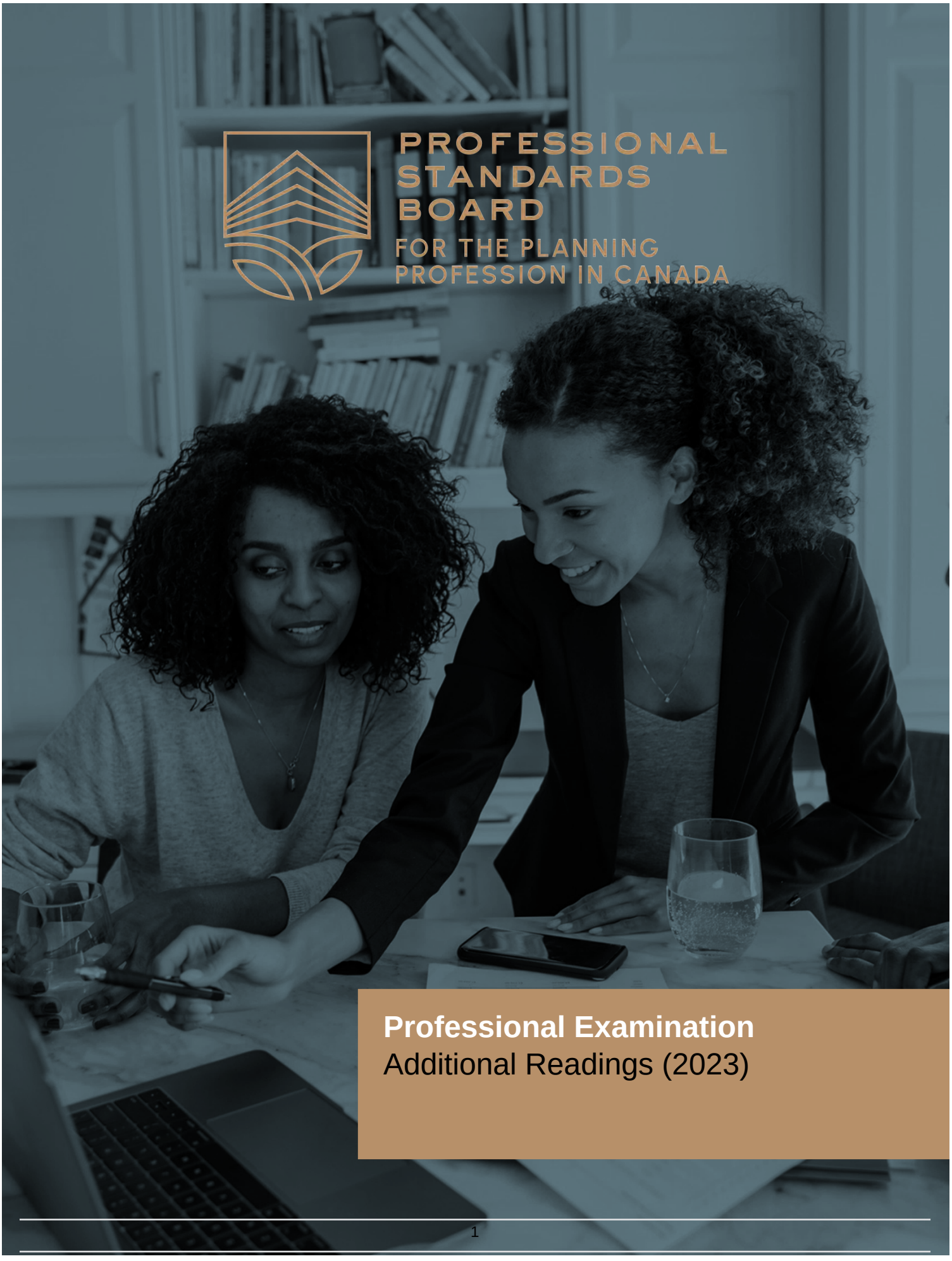
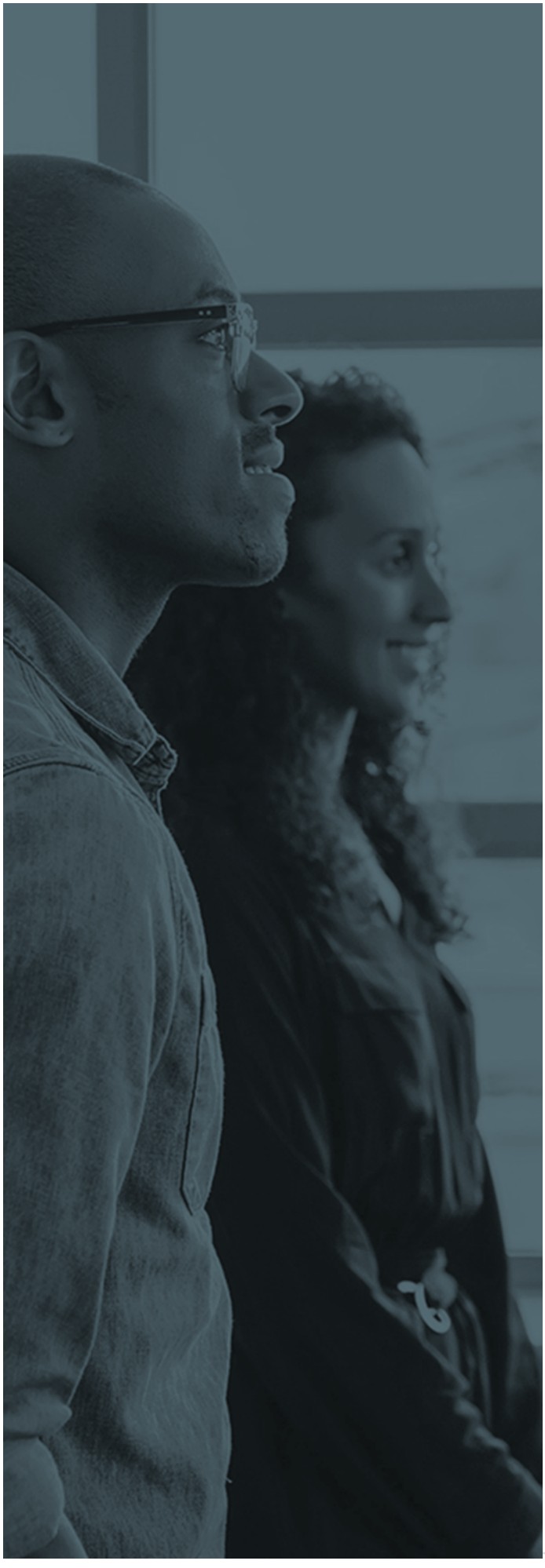



# Professional Examination

Additional Readings (2023)



# TABLE OF CONTENTS

1. Ethics

2. Public Interest

3. Professional Responsibility

4. Emerging Issues

Section 1

# Ethics

## ETHICS

The following additional readings in this theme, Ethics, will help you further develop your understanding of what it means to:

- Meet standards of competency and integrity
- Commit to education and learning over time
- Meet obligations to your client, the public, and employers
- Develop independent professional judgements and opinions
- Identify and avoid real or perceived conflicts of interest
- Practice within the Code of Professional Conduct

### Readings

1. Gifts and other inducements (Planning West 2017)
2. Dear Dilemma (OPPI)
3. Dear Dilemma (OPPI) Conflict of Interest
4. Brooks (2002) "The Critical Role of Values and Ethics", ch. 5 in *Planning Theory for Practitioners*
5. Schweitzer (2017) "Introduction: Planning Ethics in the 21st Century". Journal of the American Planning Association. 83(2)
6. Loh and Arroyo (2017) "Special Ethical Considerations for Planners in Private Practice" *Journal of the American Planning Association.* 83(2)
7. Lauria and Long (2017) "Planning Experience and Planners Ethics". *Journal of the American Planning Association.* 83(2)
8. Campbell and Marshall (1998) "Acting on Principle: Dilemmas in Planning Practice" *Planning Practice and Research*. 13(2)
9. Hickman and Sturzaker (2021) "Ethical principles in an increasingly diverse planning profession: the potential impact of different types of planners" *Town Planning Review*. 93(3)
10. Barrett (2001) "Introduction" in Everyday Ethics for Planners.
11. Shelby (2017) Ethics and RFPs. https://www.planning.org/blog/blogpost/9133127/

# PROFESSIONAL



# ETHICS*

by **John Steil**, FCIP, RPP
**Nancy Knight**, MCIP, RPP
and **Bill Buholzer**, FCIP, RPP

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

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

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

### Why are planners' ethics important?

One of the differences between members of professions on the one hand, and persons who work in trades and other types of employment on the other, is that members of professions are often governed in their work by codes of professional conduct that protect the public from incompetent or unethical professional practices. Canadian society is willing to allow baristas and house painters to ply their trades with the discipline that discourages poorly made cappuccinos and shoddy paint jobs being provided solely by market forces - there are other coffee bars to patronize, and other painting contractors. When it comes to professions whose members are able to do significant harm to the public or clients, like physicians and engineers, we have decided as a society that market forces aren't enough. Professional codes of conduct set a standard that protects the public from incompetence and ethical breaches. The existence, and enforcement, of the code of conduct also maintains the overall reputation of members of the

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**Inducements that could appear to affect planning advice (as distinct from those that actually affect planning advice, which we like to think are extremely rare) come in many guises, and may be highly nuanced.”**



profession and underpins public confidence in the quality and integrity of their work. While the harm that poorly trained or unethical planners can do to the public is not, at least in the short term, as serious as the harm that can result from the unethical or incompetent work of an engineer or emergency room physician, the positions that planners occupy in our provincial economy, including their role as decision-makers and professional advisors to government and private sector clients and the long-term social, economic and environmental consequences of planning decisions, warrant the creation and maintenance of a robust set of professional conduct standards enforced by the profession itself.

### What is the Code of Ethics and Professional Conduct?

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

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

### "It's not a conflict of interest if it doesn't actually affect my advice"

As noted, the Code requires planners to disclose possible conflicts of interest to their clients or employers. A conflict of interest is, generally speaking, a situation where a planner has a personal stake or interest in a matter in which they are also involved professionally. Such situations can be expected to arise from time to time - planners are, after all, usually citizens of the communities in which they work - and are not, in themselves, breaches of the Code. The Code does, however, impose a disclosure obligation; it requires planners to be alive to conflicts of interest when they ex-



ist or come into being, and to disclose them to the party (client or employer) who could initially be harmed if the planner continues to perform their work despite the conflict of interest. Identification and disclosure of the conflict are the first steps, and are the planner's responsibility. The client or employer can then decide whether to allow the planner to continue despite their conflict of interest, or to assign the task to another employee or consultant.

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

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

There is a good reason that the Code goes on to categorically prohibit the acceptance of a gift or other inducement that could, or could appear to, affect planning advice: it is because the acceptance of a gift inherently creates the possibility that planning advice will be seen to be compromised, and undermines public confidence in the objectivity of planning advice and in the planning profession generally. The Code does not allow professional conduct standards in relation to gifts to vary with the level of tolerance of clients and employers to this type of exchange; rather it sets an objective standard of intolerance, related to the primary objective of maintaining public confidence in the integrity of the profession. In our experience, some clients and employers of planners allow, under their own policies and codes of conduct, behaviour such as the acceptance of certain kinds of gifts that violates PIBC's Code, a circumstance that certainly complicates the application and enforcement of the Code.

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

We have just noted that the Code categorically rules out the offering and acceptance of inducements that could appear to influence planning advice. (Members should also be

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

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

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

In this regard, we note the information in the discipline report in Planning West that "there was no allegation or evidence of actual influence" with respect to the gift of tickets. A focus on "actual influence" doesn't address the aspect of the Code that deals with the appearance of influence, and even a not-especially-cynical member of the public of the local government involved might well consider that one of its planners could be influenced by the gift described in the report. In the same vein, the fact that the member had eventually paid for the tickets in question doesn't address the possibility that they could still be perceived as an inducement; we don't know whether the event in question was otherwise sold out,



whether the particular seats in question were available to the general public at any price, or whether a member of the public with a citizen's interest in one of the developer's projects might have been alarmed to see a member of the local government's planning staff sitting with the developer in those seats, regardless of who paid for them. Some government employers have addressed the business community's persistence in supplying gifts by insisting that they be donated to charity or (as in the case of a box of Christmas chocolates) simply shared with the public in the foyer of City Hall.

### An ethical minefield?

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

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DEAR DILEMMA

# Resolving complaints

## Dear Dilemma,

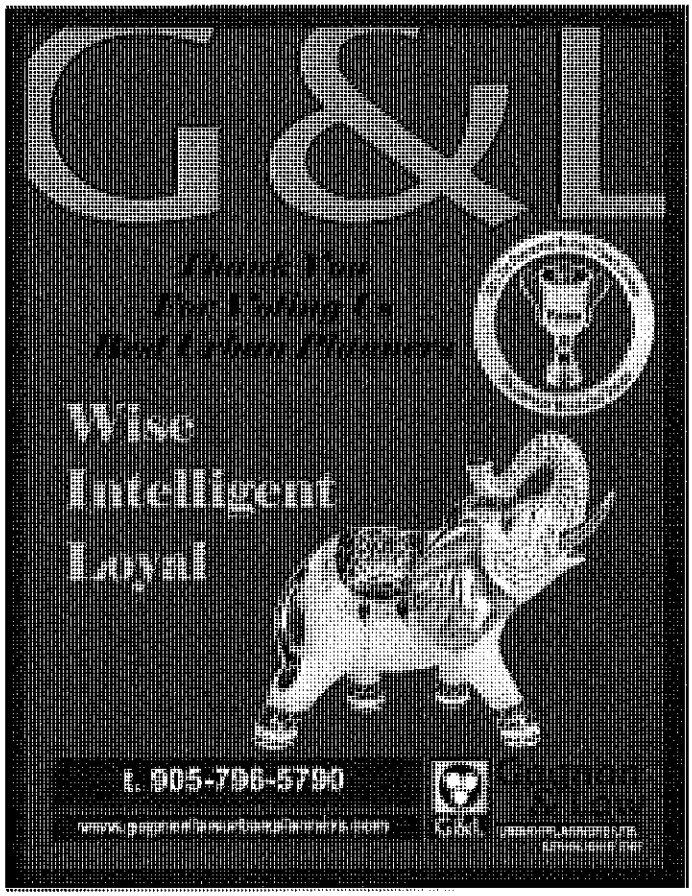
I am a practicing planner in a municipality in Ontario and a Full Member of OPPI.

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

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

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

*—Alleged Offender*




**Dear Alleged Offender,**

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

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

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

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

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

b) Take the complaint seriously.

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

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

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

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

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

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

*—Yours in the planning interest,*
*Dilemma*

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

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

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

Professional Practice

# The heart of the matter

## Dear Dilemma,

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

*—Interested in the Public Interest*

**Dear Interested,**

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

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

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

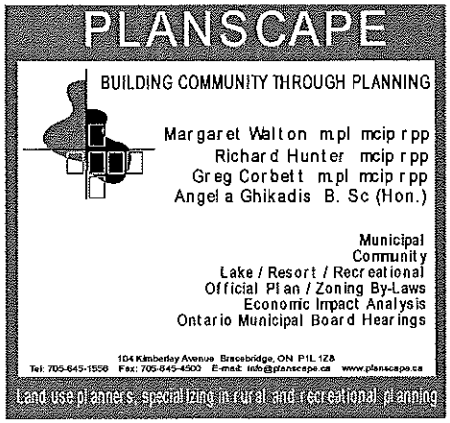
One of the most exciting parts of our profession is the dynamic nature of the public interest and the planner's role in defining it. Next time you are hearing opposing evidence at the OMB consider the evidence for yourself and determine where you think the public interest lies. It will be good practice.

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

*—Yours in the Public Interest,*
*Dilemma*

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



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

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

Clarification

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

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

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

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

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

*BB/EG*

Professional Practice

# Public interest takes precedent

## Dear Dilemma,

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

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

Sincerely,

*—Stuck Between a Rock and a Hard Place*

**Dear Stuck,**

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

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

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

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

Professional Practice

# In a quandary

## Dear Dilemma,

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

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

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

*—Searching Workopolis*

**Dear Searching,**

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

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

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

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

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

*—Yours in the public interest*

## Dear Dilemma,

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

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

Rumour has it that many councillors have close ties to the

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

*—Misinformed*

**Dear Misinformed,**

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

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

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

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

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

*—Yours in the Public Interest*

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



Online Mapping Tools

# Charting the course

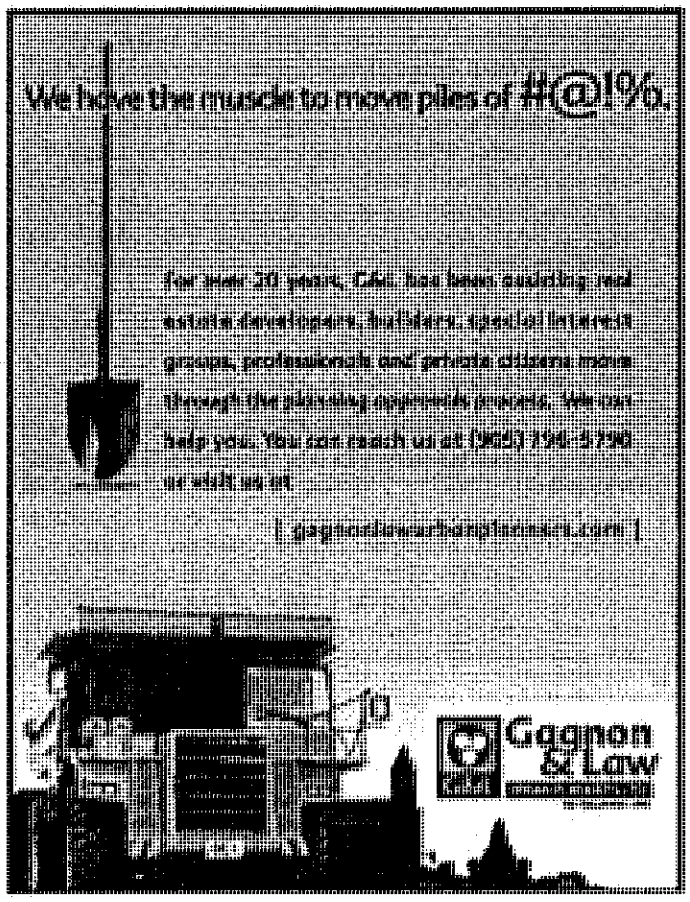
*By Robert Voigt, contributing editor*

The days of hand applied screen tones, inking, Mylar films, and digitizing tables for generating maps are a distant memory. Web-based services have created new ways to easily and inexpensively make, analyze and distribute maps. In fact the number of mapping-related tools available online is constantly increasing, and so is the amount of raw data available. These online tools are also of a quality that they can be informative, dynamic and novel; making them appealing for planners and the general public to effectively use for communication, analysis and workshops.



Robert Voigt

The public is no longer just the passive reader of mapped information, it is now active in producing maps of the things people find important. Some of these are for more personal



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

### Ask new questions

To have the potential for wide distribution through social networks videos need to be short and captivating. To maximize the likelihood of it being passed on to others, the viewer needs to feel connected with something that goes beyond just the quality of the information. To make sure this happens planners need to ask some new questions about what is being created: "Does the content cause an emotional reaction? Is the presentation particularly visually appealing? Is what is being presented being done so in a personable way that reduces perceived or expected barriers?" The infographic "How Videos Go Viral" on Mashable (http://on.mash.to/fafk2x) provides some insights into how one might create videos that can maximize their impact through social networks.

### You can get more than you pay for

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

It doesn't all have to be done on a shoestring budget though. Organizations that have the resources may still wish to invest them, such as this example from the City of Toronto: Living Up to It: Tall Buildings, Inviting Change in Downtown Toronto (http://bit.ly/f78EZc). This 7:38-minute video provides an overview of the Tall Buildings Downtown Project. Note that in terms of production value, this example is a Spielberg compared to your family camping videos.

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

*For a short course on making online videos go to http://bit.ly/wM70ao or http://scr.bi/y0XLwY.*

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

Professional Practice

# Under Pressure

## Dear Dilemma,

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

*—A Planner under Pressure*

### Dear Under Pressure,

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

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

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

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

While this hypothetical scenario is all too real in small

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

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

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

Yours in the public interest,

*—Dilemma*

## Dear Dilemma,

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

*—Uncertain*

**Dear Uncertain,**

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

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

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

Yours in the public interest,

*—Dilemma*

## A Clarification

### Dear Readers,

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

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

*—Dilemma*

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# Advising previous clients

## Dear Dilemma,

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

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

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

Your thoughts,

*—Trying To Wear Two Hats "With Trust"*

**Dear Two Hats,**

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

The core of this problem may be the common assumption that private sector planning consultants routinely advocate for an applicant's proposal rather than the public interest. Given your managerial position you may also be seen as having additional influence at the county level where planning decisions that affect your private clients may be made. Suspicion is to be expected and the last thing you want is to be painted with the lack of integrity and honesty brush.

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

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

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

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

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

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

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

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

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

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

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

Yours in the public interest,

*—Dilemma*

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# Dear Dilemma,

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

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

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

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

*—Confused Member*

## Dear Confused Member,

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

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

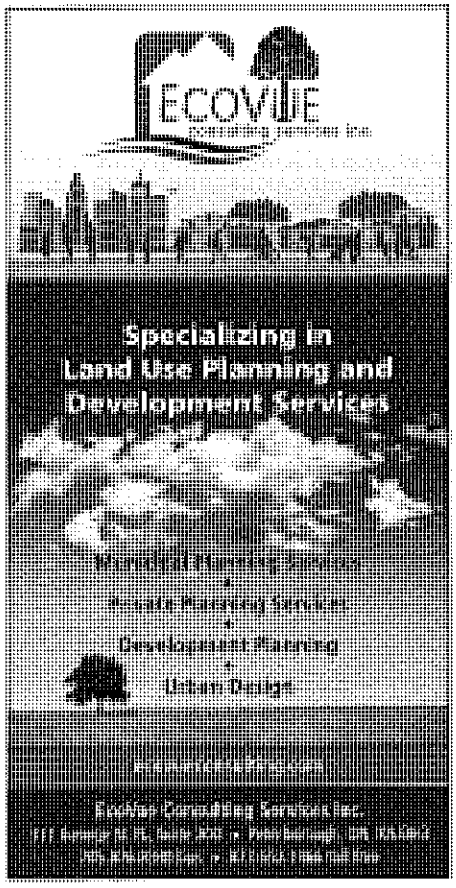
Being a member of Citizens Saving Trees and working on a project that the group has a strong opinion about creates a conflict of interest for you. The *Professional Code of Practice* states that a Member shall "ensure full disclosure to a client or employer of a possible conflict of interest arising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

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

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

Yours in the planning interest,

*—Dilemma*




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

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

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

*Ian Flett is a 4th year associate lawyer at Eric K. Gillespie Professional Corporation. Eric and the other lawyers at his Toronto-based firm practice primarily in the environmental and land use planning area. Readers with suggestions for future articles or who wish to contribute their comments are encouraged to contact Eric at anytime. He can be reached at egillespie@gillespielaw.ca.*

Footnotes

1 [2011] O.E.R.T.D. No. 29 at para. 758

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

DEAR DILEMMA

# Fairness and consideration

## Dear Dilemma,

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

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

I believe that Planner X has not provided the information that I require to determine whether the provincial planning policy is met. That is, contrary to *section 1.2* of the *OPPI Professional Code of Practice*, he did not "provide full, clear and accurate information on planning matters to decision makers and members of the public."

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I also believe that by writing as he did, he has questioned my professional integrity in the eyes of the municipality. Again, contrary to *sections 3.9* and *3.10* of the code, he did not act toward me, a fellow member, "in a spirit of fairness and consideration" and did not "when evaluating the work of another Member, show objectivity and fairness and avoid ill-considered or uninformed criticism of the competence, conduct or advice of the Member."

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

Thanks very much.

*—Wondering*

**Dear Wondering,**

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

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

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

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

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

Yours in the public interest,

*—Dilemma*



# Taking planning to new heights

*By Robert Voigt, contributing editor*

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



Robert Voigt

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

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

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

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September 01, 2021

# DEAR DILEMMA - CONFLICT OF INTEREST



*Dear Dilemma,*

*I hear my colleagues talking about "conflicts of interest" as if they are things that only come up occasionally. But I see them popping up all the time, on every single file! Am I missing something?*

*Signed,*
*Conflicted about Conflict*

Dear Conflicted,

You are not conflicted, but your question does allow me to clarify a common misconception.

It is true that on any planning matter there will be lots of conflict: developers vs. neighbours, activists vs. politicians, private-side planners vs. municipal planners, architects and engineers vs. building code officers, and of course lawyers vs. each other (and everybody else). These are unavoidable, predictable, publicly visible conflicts – conflicts BETWEEN legitimate interests. For instance, the developer's interest in maximizing profit on the parcel of land, vs. the neighbours' interest in minimizing disruption to their lives. Resolving (or at least compromising) all of these conflicts should lead to the best possible outcome in the public interest.

There is a big difference with a conflict OF interest. Imagine a planner who is allowed to give a professional opinion or recommendation on a development proposal… where the planner is going to share in the profits of whatever development is ultimately approved. The planner, as a professional, has an interest (indeed an obligation under the Code) to maximize the public interest; but the planner, as a citizen with a bank account, also has an interest in maximizing what is built and how profitable it is, since he is going to share in those profits.

So in this situation, the planner is in a conflict of interest. And unlike the other more obvious conflicts we mentioned, this one could have been easily avoided, and may be unknown to the public (or to the committee of adjustments or other decision-makers), if no one knows about the planner's profit-sharing arrangement. If or when this conflict becomes known to the public, they will wonder – did the planner sacrifice the obligation to maximize the public good, to the temptation to maximize their own benefit?

Even a planner who sincerely tries to put the public interest above personal profit will never know for sure whether they succeeded, or whether their professional advice was subconsciously nudged towards the more profitable recommendation because of their own financial interest. And suspicious members of the public who opposed that outcome will probably never believe that the planner succeeded in being fair.

This sort of uncertainty and scepticism could undermine the public's trust in the land planning system. More within the jurisdiction and concern of OPPI, it would also undermine and corrode the public's trust in the objectivity and trustworthiness of planners and their independent professional opinions.

That is why a true "conflict of interest" (as opposed to the many run-of-the-mill conflicts or disagreements) must be avoided at all costs. Members must err on the side of caution in avoiding these situations, because even if the conflict of interest is "only" apparent or potential, it is so dangerous to the important work that the planner and the profession does.

CHAPTER

# 5

# The Critical Role of Values and Ethics

## VALUES

For the purposes of this discussion, values can be defined quite simply as the principles or standards that are important to us and that therefore help shape our opinions, decisions, and actions. In one sense our values are intensely personal, reflecting our belief systems (which are often—but not always—embodied in religious or philosophical stances). Values also shape our attitudes toward the people, organizations, and institutions with which we interact; our political orientations, for example, are expressions of our value systems. Indeed, values have significant effects on many aspects of our lives, including the performance of our professional roles.

It was generally assumed, during the profession's early years, that planners should be value neutral. This assumption has yielded, however, to the realities of contemporary practice. Most planners recognize that values underlie virtually everything they do under the aegis of planning. Few select a career in urban planning based on expectations of fame, a high salary, or a soft workload; more often, the decision reflects a desire to play a part in "improving our communities" or "making the world a better place for future generations." On the job, virtually every decision a planner makes must take into account the values involved in the situation—his or her own, as well as those of numerous others.

