy 2.6.3 had said that “adjacent” to “protected heritage property”, development would be permitted only where it had been “demonstrated that the heritage attributes of the protected heritage property will be conserved.” Aside from the podium, the proposed appearance of the condo tower elicits the same Board concerns about compatibility of materials and character, between the condo site and the HCD, as the Board had for the UC site, and for the same reasons. The Board was not shown, for example, how a red tab on an upper-storey balcony was supposed to epitomize “sensitivity” to historic surroundings.

### **The Two Buildings in Tandem**

[105] Even where one or more highrises are permitted, massing remains an OP priority, as stated at policy 4.11.11:

The City will consider proposals submitted for highrise buildings in light of the following measures:

- a) How the scale, massing in height of the proposed development relates to adjoining buildings and the existing and planned context for the surrounding area in which it is located....

[106] The neighbours, with the support of Mr. Lazear, said the condo project, in tandem with the UC project, would create the visual impression of a large glass “wall” enclosing the HCD. This, they said, was inappropriate in terms of basic planning principle – particularly for an HCD. In the words of Mr. Lazear, “Notwithstanding all the nice features... it is still a tall building on the border of the HDC. Combined with the (UC) building, it creates a big wall over the entire block. It’s a curtain; it’s not a transition.”

[107] He added that the preparatory study “didn’t anticipate a wall effect.” The concern was that it would affect the experience of visitors to the HCD: “Pedestrians around the Market or on the (National Capital Commission) steps will see a wall.... It will look like one homogeneous wall.”

[108] The developer's planner denied the "wall effect"; she added that there was no public policy to prevent such an outcome anyway. First, she said the highrises circling the HCD would not "wall" the district, but rather "frame" it. This was "not a wall" compared to, say, Cooper Street. Furthermore, she said terracing at the top of the building would have a positive impact, because "variation in height helps break up a wall."

[109] Second, she cited the developer's consulting heritage expert, saying that although the City's planning documents might contain policies concerning sight lines *into* the HCD, there was no policy concerning sight lines looking out *from* the HCD. According to the cultural heritage impact statement commissioned by the developer,

There is no direct reference to the character of the area east of Dalhousie.... Outside of the "market core" it does not comment on building massing..... Whereas the zoning recommendations within the HCD study clearly support low-rise building massing, the heritage character statement includes no such commentary for the area outside of the market proper.

[110] The developer therefore concluded that no measures were necessary to "break up" that visual mass.

[111] The City's heritage planner took a different approach, but reached a similar conclusion. She said the question to ask was whether "the experience of the place impeded heritage value", and she concluded that this project did not. She did not challenge the "wall effect", but relied instead on the "excellence of design" argument: "It's a wall, but it's a well-designed wall...."

[112] The Board agrees with her interest in the "heritage experience", but does not agree with the conclusion that the wall effect was largely irrelevant. This is for two reasons.

[113] The first is visual. Although there was no dispute that the HCD's important vantage points were its gateways, and the vicinity of the Market Building, the exhibits demonstrated that at those key locations (particularly the steps), the field of vision would be largely occupied by the backdrop comprised of these two buildings. Visually, the "heritage experience" of the HCD proper could not be so easily segregated from the rest

of that panorama, including its backdrop. That backdrop is of an uninterrupted mass, a block long, with measurements akin to a football field flipped on its side. If that is not a "wall effect", then nothing is.

[114] The second reason, more importantly, is policy. Regardless of what the OP may say (or not say) about projects adjacent to heritage property, PPS policy 2.6.3 attaches unequivocal importance. That would not be so, if the visual relationship arising from that adjacency were irrelevant. The Board is therefore compelled to attach weight to it.

[115] The solution, according to Mr. Lazear, was for the façades facing toward Dalhousie Street have a visible split, so that they were "not seen as one mass", i.e. to "break up the monolithic impression." To use the language at the hearing, the proposition was that the overall development should be "more pointy and less slabby."

[116] That is a question on which the Board's power of direct intervention is limited. The rezoning By-law, which was before the Board, outlined exterior dimensions for the envelope as a whole; but if one wanted to insert an interior "split" for the condo project, and/or setbacks which accentuated the split between the condo project and the hotel, this could not be done via the zoning process, unless there were far more evidence about dimensions and details than were provided at the hearing.

[117] The preferable course, in the Board's view, is to refer that question to the Site Plan process and the Design Panel, where architectural questions rightfully belong. The Board has every expectation that they will be attentive to the governing policies and the principles of good planning.

### **Postscript**

[118] Some weeks after the hearing, the neighbours' agent, Mr. Aubin, requested that the Board consider pre-consultation notes (December, 2012) from the Design Panel, said to be negative to the proposal. These notes had allegedly been posted on the City's website. The City and developer opposed that request.

[119] Under the Board's *Rules of Practice and Procedure*, it is not customary to reopen the presentation of evidence, after the hearing is concluded, particularly when that evidence was available to the parties at all relevant times. The Board also has a

concern about relevance, since the Design Panel was not in a position – at *that* time – to work with a complete picture of the planning parameters, as compared to now.

## **CONCLUSION**

[120] In the appeals of these two By-laws, the Board has made a number of findings, summarized below:

1. The Board has no authority to intervene in the demolition of the existing UC building.
2. The Board will not rewrite statutory documents that are not under appeal.
3. The Board finds no inherent "contradiction" between "conservation" and "intensification." "Conservation" includes specific kinds of development for existing buildings; and "intensification" is not confined to redevelopment for new buildings.
4. The Board heard no evidence to support a different height for the hotel, at the UC site, than the height now proposed. The other aspects of the rezoning for that site were not disputed.
5. The Board was not shown how the proposed hotel design, at the UC site, had "materials and details" that bore any relationship to its HCD context, in accordance with the planning documents.
6. The Board approaches claims of "design excellence" with caution. Taste does not override established policy.
7. The height of the condo tower is anomalous – but not significantly more than what had already been planned for years. The Board will not intervene in the City's rezoning decision on that account.
8. The Board maintains the same concern about "materials and details" at the condo site as it had at the UC site.
9. The Board agrees in principle that the overall mass needs to be "broken up." The Board does not have enough detailed evidence with which to craft a specific zoning envelope for that purpose. The Board therefore transmits its statement of policy concern to the Site Plan and Design Panel process,

with the expectation that an appropriate solution can be devised in that forum.

**ORDER**

[121] The Board's Order is as follows:

- A. By-law 2013-110 is amended to reflect the modifications to height, at the UC site, in accordance with the "Replacement" to Tab 30 of Exhibit 2A, presented at the hearing. In all other respects, the appeal to By-law 2013-110 is dismissed.
- B. The appeal to By-law 2013-111 is dismissed.

[122] The Board presumes that its findings will be shared with the Design Panel and others involved in the forthcoming Site Plan process.

"M.C. Denhez"

M. C. DENHEZ  
MEMBER