Planners spend a great deal of time analyzing things; shouldn't this part of their role, at least, be free of the influence of values?

Easier said than done. The very selection of a topic to be analyzed often reflects values, as does the selection of a methodology. Shall we rely more heavily, in making our recommendations regarding a particular neighborhood improvement, on a careful cost-benefit analysis of the major options, or on a canvass of residents' views? If the latter, shall we rely on neighborhood meetings, undertake surveys, conduct focus groups, or employ some other method? All these choices involve values. Moreover, the value biases that the planner brings to the analysis—based on social class, education, political philosophy, and other personal characteristics—will likely play a role, no matter how hard he or she tries to keep them in check. The "facts" generated by research are often subject to diverse interpretations. Indeed, the line between value and fact is frequently rather thin where planning issues are concerned.

Are there universal planning values to which all planners can subscribe, and that can therefore guide them in their work? Israel Stollman suggested such a list in 1979; it included health, conservation of resources, efficiency, beauty, equity, pluralism, individuality, democratic participation, democratic responsibility, and rational management.[1] The list is a good one, but hardly free of problems (as Stollman himself noted). These values are held differentially—that is, in different combinations and with differing interpretations and levels of priority—by different individuals and groups; in practice, such values often end up in conflict with one another. As noted earlier, values are intensely personal, so whose—in a given situation—should prevail? The planner's? Those of elected officials? Those of the planner's client? And if the client, who *is* the client?

By way of illustrating the difficulties inherent in attempting to develop a list of universal planning values, one of my favorite teaching exercises is to ask my students to identify buildings in the local community that they consider beautiful. A lively argument generally ensues, since one person's architectural masterpiece is another's eyesore. Similar arguments can be instigated around the concepts of efficiency (at what point do admirably detail-oriented bureaucrats become "bean counters"?), equity (are we talking about equality of opportunity or of results?), and virtually every other item on Stollman's list.

In a more recent (1993) article, John Friedmann listed his own professional values, which he described as being "grounded in a humanist vision":

> In the late twentieth century, the following values seem to compel serious consideration: the ideals of inclusive democracy; giving voice to the disempowered; integrating disempowered groups into the mainstream of economic and social life while preserving cultural diversity; privileging qualitative over quantitative growth, including the notion of sustainability; gender equality; and respect for the natural world.[2]

This too is a good list, reflecting fewer obvious internal conflicts and manifesting greater harmony with postmodern planning sensibilities. But this list would hardly enjoy the full and enthusiastic endorsement of all those in the planner's work orbit, nor would consensus exist—even among planners—on procedures for acting on these values. Friedmann's intention, of course, was clear; he was stating his own values and urging others to consider them as well, but he was not so foolhardy as to endow them with official status for the profession.

Making a list of one's professional values is not a bad thing to do; indeed, I would encourage every planner to do so. Each such list, however, will be a reflection of the professional values of its author rather than a recitation of acquired professional doctrine; hence few such lists will look exactly alike.

Lists aside, are there any fundamental values that can be said to form the normative foundation of public planning? Back in the days when planning was generally viewed as an exercise in rational decision-making (before, say, the 1970s), theorists were inclined to see planning as a manifestation of utilitarianism, a body of theory originally developed by Jeremy Bentham, an eighteenth-century English philosopher. As described by Thomas Harper and Stanley Stein, utilitarian theory judges the best course of action to be "one that maximizes the sum total of whatever is intrinsically good—usually happiness or well-being."[3] The utilitarian view would suggest, then, that the planner's role is to produce the greatest good for the greatest number—a notion that is easily equated with the concept of the public interest and is readily served by cost-benefit analysis and other techniques aimed at maximizing positive outcomes.[4] An example of utilitarian theory in practice, offered by Harper and Stein, is "the justification of a new rapid transit line as having benefits (which go to many more people—that is, the commuters) exceeding costs (such as the harm to nearby and displaced residents, who are relatively few in number)."[5]

Today utilitarianism has, for the most part, been rejected by planning theorists. Its fatal flaw, as a fundamental value for public planning, is that it focuses on maximizing the sum total of a particular good at the societal (or community) level but pays no attention to individual shares of that good; in other words, it ignores the manner in which the benefits produced by planning are to be distributed—and in fact provides a basis for using the public interest as an excuse for actions that may do great harm to some individuals.[6]

Harper and Stein have suggested an alternative value system, described by them as classical liberalism but more commonly referred to today as libertarianism. Its basic focus is on "the free, equal, and autonomous individual person as the basic unit of society."[7] Specific principles include individual liberty, tolerance for differing conceptions of the good life, impartial application of the law, and restriction of the "coercive powers" of government, which should instead focus primarily on the protection of liberty.[8] Clearly, public planning would be a comparatively modest enterprise under a libertarian value system.

At the other extreme, stressing pluralistic rather than individualistic values, is communitarianism, a philosophy recently espoused by Amitai Etzioni and others.[9] Reacting in part to the alleged "me-first" spirit of the 1980s, communitarians argue that our overemphasis on individual rights has resulted in the loss of important community rights. This balance, they say, should be restored. An example: police roadblocks to check for drugs and illegal firearms may be inconvenient to the innocent, but their benefits to the community outweigh the inconvenience.

Yet another value system, developed by John Rawls, emphasizes justice as the primary criterion to be employed in public decision-making.[10] Instead of attempting to provide the greatest good for the greatest number, Rawls would have us provide the greatest benefits to the least advantaged. Under this value system, planning would focus on fairness and equity, striving to ensure that all residents of the community have equal access to the benefits of planning. (Norman Krumholz's style of planning in Cleveland, described in Chapter 8, reflected Rawls's value system.) Still other authors have attempted to develop value systems based on specific sets of issues—for example, building on concern for the environment to create an environmental ethic upon which a broad range of decisions might be based,[11] or building on the roles and life experiences of women in a capitalist society.[12]

Values are staples of planning theory, of course, and most of the work being done by contemporary planning theorists is intensely value based. Those committed, for example, to a "progressive" political ideology—and a significant number of theorists over the past quarter-century have been so committed—have not been shy in urging readers to adopt their perspectives.[13] As Nigel Taylor notes, a key value-based issue for planning theorists has been whether planners should

> engage in practices which involve working pragmatically with the market and compromising certain planning ideals to achieve at least something on the ground. One's view about this depends on one's political ethics and ideology. For those ideologically committed to Marxism, working "with" capitalist developers is exactly what planners should not do. For according to Marxist ideology, the aim is to replace capitalism, not perpetuate it by striking deals which further the interests of capitalist developers. Political liberals take a more positive view of the market system, and therefore also of a style of planning which works with the market.[14]

Do any of the value systems cited thus far provide a universally agreed upon foundation for the practice of planning? The answer is clearly no. Different planners subscribe to different sets of values, and what is important to one may be of no concern whatsoever to another. Moreover, our values are subject to change over time, reflecting—among other causes—changes in our life circumstances. For that matter, value systems are themselves highly fluid; this year's philosophical fad may not be in vogue next year. (Stollman's list of values, published in 1979, seems somewhat dated today; Friedmann's 1993 list is more au courant—but will it still be so by, say, 2015?)

I have argued that values are critically important to the practice of planning; indeed, values permeate every professional issue that the planner is apt to confront. The fact that an issue is being investigated systematically, with sophisticated methods of data collection and analysis, does not free it from this generalization. As Taylor notes, "the idea that something like cost-benefit analysis...can provide an uncontroversially right 'answer' is seriously misleading, for the problem of deciding which alternative is *preferable* remains. This problem is not 'solved' by means of a statistical calculation, for the act of choosing the preferable option still remains a matter of *value*."[15]

I have also concluded, however, that despite the socialization that occurs during the course of a planner's professional education and practice, there are no universal value systems to which all planners subscribe. Each of us might wish that his or her own values were dominant in the planning profession; indeed, countless books and articles have been published in efforts to persuade others that a particular set of values is the "right" one for planners. It is certainly reasonable to assume that values reflecting a concern for the well-being of the community, or for some segment thereof, are much more relevant to planning than are values related to one's personal well-being. In the final analysis, however, we planners acknowledge no central authority regarding the values we should hold; our values remain our own, and a measure of diversity continues to prevail in this regard. So where does this leave us?

Values themselves are inherently passive—abstract principles or standards that become concrete only when applied. Thinking about the application of values leads, in turn, to a consideration of planning ethics, which I view as the action component of planning values.

## ETHICS

In the early 1980s, while serving as dean of the design school at a large midwestern university, I made a fund-raising trip to several cities in the Southwest. In each city I met with groups of alumni, brought them up to date on events and changes at the school, and encouraged them to support the school financially. Particularly fruitful, in this regard, was a luncheon meeting with an alumnus who had recently experienced considerable financial success. The former planning director for his city, he had correctly anticipated the coming boom in downtown real estate values and had resigned his public position to form a development partnership with several private sector colleagues. Much land was acquired at the most propitious time, and much money had been made. At the end of our meeting he told me, somewhat apologetically, that his other charitable commitments required him to restrict his gift to only $50,000 for now—but that he would try to do better in later years. Since most of the donations received on the trip had been of the $50 and $100 variety, I was understandably ecstatic, and returned to the school feeling that the trip had been a major success.

Shortly after this particular pledge became public, however, a delegation of students visited my office to request that I refuse the $50,000 donation. The students' position was that since the individual in question had made his money on the basis of information he had acquired during his service as the city's planning director—which, in their view, was ethically questionable—then it would be unethical to accept the money.

I promised to consider their position, and did so. (I will not embarrass myself by specifying the length of time during which I considered it.) Ultimately, I informed the students that I had decided to retain the gift for the school. Clearly, the alumnus had vacated his public position before making the investments that proved so profitable, and he had waited an appropriate period of time before interacting with his former department. Had he attempted to profit from his inside knowledge while on the public payroll, he most certainly would have been engaging in behavior that was unethical—and illegal as well. But this had not been the case, and I concluded that no ethical principles had been violated in this situation.

I describe this case simply to introduce the concept of an ethical dilemma. All of us face such dilemmas constantly, in both our private and our professional capacities. We know that we are facing an ethical dilemma when we ask ourselves, "What is the right thing to do here?" Ethical dilemmas typically force us to reflect upon our values and how they should be applied to the situation at hand.

In planning, I find it useful to distinguish between "micro" and "macro" ethical issues; the former pertain to individual professional behavior, while the latter involve the collective behavior of the profession as a whole.

National planning organizations have generally served as the definers and enforcers of ethical practice; today this function is the responsibility of the American Institute of Certified Planners (AICP), whose code of ethics will be discussed later in this chapter. Historically, the formal enactment of this role has focused primarily on micro ethical issues. In the 1960s and 1970s, when the American Institute of Planners (a forerunner of the AICP) concerned itself with enforcing ethical standards, the situations in question were likely to involve conflict of interest, or the unethical use of inside information, or even the violation of the principle that planning consultants who are bidding on contracts should never bad-mouth their competitors.

Today, more attention is being paid—at least in the planning literature—to macro ethical issues. Public planning entails decisions regarding the nature, distribution, and timing of a variety of potential benefits; needless to say, these decisions are quivering masses of ethical dilemmas. It is not surprising, then, that ethical complaints are voiced from time to time regarding planning departments that seem to be doing the bidding of corrupt political administrations, or seem too cozy with developers, or overlook the negative impacts of specific projects on low-income neighborhoods, or remain silent in the face of discriminatory or exclusionary policies, or appear too willing to alter their research findings and projections to comply with the biases of elected officials. The issues underlying these sorts of charges are never simple, of course; strong political forces may be at work, involving numerous players, and the stakes are typically high. Nevertheless, such charges pose genuine ethical problems for the planning profession, and we do not always cover ourselves with honor on such matters.

Other observers have charged that too many planners are living out stable and secure careers as bureaucrats, rather than serving as advocates for equity, social justice, environmental quality, and other important principles. Peter Marcuse, for example, has asserted that planning ethics as currently practiced are "system-maintaining" rather than "system-challenging." He believes that planners' professional ethics tend to reinforce established power relationships, and that we have shied away from perspectives that might yield entirely different sets of ethics.[16]

A widely discussed concept in the realm of popular philosophy in decades past was that of situational ethics. This concept is based on the proposition that few ethical principles are applicable to all situations, and that the context of an action helps to shape its ethical content. Thus what is unethical in one situation may be quite ethical in another. (Lying to an accident victim who is clearly dying, killing an armed intruder who is threatening one's family—these and similar situations are typically offered as examples.)

I suggest that planners, too, often encounter decisions involving situational ethics. Years ago, the planning director of a well-to-do Philadelphia suburb was ordered to draft a revised zoning ordinance for his county, the intention being to increase significantly the lot-size requirements for new development. The objective was clearly exclusionary. Rather than comply with this order, he

resigned his position. His principled stand received much applause in planning circles, and he was soon in a position to choose from several attractive job offers. It is important to note, however, that this event occurred at a time when federal funds for planning were abundant. *Jobs in Planning*, distributed monthly at that time by the American Society of Planning Officials, was a thick "dreambook," regularly listing hundreds of available positions throughout the nation. Today's situation, of course, is quite different; staffs tend to be smaller, openings are not as abundant, and the job market as a whole is less fluid than it was in the 1970s. As a result, planners have less mobility—and more anxiety about hanging on to the positions that they have. This circumstance inevitably renders planners more cautious about making waves. I might consider resigning as a matter of principle over a particular issue—but can I be certain that I will immediately be picked up elsewhere, and by a community in which I would want to live? Can my family afford to go a few months with little or no income? Such questions do give one pause, and greater caution may result. I raise this point not to apologize for ethical lapses in planning behavior but simply to suggest that the ethical climate is indeed influenced by situational factors—and that one of these factors is the current vitality of the job market. Tight job markets undoubtedly pose special challenges to the realm of planning ethics.

## A Typology of Ethical Dilemmas in Planning Practice

Much has been written about the ethical dilemmas planners face in the course of their professional practice.[17] Most of these dilemmas, I believe, involve one or more of the following five kinds of issues:

*(1) Loyalty to one's employer versus loyalty to a broader principle or group.* The planning director who resigned his job rather than produce the exclusionary zoning revisions requested by his superiors resolved his dilemma in favor of his principles. I suspect, however, that virtually every reader of this book can think of examples to the contrary—that is, situations in which planners sacrificed their principles in order to do the bidding of their superiors (whether the planning director, city manager, or elected officials). Indeed, many readers will have personal experience of this sort; sometimes there appears to be no other option, consistent with retaining one's job. Because acting contrary to their values on a

regular basis can be devastating to their personal and professional self-respect, however, many planners have defined a "resigning point," an ethical limit beyond which they are unwilling to go. This can be, in fact, a significant element in one's professional value system.

*(2) The control and release of information.* When, if ever, is it ethically permissible to leak confidential information? A planner might feel no temptation whatsoever to leak information—about, say, a planned entertainment complex—to developers who could benefit financially from that information, but would a planner be equally reluctant to share information with an environmental advocacy group that wishes to prevent the potentially damaging complex from being built? An African American planner learns of impending plans to clear part of a predominantly black neighborhood to allow for the expansion of a local university; is that planner justified in blowing the whistle so that the neighborhood can begin to organize in opposition to the plan? Clearly, the "loyalty to employer" principle would preclude leaking information in either case, but temptations nevertheless occur—temptations that originate with the planner's commitment to other values and principles.

*(3) The accuracy and integrity of information.* Martin Wachs has written about the difficulties planners encounter when they are asked to fudge or cook the numbers, in studies they have conducted, in order to place the city (and its officials) in a more favorable light.[18] His examples include publicizing the positive reactions to a proposed development while keeping the negative reactions under wraps; reworking the assumptions in quantitative models to produce the results that superiors or clients desire; and making overly optimistic projections of population or economic development.[19] Equally troubling are situations in which findings from a study in one locality are applied to another, or where clearly out-of-date data are presented as an accurate description of current circumstances (do 1990 census data accurately portray a city's housing problems in 1999?).[20]

A sizable body of planning theory focuses on the accuracy and integrity of planning communications; this literature will be examined in Chapter 9. For now it suffices to note that planners have significant ethical responsibilities regarding the accuracy and integrity of the information that they generate, analyze, and communicate to others.

*(4) Conflict between what one deems right and what will sell.* Planners often analyze alternatives (potential actions, developments, locations, magnitudes, timing, and so on) only to learn that those they deem best are not those that receive public or political support. Sometimes, in fact, the most popular "solutions" to a problem are those that the planner knows will render the situation worse.

A major industry wants to locate on a waterfront site in your county; you know that the site is entirely wrong, that environmental problems are sure to arise, that the subsidies promised the firm are out of line with reasonable expectations for increases in tax revenues, and that most of the jobs created by the development will go to outsiders. Your efforts to convince others on these points fall on deaf ears; local elected officials want to land this firm at virtually any cost. What do you do? Should your report to the planning board communicate what you really think, or is it safer to tell the board members what you know they want to hear? Again, one must consult one's values and ethics.

*(5) Shortcuts.* The results of a study done on the run—using shaky data because they were all one could find, ignoring particular sources or methods because they would have consumed more time or funds than one wanted to spend, drawing conclusions that are not really supported by the data at hand—may vary radically from those yielded by a more competent study. Shortchanging the citizen participation process—treating it as a troublesome requirement that must be carried out rather than as an opportunity to strengthen the legitimacy of a particular decision—can backfire in a number of unpleasant ways. Any situation in which a planner is tempted to take shortcuts—that is, to give something less than his or her best—is one that raises ethical issues.

The accompanying sidebar is an exercise that I have used in the classroom on several occasions. It stacks the deck, to be sure, but it does illustrate several of the types of ethical dilemmas I have described. The reader may find it useful to reflect on this case and determine how she or he would respond to the questions asked at the end.

### The AICP Code of Ethics and Professional Conduct

As noted earlier, national organizations often assume responsibility for the development and enforcement of standards of professional ethics. For planners, this role is played by the AICP, whose Code of

## An Ethical Dilemma

You are the planning director for Pleasantville, Virginia, a city of 70,000. You report directly to the city manager, who considers economic development to be her highest priority. She has succeeded in convincing a New England chemical firm to relocate its manufacturing facility to your community, and the firm has identified a riverside site (currently zoned for low-density residential use) as its only acceptable location. "If we can't have that site, we'll go to a community that places a higher value on economic progress," the firm's president has threatened. (Ironically, you yourself live in Happiness Estates, a neighborhood that begins only three blocks from the site.)

On the one hand, it is estimated that the facility will create two hundred new jobs for the community, and this employment increase is universally applauded. On the other hand, the firm's poor environmental record is a source of serious concern to you, especially since the river that flows through your community passes through several other populated areas on its way to the Chesapeake Bay. Given the obvious economic benefits of the firm's relocation, however, few city leaders seem concerned about the possibility of environmental problems.

When you express your concerns to the city manager, she responds angrily. "Bringing in this firm serves the public interest in our community," she asserts, "and I want you to do everything in your power—rezoning, tax incentives, any other legal means—to ensure that the deal goes through. Make it happen."

Meanwhile, the Happiness Estates Neighborhood Association, representing the area in which you live, has announced an evening meeting for the purpose of developing a strategy for opposing the proposed site. Most people in the neighborhood welcome the jobs that the firm would create, but they don't want the plant located so close to their own homes; their greatest concern is that the proximity of the chemical plant will damage property values. The president of the neighborhood association has invited you to attend the meeting as a "resource person," and has asked you to bring along any information you might have regarding the firm, its environmental track record in other locations, the details of what it wants to do on the riverside site, and the potential risks that it presents to the neighborhood.

What are the major issues that you must consider in deciding how to respond to this invitation—that is, in deciding whether or not to attend the meeting? What decisions would you make on these issues, and why?

Ethics and Professional Conduct was first adopted in 1978 and was last amended in 1991. The intent of the code is to provide planners with an ethical compass to guide them through the difficulties they may encounter in the course of their practice. It performs this task well in some regards—and not so well in others.

In my view, there are two problems. The first, and most serious, is the code's reliance on a concept that—as we have seen—has little concrete utility in practice. "A planner's primary obligation," says the code, "is to serve the public interest. While the definition of the public interest is formulated through continuous debate, a planner owes allegiance to a conscientiously attained concept of the public interest."[21] As Taylor has noted, there is a tendency to speak of the public as though it were "an undifferentiated group. This is, of course, far from the truth; the public of any modern society is composed of all sorts of different groups, with differing and sometimes incompatible interests."[22] Which of these publics, then, is the planner to serve? To assert, moreover, that "the definition of the public interest is formulated through continuous debate" raises an interesting philosophical conundrum: if that debate is expected to reach an end state—yielding a truly workable definition—shouldn't we wait until we have it before attempting to operate under its terms? If, on the other hand, the debate is expected to remain forever "continuous," how can the planner be expected to serve such a fluid and undefined principle? The statement that "the planner owes allegiance to a conscientiously attained concept of the public interest" implies that the definition will vary from individual to individual (which is, of course, an accurate observation); but how will the AICP know, in any particular case, whether the public interest has indeed been served? In short, this aspect of the code is both internally contradictory and unenforceable.

In fairness, it must be noted that the statement about the public interest is followed by a list of seven "special obligations" of planners, dealing with attention to long-range consequences, the interrelatedness of decisions, the provision of clear and accurate information, opportunities for meaningful citizen participation, the expansion of choice and opportunity for all persons (with emphasis on the "responsibility to plan for the needs of disadvantaged groups and persons"), the integrity of the natural environment, and excellence in environmental design and conservation. Each of these items does suggest a useful ethic for planners, albeit at a highly general level. These special obligations stand on their own,

however; they do not collectively add up to the public interest, nor do they need to be subsumed under a definition of the public interest in order to be meaningful.

The second major item in the code states that the planner "owes diligent, creative, independent and competent performance of work in pursuit of the client's or employer's interest. Such performance should be consistent with the planner's faithful service to the public interest." Here we encounter an internal contradiction. What if the client's and the employer's interests are in conflict (which is, I suspect, often the case)? To be sure, the code says "client's *or* employer's" rather than *and*, so perhaps it is acceptable to make a choice. Does this mean, however, that it is quite all right to violate the interests of a client as long as the employer's interests are being served? I doubt that was the intent. The "faithful service to the public interest" clause also presents difficulties. If we don't know what the public interest is, how can we serve it faithfully? If my personal conception of the public interest happens to conflict with that held by my client, my employer, or both, am I justified in ignoring their interests?

Once again, the major principle is followed by a list of ethical do's and don'ts, most of which (except for those that continue to ignore the possibility of client-employer conflict) are situation-specific and thus potentially useful. The other two major headings, the first of which deals with the planner's responsibility to the profession and to colleagues, the second with the importance of "high standards of professional integrity, proficiency and knowledge," both supported with useful lists of specifics, are essentially unarguable as well.[23]

In the final analysis, the code is a mixed bag. On the one hand, it does provide several useful definitions of ethical versus unethical conduct under specific circumstances. On the other hand, it leaves some of the profession's major conceptual difficulties unresolved—and may, in fact, confuse the issue by introducing the internal contradictions noted earlier. It is unfortunate, moreover, that the code relies so heavily on the concept of the public interest, for which it is unable—not surprisingly—to provide a workable definition.

## CONCLUSIONS

Our lives as planners might well be less stressful if we possessed a set of rules of ethical conduct telling us how to behave in every

situation; this would relieve us of the need to ponder our ethical dilemmas and to make difficult choices. No such set of rules exists, however. The AICP code offers some useful directions on specific points but does not provide an overall system of planning ethics that is well defined and internally consistent, and therefore applicable across a broad range of situations. No other individual or organization, moreover, possesses the requisite authority for articulating such a system, so planners have nowhere else to turn for this purpose.

Does this leave the planning profession in an ethically untenable position? I don't think so. I question, in fact, whether we would be well served by a uniform, overarching statement of professional values and ethics, one with which all planners would be compelled to comply in order to continue practicing. As Arthur Bassin has observed, planners are as free as others "to choose their own politics and personal commitments and to act upon these in a manner befitting responsible citizens of a democracy."[24] We have no party line—a situation that I do not consider unfortunate.

What the absence of such an overarching statement means, however, is that the most important processes involving values and ethics are ultimately internal to each individual planner. As professionals, then, each of us should be engaged in a never-ending quest for ethical behavior based on the values of greatest importance to us. Noting the unlikelihood that we could ever succeed in formulating a "single, general ethical theory of planning practice," Richard Bolan has nevertheless stressed the sense of morality that must underlie planning practice.

> As moralist, the practitioner is continually pushed to make ethical judgments and decisions in a social field that is characterized by a thicket of conflicting claims and pulls, some clearly apparent while others are ambiguous, covert, hidden or unspoken. The practitioner's role of moralist, then, is actually the more prominent in terms of professional creativity and imagination as distinct from the scientific, "puzzle-solving" role. The true task of the professional is not to display cleverness and intellectual dexterity but, rather, to create a new sense of value. Thus, the true challenge for every practitioner is to become a creative moralist.[25]

Neither I, nor any of the others who write about planning, nor your employer or elected officials, nor the AICP, nor any other person or institution of significance in your life can provide you with a

definitive and universal set of ethics that will cover all situations. Self-awareness, introspection, sensitivity to the value nuances of practice—these are major virtues that every planner should possess. Each planner should be sensitive to the ethical dimensions of his or her work, and should be able to recognize an ethical dilemma when it appears. Above all, each planner should formulate an individual and highly personal conception of what constitutes ethical professional behavior, based on his or her own value system. With such a conception, planning is a distinguished and noble profession; without it, planning is simply...a job. Indeed, the bedrock of public planning is made up of the values and ethics of those who practice it. The profession's foundation is only as solid as the body of values on which it is based.

## NOTES

**1.** Israel Stollman, "The Values of the City Planner," in *The Practice of Local Government Planning*, ed. Frank S. So, Israel Stollman, and Frank Beal (Washington, D.C.: International City Management Association, 1979), pp. 8–14.

**2.** John Friedmann, "Toward a Non-Euclidian Mode of Planning," *Journal of the American Planning Association*, Vol. 59, No. 4 (Autumn 1993), p. 483.

**3.** Thomas L. Harper and Stanley M. Stein, "A Classical Liberal (Libertarian) Approach to Planning Theory," in *Planning Ethics: A Reader in Planning Theory, Practice, and Education*, ed. Sue Hendler (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1995), p. 14. Also see Nigel Taylor, *Urban Planning Theory Since 1945* (London: Sage Publications, 1998), pp. 79–80; Elizabeth Howe, "Normative Ethics in Planning," *Journal of Planning Literature*, Vol. 5, No. 2 (November 1990), p. 127; and Hilda Blanco, *How to Think about Social Problems: American Pragmatism and the Idea of Planning* (Westport, Conn.: Greenwood Press, 1994), pp. 141–142.

**4.** Taylor, *Urban Planning Theory*, p. 80.

**5.** Harper and Stein, "Classical Liberal Aproach," p. 15.

**6.** Ibid.

**7.** Ibid., p. 12.

**8.** Ibid.

**9.** See Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda* (New York: Crown Publishers, 1993); and Hilda Blanco, "Community and the Four Jewels of Planning," in Hendler, *Planning Ethics*, pp. 66–82.

**10.** See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). For a commendably accessible discussion of Rawls's impact on planning thought, see Shean McConnell, "Rawlsian Planning Theory," in Hendler, *Planning Ethics*, pp. 30–48.

**11.** See, for example, Harvey M. Jacobs, "Contemporary Environmental Philosophy and Its Challenge to Planning Theory," in Hendler, *Planning Ethics*, pp. 154–173.

**12.** See, for example, Leonie Sandercock and Ann Forsyth, "A Gender Agenda: New Directions for Planning Theory," *Journal of the American Planning Association*, Vol. 58, No. 1 (Winter 1992), pp. 49–59; and Sue Hendler, "Feminist Planning Ethics," *Journal of Planning Literature*, Vol. 9, No. 2 (November 1994), pp. 115–127.

**13.** See, for example, Robert Beauregard, "Bringing the City Back In," *Journal of the American Planning Association*, Vol. 56, No. 2 (Spring 1990), pp. 210–215.

**14.** Taylor, *Urban Planning Theory*, p. 128.

**15.** Ibid., p. 79.

**16.** Peter Marcuse, "Professional Ethics and Beyond: Values in Planning," in *Ethics in Planning*, ed. Martin Wachs (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1985), pp. 3–24.

**17.** For broad and insightful treatments of this topic, see Wachs, *Ethics in Planning*, and Elizabeth Howe, *Acting on Ethics in City Planning* (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1994). Howe and Jerome Kaufman have authored, both singly and together, a number of articles reporting on their research on the ethics of planning practitioners and students. Also valuable is the work of Carol D. Barrett, who has developed a number of ethical scenarios that illustrate the types of dilemmas being described here; see, for example, "Planners in Conflict," *Journal of the American Planning Association*, Vol. 55, No. 4 (Autumn 1989), pp. 474–476.

**18.** Martin Wachs, "When Planners Lie with Numbers," *Journal of the American Planning Association*, Vol. 55, No. 4 (Autumn 1989), pp. 476–479.

**19.** Ibid., p. 477.

**20.** Ibid.

**21.** The code appears in a number of publications. A recent one—and the one I am employing here—is *Planners' Casebook* 30/31, Spring/Summer 1999. Given this diversity of sources, I will dispense with page numbers in this discussion.

**22.** Taylor, *Urban Planning Theory*, p. 50.

**23.** A somewhat more general critique of the code was published in 1988 (and thus before the last set of amendments) by William H. Lucy, who felt that it oversimplified a number of difficult issues confronted by planners. See "APA's Ethical Principles Include Simplistic Planning Theories," *Journal of the American Planning Association*, Vol. 54, No. 2 (Spring 1988), pp. 147–149.

**24.** Arthur Bassin, "Does Capitalist Planning Need Some Glasnost?" *Journal of the American Planning Association*, Vol. 56, No. 2 (Spring 1990), p. 217.

**25.** Richard S. Bolan, "The Structure of Ethical Choice in Planning Practice," in Wachs, *Ethics in Planning*, p. 87.



Journal of the American Planning Association

ISSN: 0194-4363 (Print) 1939-0130 (Online) Journal homepage: http://www.tandfonline.com/loi/rjpa20

# Introduction: Planning Ethics in the 21st Century

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**To cite this article:** Lisa A. Schweitzer (2017) Introduction: Planning Ethics in the 21st Century, Journal of the American Planning Association, 83:2, 159-160, DOI: 10.1080/01944363.2017.1290496

**To link to this article:** http://dx.doi.org/10.1080/01944363.2017.1290496

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# Introduction: Planning Ethics in the 21st Century

Lisa A. Schweitzer

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I became frustrated that my half-semester course on planning theory left no time to work through planning ethics; I decided therefore in fall of 2013 to develop a class on planning ethics for the spring. I surveyed the academic literature and found the discussion on professional ethics dated, in some instances by decades. The academic research focused more on public ethics and macro issues, such as normative theory about what roles and epistemological bases should govern the profession and what constitutes the just city (Campbell, 2012; Fainstein, 2010; Harvey, 2009; Sandercock, 2004; Thomas, 2008; Throgmorton, 2003). Practitioners associated with the APA during the same period, in contrast, had written detailed cases about individuals facing difficult choices in contemporary planning contexts. The gaps between the APA cases and academic writing suggested that bringing academics and practitioners together to write about professional ethics today might yield insights for both research and practice. That idea led to the call for papers for this special section.

A dated literature on ethics does not necessarily mean that older ideas no longer apply. The difficulties confronting professionals tend to center on choices between doing what advances one's own career, the interests of the agency or firm one works for, the public good rationales of the profession itself, or empowering others, such as community members (Wachs, 1985). Perennial tensions tend not to change. Contexts nonetheless can alter the various concerns that individuals weigh with these decisions; the articles presented here highlight new concerns that have arisen for the profession as the U.S. context for planning has changed.

An obvious change concerns technology. Nader Afzalan and I explore the problems looming for planning and democratic action given technological changes from Big Data, fast processing, and widely deployed, automated data collection in "09 F9 11 02 9D 74 E3 5B D8 41 56 C5 63 56 88 C0: Four Reasons Why AICP Needs an Open Data Ethic." Control over sensor technology and mobile app data will likely reside with private firms rather than public agencies, unless those agencies and planners within them act strategically to leverage opportunities for data sharing and open data. We point out four reasons why the American Institute of Certified Planners (AICP) should adopt an open data ethic based on the ways that technology has altered data, communications, and knowledge structures. Big Data poses a steep learning curve so that experts and nonexperts may experience different benefits from new urban informatics. Control over data collection and use can lead to anticompetitive behavior that undermines what new technologies might deliver for both public and private sector applications. Algorithms have become increasingly important in e-government, and these have consequences for the distributive justice of urban service provision and neighborhood environmental quality. Informatics and access influence the urban experience just as much street design, land use, mobility, or other domains for which planners readily set standards. Ubiquitous computing and data-sharing innovations also erode the idea that individuals consent to data collection and use so that community standards for data collection may make more sense in determining what data planners should collect, share, and use via urban informatics. Planners should not cede new technology and data systems to for-profit firms seeking information products in cities simply because commercial applications may move first in implementing new sensor technology.

A second change in the past 30 years concerns privatization and private sector participation in urban planning. These forces have raised new challenges, such as who is ultimately accountable for plans and designs produced by private, for-profit firms in collaboration with the public on behalf of public agencies governed by elected officials. As a younger planner entering the profession in 1995, first with a state agency and then as a private consultant in a for-profit firm, even I was shocked that AICP had one code of ethics meant to cover all planners in private for-profit, nonprofit, and public contexts. The AICP Code of Ethics does so remarkably well, and yet we have had little information on precisely how ethical choice differs for planners ensconced within private firms from planners working for local governments. In this issue, Loh and Arroyo in "Special Ethical Considerations for Planners in Private Practice" conduct in-depth interviews with a small sample of private consultants to discuss the issues most germane to their practice. Many issues that private sector planners raised within the wide-ranging discussion overlap with those of planners working for public agencies or nonprofits, such as how to work ethically with communities when their expressed democratic preferences run counter to good planning and development practices.

Unique to private firms, however, are questions about how far consultants should go to retain or attract clients. Loh and Arroyo's interviewees were confident generally of their ethical judgments. Their answers, of course, might represent social desirability bias, which is a concern in surveys about moral conduct. People hesitate to disclose their own lapses and flaws, and for good reasons. This problem may be especially acute for professionals who reputations govern their economic livelihood. Loh and Arroyo's interviews suggest that private sector planners were suspicious about the behavior of their competitors. These suspicions themselves may reflect little more than internecine shade throwing. They may also attest, however, to unclear delineation in the field about what constitutes "virtuous competition" among planning consultants. Virtuous competition is a term used among business ethicists to connote the fair bases of competition among firms and individuals that can yield both profits for firms and pro-social benefits. Planning firms share some of the same potential for virtuous competition as other types of businesses. Market competition can discipline those who cut corners with clients and encourage innovation in service design and delivery under the right circumstances. The problem remains in defining what constitutes good service design and delivery with services rendered by private firms, ostensibly to the public but paid for by governments. The AICP Code might benefit from more explicit exploration of what constitutes fair bases of competition among private planning firms.

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Linovski, in her Planning Note, "Pro Bono Practices and Government Agencies," highlights how important it is to seek some clarity about fair competition in business development. Planning as a field does not have many traditions governing pro bono work, perhaps because so many planning professionals are predominantly situated in public agencies. Pro bono work, as Linovski notes, has traditionally entailed professional skills deployed in direct service provision to individuals for philanthropic purposes. Linovksi describes the difficulties associated with offers of pro bono services to municipalities from architecture and urban design firms. Private firms make these offers from many motivations: Creative professions enjoy experimentation and audiences, so offers for free displays or installations can amount simply to self-expression and democratic engagement. The offers of pro bono planning work can also, however, amount to a means of business development and getting a foot in the door. Every professional, including those in the visual arts and design professions, requires networking and business development opportunities. The problem comes in distinguishing when pro bono work crosses the line into circumventing standard procurement procedures designed to keep public agencies honest. The answers here are not clear, but Linovski's discussion creates a nice starting point for exploring how planning ethics might set acceptable parameters for pro bono work.

Linovski's concerns overlap with those raised by Johnson, Peck, and Preston in their contribution, "City Managers Have Ethics Too? Comparing Planning and City Management Codes of Ethics." Johnson et al. compare the formal codes of ethics for both city managers and urban planners and find that these two professions hold many principles in common for individual conduct regarding competency, fairness, and confidentiality. There is a central difference about to whom or what each profession holds themselves accountable. City management, by necessity, stresses accountability to elected officials. The planning code, by contrast, emphasizes external accountabilities to communities over that of representative public officials. These differences mean that city managers' and planners' professions are likely to come into conflict over what a "good" city is and what roles professionals have when attempting to achieve such a city.

The final article in this special section highlights another reason that planners need ethical inquiry on what technology, data, and analysis means to cities and human life. Lauria and Long update and redo an analysis of how practicing planners think about their roles and ethical decision-making based on a similar survey done by Howe and Kaufman in 1979. One difference between the APA member planners in 1979 and 2015 is especially striking: More practitioners in the later sample identify their roles as technical rather than political or even hybrid, a combination of political and technical. The changes in technologies and data collection opportunities between 1979 and 2015 are legion. The cities in which planners seek to influence development have become more data rich, more connected, and more cyberkinetic. The fact that the profession itself remains attached to technical analysis should perhaps come as no surprise. Lauria and Long themselves attribute their findings to the fact that most of the APA members they surveyed had not been educated as planners and had not been exposed to planning theorists who argued for taking a more advocacy-based role. They also suggest that playing a technical role may be the most useful approach for planners who must operate in increasingly politically conservative environments. The authors, in short, suggest that planners may play a technical role because they find it more effective than other approaches, although their answers may also reflect social desirability bias, giving the answers they felt were the "correct" ones whether accurate or not.

Lauria and Long also find, however, planners engaged in technical roles share strong core ethical commitments with planners in other roles. Planners, regardless of the type of work they do, care consistently about personal morality (virtue ethics) and rules (deontic ethics), and they apply their judgments supported with the AICP Code depending on the problems confronting them. In sum, the world may have changed cities and the profession, but planners themselves across time show remarkably consistent commitments to justice, serving communities, and good conduct.

Many interesting points emerge from our conversation in this special section, but perhaps the most reassuring is the abiding decency evident in the responses from the practitioners both in 1979 and four decades later. Meaning well can fall far short of doing well, but it is hard to believe that the latter is possible at all without the former. The articles also show that bringing together practitioners and researchers to write about ethics knits across theory and practice in insightful ways. These articles raise as many questions as they answer, however; they confront us with new ethical and intellectual puzzles to address. They also shed some new light on the ethical problems and complexities planners face as cities and society change. We may now consider new conversations about planning ethics well begun.

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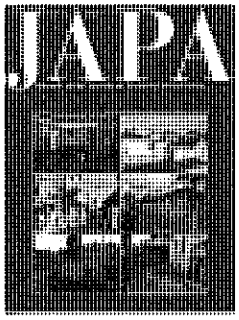
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Taylor & Francis Group

Journal of the American Planning Association

ISSN: 0194-4363 (Print) 1939-0130 (Online) Journal homepage: http://www.tandfonline.com/loi/rjpa20

# Special Ethical Considerations for Planners in Private Practice

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To cite this article: Carolyn G. Loh & Rodney L. Arroyo (2017) Special Ethical Considerations for Planners in Private Practice, Journal of the American Planning Association, 83:2, 168-179, DOI: 10.1080/01944363.2017.1286945

To link to this article: http://dx.doi.org/10.1080/01944363.2017.1286945

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# Special Ethical Considerations for Planners in Private Practice

Carolyn G. Loh and Rodney L. Arroyo

**Problem, research strategy, and findings:** Planners must constantly consider the ethics of their professional behavior, yet few studies have specifically investigated the ethical landscape for those planners working in private practice, assuming that all members of the profession are subject to similar ethical considerations. We investigate the particular ethical considerations faced by planners in private practice by interviewing owners of 10 planning consulting firms. Our sample size is very small and limited to three states, which limits the generalizability of the study. We find that private practice planners routinely experience ethical conflicts related to disclosure of information, balancing uneven benefits among stakeholders, interests of the client, and ethics of firm competition. Alhough planners mostly navigate everyday ethical concerns with confidence, they face ethical challenges in managing client relationships when values conflict, and in competing with other firms.

**Takeaway for practice:** We find that challenging ethical situations arise for private sector planners on a routine basis. The planners we interview feel that they are able to identify ethical pitfalls and choose the correct course of action, but more research is needed to understand the scope and nature of private practice ethical challenges, and to determine whether more education or enforcement would be effective solutions to between-firm conflicts.

**Keywords:** planning ethics, planning consultants, AICP Code of Ethics, professional services firms, public interest

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Planners must constantly consider the ethics of their professional behavior, both within the systems in which they work, and occasionally by stepping back and critiquing those systems themselves. Most essays and studies of planning ethics have glossed over the differences in experience between planners employed in public agencies and those in private practice, assuming that all members of the profession are subject to similar ethical considerations (Birch, 2001; Campbell & Marshall, 1998, 1999; Howe, 1994). Yet more than 25% of practicing planners work for private firms (Dalton, 2007).

Planners in private practice must deal with questions of accountability, transparency, fairness, and moral judgment, just as do planners who work for public agencies and nonprofit organizations. However, unlike those planners, senior planners in private practice are also business owners or members of partnerships, with a responsibility to create profit for the firm and maintain the firm's long-term financial health. Although planners are expected to give "independent professional judgment" regardless of the consequences (APA, 2009; Marcuse, 1976), their firms' continued existence depends on client satisfaction. While it may be true that there is no consensus as to who any planner's client really is, as Hillier (1993) asserts, private sector planners have concrete client service relationships, yet, according to the American Institute of Certified Planners (AICP) Code of Ethics they must still imagine the public interest to be their ultimate client (APA, 2009). In addition, private sector planners are nonpublic actors involved in public processes (Linovski, 2015): They are not public employees and usually do not maintain offices in a client community's municipal building. Depending on how extensive the public participation process is, the private practice planners may not have much

Journal of the American Planning Association,
Vol. 83, No. 2, Spring 2017
DOI: 10.1080/01944363.2017.1286945
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contact with the public. Their involvement may potentially lengthen the "chain of accountability" between the public and decision makets as even more of the typical bureaucratic discretion planners engage in takes place out of the public eye (Forsyth, 1999, p. 9). Finally, planners in private practice may work for both public sector and private sector clients, and must carefully consider which cases and clients they will take on to avoid a conflict of interest. For example, a planner would not work for a developer in a city in which he or she was currently working as a consultant, but might consider doing so after the public client relationship had ended. Therefore, planners who are firm owners find themselves at the intersection of ethical considerations for planners and professional services firms.

We use an inductive approach to explore the particular ethical considerations faced by planners in private practice by interviewing owners of 10 planning consulting firms in Michigan, Florida, and New Jersey to find out what are their most pressing ethical concerns and how they handle them. We find that although planners in private practice frequently encounter potentially unethical situations in their daily practice, for the most part they feel confident in navigating an ethical path. However, they face particular difficulties in managing client relationships when client values contradict established planning values. They also face difficulties in negotiating the competitive landscape with other planning firms. We hope and intend this study to contribute some practical considerations for planners in private practice as they go about their work, such as how to manage their clients' ethical behavior. We also hope to raise larger questions about the structure of the professional context in which many of our colleagues practice; for example, we recommend that APA create a private practice–specific ethics training program ro address some of the ethical issues raised in this study, such as that of business ethics between firms.

## What Do We Know About Private Sector Planners?

The literature shows that planning consulting firms share many similarities with others that provide professional services such as law, accounting, and engineering firms in their business structure, their relationships with clients, the nature of their means of production, and their internal relationships between employees and employers. Yet we find that the AICP Code emphasizes serving the public interest to such a greater extent and in different ways than do other professional services firms' codes of ethics that the ethical expectations for planning firms are unique among professional services firms. In this section, we first review the relevant literature that explores structural ethical considerations that planning firms share with other professional services firms, then explain the ethical responsibilities that are unique to planners and how these two realities intersect.

### Specialized Knowledge and Information Asymmetry in Professional Services Firms

The business literature on professional services firms, such as accounting, engineering, law, and planning firms, tells us that such firms are distinct from other businesses because their "product" is specialized knowledge that clients are willing to pay for (Anand, Gardner, & Morris, 2007; Malhotra & Morris, 2009; Teece, 2003). Therefore, there is usually an information asymmetry between the consultant and the client: The consultant usually knows much more about the topic than does the client "either in terms of expertise or in terms of experience in similar problem-solving situations" (Løwendahl, 2005, p. 35). In fact, it is in the interesr of such professionals to maintain some level of "mystique" around their expert knowledge, as the value of that knowledge is to some degree socially constructed (Linovski, 2015; Malhotra & Morris, 2009). This information asymmetry, in addition to the potentially idiosyncratic nature of each contract, makes it difficult for the client to judge how well the consultant has completed the task he or she was hired to do, and even to evaluate how well the consultant's performance on other work would translate to the client's own needs (Løwendahl, 2005; Maister, 2007). In addition, the interests of the principal (in this case, a client) may not be aligned with those of the agent (in this case, a consultant; Stein, 1990). The principal must then always be concerned about opportunities for shirking and moral hazard, as the agent has more information about what he or she is doing than does the principal (Brehm & Gates, 1997; Holmstrom, 1979; Waterman & Meier, 1998). Information asymmetry leading to client concerns about moral hazard and the socially constructed value of professional services firms' specialized knowledge means that firms must find ways to signal the quality of their work and the value of that knowledge to potential clients.

In planning, local governments and private landowners and developers hire planning consulting firms for their specialized planning knowledge. This is especially true when client communities lack their own planning staff and hire consultants on retainer to provide planning services, which is a common type of planning consultant–client relationship (Loh & Notton, 2013). This asymmetry in knowledge is likely smaller when a unit of local government hires a consulting firm to work with and supplement

the activities of permanent staff to complete a certain task, which is another very common arrangement. However, this might be akin to a company with in-house counsel hiring an external litigation firm to handle a lawsuit, since the planning firm may still have more expertise in that particular aspect of planning (Loh & Norton, 2013).

## Professional Services Firms' Codes of Ethics

The difficulty clients have in judging the quality and ethics of professional services firms' work means that these firms largely trade on their reputations. One important way to signal firm quality is for its employees to join a professional organization and sign on to its code of ethics (Von Nordenflycht, 2010). Many professional services firms use codes of ethics to encourage high standards, signal those high standards to members of the public and to potential clients, and provide a framework for disciplinary action against those who violate the code (Jamal & Bowie, 1995). For example, an engineer who violates his or her state's code of professional conduct may be sanctioned or have his or her license put on probation, suspended, or even revoked (McDonald & Lawson, 2005). The court may sanction, suspend, or disbar a lawyer who violates his or her state's code of professional conduct (American Bar Association Center for Professional Responsibility, 2016). The APA's professional arm is the AICP; planners with a certain number of years of professional experience may apply for the AICP credential by taking an exam. Planners who achieve AICP status are bound by the AICP Code of Ethics and Professional Conduct. The AICP Code of Ethics and Professional Conduct consists of four parts: a set of "aspirational principals that constitute a set of ideals to which we are committed," but a violation of which cannot be grounds for a charge of misconduct; a set of rules of conduct to which we are held accountable; a description of procedures that apply when a planner violates the rules; and the procedure for when a planner is accused of a serious crime (APA, 2009). Thus, the AICP Code of Ethics is both aspirational, describing the ideals to which planners should adhere, and boundary setting, describing what forms of professional behavior should be considered unacceptable (Campbell, 2012; Hendler, 2005). Those who commit violations of the AICP Code may lose their AICP designation and have their names and revocation publicized (APA, 2009). The executive director of APA/AICP is the organization's Ethics Officer. Planners may consult the Ethics Officer for informal or formal advice. It is also with the Ethics Officer that charges of misconduct are filed. Achieving AICP designation, and signing on to the AICP Code of Ethics, is thus a highly visible signal to clients that a planning consulting firm's owners and employees have achieved a certain level of proficiency and ethical behavior that meets accepted professional standards (McClendon, Erber, McCoy, & Stollman, 2003).

## Professional Codes of Ethics and the Public Interest

It is common for professional codes of ethics to include "provisions that define the public interest" (Jamal & Bowie, 1995, p. 704), as does the AICP Code of Ethics (APA, 2009). Among the professional services fields with which planners commonly interact, the American Bar Association Model Code calls on lawyers to work to educate others about the law, engage in pro bono work, and "help the bar regulate itself in the public interest"; still, the lawyer's primary responsibility is to zealously represent his or her client within the principles of the law (American Bar Association Center for Professional Responsibility, 2016). "Public interest lawyers," who advocate for low-income clients or champion progressive causes, make a strong commitment to social justice and serving the public interest, but make up a tiny percentage of all lawyers (Luban, 2003). The National Society of Professional Engineers Rules of Conduct states that "engineers must at all times strive to serve the public interest," which they define as being involved in public life and engineering education, adhering to engineering standards, and advancing principles of sustainable development when possible (National Society of Professional Engineers, 2016).

AICP's conceptualization of planners' responsibility to the public interest is more extensive and detailed than in the codes of ethics of either engineering or law, placing greater emphasis on working for social justice, inclusion, and civil rights than in other professions (Barrett & Joice, 2001; Campbell & Marshall, 1998). Although Part B, the Rules of Conduct, does not explicitly mention the public interest, Part A, the set of aspirations, refers to it many times. The first "Principle to Which We Aspire" begins, "Our primary obligation is to serve the public interest and we, therefore, owe our allegiance to a conscientiously attained concept of the public interest that is formulated through continuous and open debate" (APA, 2009). This service to the public interest includes the following obligations:

a) We shall always be conscious of the rights of others.
b) We shall have special concern for the long-range consequences of present actions.
c) We shall pay special attention to the interrelatedness of decisions.
d) We shall provide timely, adequate, clear, and accurate information on planning issues to all affected persons and to governmental decision makers.

e) We shall give people the opportunity to have a meaningful impact on the development of plans and programs that may affect them. Participation should be broad enough to include those who lack formal organizarion or influence.
f) We shall seek social justice by working to expand choice and opportuniry for all persons, recognizing a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration. We shall urge the alteration of policies, institutions, and decisions that oppose such needs.

The AICP Code goes on to say explicitly that in instances where the client's interests conflict with the public interest, the planner's "primary obligation" is to the public interest. Again, this contrasts with other professional codes of conduct. Engineers are also bound by a primary obligation to the public interest, but this is much more narrowly defined as relating to health and safery. A lawyer's primary obligation is to the client, even when the client's interest conflicts with the public interest. For example, a lawyer may still defend a client he or she suspects or knows has committed a crime even if it is clearly in rhe interest of the general public to have that person convicted of the crime (Asimow & Weisberg, 2008). Planners are therefore obligated to aspire to a much wider range of public interest commitments than are other professionals, even when those commitments conflict with responsibilities to the client. It is indicative of how seriously the field takes the issue of the public interest that some planners even feel thar the code does not go far enough to emphasize planners' obligation to seek social justice (Marcuse, 2014). It is important to point out that planners who are not AICP members are nevertheless expected to follow rhe APA's Ethical Principals in Planning, although there is no enforcement arm as for those with AICP membership (Weitz, 2016).

## How the AICP Code of Ethics May Present Particular Challenges for Planners in Private Practice

For planners in private practice, client service may come into conflict with the public interest in particular ways with both public sector and private sector clients. Situations that demand ethical consideration are often "predicaments: they have no easy solutions, and sometimes no satisfactory ones" (Baum, 1998, p. 412). Planning consultants advise elected and appointed officials on planning decisions; these officials are the final decision makers on adopting plans and regulations (Howe, 1994). Planners may find themselves in a situation where the decision makers wish to take action that, in the planner's view, runs contrary to the AICP Code of Ethics. If the consultant pushes back too hard against the client's unethical behavior, the firm may be fired (Marcuse, 1976). If hired on a per-project basis, the consultant may have difficulty expanding the scope of the work to include either concern for the long-range consequences of present actions or the interrelatedness of decisions, that is, responding to items (b) and (c) of the AICP Code. Clients, rather than planning consultants, may set the terms of disclosure of information to affected parties, as required by item (d) of the AICP Code. Clients and their budgets, rather than the preferences and values of the consultant, may set the terms of public participation processes, as required by item (e) of the AICP Code. Clients may not make seeking social justice a priority, leaving consultants to decide how hard to push for its inclusion in planning processes and products (Wolf-Powers, 2009). Finally, consultants and clients may not even agree on how to define and serve the public interest (Campbell & Marshall, 2002; Howe, 1994).

In Section B, Rules of Conduct, the AICP Code of Ethics also describes specifically how plannets should behave. This section is clearly written with both publicly and privately employed planners in mind, as most of the rules reference interactions with employers or clients. The Rules of Conduct cover conflict of interest situations, transparency in communication, and relationships with employers and with other planning firms. How should we think about the relationship between the two sections? Planners with AICP status are required to follow the Rules of Conduct, but we hypothesize that most planners take the aspirational section of the AICP Code of Ethics seriously and try to meet the expectations of both sections. The amount of clarity on how to meet those expectations and the degtee of difficulty or ease with which they may be met varies considerably, and it is helpful to have a framework with which to categorize the types of ethical situations and decisions planners encounter.

## Categorizing Ethical Considerations

The AICP Code of Ethics describes a wide variety of ethical considerations for planners, with varying degrees of concreteness and prescriptiveness. We find the work of Martin Wachs particularly useful in categorizing these ethical judgments by both the frequency with which planners likely encounter them and the complexity of the judgment they involve. In this section, we explain how the sections of the AICP Code of Ethics fit into Wachs's typology, and how they might apply in particular to ethical considerations planning firm owners must make. In the sections below, we describe how a sample of senior private sector planners describe the ethical issues they face in terms of the insights Wachs provides.

Wachs (1985) identifies four categories of ethical considerations that planners face. His first category, the "ethics of everyday behavior," includes common decisions planners make about to whom to disclose information and when, how to avoid conflicts of interest, and how to make decisions that the planner knows would benefit one party over anorher. By and large, these are the types of situations that the AICP Rules of Conduct, Section B, addresses, and it is interesting that the bulk of the Code covers what are arguably the easiest decisions to handle, where the moral issues at stake are least ambiguous. For example, most people are aware that accepting a bribe or recommending a policy decision thar benefits them personally is unethical and would know to avoid taking such actions. We expect that because planning firm owners manage multiple public and private sector clients over time, they likely encounter situations where there is a real or apparent conflict of interest quite often.

Wachs's (1985) second category of ethical consideration, the "ethics of administrative discretion," encompasses all of the detailed decisions that elected and appointed officials leave up to planners. Elected and appointed officials set parameters through laws, but planners are often responsible for implementation and must use their own judgment to decide, for example, what concessions to make on either the public or ptivate side of a public unit developmenr (PUD) negotiarion, depending on the client, or whether a project meets the intent of an ambiguous ordinance. Wachs points out thar the decisions planners make, even small ones, can create winners and losers, and thus involve ethical consideration on the part of the planner. The AICP Code recognizes these opportunities for discretion, saying in Section A that planners "shall exercise independent professional judgment on behalf of our clients and employers" (APA, 2009). The ethical consideration here for a planner in private practice is how to make decisions that the planner believes to be in line with the client's intent, while, as the code requires, fulfilling the obligation to serve the public interest.

Wachs's (1985) third category, the "ethics of planning techniques," demands that planners acknowledge and account for all the assumptions tbat underlie their planning analysis and modeling techniques, since none are complerely value neutral. The AICP Code of Ethics acknowledges this issue obliquely, stating in Section A.2.e that planners shall "examine the applicability of planning theories, methods, research and practice and standards to the facts and analysis of each particular situation and shall not accept the applicability of a customary solution without first esrablishing its appropriateness to the situation" (APA, 2009). This aspiration does not explicitly call on planners to be transparent about assumptions, however. Planners in private practice, who are often brought in to be the "objective" voice in a difficult situation (Loh & Norton, 2013), may have a special responsibility to make the assumptions of their research explicit and transparent.

Wachs's (1985) fourth category of ethical considerations, the "ethics of plans and policies," requites planners to be cognizant of the fact that every plan makes choices about policies, land uses, and priorities that may or may nor reflect their own values, those of participants in the planning process, and those of other community stakeholders. Plans and policies create winners and losers and force planners and officials to explicitly balance the relationship between the present and the future (Beatley, 1991). This category is where Section A.1 of the AICP Code, "Our Overall Responsibility to the Public," comes in. The code asks planners to work to expand opportunity for disadvantaged people, to preserve natural areas and the built environment, to be fair and equitable, and above all to serve the public interest. Private practice planners' public clients may or may not share the values the AICP Code of Ethics espouses, and if not, the planner must balance his or her own ethics wirh the need to run a profitable firm when deciding how strongly to push the client to include these values when making long-range planning or regulatory decisions. We do have some evidence that planning consultants may nudge their clients toward planning decisions that adhere to the smart growth principles, but we do not completely undersrand the process by which that might happen (Loh & Norton, 2015). It may be even more difficult for the private practice planner to balance a developer client's interests (making a profit) with his or her obligation to the public interest, since developers vary in their commitment to building community context–sensitive projects. Private practice planners who do not have ongoing retainer relationships with a particular public client and are hired on a temporary basis for project-based work may have to take extra steps to understand the communiry context and to determine whether the client's agenda is truly fair for all participants.

Each of Wachs's (1985) ethical categories requires planners to be thoughtful, balanced, and explicit about their assumptions, the way they assign weights to different considerations and priorities, and how they acknowledge and account for the influence of interested parties. All of Wachs's categories, however, presume a "morally demanding ethics," in which the actor must resolve obligations to competing interests or loyalties (Verma, 2009). Yet there is another category of "cognitively demanding ethics," which requires mnch more self-awareness about possibly deliberate but mostly accidental intellectual limitations or blind

spots. These may include "'falling in love with pet ideas,' 'too accepting of conventional wisdom,' 'being seduced by rigor,' 'disregarding relevance,' 'ignoring problems that one is not trained to handle,' and other similar concerns" (Verma, 2009, p. 42). These types of ethical considerations are much less obvious to actors themselves, and therefore are more difficult to research. We do not address these cognitively demanding types of ethical considerations here, although we hope to do so in the future. In the next section, we describe how we gathered information about ethical considerations from planning consultancy firm owners, and then present our findings.

## Determining the Ethical Concerns of Private Planners

Our primary interest was to learn from planners in private practice which issues are at the forefront of their ethical concerns, and how they and their firms respond to those issues. We evaluate the issues they raise both in terms of the AICP Code of Ethics and in terms of Wachs's (1985) categories of different levels of ethical concerns. While we are not explicitly trying to compare ethical issues that private sector planners and public sector planners face, our interviewees did make those comparisons on occasion, which we report and discuss. Our research fits squarely into the category of "bottom-up" orientation, where we emphasize "learning from practice" (Campbell, 2012, p. 385). We interviewed firm owners and equity partners of 10 planning consulting firms in Michigan, Florida, and New Jersey to find out find out what they considered the most salient ethical issues for privare practice planners, how they have handled those issues, and what policies their firms have in place to reduce ethical problems. We chose to interview firm owners because we wanted to get the perspective of planners who are responsible for managing their businesses as well as conducting planning practice, and because we wanted to hear from planners who set policy for and would hear ethical concerns raised by their employees. We were asking questions of our respondents both as individuals and as representatives of their entire firm.

We drew our sample from the 2010 membership roster of the APA Private Practice Division. We used an older list because we wanted to interview owners of firms that had been in business for at least five years. We chose Michigan, Florida, and New Jersey because each state had a large number of planning firms but differed in important ways. Michigan is a weak mandate stare—in other words, it permits local governmeuts to plan and suggests that they do so, but plans are advisory only (Loh & Sami, 2013)—that is experiencing population decline. Florida has tradirionally had a strong state-level regulatory framework where local governments were required to plan and plans had a strong regulatory role, although in recent years the legislature has weakened these mandates (Linkous, 2016). Florida is growing quickly, adding more than 200,000 people between 2013 and 2014 (U.S. Census Bureau, 2014). New Jersey is the only state that requires licensing for planners (Meek, 1998). From the list, we selected those planners that reported their title as president, CEO, owner, or principal, and were AICP. We eliminated firms whose primary business was not planning (mainly engineering and law firms). We contacted 12 firms in Florida, 16 in Michigan, and 15 in New Jersey. Three firms in Florida and four firms in New Jersey had closed since 2010. Ultimately, we surveyed 10 people representing 10 firms: 7 firms in Michigan, 1 in Florida, and 2 in New Jersey. There were seven men and three women in our sample. Each was a firm owner or equity partner, and all had AICP status. We did not collect race and age data. The average length of time the firms had been in business was 27 years. The firms we describe here provide a range of services to their clients, including retainer services where they provide the full range of planning and zoning services to client communities without their own planning staff, consulting on housing plans, comprehensive planning, expert witness testimony, traffic studies, and consulting for developers.

We sent each person on the list a recruitment email, then followed up with a phone or in-person interview. The interviews lasted a minimum of 30 minutes, although most were far longer. One of the planners preferred to write the answers to the interview questions in an email and did not want to speak over the phone. Five of the remaining respondents allowed us to record their interviews; these we had transcribed. We took extensive notes dnring the other interviews. To avoid conflict of interest in our study, Carolyn Loh, who is an academic and no longer a practicing planner, contacted all of the people in the sample. She also conducted all the interviews and made the interview transcripts anonymous before sharing them with Rod Arroyo, who is currently a practicing planner. We made this procedure clear to all participants when we contacted them initially.[1]

We used largely open-ended questions; rather than imposing categories and concepts on the interviewees, we allowed them to guide the discussions so that the topics and categories would most accurately reflect their own priorities. We asked the planners about their firms' policies on ethics, difficult ethical situations they or others in the firm had encounteted and how they handled the situations, how they balanced the interests of different stakeholders, conflict of interest issues, and how they handled unethical

behavior by clients. The full list of interview questions can be found in the online Technical Appendix.

We analyzed their responses in light of Wachs's (1985) four categories of ethical considerations, coding the interview transcripts for evidence of thinking or acting on ethical issues in each category. For example, we coded statements about how planners handled conflict of interest situations and compiled them into one section of our coding spreadsheet. We also counted those situations as falling into Wachs's first category, the ethics of everyday behavior. We also coded concepts that emerged as important, in that they were mentioned by multiple interviewees. In our analysis, we also examined the use of the AICP Code of Ethics, both when people mentioned it explicitly and when they talked about issues covered in the aspirational or rules-setting sections of the code. Although we split up the interview coding, we both read each interview and created a shared spreadsheet where we each checked the results of the other's analysis. In the next sections, we first present the results of this analysis of Wachs's categories, then we present the results of the analysis of how planners use the AICP Code of Ethics.

## Wachs's Four Categories of Ethical Considerations for Planners in Private Practice

### The Ethics of Everyday Behavior

The owners of planning firms most commonly referenced issues falling into the category of the ethics of everyday behavior, which includes conflict of interest issues, managing disclosure of information, and making decisions that unequally benefit different stakeholders. Conflict of interest issues were common for planning firm owners, although they seemed confident of their ability to navigate them ethically. Several assumed that conflict of interest was more of a problem when working for developer clients, and said that they solved that problem by only taking public sector clients. One Florida firm owner said, "I am old enough to feel confident in my own discretion and honor and so forth." Many interviewees skipped right over our question on actual conflict of interest, which they considered easy to handle, to the issue of apparent conflict of interest, where there may not be actual financial gain for parties involved, but the situation might look unethical on its face. One New Jersey planning firm owner said,

> If I believe it is an appearance of a conflict then I divulge to all parties and we determine as a group with full disclosure whether or not it makes sense for us to proceed. That is when I perceive that there is not a conflict of interest but only an appearance of a conflict of interest. If I believe that there is a true conflict of interest, I will obviously not take the work.

Another New Jersey firm owner said that she consulted the AICP Ethics Officer if she was not sure about a conflict of interest situation. A Michigan firm owner said that he referenced the AICP Code of Ethics with clients when conflict of interest issues arose; he viewed it as "an opportunity to explain" his professional obligations.

Ethical decisions regarding disclosure of information can involve dealing directly with the public during a planning process or procedural issues with the client. Most firm owners emphasized transparency in their work with public clients, especially during public participation processes. One New Jersey firm owner said that her firm recorded all of their public meetings. A Michigan firm owner said that during a recent master planning process "every sticky note someone wrote we put up on the website." Planners at another Michigan firm scan the comment sheets from public participation sessions and put them into the plan so people can see how their comments translated into the plan's goals and objectives. Yet several planners also said that it was up to the client and the client's budget how much community engagement they would carry out during a given planning process; the consultants did not make that decision.

Planning consultants are privy to information that, if disclosed, could benefit certain stakeholders. Most planners we interviewed did not mention being asked to behave unethically in using such information, but did insist on transparency with and by their clients, who seemed to be more likely to ask planning consultants *not* to provide information. For example, a mayor asked one planner not to answer questions from city council members, and a city planning director asked another planner not talk to certain members of the community who were going to be displaced by a project under review. However, one Michigan planner lived in and consulted for the same small town, and found that

> ...neighbors would call me all the time. Most of the time I would say, make an appointment and we'll talk about it at the counter. That was usually pretty effective.... I'd be out planting flowers and people would ask, do you think this council person is going to vote this way, etc. I would say I can't tell you, they are an independent body. They are in the phone book, you can call them. I would treat everybody like they were

> coming into the office. People would come up to me and say, I know you can't tell me this, but then they'd ask anyway.

This planner also said that she would remind her public sector clients not to "have the meeting at McDonald's," and that "giving the impression of having made a decision ahead of time is as bad as actually doing it." Thus, planning consultants' ethical considerations included both providing information when appropriate and keeping information confidential, or at least only providing that information in an official setting.

Planning firm owners were aware that when they recommended certain decisions to elected or appointed officials, those decisions might benefit some stakeholders more than others. One Michigan planner described the difficulty of balancing competing interests in a planning process, which he thought was particularly difficult for private practice planners:

> You have the desires and the expectations of the city administration or township administration and you have the desires and expectations of the public and you have the desires and expectations of the political, the elected officials. And you have to kind of walk that balancing beam in terms of making sure that everybody is fairly represented but at the same time making sure that your values and principles are pretty much intact because you can get into a situation where those different groups do not agree with each other and that is where kind of the snarly and the snarky things start to happen.

Although the planners we spoke to seemed to feel that simply following the ordinance to the letter protected them from being in a position to pick winners and losers, many planners described being asked to violate the AICP Code of Ethics in such situations. Planners recounted being asked ro recommend decisions specifically to benefit a particular party, including being asked to choose a particular contractor, bend zoning rules, fast-track a particular proposal, and evaluate a particular traffic study more favorably. These stories encompass an astonishing range of opportunities to behave unethically. In all cases, the planner recounting the episode recalled easily recognizing the ethical pitfall and refusing to compromise his or her principles: The potential violations in this category of everyday behavior were obvious, as were the correct courses of action.

## The Ethics of Administrative Discretion

Planners reported that providing a professional opinion on administrative issues often raised ethical issues. For example, one Michigan planner recalled urging his client to hold firm against a national fast-food chain that wanted a much larger and taller sign than the ordinance allowed. "I said, 'You want good advice or do you want to get bullied by big corporations? ...[T]hey're going to open up the whole town!'" The planning commission only allowed the fast-food chain to erect a sign that met the ordinance and the corporation abided by the decision. Another Michigan planner found herself on the other side of a similar situation, when she refused to help a large corporation ask for a variance for a large sign. She told the client, "I don't like it, I wouldn't want it in my backyard, I won't help you recommend that." In both cases, the planner knew what was allowed under the ordinance and recommended against deviating from ir. Another planner felt thar his firm had been set up to fail by a township where a popular bur nonconforming bar wanted to expand and applied for rezoning. Although afraid the rownship would fire them, and against public opinion, the planners recommended against the rezoning. The planner recalled, "We got booed and hissed at and...then personal attacks" but in the end he felt that his firm "got [the planning commission's] respect" for resisting public opinion and recommending that the township follow the master plan.

## The Ethics of Planning Techniques

Tbe ethics of planning techniques requires that planners acknowledge that plans and models are built on assumptions that reflect particular values, and that they make those assumptions explicit. When we asked questions about transparency in public planning processes, though, only one planner talked about the underlying assumptions of planning recommendations, saying that his firm used and communicated standard ratios when recommending provision of parks and open space, "how many acres per thonsand people there should be versus how much there is. And then we will advocate for a more appropriate ratio of open spaces to the population." The planners we interviewed did not seem to view situations that fall into this category as particularly salient when they were thinking about ethics.

## The Ethics of Plans and Policies

Wachs's (1985) last and most complex and challenging ethical consideration is the ethics of plans and policies, which requires planners to reflect on their own values and those of other participants when creating plans and carrying ont planning processes. The planning firm owners we interviewed reported that it was here that they found the most gray areas. One Michigan planner said, "I think that, candidly, the issue that is always confronted in the private

firm is how willing are you to bend your values and your principles to retain a client?"

Many planners spoke of their desire to reform unethical client behavior toward planning values; thus, many were willing to bend their values *for a time*. In other words, they would keep working for a client that behaved unethically with the hope that they could guide that client to ethical behavior. Only if they believed they could never convince the client to adopt appropriate planning values would they fire the client, but all said they would do this if necessary, and most had done it in one or two circumstances. One New Jersey planner explained,

> I have a municipality who really does not want to see a single additional affordable housing unit in its town. ...[A]nd, they asked me to do as much as I can to keep them out of trouble with the state but as little as I have to. ...[W]hat they are saying is, "We hate this and we do not want to get in trouble and we do not want to get sued so please do the minimum." Now that goes against—I mean, I am a big advocate of affordable housing—there is a huge shortage in Jersey and I would really like to facilitate this at a greater pace. But for the last two years I have been working at their pace. And I think slowly it is starting to pay off.

The client had recently authorized the planner to put together an affordable housing plan "with teeth." For this planner, it was worth keeping the client if he could see them moving in the right direction with his guidance.

For one Michigan planner, however, attempts to get the community to do the right thing ultimately failed:

> There were a couple of places where I couldn't go back. I had a seasonal community that wanted to hold all its meetings in the winter, didn't want to notify second homeowners because they said they didn't have standing, even though they paid non-homestead taxes which were the majority of township revenue. I couldn't make them do it the right way. That was the only place I walked out mid-project. I even gave them back some money.

This planner was up front with competitors who asked her why she had left the client, saying, "These were the things I couldn't abide."

Several planners spoke about making sure they were not so desperate for work that they would be tempted to compromise on ethics to keep a client. One Michigan firm owner said that she and her partner "try not to ever rely on one client, so that they can't put that pressure on you and threaten your livelihood." Another Michigan firm owner admitted that in the situation where she refused to help a client ask for a sign that she personally did not like, she might have helped them if she had been "hungry" enough for work.

## Implications for Theory and Practice

The planners we spoke with were thoughtful about ethical issues and comfortable talking about them. As we expected, most of the ethical considerations these private practice planners encounter most often fall into Wachs's (1985) category of the ethics of everyday behavior. All of the planners referenced the AICP Code of Ethics as a guide for ensuring their own and their employees' ethical behavior. As an organization, AICP appears to have succeeded in encouraging planners to identify with this code. More than one planner contrasted the AICP Code of Ethics with those of other related fields, such as landscape architecture and engineering, characterizing the other codes as being less concerned with equity issues and social justice. Most of the planners we interviewed talked about the importance of the public interest. One Michigan planner said, "We are not experts in everything, but we are experts in terms of weighing a whole variety of input into a subject in terms of ultimately rendering an opinion in terms of what is in the best interest of the community." So, these planners are aware of both the rules of the code and the aspirational sections, and report at least trying to adhere to all of the sections. Over time, these professionals also build up an ethical compass that they rely upon to guide their behavior: Some recalled episodes from early in their careers that they learned from and would have handled differently had they occurred in the present day. As one Michigan planner put it, "I tell these young planners, 'You can review the AICP and understand the AICP Code of Ethics, but then you also have to review and understand what your personal ethics are.'"

Although planning consultants are agents in the principal–agent model, most do not seem to see themselves that way. Rather, they see themselves as autonomous actors managing relationships. In fact, many of the planners we spoke with described using their powers of persuasion and the AICP Code of Ethics to get their clients to do what the consultants thought was right. Initially, we had also thought that consultants might be in a more vulnerable position relative to public sector planners because clients can easily terminate their contracts. While the firm owners we interviewed acknowledged their reliance on maintaining client relationships, it was clear that consultants have a

significant amount of autonomy and may just as easily fire their clients if needed. So a planner in a snccessful private practice may in fact be able to push clients more strongly to behave ethically than can a public employee.

The planners also explicitly linked ethics with business success. One Michigan firm owner said, "We are in a trust business, a caring business, and we have to be careful that we protect that trust. Because basically that is all we have. That is what we are selling." Another Michigan principal said, "The one thing that you do not want to do is ever get yourself into a position where people start perceiving you and your firm as being unethical." This emphasis on ethics makes it somewhat concerning because many firm owners, when asked to name an ethical issue that they thought mattered particularly for planners in private practice, said that unethical practices by competing firms were the biggest ethical problem they faced. A frustrated Florida firm owner said, "I do not like being the only one who works this hard. Let us put it that way. Because you wind up losing clients to people who are a little more accessible ethically, and I find that very troubling." A Michigan firm owner said,

> I think there is a code within the profession of people that have been around a while, and that is to treat each other with respect and to treat each other's relationships with clients with respect, especially when there is a contractual relationship. Unfortunately there are some who do not abide by that code, and...let us face it, there are elected officials that do not always play by the rules. And frequently you will be contacted or you know someone else is contractually involved, and we just do not get involved in those kinds of situations. But I cannot say that that is a universal practice, frankly.

Another Michigan firm owner echoed this concern, saying,

> I've seen some firms do unethical steps to get the work or hold onto the client. There was a rownship we had heard was interested in changing consultants. They invited us to a meeting and then went to a formal interview process. The other firm gave the client a list of questions to ask us. I thought that was pretty low. The client isn't smart enough to ask their own questions. Stuff like that that happens.... I'd like to think that the work we do and the work other planning firms do stands on its own and you get work because of the work you do and not because you out-hustle other firms.

The planners we interviewed all believed themselves to be ethical planners and their firms to engage in ethical planning behavior. Yet they contrasted their own behavior with that of others. It is human nature to ascribe loftier principles to oneself than to others, so we view these concerns with some skepticism. But a profession where many firm owners believe themselves to be the lone good guy in a field rife with unethical practices may need to take a closer look at some of its norms. State APA chapters already provide some training and discussion about ethics issues facing plannets in private practice (Burkhart, Buchheit, Williams, Desmond, & Gerhart-Fritz, 2011; Burris, Meihoff, Rothstein, & Rhodeside, 2015); they could take the lead in facilitating exploration of these issues. For example, state APA chapters could investigate whether local planners act unethically toward other firms because they are unaware of the rules, or whether they are deliberately trying to steal business from more ethical firms (and whether the perceptions of unethical competitive behavior we heard in this study are shared by a larger group). The Michigan Association of Planning (MAP), the Michigan chapter of APA, like many other state chapters of APA, has a Planners in Private Practice group that promotes access to information about local planning firms, provides a forum for exchange of ideas and concerns related to private practice, strives to improve practice, and includes participation of MAP staff in meetings and activities. The Private Practice Division of APA, at the national level, also strives to provide for an exchange of ideas and to promote the quality of private practice. The Division's recent publication, *Private Planning Practice Handbook*, addresses project management, organization, ethics, and more. APA should consider developing a case study–based training program on ethics aimed just at planners in private practice that focuses on the issues raised by the planners in this study to supplement its existing publications on ethics for practitioners in general, including one just published in early 2016 (Weitz, 2016). The AICP certification maintenance program would be an excellent vehicle for such an initiative.

## The Ethical Challenges of Private Practice

We interviewed planning firm owners to understand how they experience issues of planning ethics and how those issues intersect with their roles as business owners, given the AICP Code of Ethics' strong aspirational emphasis on serving the public interest. We used both the AICP Code of Ethics and Wachs's (1985) categories of ethical behavior to help categorize their responses. We find that challenging ethical situations arise for these planners on a routine basis, involving conflict of interest, disclosure of information,

and balancing uneven benefits among stakeholders, but that most of those fall into the category of the ethics of everyday behavior. The planners we interviewed felt that they were able to identify ethical pitfalls and choose the correct course of action. The less straightforward ethical situations often dealt with the aspirational section of the AICP Code of Ethics, where planners had to balance competing ethical goals and persuade clients to take the ethical course of action. These planners viewed this management of client ethics as an important part of their job. The private practice planners we spoke with strongly identify with both the aspirational and the rules-based sections of the AICP Code, and use it on a regular basis to guide their decision making, but often felt that other planning firms did not exhibit ethical behavior.

Our study sample was limited to a small group of planning firm owners in three states, so we hope that we or others are able to conduct further research with a much larger group of private practice planners to see if they share the views on ethics of the planners we interviewed for our exploratory study. We also believe that, given the concerns our respondents raised about business ethics, more research is needed to understand the scope and nature of this problem, and whether more education or more enforcement would be effective solutions. Finally, all of the questions we asked our interviewees for this project dealt with Verma's (2009) "morally demanding ethics." Future research should investigate questions of "cognitively demanding ethics," which we suspect would be much less straightforward to discern.

## Supplemental Material

Supplemental data for this article can be accessed on the publisher's website.

## Note

1. We should add that this potential issue initially occurred neither to us nor to the university's Institutional Review Board, but that one of the planners we contacted very early on brought it up as a concern. We immediately changed our interview protocol.

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# Planning Experience and Planners' Ethics

Mickey Lauria and Mellone Long

**Problem, research strategy, and findings**: Ethical considerations are integral to most aspects of planning, but the bases of planners' ethical decisions are not well understood. In fact, there has been no follow-up to Elizabeth Howe and Jerome Kaufman's original 1979 survey of the ethics of American planners in this journal (45(3), 243–255). Our research evaluates the differences in planning roles and planners' ethical perspectives since then. In their study, Howe and Kaufman use hypothetical scenarios to determine which of three roles planners play: technician, politician, or a hybrid. They also evaluate how the role that planners assume affects their ethical views. Our research uses similar scenarios to evaluate these relationships in contemporary planning practice while simultaneously evaluating the influence of professional experience on the ethical bases of those choices. We confirm many of Howe and Kaufman's findings, but first we find that today's planners assume different roles than they did in the mid-1970s, conforming more often to a technical role and less to a political or hybrid role. Second, today's planners tend to make virtue-based choices when concerned with ideological and legal issues, but revert to rule-based or utilitarian choices when faced with the dissemination and quality of information and segments of the population receiving special advantages. Finally, we find that planners, at all stages in their careers, maintain a mixture of virtue- and rule-based ethical choices while affirming the profession's core values (as represented in the 2009 AICP Code).

**Takeaway for practice:** The vast majority of practicing planners in our sample (80%) use the AICP Code of Ethics in response to our hypothetical scenarios. At the same time, self-interested responses were rarely made. These findings reaffirm the code's value to the profession.

Ethical considerations are integral to most aspects of planning, from the smaller decisions such as determining the location of a public meeting to the larger decisions involved in planning for affordable housing or a new industrial site. Planners should use a good evaluation strategy that incorporates ethical considerations, not their personal preferences, to make policy recommendations (Anderson, 1985). As Elizabeth Howe and Jerome Kaufman observe in their seminal 1979 *JAPA* article:

> For planners, ethics set the boundaries of acceptable behavior. In theory, a set of commonly held behavioral norms make up the body of professional ethics. …[W]hether codified or not, these norms represent guidelines for planners to adhere to in conducting themselves as professionals. More importantly, they represent the basis for assuring the public who uses planning services that planners will act responsibly in exercising their professional judgment and in applying it. (pp. 243–244)

In the complex world of plural politics, planners charged with serving the public interest are often challenged by the frequently competing demands of various stakeholders: their employers, clients, public officials, developers, community activists, neighborhood associations, and many more public and private constituencies. Planning activities are intended to serve an entire community, but in reality can and do affect various constituencies differently, which poses multiple ethical challenges.

We revisit the seminal 1979 Howe and Kaufman study. Howe and Kaufman asked planners to explain what they would do in a variety of challenging situations; based on those responses, these researchers categorized the ethical frameworks that planners use to undertake their professional duties. Howe and Kaufman find that planners fall into three roles: *politicians, technicians*, or *hybrids*, although most fall into the last category.

**Keywords:** planners' ethics, planner's roles, ethical frameworks

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Journal of the American Planning Association,
Vol. 83, No. 2, Spring 2017
DOI: 10.1080/01944363.2017.1286946
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In this context our broad question is: If ethics forms a commonly held body of behavioral norms that sets the boundaries of prescribed acceptable action (Howe & Kaufman, 1979), what frameworks are practicing planners using today? More specifically, using similar methods, we ask:

- What roles do planners assume today?
- How well do today's practicing planners conform to their prescribed code of ethics, the AICP Code of Ethics and Professional Conduct (American Planning Association [APA], 2009)?
- How does a planner's role influence their ethical choices?
- How does experience influence the ethical choice and/or roles of planners?

To do so, we conducted a survey of a large number of 2015 members of the APA, building on Howe and Kaufman's work but making important changes to represent contemporary planning practice.

We organize this article into four sections, beginning with a discussion of planners' roles and ethical frameworks. First, we explain Howe and Kaufman's (1979) research and the necessity of reevaluating that work. Second, we explain our perspective on the ethical dilemmas in contemporary planning practice and the ethical frameworks that practicing planners might use to resolve them. Third, we explain our research questions, research design, and survey methods. Fourth, we describe our findings and conclude from our survey.

Many of our findings confirm Howe and Kaufman's (1979) work, but there are important differences between our work and theirs. Our first major finding is that there are meaningful differences in the roles planners assume today and those they assumed in the mid-1970s. Planners today conform more often to a *technical* role, in which planners see themselves as value neutral, relying on objective information, and less to a *political* role, where planners see themselves as advocates for specific values or polices. Planners today are also less likely to conform to a *hybrid* role, where they pragmatically use the tools most appropriate for the situation, either political or technical. We also find that today's planners tend to make virtuous choices, aspirational decisions based on their own moral codes, when concerned with ideological and legal issues. Planners revert, however, to deontic ethics—that is, rule-based decisions—or utilitarian ethics, those concerned only with the impact or outcomes of those decisions, when faced with the dissemination and quality of information and segments of the population receiving special advantages. Finally, we find that planners at all stages of their careers today maintain a mixture of virtuous or aspirational choices and deontic- or rule-based ethical choices while affirming the profession's core values.

## Planners' Roles and Ethical Frameworks

Revisiting the Howe and Kaufman (1979) work is necessary for two major reasons. First, planning and planners have changed in the last 37 years. While there has been some writing on the subject of planners' roles and their ethics since Howe and Kaufman's original survey, there has been no follow-up to that seminal work. One significant change since 1979 is the demographic makeup of planners. Today planners are younger, more educated, and less likely to be male and White. Each of these demographic changes has the potential to affect how and why planners make role choices and ethical decisions (Howe, 1980). Second, since Howe and Kaufman's original survey of APA members was conducted, the planning accreditation process has required a curriculum component to cover ethics. Thus, we expect that recent professionally trained planners will have received this ethical training and be more familiar with ethical dilemmas.

Howe and Kaufman (1979) surveyed respondents on what planners think is ethical and what factors influence their views. They find that the role assumed by planners greatly influences their ethical views and that these role choices are related to planners' political views. Howe and Kaufman do not, however, explore the ethical bases of these planners' views. Ethical theory (as we discuss below) in fact has provided a basis for very different ethical perspectives. Thus, our question is not whether a particular action is ethical, but rather the bases on which planners consider that action to be ethical or not. Our work is designed to simultaneously evaluate the ethical bases of planners' views and the influence of practical experience on those role and ethical choices.

Howe and Kaufman's 1979 survey provides 15 ethics scenarios. They use a 5-point Likert scale to develop their classification of planner roles, asking the respondent if the situation was *ethical* (5) or *not ethical* (1). They provide a second set of 15 planning scenarios, asking their respondent whether they would make the same choices as did the planner described in the scenario, also using a 5-point Likert scale. These scenarios are not comprehensive and, more important, they did not provide a political or social setting, thus creating potential measurement error (i.e., it is difficult to know if all the respondents were answering the same question). To correct these potential deficiencies, we use focus groups to modernize the scenarios in our survey.

Howe and Kaufman classify their respondents into three roles (Howe, 1980) based on their attitudes[1] toward technical analysis and political behavior in planning

following the debate at the time reflected in the prior literature by Walker (1950), Meyerson (1956), and Beckman (1964) versus Banfield (1961), Rabinovitz (1969), Benveniste (1972), Needleman and Needleman (1974), Cantanese (1974), and Meltzner (1976). The technical role, according to Howe and Kaufman (1979), is that of a value-neutral advisor. This planner is an advisor to both the decision makers and the public. As a trained and educated professional with expertise and experience, a planner assuming the technical role provides information (often the pros and cons of specific alternatives) and knowledge of the legal rules and procedures without displaying a personally preferred policy position. They classify 26% of their respondents as *technicians*.

The political role is different from the technical role in that it is value committed (Howe & Kaufman, 1979). Planners may be activists or advocates for particular policies using their expertise and position to ensure that their preferred policies and programs are implemented. Much of the literature on this subject, from, for example, Davidoff (1965), Beneviste (1972), Cantanese (1974), and later Forester (1989, 1999) and Flyvberg (1998), has suggested that the *political* role is much more effective than the traditional technical role. Political planners use their professional, personal, and community's values to determine their planning objectives (see also Harper & Stein, 2006; Innes, 1995, 1996). Howe and Kaufman classify 18.2% of their respondents as *politicians*.

Howe and Kaufman (1979) suggest that the roles that planners adopt fall on a continuum and cannot always be categorized as solely traditional and technical or political. Their research suggests that there is a *hybrid* role, a mixture of both the technical and the political roles. Such planners are pragmatic, using whatever approach they deem most appropriate for a particular situation (Howe & Kaufman, 1979). Howe and Kaufman classify more than half the planners (50.8%) in their sample as taking a hybrid role based on their responses to the survey.

Howe and Kaufman (1979) do not include responses that scored low on both the political and technical scales due to a low response rate. Only 4.5% of their respondents would have been classified in this category. Following Meltzner's (1976) ideas, we suggest that discarding these respondents may have been in error because the planner who scores low on both the political and technical scales chooses neither a political nor technical role. Instead, this type of planner may be considered bureaucratically pragmatic, not solely technically pragmatic and politically pragmatic as implied in the hybrid role.

Following Howe and Kaufman (1979), we posit that ethical dilemmas today can be attributed to a central conflict in planning practice: the role of expertise in planning recommendations (legitimacy) and the role of plural politics in decision making (democratic legitimacy) and in the implementation of those decisions. Out of this dilemma we pose a new delineation of strategic planning roles.[2] Planners as technicians in our approach lean heavily on their expertise (and therefore legitimacy) using science and objective analysis to steer clear of the supposed quagmire of plural politics and leaving democratic legitimacy to actors in the political sphere. The planner as politician is more overtly "value committed" and leans more heavily on discovering, or helping to construct, the political requirements for a recommendation's approval and the potential collaborative relationships necessary for its implementation. The political planner leans more heavily on interpersonal skills of communication and collaborative relationship building than on technical expertise to achieve strategic agreement. As with Howe and Kaufman (1979), we define a hybrid planner as placing a high value on expertise, but recognizing that planning recommendations that are technically and scientifically accurate but politically unsupported are unlikely to be implemented. These planners ascribe to a role that combines aspects of both technical and political strategies to achieve viable or implementable recommendations.

Finally, we find that for some planners a planning position is merely a vocation, perhaps to support some other avocation. The strategic decisions and role assumption of these practicing planners are designed first and foremost to maintain that vocation; we create a new role and style these planners as *careerist*. Careerists are not concerned with the integrity of their expertise or the legitimacy of a democratically constructed government apparatus and its collective decision making. Their strategic decisions are based only on the technical requirements of their functions within the bureaucracy. Meltzner (1976) labels these planners "pretenders" (p. 15).

## Ethical Frameworks and the AICP Code

Most professional occupations have a code of ethics, something they need to engender trust between their professionals and the public.[3] Martin Wachs (1985) notes, "The historical role of professionalism is to seal a social bargain between the members of a profession and the society in which its members work" (p. 20). This promise is significant, since the majority of a planner's work is either for or with the public. The professional code of ethics for planners is the AICP Code of Ethics and Professional Conduct, revised in 2009 (see https://www.planning.org/ethics/ethicscode.htm).[4]

The AICP Code of Ethics and Professional Conduct reflects a combination of three theories of ethics about how planning decisions should be made:

- virtue ethics, which are aspirational and based on the moral character of the decision maker and not on the outcome of the decision;
- deontic ethics, which stress following accepted rules of behavior and are not based on the outcome of the decision; and
- utilitarian ethics, which depend solely on the outcomes or consequences of the decision (Long, 2017, ch. 2).

Daniel Wueste (2005) argues that a convergence of ethical theories creates confidence in the ethical basis of a decision. In the planning profession, if these three theories confirm the same decision, planners can know that the decision is ethical. We use these ethical theories to examine the particular ethical frameworks professional planners may use in their decision making. Note that these three theories depend on different perspectives: on either the personal or organizational rules that the decision maker follows or the outcomes, as we explain in greater detail below.

Virtue ethics is aspirational, and does not rely on a set of rules; rather, this concept focuses on what people should do to be the best people they can be, "striving for excellence in life" and doing what someone they respect would do (Wueste, 2005, p. 20). We use the term *virtue ethics* to refer to decisions that make decision makers appear to have the best character because we cannot infer their true character by the decisions they make. Planners making decisions using a virtuous framework will do as they perceive someone who they respect would do. This would include the principles outlined in the aspirational section (Section A: "Principles to Which We Aspire") of the AICP Code of Ethics.[5] In the section on planners' "overall responsibility to the public," for example, the AICP Code tells planners that "we aspire to the following principles: e) we shall give people the opportunity to have a meaningful impact on the development of plans and programs that may effect them. Participation should be broad enough to include those who lack formal organization or influence."

Virtue ethics suggests that the planner does the ethical thing because it is moral, not because of the impact on others. "The rightness of an action in a given set of circumstances is to be derived from its being one that a fully informed and virtuous agent would perform in those circumstances (if acting in character)" (Cullity, 1999, p. 283). But the impact on others also has moral ramifications. The rightness of an action is dependent on who is judging and under what circumstance. What might be virtuous to a 60-year-old woman in the United States and a 20-year-old man in Malaysia is different. This leaves virtue ethics open to interpretation. Thus, in our analysis and interpretation, we focus on responses that demonstrate that planners are "striving for excellence" as an indicator that they are trying to act virtuously.

A deontic theory of ethics, the second framework on which the AICP Code is built, is based on an accepted set of rules. For AICP-certified planners, these rules are provided by Section B: "Our Rules of Conduct" of the AICP Code of Ethics. Not all planners are members of AICP and cannot be held accountable by its adjudication and disciplinary process, but non-AICP professional planners work hand in hand with and often are supervised by AICP planners. Thus, non-AICP planners often adopt the AICP Code as their accepted rules of conduct.

Le Bar (2009) uses a second-person account to explain a deontological standpoint, the gist of which is "our recognition of others as having the status to make claims upon us and hold us accountable for our treatment of them" (p. 648). The rule created by the second-person argument is summed up with the golden rule: Treat others as you would want to be treated. But more clearly it is: Do not treat anyone in a way you would not want to be treated.

Deontic ethics are easy to understand, but also easy to criticize. Using a clear set of rules helps planners decide on the best course of action but does not address situations in which that decision leads to a negative outcome. Strict code enforcement of minor violations in low-income neighborhoods, for example, can lead to household displacement, more abandoned structures, dangerous and illicit land uses, increasing housing-cost burdens, more neighborhood decline, and associated reductions in tax revenue. Thus, while situations can be examined for their morality by using a deontological approach, making deontic decisions does not ensure a collective benefit (outcome).

Utilitarian ethics, on the other hand, are all about outcome. This ethical theory holds that the proper course of action is the one that maximizes utility, usually defined as maximizing happiness and reducing suffering. The ethical thing to do is the thing that results in, unit for unit, more good than harm. Utilitarianism focuses on maximizing utility and reducing suffering for the entire community, but community may be defined in the particular context. The preamble to the AICP Ethical Principles in Planning (as adopted May 1992) provides an example of this paradigm:

> The planning process exists to serve the public interest. While the public interest is a question of continuous debate, both in its general principles and in its case-by-case applications, it requires a conscientiously held

> view of the policies and actions that best serve the entire community.

This is consistent with how Rachels and Rachels (2012) define a conscientious moral agent:

> …someone who is concerned impartially with the interests of everyone affected by what he or she does; who carefully sifts facts and examines their implications; who accepts principles of conduct only after scrutinizing them to make sure they are justified; who is willing to "listen to reason" even when it means revising prior convictions; and who, finally is willing to act on the results of this deliberation. (p. 13)

Hedonism, or ethical egoism, is a fourth philosophy of some interest in our research, although not contained in the AICP Code of Ethics. As Becker and Becker (2001) note, hedonism finds it ethical to act in one's self-interest, ignoring the interests of others unless they happen to merge or conflict with the interests of the self. Hedonism does not measure either the impact on others or the pain to others as long as the decision maker has pleasure (see also Rachels, 2008). This ethical theory is clearly focused on the individual and not the community. We doubt most planners think that they use self-serving ethics to make decisions, but we examine the possibility that hedonism, or a focus on self-interest, does motivate some planners.

We conclude that the AICP Code of Ethics strives for the convergence of virtue ethics, deontic ethics, and utilitarian ethics in many of its rules of conduct. We use these three ethical theories and a fourth, hedonism, to examine the particular ethical frameworks professional planners may use in their decision making. The scenario in Question 31 of our survey provides an example of how we accomplish this, allowing respondents to provide only one response:

> Policy says "advertise in a newspaper of general circulation." You know the residents in the rezoning area generally don't read the newspaper and the newspaper has a low circulation rate in the area. You:
>
> - Just follow policy.
> - Find additional ways to advertise.
> - Don't bother advertising at all.
> - Follow policy as written, but use this as an example to public officials to recommend a change to the policy.
> - Follow the policy and note in staff report that it was only advertised in the newspaper and therefore notice may not have reached all concerned.

We classify the first response option, "Just follow policy," as based in deontological ethics because planners selecting this option are just following policy. The second possible option, "Find additional ways to advertise," is based in utilitarian ethics because it demonstrates an effort to increase the effectiveness of the outcome. We classify the third response option, "Don't bother advertising at all," as based in hedonistic ethics because it expresses an unwillingness to follow the rules because of the "bother" or work it imposes on the planner. We classify the fourth response option, "Follow policy as written, but use this as an example to public officials to recommend a change to the policy," as based in virtue ethics because the planner decides to follow specific rules but goes further with the intent to change that policy and improve the rules. Finally, we classify the fifth response option, "Follow the policy and note in staff report that it was only advertised in the newspaper and therefore notice may not have reached all concerned," as based in both deontological ethics because planners choosing this response indicate that they would follow the rules, and in utilitarian ethics because their concern for the outcome requires they note that deficiency of the decision.

The AICP Code of Ethics may be interpreted to prescribe decisions that conflict with those that political and/or community interests expect planners to recommend, and our survey focuses on this issue as well. Such political pressures are often a reason planners use to explain ethical inconsistencies (see Long, 2017). This is consistent with Vasu's (1979) work, which finds that planners recognize that the social and political realities of practice often conflict with their technical role. The perceived conflict between political pressures and ethical choices is also consistent with Hoch's (1988) survey of American planners that finds that many planners think politics are often pitted against planning and, moreover, that politics are dangerous.

Our research also seeks to characterize differences in ethics that are associated with differences in professional experience. We specifically question how experience, the context in which planners work, and their assumed role influence their ethical principles. As planners acquire experience, their decision-making process may change. No one has evaluated whether planners will learn to make better decisions over time, although it is often assumed so. In fact, one can imagine that the quality or ethical basis of a planner's decision making may decline if poor or unethical decisions are rewarded. We hypothesize that the longer a planner is on the job, and the more challenges faced, the more a planner learns, and there is a greater chance of differences in the ethical choices planners make at different career stages.

## A Survey of the Ethics of Professional Planners

To answer our general question (What ethical frameworks are practicing planners using today?), we surveyed professional planners in the United States to determine which ethical frameworks practicing planners use today to structure their work. More specifically, we asked: How well do today's practicing planners conform to the AICP Code of Ethics? How do the roles planners feel comfortable performing influence their ethical choices? How does professional experience (in years) influence the ethical choice and/or roles of planners?

In the spring of 2015, we conducted focus groups and a pilot survey to replicate but also modernize the Howe and Kaufman (1979) scenarios to reflect current planning practice. We held two focus groups with participants of various ages, experience levels, and job experience. The focus group members were given each scenario in the survey and asked to evaluate it for accuracy and relevance to planning practice today. They were also asked to volunteer any scenarios they might have encountered and to explain the importance of ethics to their decision making. We then revised the scenarios in our survey instrument in response to the comments of the focus group participants. We shared the revised survey instrument with the pilot survey respondents to allow us to more carefully scrutinize the survey instrument and make corrections before the official survey was sent to a larger sample of members of the APA.

We surveyed the members of the APA, an organization of professional planners. In 2014, there were 37,750 members of the APA. Although most planners belong to the APA, not all planners do. Thus, our population comprises those who consider themselves professional planners and have joined this professional organization. We could not conduct a stratified random sample because the APA would not share their membership list. The APA, however, did email all members and requested that they participate in the survey and followed up with two reminder emails. The survey was also advertised in the APA Interact (the Association's member email blast) twice. The APA emails directed willing participants to participate in an online survey. The advantage of using email is that the vast majority of APA members (more than 98%) have an email address.

We may have introduced a small coverage error because a small number of APA members do not have email. This raises the possibility of self-selection bias as well as potential nonresponse error because some people might not respond to an email request. The APA made five email contacts to limit nonresponse (following Dillman, Smyth, & Christian, 2014). We needed 1,038 responses to achieve a confidence interval of 5% for a total population of 37,750 members. We received 1,334 complete responses.

### Our Sample Respondents

Table 1 presents the demographic characteristics of our sample compared with sample data from the APA 2014 Salary Survey.[6] Our respondents ($n$ = 1,334)[7] were 57% male and 88% White. Sixty percent held planning degrees, 72% held masters degrees (48% of those in planning). Sixty-seven percent worked in the public sector, while 22% worked in the private sector; 71% were AICP certified. Respondents averaged 20 year of work experience evenly distributed with a large (21-year) standard deviation. More respondents worked in the west (29%) than in the south (24%), Midwest (20%), mid-Atlantic and New England (17%), or southwest (8%), while 1.5% worked outside the United States. Roughly 2% were younger than 25, 31% were between 25 and 40, 46% were between 41 and 60, and 20% were older than 60. Forty-nine percent of the respondents were working at the executive level. Howe and Kaufman (1979) do not include demographic data about

Table 1. Sample demographic comparison.

| | | 2015 ethics survey sample, % | 2014 APA salary survey,% |
|---|---|---|---|
| Gender | Male | 57 | 61 |
| | Female | | 38 |
| Race | White | 88 | 86 |
| | Non–White | 12 | 14 |
| Age, years | <25 | 2 | 0 |
| | 25–40 | 31 | 40 |
| | 41–60 | 48 | 49 |
| | >60 | 20 | 11 |
| Experience, years | <20 | 50 | 60 |
| | 20–30 | 22 | 22 |
| | >30 | 28 | 13 |
| | Median | 19 | 15 |
| Education | <BS | 5 | 2 |
| | BS/other | 12 | 17 |
| | BS/Planning | 9 | 10 |
| | MS/other | 24 | 21 |
| | MS/Planning | 48 | 47 |
| | PhD/JD | 2 | 4 |
| Employment sector | Public | 67 | 71 |
| | Private | 22 | 23 |
| | Non-profit | 3 | 3 |
| | Other | 8 | 0 |
| AICP | Yes | 71 | 58 |

their sample; we do know, however, that that 53% of their sample worked in the public sector. Our sample's demographic characteristics are similar to the APA's 2014 Salary Survey data in terms of race, education, and employment. Our sample contains slightly more responses from female, older, more experienced planners, and more AICP respondents than those represented by the APA sample.[8]

## Surveying APA Members

Our survey consists of three sections. The first section includes nine questions to collect background and demographic information to determine which attributes, such as education or years of service, have an impact on ethical decision-making. The second section is modeled directly on Howe and Kaufman's (1979) survey to determine respondent role choices. The third section consists of ethical scenarios used to evaluate respondent ethical frameworks.

We asked six questions to determine how respondents saw their role. Table 2 is a synopsis of the scenarios presented in the role choice portion of the survey. We use a 5-point Likert scale to determine degree of disagreement or agreement, as do Howe and Kaufman (1979). The scenarios include the tactic (the planner's ethical choice) and who or what benefits from the issues being considered.

Table 3 contains the 18 ethical scenarios for which we provided a choice of responses that represent the AICP Code, but also vary according to an ethical framework: virtue, deontological, utilitarian, or hedonist. We provided these varied choices because we were interested in the ethical frameworks that might underpin a planner's ethical perspective. We delve deeper into the ethical bases of respondent choices than do Howe and Kaufman (1979); we asked respondents to choose a response that was formulated within the particular ethical frameworks discussed above, rather than just asking them to determine if a scenario was ethical or not. Respondents were given 18 scenarios and asked how they would handle the situation. Table 3 provides a synopsis of the 18 scenarios presented to determine ethical framework. The figure includes the scenario, the central tactic, and which interests or stakeholders were addressed or benefited.

We gave respondents five choices corresponding to a combination of the different ethical frameworks discussed earlier: virtue, deontological, utilitarian, and hedonistic. Individuals (practicing planners included) do not consistently use a single ethical framework: What matters is context, tactical strategy, and to whom the ethical responsibility refers (consistent with Howe and Kaufman's 1979 findings).

We developed a coding scheme to classify individual planner's ethical frameworks (tendencies) to evaluate respondent choices. In developing this coding scheme, our logic is that if the choices of framework made by

Table 2. Description of planner role scenarios, tactic, and beneficiary.

| Scenario | Tactic | Issue benefiting |
|---|---|---|
| Q10: An economic planner initially criticized, on technical grounds, a proposal by a community development corporation to develop a small industrial park in a low-income area presented before the planning commission. Later, that same planner recommends the project to the commission after being told of the director's support for the project. | Change technical judgment due to pressure | Low income |
| Q11: A city planner who is a member of the Chamber of Commerce gives information, without authorization, to the head of the Chamber on an agency study being prepared that will recommend reducing number of on-street parking meters in the central business district (CBD) to lessen traffic congestion. | Leak information | Development |
| Q12: A planning director undertakes a campaign to create a crisis atmosphere about the pollution and health hazards of the city's waterways by holding press conferences next to the city's most polluted waterways to get media coverage. | Dramatize problem to overcome apathy | Environment |
| Q13: A city planner gives draft recommendations on a scattered-site public housing plan to the representative of an affluent homeowners' group who requests them; no agency policy exists about releasing such information. | Release draft recommendations upon request | Low income (anti) |
| Q14: A county planner, without authorization, gives information and advice on her own time to a citizen's group trying to overturn in court a county rezoning decision. The county planning staff had opposed this rezoning, but it was approved by the County Council. The rezoning allows an oil company to build a refinery on a large, tree-covered waterfront property. | Assist group in overturning an official planning action | Environment |
| Q15: A planning director is preparing to interview prospective planners for her department. She has narrowed the applicants down to the five most qualified. She googles each of the top five applicants and finds that one of the applicants is in a different political party than she and another has inappropriate posts on his Facebook page. She decides not to interview either of them and only interviews the remaining three. | Discriminate based on partisan politics and use of personal information | Organization |

Table 3. Description of ethics scenarios, tactic, and beneficiary.

| Scenario | Tactic | Issue benefiting |
|---|---|---|
| Q16: You are a planner for a city and are invited to lunch by a developer who has an application before the City Council. | Accept bribe | Developer/personal benefit |
| Q17: A community group asks to see a development application, submitted but still under staff review; the city you work for has no policy. | Leak information | Community group |
| Q18: Your county is planning to vote on new transit fares. Regional planners have developed estimates that would recommend raising the fares. Each time in the past that the fares have been increased, ridership has decreased more than the revenue produced by the increased fares. | Distort information | Mass transit, low income |
| Q19: A project under review by your office will improve a neighborhood you own property in and will likely lead to a positive impact on property values. | Misuse professional position | Personal benefit |
| Q20: As the planning director for a city planning agency, you want to develop support for a new park & ride facility. So far, less than half of the neighborhood groups you have consulted are in favor of this. | Distort information | Mass transit |
| Q21: Another department within the city recommends clearance of a substantial amount of land in a low-income neighborhood. You are the city planner for that neighborhood. | Leak information | Low income |
| Q22: The suburb you work for has exclusionary zoning. | Protect underrepresented groups | Low income |
| Q23: Your agency's director purposely left out certain documented findings because they do not support agency policy. An environmental group requests the findings. | Leak information | Environment |
| Q25: You know during the budget process you will have to negotiate all items in the new fair share housing plan. | Use expendables as tradeoff | Low income |
| Q26: A land developer requests the "draft" recommendation for a development plan for a largely underdeveloped part of city. This draft has been vetted by city departments; it has not been reviewed by the Planning Commission. The city has no policy on providing drafts to public. | Release draft recommendation on request | Land developer/ development |
| Q27: Your brother-in-law brings in an application for development review. | Misuse professional position | Personal benefit |
| Q28: The IT director for the city you work for can get iPhones at the municipal rate (which is much less than the retail rate) and offers to get you one or more if you prepay in cash. This is not a city employee incentive; the IT director has just made this offer to you and the other directors. | Misuse professional position | Personal benefit |
| Q29: Every area in your city that has an adopted neighborhood plan has improved and the property values have increased. The neighborhood you live in is tenth on the list of area plans to be performed. | Misuse professional position | Personal benefit |
| Q30: Your supervisor asks you to approve a project regardless of its status. | Change technical judgment due to pressure | Politician |
| Q31: Policy says "advertise in a newspaper of general circulation." You know the residents in the area for the rezoning have a low circulation rate and don't generally read the newspaper. | Provide adequate information | Residents |
| Q32: You are the note taker at a neighborhood meeting, and those who attend the meeting are expressing views different than you think many in the community believe. | Provide adequate information | Residents |
| Q33: You are a city planner and one of your responsibilities is to maintain the planning department content on the City's Facebook page. The City has just recently obtained a Facebook presence and currently has very few policies on its use. A citizen requests a copy of an application in for development approval. | Provide adequate information | Residents |

respondents were random, their choices would not be significantly different than 25% in each category, or 4, 4, 4, 4. We feel it is clearly not a random choice when planners choose one of these four more than 50% of the time; we can then infer that the category chosen more often is their primary preference framework (our dominant categories). If planners, after choosing that primary preference framework, were to choose randomly among the remaining categories, then those choices would not be significantly different than 33.3%, or 10, 3, 3, 3. So, if after choosing the primary preference framework, respondents choose one of the remaining three more than 50% of the time, five or greater (10, 5, 2, 1), that is clearly not a random choice and we can infer it is their secondary preference framework (our combined dominant categories). The remaining categories are mixed (no clear dominant preference choice).

But not all mixed frameworks are the same. There are mixed frameworks with a subdominant preference: those clearly significantly different than random, but with no one dominant framework (between 50% and 33%, still clearly greater than 25%), whose most frequently chosen framework is chosen seven to nine times, and if the second choice is less than five, it would be a mixed but with a subdominant category. Another differentiated mixed category would be one where there is no dominant choice, but two tied for subdominance, but not three tied (so 9, 9, 0, 0 or 8, 8, 2, 0, or 7, 7, 3, 0). This is a mixed but with dual subdominants category. Finally, if there is no clear preference of framework, no framework chosen more than six times (6, 6, 6, 0 or 6, 6, 5, 1, etc.), we can label them chaotic. Table 4 summarizes the categorization of ethical frameworks chosen in our sample.

Finally, we should note that our survey, as do all surveys, suffers from the potential biases of all self-reported data. First, respondents may answer questions in a fashion that they perceive professional planners should answer them, overemphasizing their use of the frameworks the AICP Code represents. Second, the use of hypothetical situations simplifies the difficulties and actual constraints involved in real planning situations. This could further exacerbate a planner's tendency to overemphasize the use of the frameworks consistent with the AICP Code because it is much easier to overcome or simplify these difficulties and constraints in hypothetical situations. We try to ameliorate these biases by providing only ethical choices plus one self-interested hedonistic response. Thus, respondents could indicate they would "do the right thing" but with different justifications based on the various ethical frameworks we are researching.

Table 4. Categorization of ethical frameworks chosen in the sample.

| | | |
|---|---|---|
| **Dominant categories** | Solo dominant (4 possible, 2 in the sample) | |
| | Virtue | 10 virtue choices, other choices each <5 |
| | **Deontological** | **10 deontological choices, other choices each <5** |
| | Utilitarian | 10 utilitarian choices, other choices each <5 |
| | **Hedonistic** | **10 hedonistic choices, other choices each <5** |
| | Combined dominant (12 possible, 1 in the sample) | |
| | **Deontological/ virtue** | **10 deontological choices, 5> virtue** |
| **Mixed categories** | Mixed subdominant (12 possible, 4 in sample) | |
| | **Mix/vir** | **7–9 virtue choices, second most frequent less than first, 5>** |
| | **Mix/deo** | **7–9 deontological, second most frequent less than first, 5>** |
| | **Mix/util** | **7–9 util choices, second most frequent less than first, 5>** |
| | **Mix/hed** | **7–9 hedo choices, second most frequent less than first, 5>** |
| | Dual subdominant (4 possible, 1 in the sample) | |
| | **Dual sub** | **Less than 10, but first two tied, but >6** |
| **Chaotic** | no framework choice >6 | |

Note: The frameworks in bold appeared in the sample.

## Planners' Role and Ethical Frameworks in the New Millennial

### Different Planner Roles Over Time

Table 5 depicts our modification of Howe and Kaufman's (1979) planner roles based on our research. We find significant differences between the role orientation of planners in our sample and in Howe and Kaufman's mid-1970s sample. First, we find slightly more than four times the proportion (4.5% to 20.7%) of careerists (those 26 scoring low on both their political and technical scales who were disregarded in Howe and Kaufman's original survey), a slightly smaller proportion of politicians (18.2% to 15.3%), but twice the proportion of technicians (26.5% to 53.7%) and almost one-fifth the proportion of hybrids (50.8% to 10.3%). If both our findings and Howe and Kaufman's are comparable and accurate, Table 5 clearly shows that the political role of planners has diminished significantly: overtly in a drop in the politician role, but mostly by the decrease in the hybrid role offset by the corresponding increase in technicians.

Table 5. Planner's role choice ($n$ = 1,334).

| | **Political scale** | |
|---|---|---|
| **Technical scale** | **Low** | **High** |
| **Low** | Careerists | Politicians |
| | 20.70% | 15.30% |
| | $n$ = 276 | $n$ = 204 |
| **High** | Technicians | Hybrids |
| | 53.70% | 10.30% |
| | $n$ = 716 | $n$ = 138 |

Note: Respondents are categorized by role choice based on their response to five questions (Q10–Q14 on our survey) asked by Howe and Kaufman (1979). They are categorized if they answered these questions as follows in this order (strongly agree or agree, neither, disagree or strongly disagree): Political: if 5,0,0; 4,1,0; 4,0,1; 3,2,0; or 3,1,1; Technician: if 1,2,2; 1,1,3; 1,0,4; or 0,0,5; Hybrid: if 3,0,2; 2,1,2; or 2,0,3; and Careerist: if 2,3,0; 2,2,1; 1,4,0; or 1,3,1.

The low number of politically oriented planners in our sample runs counter to the large percentage of executive-level planners in our sample who are subject to higher levels of political influences. This unexpected finding suggests that our respondents may have been hesitant to admit to political influences on their professional ethics or that these professional planners were not planning educated. To evaluate this unexpected finding with the data we have, we cross-tabulate the roles that planners chose with their educational background; we find that 62% of the hybrid, and 63% of the political planners, were planning educated, while only 54% of the technicians were educated in planning programs (a statistically significant difference at the .05 level). Thus, the differences between the number of *technical* planners in our two samples may in fact be due partially to the increase in number of non-planning–educated practicing planners (e.g., civil engineers, economists, geospatial sciences, environmental engineers, etc.). Unfortunately, we do not ask in which non-planning fields they were educated.

We evaluate whether the roles chosen by planners are affected by personal attributes by cross-tabulating the role choices and the personal attributes of each respondent. If sociodemographic characteristics do not affect role choices, these characteristics would be proportionately distributed across the role choices. A comparison indicates where particular demographic characteristics are disproportionately represented in different planning role choices and suggests that those characteristics affected the respondents' choices. Table 6 demonstrates that race and region of employment are not strong factors in role choice in our sample. Planners who indicate that they have chosen a technical role tend to be middle-aged (41–60 years old), executive-level planners, with fewer planning degrees. Interestingly, a higher proportion of non–AICP-certified and non–planning-educated practitioners assume a political role. Those who choose a political role tend to be young (less than 25 and 25–40 years old) and have less than 10 years of work experience; they are less likely to be executive-level or public sector planners. Political planners are also more likely to have planning degrees. Hybrid planners are less likely to be from the Midwest, and are more likely to be from the west, in entry-level positions, and with planning degrees (66.4%). Finally, careerists are more likely to be in entry- or mid-level positions with fewer years of experience.

We also conduct a factor analysis of the data, similar to the analysis undertaken by Howe and Kaufman (1979). Our analysis allows for significant factor categorization, as does Howe and Kaufman's (see the Technical Appendix for the details of this analysis, including sampling adequacy tests, significance tests, factor loadings, and correlation coefficients).[9] Figure 1 provides a visualization of our factor analyses of planners' role choices. Our analyses show that role choice is solidified for older, more experienced, AICP-certified, and middle- and executive-level planners; note that age, experience, and position level correlate highly on the first component, labeled "experience," for all four planning roles). This is not an earth-shattering finding: We are well aware that as we age and gain experience, our identity and sense of self solidifies. What is interesting about these results is their differences. The second, third, and fourth components of the roles vary greatly. Those choosing a technical role are more likely to be a well-educated, White, female, private sector planner with AICP certification. The political planner is more likely to be an experienced, White, not well-educated, AICP-certified planner in the public sector, whereas the hybrid planner is an experienced, well-educated, White, female planner in the private sector. Careerists are more likely to be experienced, well-educated, private sector planners, or experienced, well-educated, non-White, male AICP-certified planners. The hybrid planner is similar to the technician, but more highly concentrated in the private sector. And the careerist is similar to the politician but more highly concentrated in the private sector.

## Planners' Ethical Choices

Overall, a slight majority of our respondents use a mixed deontological framework (50.5%) to make planning decisions. The next most common framework used by planners is a dominant deontological framework (17.5%). The third and fourth most common frameworks are a combined deontological and virtue (12.7%) and a mixed and virtue (7.6%). Finally, few of our respondents (0.1%) use primarily an individually self-interested (hedonistic) framework.

Table 7 provides a cross-tabulation of planners' role and ethical framework choices, while Figure 2 is a visualization of the ethical frameworks used by particular planner roles. If planners' ethical frameworks are not affected by their role choice, then respondents would be proportionately distributed across those frameworks. However, we find that the ethical framework used by those who adopt a political or hybrid role are affected by their role choice. Planners following a political role clearly use more mixed frameworks (particularly mixed/virtue, mixed/utilitarian, and mixed/mixed), choosing a much lower percentage of deontological responses than the other planners. Planners following a hybrid role make a higher proportion of deontological choices, with a lower proportion of deontological or virtue and mixed or virtue choices than would be

Table 6. Planner attributes and role choice (in percentages).

| Characteristic | | Technician | Politician | Hybrid | Careerist | All planners |
|---|---|---|---|---|---|---|
| Gender | Male | 57.2 | **51.0** | 56.9 | 60.5 | 56.9 |
| | Female | 42.8 | **49.0** | 43.1 | 39.5 | 43.1 |
| Race | Non-White | 11.8 | 11.3 | 12.3 | 12.4 | 11.9 |
| | White | 88.2 | 88.7 | 87.7 | 87.6 | 88.1 |
| AICP certification status | Non-AICP | 27.8 | **33.8** | 27.5 | 30.8 | 29.3 |
| | AICP | 72.2 | **66.2** | 72.5 | 69.2 | 70.7 |
| Education | BS-planning | 9.4 | 11.3 | **5.1** | 10.1 | 9.4 |
| | BS-other | 14.3 | **7.8** | 8.8 | 9.8 | 11.8 |
| | MS-planning | **43.6** | **52.0** | **57.0** | 50.0 | 47.6 |
| | MS-other | 24.9 | 22.5 | **20.4** | 22.8 | 23.6 |
| | PhD-planning | 0.6 | 0.0 | 0.7 | 1.1 | 0.6 |
| | PhD-other | 1.4 | **2.9** | 2.2 | 1.4 | 1.7 |
| | Planning | 56.6 | **64.7** | **66.4** | 63.4 | 60.3 |
| | Non-planning | 43.4 | **35.3** | **33.6** | 36.6 | 39.7 |
| Age, years | <25 | 1.3 | **4.4** | **0.7** | 2.5 | 2.0 |
| | 25–40 | **26.5** | **41.7** | 34.1 | 34.1 | 31.2 |
| | 41–60 | **52.0** | **36.8** | **42.0** | **41.3** | 46.4 |
| | >60 | 20.2 | **17.2** | 23.2 | 22.1 | 20.4 |
| Experience, years | <10 | **18.9** | **30.8** | 25.4 | **28.0** | 23.3 |
| | 10–19 | 28.8 | 29.2 | **23.9** | 28.4 | 28.3 |
| | 20–29 | 24.8 | **18.1** | **26.1** | **16.0** | 22.1 |
| | 30–39 | 19.1 | 17.7 | **14.9** | 18.3 | 18.3 |
| | 40+ | 8.4 | **4.0** | 9.7 | 9.3 | 8.1 |
| Employment sector | Private | 22.2 | **27.5** | 25.6 | 24.9 | 23.9 |
| | Public | 75.2 | **68.7** | 70.5 | 70.4 | 72.8 |
| | Nonprofit | 2.6 | 3.8 | 3.9 | 4.7 | 3.3 |
| Position | Entry level | **6.4** | **12.6** | **11.9** | **11.4** | 9.0 |
| | Mid-level | **36.2** | **49.4** | 40.5 | **47.2** | 40.9 |
| | Executive | **56.6** | **35.6** | 46.8 | **39.8** | 49.0 |
| | Public official | 0.8 | **2.3** | 0.8 | 1.6 | 1.2 |
| Region | West | 26.5 | 29.2 | **37.0** | 31.2 | 29.0 |
| | Southwest | 9.0 | 8.4 | 7.2 | 7.1 | 8.3 |
| | South | 24.1 | 23.3 | 26.1 | 23.0 | 24.0 |
| | Midwest | 21.5 | 20.3 | **13.0** | 19.7 | 20.1 |
| | Mid-Atlantic | 13.5 | 11.9 | 11.6 | 14.1 | 13.2 |
| | New England | 4.2 | 4.5 | 3.6 | 4.1 | 4.1 |
| | Outside U.S. | 1.1 | **2.5** | 1.4 | 0.7 | 1.3 |

Note: The proportions bolded are significantly different than those for all planners at the .05 level.

expected if distributed proportionally in our sample. Thus, planners assuming a hybrid role are more rule based and less aspirationally motivated, while political planners make a lower proportion of deontological choices than would be expected if those choices were random.

Finally, planning experience and ethical choice are significantly correlated, but the correlation coefficient is so small ($r$ = .076, $p$ = .001) that our hypothesized relationship is not theoretically significant. We suspect this is a result of the sample size. Thus, we cannot verify, as we

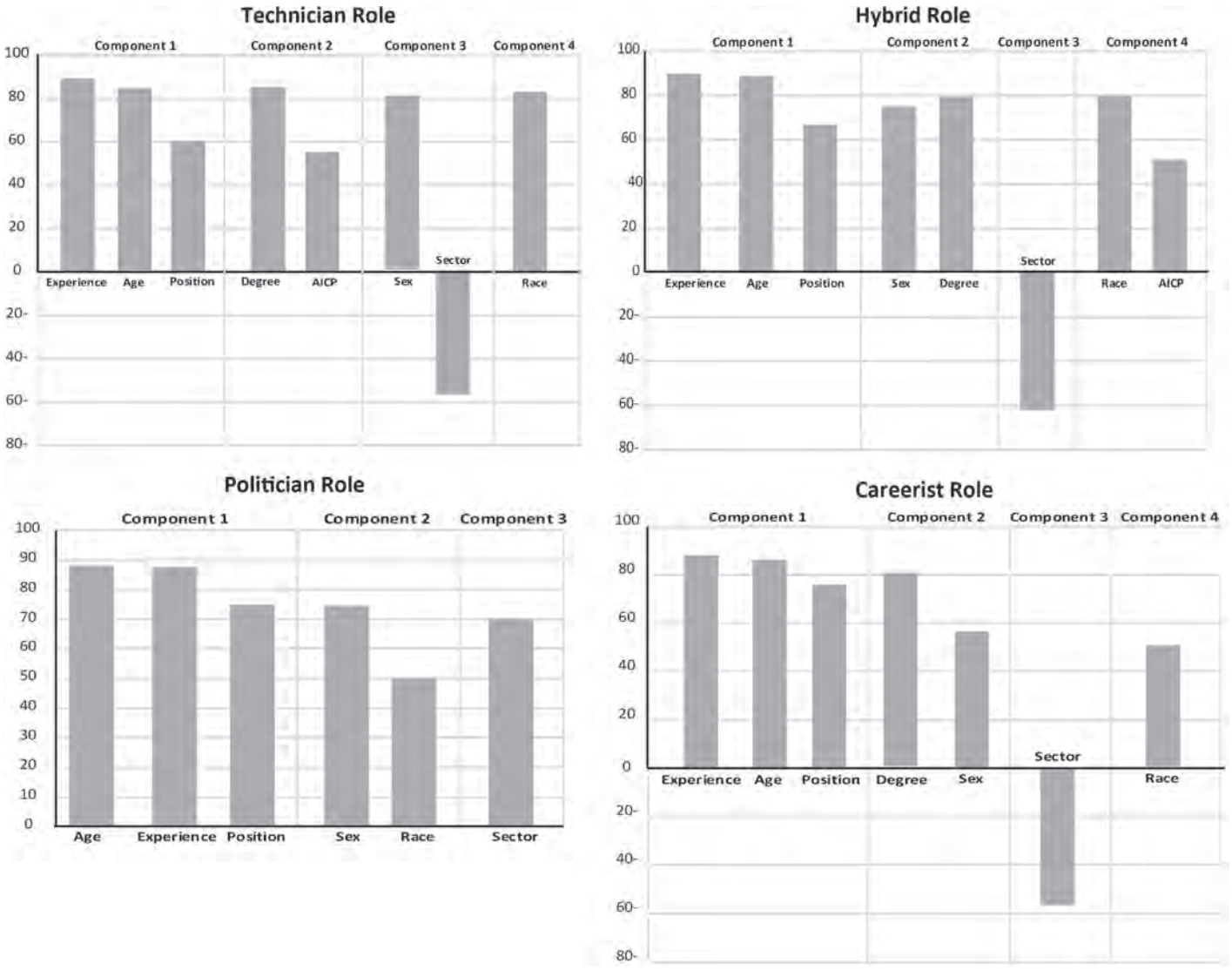



Figure 1. Planner attribute factor loadings by planner role.

hypothesized, that planners are likely to use a deontological ethical framework early after receiving their certification, but as time goes by will begin to rely more on their experience to make decisions. In fact, it appears that planners maintain a mix of virtuous and rule-based ethical choices after they have gained experience.

Another way to examine the relationship between planners' role choice and ethical frameworks is to evaluate

Table 7. Planners' ethical framework and role choice.

| | Technician, % | Political, % | Hybrid, % | Careerist, % | All Planners, % |
|---|---|---|---|---|---|
| Deontological/virtue | 15.6 | 12.7 | **6.5** | **10.1** | 13.1 |
| Deontological | 19.1 | **10.3** | **27.5** | 15.6 | 17.9 |
| Mixed/deontological | 47.5 | 52.9 | 52.9 | 51.8 | 49.8 |
| Mixed/virtue | 7.1 | 9.8 | **1.4** | **11.6** | 7.9 |
| Mixed/utilitarian | **0.4** | **2.9** | 1.4 | 1.4 | 1.1 |
| Mixed/hedonistic | 0.1 | 0.5 | 0.0 | 0.0 | 0.1 |
| Hedonistic | 0.0 | 0.0 | **0.7** | 0.0 | 0.1 |
| Mixed/mixed | 10.1 | 10.8 | 9.4 | 9.4 | 10.0 |

Note: The proportions bolded are significantly different than those for all planners at the .05 level.

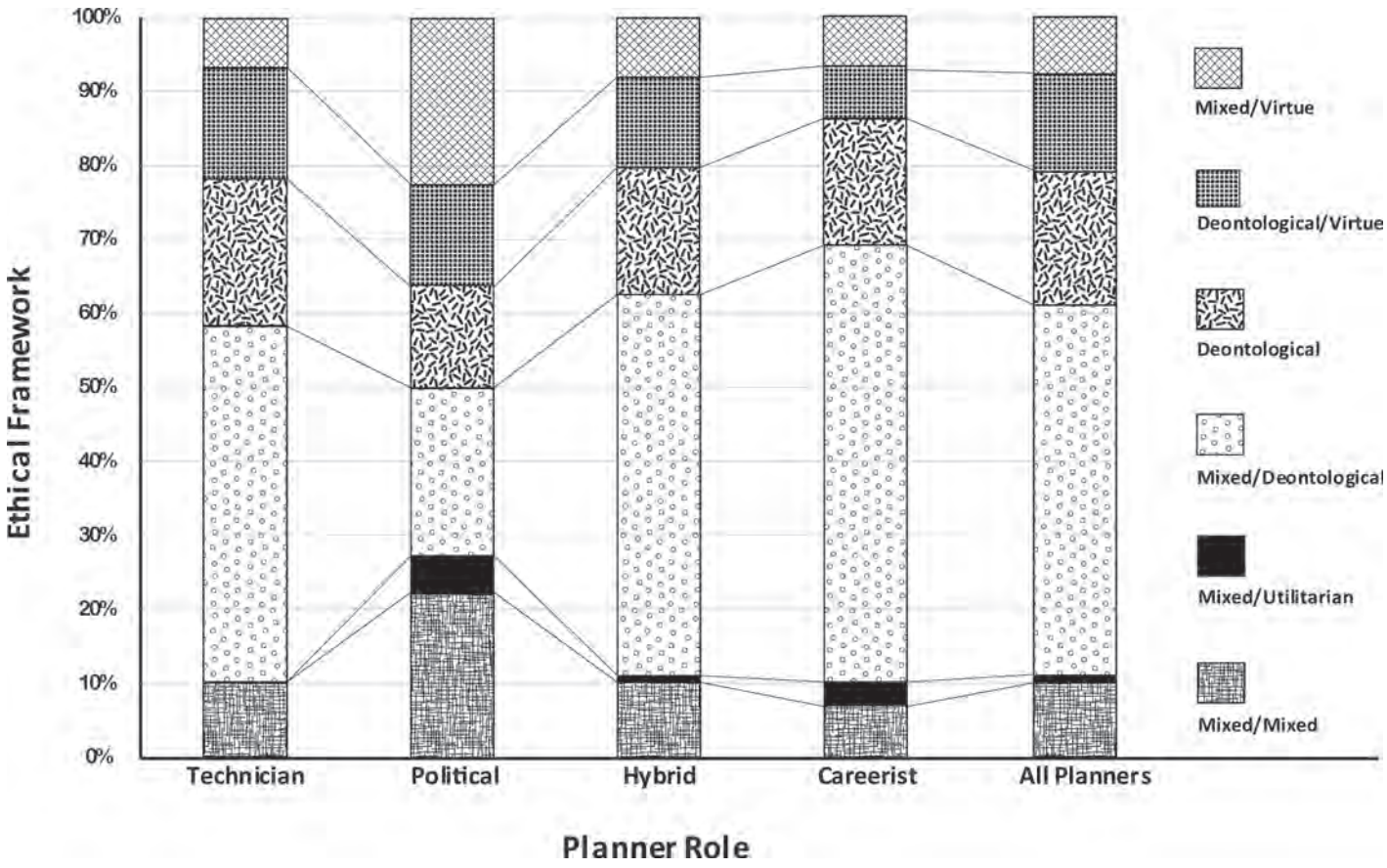



Figure 2. Planner's ethical framework by role choice.

the demographic characteristics of the planners that make choices within the various ethical frameworks. Here again factor analysis allows us to see these relationships in their complexity. Figure 3 is a visualization of the results of our factor analyses of the chosen ethical frameworks. The standalone frameworks of virtue, utilitarian, and hedonistic and the mixed frameworks of mixed virtue, mixed utilitarian, mixed hedonistic, and dual subdominant had too few responses for factor analysis to evaluate. Those that scored the highest on deontological choices are again White, male, well-educated public sector planners; older, experienced, AICP certified and promoted tend to choose the deontological framework. The factors scoring the highest with the combined dominants deontological and virtue indicate that White, educated, experienced, mature, promoted planners and private sector planners with AICP certification tend to choose the deontological/virtue framework. Experienced, mature, educated, promoted, White, female, public sector planners with AICP certification are more likely to give mixed deontolgical responses. Finally, White, educated, mature, experienced, promoted, AICP-certified, male public sector planners are most likely to give chaotic responses. The differences here are mostly in regard to sector. The private sector planners tend to choose deontological or virtue, while public sector planners purport to apply a more rule-based approach.

## How Planners View Tactical Ethics

Howe and Kaufman (1979) find that the tactics, or how planners accomplished their goals, have an important effect on ethical choices. Table 8 lists the five tactical situations used in the scenarios, ranked by how respondents indicated the acceptability of the proposed actions. Fewer planners in our sample than in Howe and Kaufman's (67% vs. 75%) find "leaking information to the Chamber of Commerce" unethical. In contrast, more of our respondents than Howe and Kaufman's feel that "assisting a group to overturn official action" (65% vs. 24%), "changing a technical judgment due to pressure" (52% vs. 39%), and "dramatizing a problem to overcome apathy" (47% vs. 13%) are unethical. Planners in our sample are roughly as likely as those in the Howe and Kaufman sample (36% vs. 34%) to think that "releasing draft information on request to homeowners groups" was unethical. These responses are consistent with the larger number of planners in our survey who assume a technical role, perhaps indicative of our more conservative political climate.

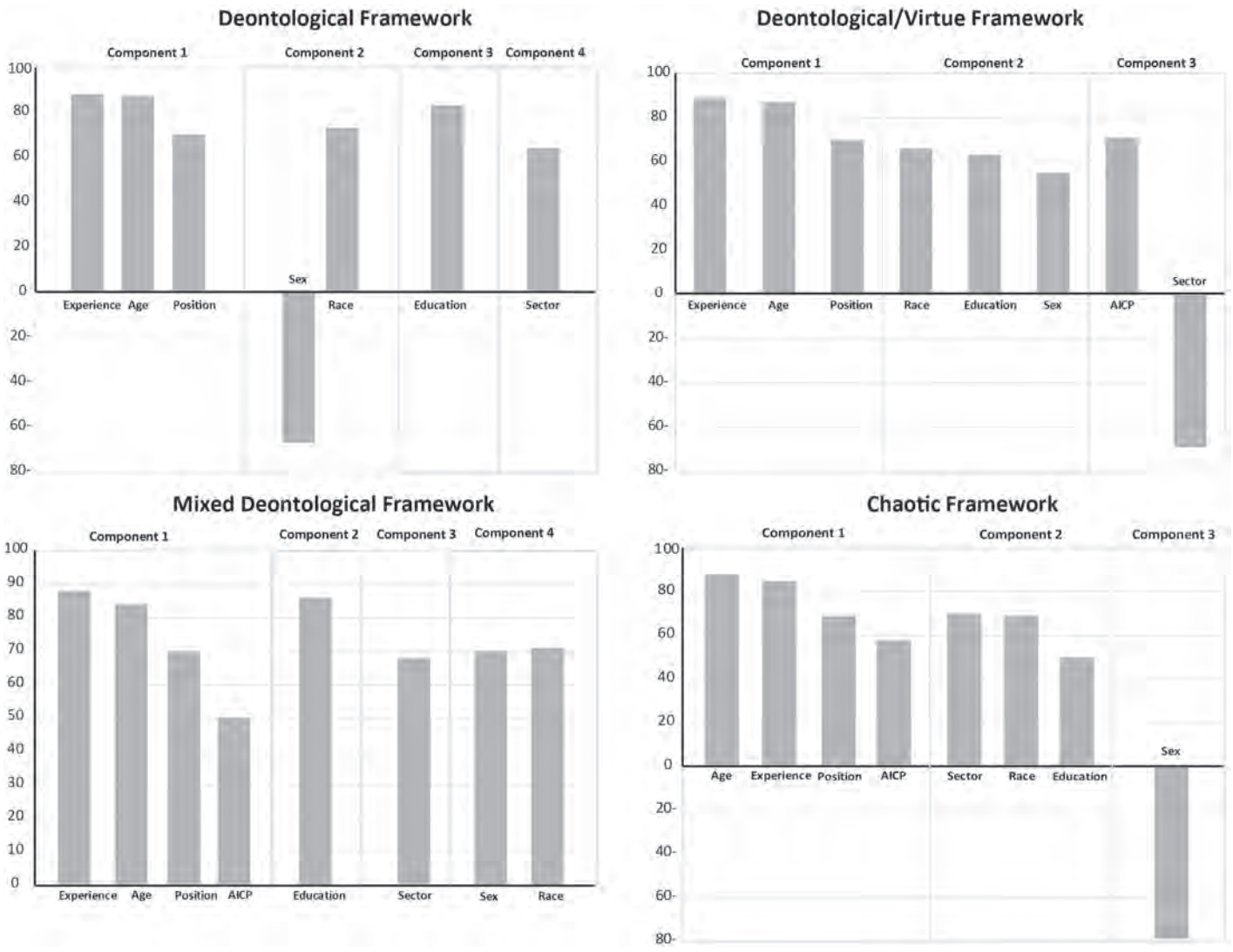



Figure 3. Planners' attribute factor loadings by ethical framework.

Table 8. Rank order of tactics by ethical acceptability.

| Rank[a] | Tactic | Scenario | Percentage total response ethical[b] | Percentage total response unethical[c] | Percentage total response not sure | Mean[d] |
|---|---|---|---|---|---|---|
| 1/3 | Release draft information on request to homeowners group | 13/14 | 38.4 | 36.0/34 | 25.5 | 3.03 |
| 2/1 | Dramatize problem to overcome apathy | 12/13 | 27.5 | **47.2/13** | 25.2 | 3.38 |
| 3/2 | Assist group overturn official action | 14/15 | 21.2 | **64.9/24** | 13.6 | 3.71 |
| 4/4 | Change technical judgment due to pressure | 10/11 | 11.3 | **51.5/39** | 27.6 | 3.65 |
| 5/5 | Leak information to Chamber of Commerce | 11/12 | 11.8 | **67.4/75** | 20.8 | 3.83 |

Notes: The proportions bolded are significantly different at the .05 level.

[a]Our ranking is listed first, followed by Howe and Kaufman's 1979 ranking.

[b]Percentages for some scenarios are less than 100% due to rounding.

[c]Percentages in our sample is listed first; Howe and Kaufman's (1979) is listed second.

[d]The lower the mean score, the higher the number of ethical responses; the higher the mean score, the higher the number of unethical responses. The scale was (1) *clearly ethical*, (2) *probably ethical*, (3) *not sure*, (4) *probably unethical*, and (5) *clearly unethical*.

Table 9 demonstrates the proportion of survey responses by ethical framework for each of the 18 scenarios. Each scenario has five choices, each choice representing an ethical framework or a combination of frameworks. We discern the differences between the choices of ethical frameworks by sorting the table data by each ethical framework (largest to smallest) separately. Planners choose the virtue framework—basing a decision on a personal moral code or what a respected professional would do—most often in scenarios that concern protecting the unrepresented, responding (or not) to threats, accepting bribery, releasing draft recommendations on request, using expendables as tradeoffs, and changing technical judgment due to pressure. Planners make deontological choices, those based on formal rules, most often in scenarios that address distorting information, misuse of professional position, and giving special advantages to certain stakeholders. Planners make utilitarian choices, those based on the value of the outcome, less frequently than either virtue or deontological choices in general, but were chosen most often in scenarios involving leaking information, adequate information, release of draft recommendations, and changing technical judgment due to pressure. Finally, planners rarely make hedonistic, or self-interested, choices, but when they do, the tactics concerned are using expendables as tradeoffs and changing technical judgments due to pressure. Thus, it appears these planners are virtuous when dealing with ideological issues (protecting the unrepresented, releasing draft recommendations on request, and changing technical judgments due to pressure) and legal issues like bribery and threats. They are more likely to be rule based (make deontological choices) or make utilitarian tradeoffs when concerned with the distribution of information and conferring special advantage, to themselves and on certain stakeholders.

Howe and Kaufman (1979) find that "planners react more to tactic than to the beneficiary in making their ethical choice" (p. 247). However, as shown in Table 10, in 2015 our sample suggests that the beneficiary also affects the ethical choices that planners make. Resorting the data in Table 9 to create Table 10, we see that planners choose the virtue framework, making their choices based on what they think is moral or admirable, most often in scenarios where the issue benefits the environment and low-income communities or stakeholders, but also developers and land development issues and politicians. Planners make deontological or rule-based choices most often in scenarios where the issue being addressed is mass transit, personal benefits, or residents. Planners make utilitarian choices, those focused on the outcome, less frequently than either virtue or deontological choices in general; planners do choose the utilitarian framework most often in scenarios where the scenario concerns benefits for a community group. Finally, hedonistic choices are very rare in general but planners make such choices when the scenario indicates that politicians would benefit.

## The Contemporary Ethics of Professional Planners

We conclude by highlighting our major findings in terms of their significance for the planning profession and planning education. Our first research question concerns the roles that planners assume today in comparison with Howe and Kaufman's 1979 findings. We find a significantly larger proportion (4.5% to 20.7%) of careerists and technicians (26.5% to 53.7%) than do Howe and Kaufman, but a smaller proportion of politicians (18.2% to 15.3%) and hybrids (50.8% to 10.3%). Thus, a major difference between our findings and those of Howe and Kaufman is that most of our respondents choose a technician role, not Howe and Kaufman's hybrid role. Baum (1996), following Shön (1983) and Dalton (1986), suggests that planners affirm the technical role not only because it supports claims of their professional status but because experience has taught them it is effective. We feel that Howe and Kaufman's findings are contextually related to the political climate of the 1960s and 1970s, while our findings are just as contextually related to our recent and current political culture. Thus, as with the general population, professional planners have become more conservative.

Technical justifications and viewpoints might function, however, as a safe refuge for politically liberal planning policy perspectives. In fact, this interpretation is consistent with Howe and Kaufman's (1979) prescient prescription:

> Our data indicate that the most effective way to ensure that planners have such a restrictive view of planning and of ethical behavior would be to train people as technicians, since, of our three roles, they have not only the narrowest view of the planners' range of discretion, but are even more restrictive in what they are actually willing to do in practice. (p. 253)

Taking a technical role over a political role is not, however, consistent with how ethics and planning roles have been taught in planning schools since Howe and Kaufman's prescription (Klosterman, 1981, 1992, 2000, 2011). Planning educators, in fact, have been professing to the contrary: that the traditional technical role is theoretically impossible and potentially distorting and that a political or hybrid role

Table 9. Tactics by ethical acceptability sorted by proportion of survey responses.

| Tactic | % Virtue | Tactic | % Deontological | Tactic | % Utilitarian | Tactic | % Hedonistic |
|---|---|---|---|---|---|---|---|
| Protect underrepresented | 86.1 | Distort information | 92.1 | Leak information | 28.5 | Use expendables as tradeoff | 12.7 |
| Threaten legal action | 85.6 | Misuse professional position | 83.6 | Provide adequate information | 19.0 | Change technical judgment due to pressure | 12.4 |
| Accept bribe | 84.4 | Provide adequate information | 65.8 | Release draft recommendation on request | 17.0 | Leak information | 7.1 |
| Release draft recommendation on request | 76.5 | Leak information | 30.0 | Change technical judgment due to pressure | 15.2 | Misuse professional position | 5.4 |
| Use expendables as tradeoff | 66.0 | Accept bribe | 15.2 | Use expendables as tradeoff | 11.8 | Provide adequate information | 3.5 |
| Change technical judgment due to pressure | 57.0 | Change technical judgment due to pressure | 14.2 | Misuse professional position | 9.8 | Distort information | 1.8 |
| Leak information | 33.3 | Threaten legal action | 12.1 | Distort information | 6.0 | Threaten legal action | 1.4 |
| Provide adequate information | 10.3 | Protect underrepresented | 10.3 | Protect underrepresented | 2.5 | Release draft recommendation on request | 0.4 |
| Misuse professional position | 0.4 | Use expendables as tradeoff | 7.6 | Accept bribe | 0.0 | Accept bribe | 0.4 |
| Distort information | 0.0 | Release draft recommendation on request | 4.9 | Threaten legal action | 0.0 | Protect underrepresented | 0.1 |

Table 10. Issue benefiting by ethical acceptability sorted by proportion of survey responses.

| Issue benefiting | % Virtue | Issue benefiting | % deontological | Issue benefiting | % Utilitarian | Issue benefiting | % Hedonistic |
|---|---|---|---|---|---|---|---|
| Environment | 77.3 | Mass transit, low income | 92.1 | Community group | 51.6 | Politician | 12.4 |
| Land developer/ development | 76.5 | Personal benefit | 70.0 | Residents | 19.0 | Environment | 8.8 |
| Politician | 57.0 | Residents | 65.8 | Land developer/ development | 17.0 | Community group | 5.0 |
| Low income | 53.0 | Low income | 25.1 | Low income | 16.1 | Low income | 4.6 |
| Community group | 24.0 | Community group | 18.7 | Politician | 15.2 | Personal benefit | 4.4 |
| Personal benefit | 17.2 | Politician | 14.2 | Personal benefit | 7.8 | Residents | 3.5 |
| Residents | 10.3 | Environment | 13.1 | Mass transit, low income | 6.0 | Mass transit, low income | 1.8 |
| Mass transit, low income | 0 | Land developer/ development | 4.9 | Environment | 0 | Land developer/ development | 0.4 |

has proven to be more effective (Baum, 1996; Flyvbjerg, 1998; Forester, 1989, 1999; Innes, 1995, 1996). This may suggest that professional planners in recent and contemporary practical planning contexts have found, contrary to their education, that technical and hybrid roles have helped them achieve their planning goals. In addition, this might be an even more widespread tendency, since our data indicate that the practicing planners subscribing to a technician role were infrequently planning educated (28% compared with 60% in our sample as a whole). We doubt that planning educators can influence this tendency via our planning curriculum in part because so many practicing planners are not planning educated.

Those scholars and educators who continue to believe that planners will be more effective if they assume a political role may have to choose other ways to convince practitioners to consider doing so, in part because so many APA members are not planning educated. Those educators who wish to influence practitioners to consider becoming more political may have to make their case in professional planning outlets like *Planning* magazine and through the AICP certification maintenance program. Presenting positive case studies of projects or plans that were more effective and were implemented more quickly or fully may help sway those who continue to believe in the greater efficacy of the technical role.

Our second research question focuses on how well practicing planners conform to the ethical frameworks that drive the AICP Code. We reconfirm Howe and Kaufman's (1979) finding that the planning profession's core values (as represented in the 2009 AICP Code) are shared by a significant majority of practicing planners: 80% in our sample. We do admit that the share of planners who actually act according to the core values is probably smaller than either survey found because people are likely to give socially acceptable responses. Our hypothetical scenarios, moreover, present situations that are simpler and more straightforward than they would be in practice. Our findings are significant, however, even if the response bias leads us to overestimate conformity to the AICP Code by 10 to 20 percentage points.

The third research question motivating our work is how the role that planners assume affects what they see as ethical behavior. We find that the ethical frameworks of planners who choose either a technical or careerist role are not affected by those role choices. The ethical frameworks of those choosing hybrid and political roles, in contrast, are. Hybrid planners make a higher proportion of deontological, or rule-based, choices with a lower proportion of deontological/virtue and mixed/virtue choices than would be expected in our sample. Political planners make a lower proportion of deontological choices than would be expected in our sample. Hybrid planners appear more pragmatic, making more rule-based choices and fewer virtuous or aspirational choices than expected, while political planners appear less willing to make rule-based choices.

Our fourth major research question is how job experience influences both the ethical frameworks that planners use and the roles they choose to play. We were limited in our ability to address that question; to begin, we conducted a cross-sectional study, so we cannot attribute differences in ethical choices or roles to changes over time in professional experience. Second, we expected to find that very experienced planners would be more likely to base their decisions on their personal experience, whereas younger, less-experienced planners would base their efforts on the AICP Code; that is, using a deontological, or rule-based, ethical framework. We find, in fact, that most planners, regardless of the stage of their career, use a mix of virtue and rule-based ethical frameworks. We suspect that experienced professional planners have found that using a mix of ethical frameworks, well represented in the AICP Code, is an effective approach in contemporary planning practice.

We conclude that our survey of APA members shows that the AICP Code of Ethics has value. Our conclusion contrasts with that of Howe and Kaufman (1979), who question the usefulness of the code. We attribute the greater importance of the code in the decisions made by the practicing planners in our survey to two factors: 1) important code revisions over time that respond to wider and more up-to-date ethical challenges and 2) improvements in planning curriculum due to changes in Planning Accreditation Board accreditation guidelines that have resulted in the revised AICP Code being used directly in the classroom with the kinds of ethical dilemmas posed in Howe and Kaufman's scenarios for at least three decades.

It is crucial to both practitioners and academics to understand what planners currently consider ethical behavior and the basis on which they make ethical decisions. We find, in updating the seminal 1979 Howe and Kaufman survey of practicing planners, that most planners today reject a political role as an advocate for specific policies or stakeholders, and are more likely to adopt a technician role as an unbiased professional simply reporting data and information to a variety of stakeholders. Their behavior is largely consistent with deontic or rule-based ethical frameworks, many of which are embedded in the AICP Code. We find it surprising that this is independent of how long someone has been a planner or their rank or position, although we do find some differences by sociodemographic factors and professional experience. We believe that our respondents may assume (or report) playing a technician

role largely because they have found that role to be more effective, and perhaps less personally threatening.

Academics, however, feel that planners are more effective when they advocate for certain positions or stakeholders and when they take a more active part in bringing multiple stakeholders to the table while addressing barriers to their active participation in planning processes (see Brooks, 2002). The above role choice combined with the normative structuring that deontological frameworks play in contemporary professional planners' espoused choices also suggests that the challenge posed by Campbell and Marshall (1999) that planning educators "need to find a way of giving prominence to universal values such as equity, environmental sensitivity and social justice without at the same time ignoring the situatedness of the socio-economic and institutional contexts with which planners are confronted" (p. 476) still stands.

We also accept that simply assessing answers to simple scenarios, and quantifying factors that may lose meaning when quantified, may have affected our results. We believe it is crucial to also interview a wide variety of planners, seeking deeper insights in what motivates their decisions, how they personally determine what is ethical behavior in the more contested and real-world situations that they face, and the skills needed to negotiate them successfully and ethically. Combining more qualitative work with our survey results will allow practitioners and academics to better understand how much more political planners can really be in today's political climate and the rewards as well as problems of assuming a political role.

## Notes

**1.** It is important to remember that Howe and Kaufman's (1979) role scale, like ours, only measures a planner's attitudes, since respondents were not asked if they possessed the necessary skills for the role. Although planners may aspire to take a political, technical, or a hybrid role, without the necessary skills to perform their duties in a particular role, they will not be successful in assuming that role. This question of the skills necessary to be successful at a particular role is addressed in the interview portion of our research project.

**2.** Forester's (1989) construction of the five types of planners (technician, incrementalist, liberal-advocate, structuralist, and progressive) is meant to explain how various planners confront different situations. "Each of these planning perspective points to a different source of the need for information, and thus defines a different basis of power: technical problems, organizational needs, political inequality, system legitimization, or citizen action" (p. 31).

**3.** Johnson and Gore (2016) compare the historical changes in planning and architecture codes of ethics in terms of the values represented with an eye toward the potential for professional collaboration.

**4.** The development of many planning organizations gave planning a great sense of a legitimization. In 1959 the Association of Collegiate Schools of Planning (ACSP) was born when a few department heads of planning schools got together at the annual ASIP conference to confer on common problems and interests regarding the education of planners (*Timeline of American Planning History*). In 1971, the American Institute of Planners (AIP) adopted a Code of Ethics for professional planners. The AIP and American Society of Planning Officials (ASPO) merged to become the APA in 1978. At this time, the APA established a professional institute, the AICP, to be responsible for the national certification of professional planners. The ACSP in its current incarnation was established to represent the academic branch of the planning profession in 1980 (Chatterjee, 1986). Prior to the creation of the Planning Accreditation Board (PAB) in 1984, the National Education Development Committee (NEDC) had a planning degree recognition program that began in 1960 to assess the qualifications of graduates to take the AIP exam. It was not until 1989 that the PAB was recognized by the Washington-based Council on Post-Secondary Education to be the sole accrediting agency in the field of professional planning education. Following that, PAB started a full-fledged accreditation, involving a much more detailed evaluation.

**5.** The AICP Code of Ethics is divided into four sections. The first two are of interest here. The first section (A) has the aspirational ethics. Planners are not held to these aspirations as they are to the Rules of Conduct, section (B). These rules are to be closely abided to and planners have the responsibility to follow them; if not, the planner can be charged with misconduct.

**6.** We also were able to compare our sample data with some incomplete data provided by the APA for 2015. This data is much less comprehensive, so we do not provide it here.

**7.** There are a varying number of respondents based on particular questions, but the number of missing responses is generally very low. It ranges from 39 for years of experience to 0 on sex. Thus, our sample sizes are still sufficient.

**8.** While we had expected to be able to test the representative nature of our respondents, to our surprise the APA does not collect demographic data on its members. Thus, we cannot assume our sample is representative of the membership of the APA, let alone professional planners more generally.

**9.** Our analysis used orthogonal (varimax) with Kaiser-Meyer-Olkin Measure of Sampling Adequacy greater than .6 (varying from .616 to .689 for individual runs). All four planning role categories were significant at the .000 level using Bartlett's Test for Sphericity approximating Chi-Square.

## Supplemental Material

Supplemental data for this article can be accessed on the publisher's website.

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Planning Practice & Research

ISSN: 0269-7459 (Print) 1360-0583 (Online) Journal homepage: https://www.tandfonline.com/loi/cppr20

# Acting on Principle: Dilemmas in Planning Practice

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**To cite this article:** Heather Campbell & Robert Marshall (1998) Acting on Principle: Dilemmas in Planning Practice, Planning Practice & Research, 13:2, 117-128, DOI: 10.1080/02697459816139

**To link to this article:** https://doi.org/10.1080/02697459816139

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*Planning Practice & Research, Vol. 13, No. 2, pp. 117–128, 1998*

ARTICLE

# Acting on Principle: Dilemmas in Planning Practice

HEATHER CAMPBELL & ROBERT MARSHALL

## Introduction

Throughout the history of planning there have been lengthy debates as to the nature of this activity and the principles which should guide practice. The ill-defined quality of the problems which confront planners and the multiple interests affected lead to tensions and dilemmas as to the most appropriate choice of actions or values to endorse. Despite much of the professional rhetoric of planning remaining resolutely attached to the reassuring claims of technical expertise, there is at least implicit recognition that moral judgements and ethical questions pervade the daily practice of planning (Reade, 1987; Low, 1991). The choices planners make are fundamentally about questions of right and wrong and good and bad.

Growing awareness about the ethical dimensions of professional activity are not the exclusive province of planners, as can be seen in the current debates within law and medicine. However, the traditional focus of planning activity within public sector institutions, makes the choice of appropriate actions particularly problematic whether that be in terms of underlying goals or the means to achieve those objectives. Such circumstances make the obligations placed on planners more problematic than in personal professional relationships. For example, are planners obliged to serve the interests of their political employers, the organisation, personal values, clients, the wider community, future generations or the profession? Moreover, obligations, and the actions that are implied, are likely to be influenced by changing contextual circumstances. That is not to suggest that modifications to the nature of planning are inevitable, but that at the very least accepted values and practices will be subjected to close scrutiny.

The 1980s were marked by the extent to which the post-war consensus as to the value of planning became the focus of concerted challenge. The very justification for intervention in land and property markets was questioned and the institutional context most often associated with planning, namely local government, became synonymous with inefficiency, pejorative notions of bureaucracy and a lack of accountability. Despite this attack on the very foundations and institutions associated with planning, the 1990s have seen its survival. However, survival on its own is a relatively limited achievement; more fundamental is the

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0269-7459/98/020117-12 $7.00 ©1998 Carfax Publishing Ltd

extent to which the dimensions of the dilemmas confronting planners have been altered by this experience. How are practitioners coping with the contexts in which they find themselves and what values and methods are guiding their actions?

Critical reflection on the nature of planning dilemmas would seem to lie at the very heart of the work of planning theorists. However, most practitioners (and for that matter academics) tend to regard the output of planning theorists to be at best an irrelevance. Much of the literature appears abstruse and highly inaccessible, with little seeming to engage with topics of concern to practising planners. Notwithstanding Forester's (1993) contention that planning theory should be empirically fitting, practically appropriate and ethically illuminating and at a time when the moral and ethical foundations of society and the state are coming under greater scrutiny, the credibility of planning theory remains relatively low.

There are essentially two strands to the work directly addressing ethical dilemmas in planning. The first of these explores the merits of theoretical concepts such as truth and meaning in relation to the normative underpinnings of planning (Wachs, 1985; Hendler, 1995). The second strand focuses on the frames of reference of individual planners usually divorced from the context of everyday practice (Howe & Kaufman, 1979, 1981; Kaufman, 1985; Healey & Thomas, 1991; Howe, 1994). Much of this work emanates from a North American environment and as a consequence tends to emphasise individualistic over the more collective forms of social relations familiar to those based in Europe. In contrast to the work of planning theorists, the planning profession has largely concentrated on matters of basic procedure, exemplified in the Royal Town Planning Institute's (RTPI) *Code of Professional Conduct* (RTPI, 1994) and in recent reports such as the Lees Report on North Cornwall (DoE, 1993). Such documents tend to imply that the application of 'correct' procedure will resolve the dilemmas planners face. Moreover, that actions taken on this basis are regarded as a defence against any criticism which may result from unsatisfactory outcomes. This in turn allows planners to side-step questions concerning the values inherent in their activities.

The complexity of the socio-political world in which planning practice is embedded and the nature of the tasks confronting planners suggests that planning theory should have an important contribution to make. However, the very real insight provided by theoretical understanding will remain limited until it is more fully informed by daily practice. It is with these considerations in mind that the work explored in this paper should be viewed. The aim of the approach adopted has been to retreat from the convention of grandiose theory-building preceding empirical investigation and to start by using focus groups of practitioners to assist in the process of defining and identifying the dimensions of the dilemmas they confront. In so doing concern centres on the interrelationships between individual planners and the contexts in which they are located, as the values and actions associated with the planning activity are rarely simply a matter of individual personal choice.

Focus groups were employed as these are the most appropriate means of obtaining insight into attitudes, experiences and opinions concerning underlying

values and principles. The interaction which takes place within a group leads to issues being raised which would not come out in casual conversation, predefined questionnaires or in response to a researcher's preconceived questions (Morgan, 1988). The findings discussed in this paper result from two focus group meetings which took place in February 1996. It was felt to be important that the views of individuals from all levels of the planning hierarchy should be sought. As a result, the first meeting drew on the experiences of new entrants to the planning profession, while the second explored the views of senior practitioners. The six participants in the new entrants' group were all aged between 23 and 30 and had worked within planning for between two and seven years. In contrast the five senior practitioners in the second group were all aged between 45 and 55 and had worked in public sector planning for between 24 and 30 years. There were other important contrasts between the two groups. The senior practitioners were all male and had spent their professional lives in the public sector. All were in positions of considerable professional and managerial responsibility (two were chief officers, two were assistant directors and one was a principal planner), bringing them into frequent contact with elected members. Each had logged up a rich and varied range of experience. All but one were currently employed by metropolitan districts (a bias which may, of course, be significant in influencing opinions); the exception worked for a shire district in an outer metropolitan area. The new entrants were more diverse. Three were women and two worked for private consultants. Their office locations were geographically dispersed and, of those working in the public sector, two were employed by metropolitan districts and two by counties (one as a European Officer, having been employed previously in the forward planning section of a shire district). As recent entrants to the profession they, singly, had a much more restricted range of experience than the senior planners but, collectively, they were engaged in a considerable diversity of planning tasks.

Clearly, we would not wish to suggest that our findings are representative of practice as a whole. The approach was deliberately exploratory. However, the findings of even this limited study are instructive in highlighting some of the tensions and dilemmas at the heart of contemporary practice. Our intention is to carry out further research which will build on the issues identified through additional discussions with practitioners as well as those outside the profession including politicians, developers and interest groups.

The remainder of the paper outlines the findings of the focus group discussions, highlighting the nature of the dilemmas confronting planners and concerns with respect to the development of theory. In so doing, we draw attention, where appropriate, to significant differences between the opinions and perceptions expressed by the two groups of practitioners.

## Dilemmas in Planning Practice

Philosophical thinking in relation to ethical questions distinguishes between different approaches according to whether critical emphasis is placed on the appropriateness of action, most particularly the means adopted, or the intrinsic value of the underlying ends and goals. Furthermore, these judgements about

ends and means are set against an intricate web of obligations. These distinctions between appropriate actions, intrinsic values and underlying obligations are in practice much harder to disentangle than they are in theory. Individual ethical perspectives on planning may start from an emphasis on fairness or securing inter-generational equity but they are not easily compartmentalised from competing claims. This in turn results in tensions between different values and also between values, means and obligations. For the sake of clarity the analysis of the findings of the focus groups is clustered around these three elements, although there are clearly interrelationships between the issues raised.

### *Values and Ends*

Members of both focus groups were deeply convinced of the value and importance of the planning system, although discussion revealed major differences in perceptions as to its underlying goals, most particularly its role in relation to market processes. It was apparent that differences in perception were dependent, in part, on the local economic context. At one end of the spectrum were those working in the often demoralised economic circumstances of metropolitan districts where the main driving force was the need to secure development and jobs and where wider planning considerations were easily overridden in the process. At the other end of the scale were those representing outer metropolitan green belt authorities where the planning system is strongly regulatory, seeking to steer development to preferred locations. Locational differences did not entirely explain contrasting attitudes, however. One of the senior planners from a northern metropolitan district asserted strongly that the planning system was "quintessentially interventionist … if we can't improve on how the market performs then we have no role". A colleague, also from a metropolitan district, was not so sure, suggesting that perhaps all that the planning system could do was to *manage* the market—"doing work for it by consultation and bringing elements together to make development happen". Whatever the experience and standpoint, however, the way in which the planning system engaged with the development process gave rise to a variety of ethical concerns discussed further below.

All members of the new entrants' group saw planning as playing a crucial role in defending the 'environment'. There was an underlying sense of frustration as well as passion in the way this view was presented—"we're all undervalued for the job we do in society … we're the only people defending the environment and trying to get the best for everybody". The frustrations were several but included a feeling of being somewhat isolated, with politicians and the public not understanding the value of planning and what it is trying to achieve, the slowness with which decisions were taken and the incremental nature of the gains made.

The claims of the natural environment and the need to achieve sustainable development were given prominence by both groups although there were major contradictions in the views expressed both in relation to the meaning of 'sustainability' and its implications for planning policy. On the one hand there was the feeling that this was one area where the planning system had, in the

recent past, gained a more powerful and enhanced role and where intervention in the market would be more easily justified because there was a coming together of political and professional aspirations. On the other hand, some expressed the view that sustainability had been written into central government guidance as expressed in Planning Policy Guidance Notes (PPGs) but had not really filtered down to where it mattered at the local level because there was not the political thrust to see it through. This was particularly the case where the short-term needs of job creation would gainsay the longer-term needs of future generations for a clean and healthy environment. Encapsulated here are two ethical dilemmas for society and for the planning system. The first is the problem of balancing the needs of present and future generations. The second is the problem of balancing the claims of the natural world against those of human welfare. The competing claims of natural and social environments were expressed in the following way by one of the senior planners in respect of the major themes of his authority's Unitary Development Plan (UDP).

> The issue still arises how far the social issue is brought in. To what extent we lose some of the edge of our social concern because of our concern for the future of the planet. There is a difficult issue of trading-off the interests of poorer groups in our own generation against poorer and better-off groups in future generations. How far in rationalising the aims of our UDP was sustainability to be the big aim and how far it's a question of social disadvantage? My view is that people remain the centre of the picture but the environment is still an enormous issue....

In placing 'social disadvantage' centre stage, this participant was not reflecting the general view, although it must be said that there were important differences between the two groups in this respect. Members of the new entrants' group were unanimous in their view that questions of social justice were not inherently matters which the planning system could address or, indeed, should address. The legitimacy of planners getting involved in what was described by one participant as 'social engineering' was questioned. The senior planners on the whole were rather more ambivalent, seeing a role for the planning system but recognising that mechanisms and resources for effecting anything other than marginal change were not available. Central government was not prepared to match resources to identified needs and the allocation of increasing elements of public funding under 'challenge' conditions was exacerbating the problem. Social objectives were, it was suggested central to local economic development aims, but it was argued by one member of the group that the major impetus for giving explicit prominence to 'social exclusion' as an issue to be considered in relation to the development process was not coming through UK planning practice but from Europe.

Overall there was a sense of unease amongst the planners involved in the focus groups in dealing with issues concerning values in relation to planning. Moreover, it was evident that there were considerable tensions in attempting to operationalise a concept such as sustainability within a market-based economy.

*Process and Means*

A major tension, apparent through the discussion in both groups, is that between 'efficiency' and 'quality', although there was some variation in the ways in which these attributes were interpreted. The aspect of 'efficiency' which dominated the debate was the pressure to speed-up decision-making, especially in respect of the processing of planning applications. The significance attached to performance targets clearly differs markedly between authorities. For example, some strive to ensure that 80% or more of applications are determined within the eight-week period. Others are content to reach 'satisfactory' levels of performance using neighbouring authorities as some kind of bench-mark. As one might expect, performance targets are being met by authorities changing the 'rules' governing the way in which different categories of applications are dealt with. One common response has been for development control officers to quickly reject applications judged at the outset to be 'poor'. In the past these applications would have been kept in the system for negotiation to take place to see whether proposals might be modified or revised to remove objections so as to make them acceptable. There was some concern about the knock-on effect of this approach with the possible consequence that the apparent gain in 'efficiency' in the determination of applications was offset by more appeals being lodged. Opinions were very much divided as to what the wider consequences of these changes in administrative behaviour were.

Another major issue for all participants, including those working in the private sector, were the pressures stemming from rising workloads. Within the public sector, staffing levels were a major worry and there was widespread concern about the effects on the quality of service which could now be provided. These worries were heightened by the increased significance of planning consultants at all stages in the planning process. The tendency for consultants to be engaged much more as a matter of course, both to act as agents for members of the public and developers in the submission of planning applications and also in representing objectors to planning proposals and policies at local inquiries, was in many respects welcomed by the senior planners in that it had raised the quality of debate by giving some sections of the public a more effective voice. Whereas in the past it was argued, the adversarial nature of the planning system had advantaged the local planning authority, the balance had now shifted. One member of the group from a metropolitan district authority which had recently come to the end of its development plan inquiry agreed that

> ... the more widespread use of planning consultants had raised the quality of argument. But to make that work the authority needs to be resourced adequately. Trying to operate an inquiry on the resources we've had has put us in an invidious position. All the work we have put in could go down the swanny because we haven't had the resource to counter the arguments of private consultants.

There was widespread sympathy for this view, particularly where technical considerations were significant in the dispute and where the specialist knowledge was not available to the planning authority.

The implied view running throughout the discussion in the senior planners' group was that consultation—'giving people a say'—would improve the quality of the outcome. There was a down side, however, and this was the time required to provide effective consultation. It was apparent, for example, that the UDP process had in most cases been excessively long. From commencement order to public inquiry had taken seven years in one case and this was not unusual. There were contrasting reactions to this. One district planning officer felt that his development plan lacked credibility because of the time it was taking and its irrelevance to the problems needing to be addressed. The opposite view was that delays were an inevitable consequence of giving people a say. If speed was put first the casualty would be public participation with the result that dispute and controversy would be displaced further along the process to the point at which applications were being submitted. Ideas of 'quality' in this case were being directly linked to notions of consultation and public involvement. Somewhat contrary to expectations, the younger planners were less inclined to see public participation as a virtue. There was within the group a strong sense that what mattered in achieving quality was the technical competency and professional judgement of the planners themselves. Politicians and the public were often perceived to be obstacles in the way of achieving good decisions.

The dominant if not entirely uncontested view that planning works in harness with the private market rather than intervening in it, gave rise to a discussion of some of the ways in which that relationship with the market presented moral dilemmas. There were two aspects of this relationship which were seen to be particularly problematic and these were planning gain and the potentially more troublesome issue of public/private partnership arrangements. Planning gain has long been a matter of controversy and disquiet and it is apparent that, while the opportunities for gain are probably greatest in areas where there are relatively strong development pressures it is a widespread phenomenon. Indeed, one of the private sector practitioners put the view that is now seen by developers as a normal element in development costs. The concern here was over the way in which planning gain was being used by some developers to 'break a policy' or to get a proposal through 'on the back of something else'. Stronger development plan policies were seen as one means of dealing with some of the issues in an open and acceptable way but it was acknowledged that it was impossible to anticipate the variety of ways in which community benefits might be offered as part of a development package. More problematic, if less universal, were the issues raised by partnerships between the private and public sectors in which the outcome is a company in which both parties have a financial stake. Driven by profit maximisation instances were cited of planning considerations being subordinated and, at worst, subverted by the commercial interests being pursued.

### *Competing Obligations*

An important aim in this exploratory investigation was to uncover some of the tensions being experienced by planners in meeting the expectations of the organisations in which they are employed alongside a broader range of professional and personal principles or obligations. We were interested in discover-

ing whose interests are being served by the planning system or, perhaps more accurately, whose interests the members of the focus groups felt were being served and what conflicts or tensions were apparent in the conduct of everyday practice.

There was a strong sense running through both groups that the concept of the 'public interest' had little meaning given the changes effected to local government in the recent past and the often low priority given to planning considerations where they were not consonant with more powerful organisational goals. The dominance of corporate objectives was expressed in a variety of ways, but possibly the underlying tensions were those between pragmatism and strategic thinking and between political short-termism as against longer-range notions of community benefit.

The tension between professional and political judgement was especially acute in metropolitan districts facing major problems of economic restructuring and physical regeneration. 'Going for jobs' was the political imperative in these circumstances and this would often cut through other considerations. This is a defensible political choice, albeit one with which chief officers might not entirely agree. Much more problematic was the conflict of interests which arises where financial considerations are prominent. The particular problems of public/private partnerships have already been referred to but a similar, if internalised, conflict of interest can arise where financial targets are set for the sale of council-owned land and where the needs of the council to maximise revenue come up against the council's requirements as a local planning authority. The senior planners were able to resolve these tensions by placing accountability in such situations firmly with the elected members—"the ethical thing is to continue to make our voice heard on planning principles and let members take responsibility for the ethics of their choice".

The new entrants were rather less willing to see a resolution in this way. There was more scepticism of the quality of political leadership and a more critical assessment of the consequences of the dominance of corporatist interests within local government. Indeed, one member of the group had felt compelled to move jobs precisely because the loyalties demanded by his employer (a rural district council in the South West) could not be reconciled with his own values:

> If you just see planning as a job—there's enough institutional need to keep you going and that has some value, but if you have some vision that's very different … I lasted as long as I could in a hostile environment and then went somewhere else where I felt happier. That for me was the only practical way forward … when I'm older perhaps I'll care less … at the time I felt deeply and had to do something about it.

This individual felt that his professional autonomy had been reduced by the imposition of corporate objectives handed down not, in this case, by elected members, but by the chief executive. In moving jobs he was seeking an organisational culture which was still public service-centred and where principles of professional judgement and public accountability had not been prejudiced by organisational goals mediated through financial and performance targets.

For others in the group conflicts of loyalties were much less clear-cut. Although not overtly and unambiguously articulated, there was nevertheless a strong underlying assumption that the primary obligation was to some concept of professional autonomy—to independent professional judgement. Theirs was an essentially technocratic view of the planning process in which planners were the experts and best able to evaluate alternatives and make judgements based upon careful consideration of all aspects of the problem including the longer-run as well as the short-term implications of choices. It is not surprising therefore that, within the group, public consultation and participation did not figure prominently in the discourse. When the question of public involvement did emerge it often did so in a critical frame of reference, in the sense that the dominant view was that those who were able to influence outcomes were from narrow and privileged segments of the community who could 'hijack the system' and whose aims were often assisted by press 'misinformation'.

In staking out a claim to a distinctive body of knowledge and professional skills, the private practice planners were no different from their public sector colleagues. The latter, however, tended to question the integrity of private consultants whose judgement would be influenced by their financial dependence on their clients. It was in this context that the local authority planners came closest to defining an obligation to the public interest … "Private consultants are like lawyers—they'll defend anything if paid enough whereas we're meant to have values and defend concepts like fair play…. I feel as though I'm on the side of the angels … (that) I'm on the right side which I couldn't in private practice". The two members of the group who worked in the private sector defended their role, seeing themselves as problem-solvers for clients and acting as a check to ensure that local authorities were making the right decisions. Both, it should be noted, were employed by well-established firms mostly providing a service to the development industry. They too, therefore, had to meet organisational loyalties which in practice meant meeting obligations to clients; while one of the two felt entirely comfortable with this (she gave straightforward independent advice—it was up to the client whether it was accepted or rejected), the other confessed that she did find herself on occasion being required to do things with which she disagreed.

The senior planners all came from the public sector and a similar exchange did not occur. Some reference has already been made to the way consultants were perceived by the group. In the present context it might be added that members of the group felt that there were some unscrupulous planners in the private sector who would take on hopeless cases and contrary to their own professional judgement, would 'say what the client wants to hear'. Paradoxically, however, this advocacy role of the consultant was perceived to be an advantage in certain circumstances because the private consultant could say the 'unthinkable' and defend the 'indefensible' whereas a council employee could not. It was further argued that local authorities sometimes found it advantageous to have an 'independent' case made for them, especially in competing for government funding. An 'arms-length' view could in such circumstances be useful.

The senior planners were more inclined than the new entrants to see a positive role for public participation in the planning process. They

recognised that the opportunities to influence planning decisions were unevenly distributed but argued that efforts should be made 'to give everyone a say'. Reference has been made elsewhere in the paper to the way this was seen in relation to the development plan process. Somewhat surprisingly, given the changes effected to statutory planning during the last 15 years, the group felt that more effective efforts had been made in the recent past to involve a broader range of interests in the consultation process.

Despite this there was considerable disquiet about the effects of what was described as the citizen charter approach to service delivery within the public sector which was leading to 'customer-interest' replacing the 'public-interest'. As one member of the group put it:

> If you treat planning as a service delivered to customers who make a demand on this service the trend is towards regarding the applicant as the customer.... Hence the emphasis on speed—you treat the transaction as a quasi-business relationship. Whereas the public interest ethic has been very different. It was the planning system interposing itself between so-called customers (or private interests) and the general public interest that is a completely different relationship.

Dilemmas were also raised, in this connection, by the growth of arms-length organisations where channels of accountability were remote and where customer relationships were based upon a financial relationship.

## Conclusions

The political economy of Britain has undergone major changes in the recent past and these transformations have had significant consequences for the planning system and the traditional principles upon which practice has been based. Of central importance has been the increasing dominance of market rights over social, political and welfare rights (Cooke, 1990), which has not only required a reappraisal of the role of the planning system in relation to property and development markets but has also required a significant realignment of traditional conceptions of client service relationships as citizen rights as a whole have been recast. Running parallel have been the profound changes to the governance of Britain with increasing centralisation of state power at the expense of local autonomy and political accountability in respect of social and other services. Insofar as local authorities remain providers of services, 'value for money' has usurped the ideals of satisfaction of needs and professional standards. These changes in governance have occurred, moreover, during a period of increasing social polarisation. Paradoxically, local democratic autonomy has been reduced at a time when 'place' has assumed increasing importance in influencing access to both public and private goods.

The underlying importance of these changes was apparent in the focus group discussions. The findings confirm, furthermore, that ethical considerations are not merely a matter of academic conjecture but practical everyday concern. It is evident that individual practitioners, regardless of their position in the hierarchy, are struggling to identify what it means to be a professional planner in the 1990s.

Although members of both groups asserted strongly the independence of the profession to which they belong, it is clear that there was considerable uncertainty as to what frames of reference they were using, or should be deploying, to justify their decisions. The younger planners were more likely to seek reassurance from the concept of independent professional judgement than the senior planners, who were generally more pragmatic, particularly in relation to their perception of their role in relation to other 'players' in the process, including elected members, developers and the public. Although members of both groups invoked a variety of ethical principles in talking about their work, including, for example, concepts related to accountability, professional independence, the code of professional conduct, fairness etc., there was a tendency to define these principles more in relation to procedural requirements rather than to values and ends. Within the web of obligations which practitioners felt the need to meet, the demands of the agency within which they worked were clearly of paramount importance. The organisational culture not only influenced the frames of reference within which practitioners worked, but also exacted loyalties which sometimes conflicted with other values and obligations.

The justification for planning rests ultimately on some conception of a desirable public good or interest. What constitutes that good and how it is arrived at has provided the basis for an enduring debate within planning theory (Campbell & Fainstein, 1996). The way planning has been conceived within that debate has oscillated between two contrasting approaches. One has emphasised the ends or purposes which planning serves, and the other has looked for a concept of the good, not in the telos, but in procedural rules and precepts such as justice, fairness and the protection of individual rights. These differing conceptions represent ultimately two modes of ethical thinking but, curiously, within the realms of planning theory the moral dimensions of the planning activity have been afforded little prominence. In the face of the postmodern challenge to its intellectual and philosophical foundations (Beauregard, 1989; Healey, 1992; Harper & Stein, 1995), an important project for theory will be to provide a framework for confronting the ethical dilemmas of current planning practice.

The aim of this paper has been to generate questions rather than answers and, in doing so, to provide an initial platform from which to explore the ethical foundations of contemporary planning practice in Britain. We do not claim that the findings presented are necessarily representative, nor that a comprehensive review of the field has been undertaken. However, the work conducted so far suggests that the social, economic and political changes which have taken place in Britain in the last 15 years have had profound consequences for the planning system and have given rise to ethical questions of importance both for planning practitioners and for the future of the activity as a whole. Many of these questions are by no means new, at least in their basic form. Moreover, some might argue that planning's survival during the 1980s owed much to the lack of clarity over its ethical foundations. However, while obfuscation may have been a successful defence in the short term, it is unlikely to prove an effective long-term strategy.

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https://doi.org/10.3828/tpr.2021.43

Hannah Hickman and John Sturzaker

# Viewpoint
# Ethical principles in an increasingly diverse planning profession: the potential impact of different types of planners

## Introduction: who do planners work for?

The understanding that planners should act ethically is now so widely accepted as to arguably no longer need to be asserted. Unpacking what this means in practice, and how planners could and should behave ethically, are, of course, far from simple, as we return to below, but we first want to address another understanding that is also widely accepted. One example of this understanding is contained in a helpful recent contribution to this journal by Stefano Moroni (2020, 563), who makes clear that his focus 'will especially be on public planning; that is, planning by public authorities'. In this response to Moroni's Viewpoint, we do not take issue with this focus per se, but use it as a springboard to a broader critique of what is in turn a wider phenomenon – a view, implicit or explicit, that planning is, or should remain, fundamentally a state-led activity, and that consequently we as planning scholars should primarily concern ourselves with the activities of planners who work in the public sector.

Our concern with this assumption is that in certain countries and contexts a large and growing proportion of the planning profession works in the private sector – and we, based on our interactions with many of these professional planners, cannot accept that they are beyond the legitimate interest of planning scholarship. In this Viewpoint we explore the changing nature of the planning profession in such contexts, reflect upon the ethical principles and obligations identified by Moroni as being core to planners working in the public sector, and argue that they are equally relevant to those working in the private sector.

## The origins of planning

From our initial explorations of this issue, how planning originated as a modern formalised activity is a significant factor in how it is viewed today. Here, a comparison between the UK, Australia and the USA is enlightening. In the UK, planning rested 'on notions of an extension of public control over private interests in land and property' (Cherry, 1996, 17), hence the legislative beginnings of planning through

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the 1909 Housing and Town Planning Act, when 'statutory town planning became a new function of local government' (Cherry, 1996, 18). In order to deliver on that statutory function, local authorities began to employ planners, and planning was thus conceived as a state-led activity in the UK from its origins. The context in Australia was similar, with planning being introduced to counter untrammelled development in the early twentieth century, and thus conceived of as 'a government-based planning role' (Steele, 2009, 190), one which, like the UK, continued through the mid-twentieth century until, by the 1960s, 'the role of the planner was absorbed almost completely into the public bureaucracy' (Steele, 2009, 191). Conversely, in the early years of formalised planning in the USA, 'Only a few municipalities employed full time planners … the dominant type of planners was the private practitioner' (Birch, 1980, 26). Many of these planners were contracted by local authorities to produce plans on their behalf, but this is not the same as being directly employed by them, setting up a client–contractor relationship which, as we discuss below, can be a source of tension.

Looking now at where planners are employed today, we can see significant changes in the UK, the USA and Australia. Focusing purely on individuals who are members of the respective professional planning organisations, the Royal Town Planning Institute (RTPI) in the UK, the Planning Institute Australia (PIA) and the American Planning Association (APA), Figure 1 illustrates how the professions look today.

In the US, the proportion of APA members working in the private sector is now at 21 per cent, whereas in Australia it is 55 per cent, with the UK in the middle at 39 per cent. The latter is a very rapid rise, with previous studies finding that 22 per cent of RTPI members worked in the private sector as recently as 2013 (Koch and Harris, 2014). This change in RTPI membership is driven by two parallel changes in the economy – first, local authorities, subject to ten years of 'austerity' by the UK government, have seen their budgets fall by around 50 per cent and consequently

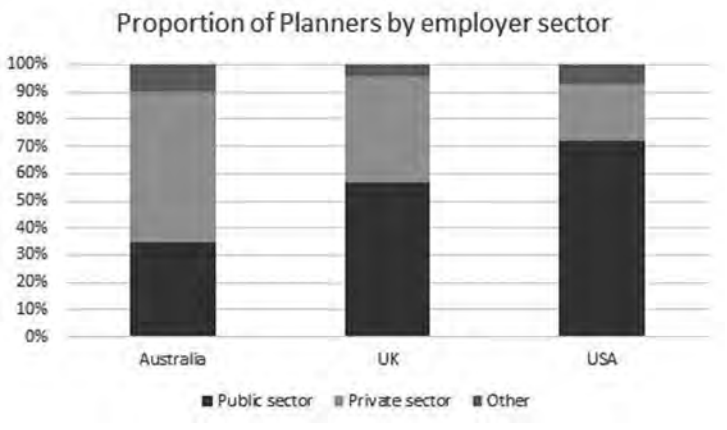



Figure 1 Proportion of planners by employer sector
*Source*: PIA (2020), APA (2018) and RTPI (2019). RTPI figures are 'primary' employers of planners

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their ability to employ planners fall likewise (Haughton and Hincks, 2013; Lowndes and Gardner, 2016). Simultaneously, the private sector has grown as the increasingly de-regulated development industry has flourished (Lord and Tewdwr-Jones, 2014) and new regulatory processes such as those required by the 2008 Planning Act appear to require substantial expertise and support from consultants, providing a market opportunity for the private sector. There has, according to Raco and Savini (2019, 4), been a 'co-evolution between reforms to make the planning system more entrepreneurial and the emergence of an increasingly powerful and influential consultancy sector'. Further, and, perhaps perversely, local authorities have been forced to contract out planning activity as they no longer have sufficient staff to carry out their statutory functions – so-called 'reluctant outsourcing' (Slade et al., 2019; Wargent et al., 2020). This latter shift is also evident in Australia, with a 'hollowed out, under-resourced and short-staffed' public sector increasingly contracting out core public planning roles (Steele, 2009, 200).

Reimer et al.'s (2013) comparative volume offers some fleeting insight from Europe. Whilst French planning practice is observed for its lack of involvement of 'non-institutional actors', including the private sector (Geppert, 2013, 117), both Italy and Greece are noted for a negotiation-based planning culture in which the private sector is increasingly engaged. In the case of the latter, government downsizing is explicitly noted as a stimulus for private-sector involvement. More revealing, perhaps, is Kunzmann's (2016, 1318) assertion of the need to understand 'the implications for a growing number of graduates from planning schools across Europe taking on professional positions in the real-estate sector', in his piece notably titled 'Crisis and urban planning?'. We have not yet found any data to be able to expand on, or interpret, this European trend in more detail.

The data in Figure 1 suggest that the planning profession in the UK is now very different than it was even five years ago, with only a small majority of planners working directly for the public sector, and others employed by the private sector on work for the public sector as well as for private clients. Recent data also evidences a marginal preference amongst students currently studying in the UK towards future employment in private practice (Hickman et al., 2021). This mix of public and private practice is similar to the origins of planning in the USA, and it is perhaps no coincidence that we find a richer history of literature on what planners and planning should seek to achieve written by American scholars (for example Beckman, 1964; Davidoff, 1965; Howe and Kaufman, 1979; Lauria and Long, 2017), as well as sources explicitly considering the public-versus-private-sector conundrum (Loh and Arroyo, 2017; Loh and Norton, 2013, 2015). Perhaps because planning in the UK remained until recently a predominantly public-sector activity, these sorts of debates have a shorter history. This reflects an assumption that planning as a public-sector activity was by default carried out in the public interest. This assumption, always problematic, has

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been explicitly undermined from at least the 1960s onwards in explorations of the regressive consequences of both processes and outcomes of public-sector planning (cf. Jacobs, 1961; Skeffington, 1969). It is, however, only relatively recently that self-reflection on the public-versus-private-sector issue has emerged in the UK (Campbell and Marshall, 1998; 2002; Slade et al., 2019; Tait, 2016) and Australia, reflecting a shift towards more 'hybridised' roles for planners in these contexts (Cook and Sarkissian, 2000; Steele, 2009).

Many of these contributions reflect upon the issues discussed by Moroni (2020) in his contribution to this journal – politics, ethics and communicative practice. We focus now on the second of these, ethics, and highlight where aspects of Moroni's discussion could be enhanced by adding to it the explicit consideration of planners working in the private sector: planners, we would argue, equally involved in the 'collective management of urban development' that Moroni (2020, 563) describes as the core activity of planning by public authorities.

## Ethics for planners in the private sector

Moroni cogently observes, 'Ethical issues concerning the role of planners are those concerning their behaviour in doing their job' (Moroni, 2020, 565). He further identifies three of 'the most important ethical principles for planners … 1 Perform quality work … 2 Adhere to duties of justice such as honesty … and truthfulness … 3 Be always accountable' (Moroni, 2020, 566). We would argue that there is nothing in these principles to suggest that they are inherently only, or more, appropriate for planners working in the public sector. Whilst there is no equivalent of the so-called 'Nolan Principles of Public Life' (Committee on Standards in Public Life, 1995) for the private sector, Moroni's principles can be found in the codes of practice of the professional bodies for planners in the US, the UK and Australia, regardless of the sector those planners work within. The RTPI, for example, 'requires its Members to adhere to five core principles, namely: Competence, honesty and integrity; Independent professional judgement; Due care and diligence; Equality and respect; Professional behaviour' (RTPI, 2016, 2). Similar principles are included in the US and the Australian equivalents (AICP, 2016; PIA, 2018), and in the 'ethical framework for the global property market' produced by the International Ethics Standards Coalition (2016).

Opinions differ in relation to whether planners might find it harder to deliver on their professional commitment to ethics depending upon who they work for. It is not as simple as a dichotomy with the public interest and the state counterposed against private interests. In the US context, private-sector planners are said to 'face particular difficulties in managing client relationships when client values contradict established planning values' (Loh and Arroyo, 2017, 169). Conversely, Campbell and Marshall

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(2002, 106) found that in public-sector organisations which did not consider planning to be particularly important, 'corporate interests were regarded as directly at variance with the public interest ethic', with some private-sector planners regarding it as their role to challenge and check local authorities.

This client–planner relationship is one which is often highlighted as being a potential ethical challenge for planners, but remains ill-understood. Moroni (2020) and Lauria and Long (2017; 2019) draw upon the distinction between different ethical approaches to elucidate these challenges and, in the case of Lauria and Long, to explore how planners deal with them in practice. Moroni's distinction between consequentialist and deontological ethical approaches is helpful with respect to the client–planner relationship – 'Loyalty to a client may be considered absolute and unconditional from a deontologic viewpoint, while it may not be absolute from a consequentialist viewpoint (in other words, there could be cases where unconditional loyalty would lead to undesirable consequences)' (Moroni, 2020, 567). For planners who have signed up to a code of conduct such as those discussed above, there is no doubt that unconditional loyalty to a client would conflict with requirements such as the duty to act 'for the benefit of the public' (RTPI, 2017, 5). How private-sector planners, particularly, balance these conflicting drivers in practice is as yet relatively underexplored, as indeed is the whole question of ethical behaviours for such planners. In the final section of this Viewpoint we discuss the normative question of planning in the private sector.

## Can planners in the private sector behave ethically?

There remains a strong tendency amongst scholars of planning theory, particularly those working in Europe, to equate 'the market', and in turn the private sector, with a purely profit-driven approach. Planners in turn are described as 'willing collaborators in the capitalist project' (Tomaney and Ferm, 2018, 3). Others categorise them as either 'profiteer planners, who conform' or 'struggling planners, who resist market dominance' (Taşan-Kok and Penpecioğlu, 2018, 113), seemingly ruling out a middle ground. In the context of planning education, it is suggested that students should ask themselves, 'will they be profit-driven and make compromises for profit, or will they choose to be impact- and value-driven and always give priority to this impact which they aim to realise?' (Taşan-Kok et al., 2016, 637). Setting up profit and impact in opposition with each other is not, we argue, necessarily helpful: it may not reflect an accurate characterisation of the reality of the private-sector planner's experiences. An approach which acknowledges the need for development to make a profit yet retains a focus on impacts and values is not considered. Similarly, Albrechts (2018, 291), as part of an argument that planners should be activists, identifies the types of roles they could perform: 'For planners working in the system (government planners),

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an equity type of planning … seems suited. For planners working outside the system (non-governmental organizations [NGOs], community organizations), only a radical type of planning [is appropriate]'. Albrechts does not appear to consider the possibility that planners working in neither the public nor third sectors can be activists. The absence of the private-sector planner from this suggests, perhaps, that they are not perceived as planners at all. Whilst Moroni (2020, 563) was clear that his focus was on the public sector, in so doing he acknowledged that 'professional urban planners are not the only ones who "do" planning'. With no mention of private-sector planners, we question how their role as planners is perceived.

These narratives fail to explore the idea that the private-sector planner may be able to simultaneously pursue profit and act in a progressive way, or even – and perhaps more radically – the idea that the private-sector planner may, in some contexts, be better placed to pursue notions such as 'the public interest' from outside the strictures of the political and regulatory state setting. Perhaps the assumption that all work carried out by the private sector has a profit imperative could also be challenged, allowing to emerge the possibility for a narrative about private-sector planners engaging in planning work that could be characterised as activist.

There are some sources, based on robust empirical data, which suggest that there are few differences between the values adopted by planners in different sectors – Loh and Norton (2013) spoke to public- and private-sector planners in the US, and whilst each group thought they behaved more ethically than the other, in fact there was 'a remarkable degree of convergence in the professional values of practicing planners' (Loh and Norton, 2013, 146), regardless of employer. A recent study of planners in the UK, focusing particularly on private-sector planners working on consultancy projects for public-sector clients, likewise noted that in that context there were few sectoral differences in how planners tried to behave (Slade et al., 2019). This might suggest, therefore, that it *is* possible to serve the public interest, be an activist planner, someone concerned with impacts and values, whatever sector you work in. Our experiences, including with some of our recent graduates and the practising planners we regularly encounter, suggest that some planners in the private sector perceive themselves as acting as the conscience in developer discussions, able to push agendas around social value and climate change as much, if not in a more impactful way, as their public-sector counterparts.

We do not wish this Viewpoint to be seen as an attack on our fellow planning scholars – rather we raise the question whether traditional approaches to considering ethics and planning theory and practice have adapted sufficiently to the contemporary state of the planning profession. The same may apply to professional institutes – some of the private-sector planners in the US spoken to by Lauria and Long (2019, 402) felt that the AICP's code of conduct did not fully reflect 'the ethical dilemmas they face in their professional practice'.

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Much of what planners do remains hidden – particularly, we believe, the work of planners in the private sector who work for private-sector clients, for example developers, but who nevertheless consider it possible to behave ethically in a setting where profit is also an inherent driver. How do these 39 per cent of planners in the UK try and work towards conceptions such as the public interest? Is that an accepted part of their company values? How do they strike a balance between the ethical requirements of their profession and the demands of their clients? What factors contribute to their decision making? We know that a range of 'obligations' affect how people, and therefore planners, decide what to do (Campbell and Marshall, 2000) – including their family, their identity, their workplace and their education. In order to cast light on such obligations, we are embarking on research to better understand the interactions between these, and other, drivers of planners' behaviour and to seek to address the 'limited understanding of the nexus of professional figures currently active in planning' (Raco and Savini, 2019, 5). In this, we are not seeking to deny the worries expressed by Sager (2016) and others about the impact of neoliberalism on development and planning practice and the complicit role of some private-sector planners – rather we are seeking to understand private practice in a more nuanced way, allowing for multiple ideas of the private sector to emerge. We look forward to further debate with colleagues on this topic.

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CHAPTER

# 1
# Introduction

Planners are not expected to be the most perfect of society's members. As authority and influence accrue to a profession, public expectations rise. This public trust imposes increased responsibility on planners to offer an example of impeccable conduct.

## WHY THIS PUBLICATION WAS PREPARED AND HOW TO USE IT

Most of those in the planning profession accept the concept of ethical conduct for planners as important. Most planners also believe that what they do is ethical simply because they deliberately chose a specific course of action. At the same time, in any office, one will observe a variety of different behaviors provoked by the same circumstance. For example, Sandy rigidly insists that each issue can be properly analyzed and that any course of action can be determined to be either right or wrong. Gary is more elastic in his views: life consists of variables, not constants. Mike is skeptical that a workable ethical code can be formulated for the entire planning community. Paula snickers at the lofty aspirational tone of the AICP Code. Caroline thinks that no planner, threatened with job loss, can afford the luxury of ethics. And Bernie rejects the entire concept of ethics. He says that life, planning included, is a zero-sum game. In his view, bluffing, deception, and corner cutting are acceptable to achieve planning objectives. The attorney, meanwhile, advises that it is sufficient to stay within the letter of the law.

Some benchmarks are needed to sort through this plethora of perspectives. Trying to ignore ethical problems is akin to getting rid of a boomerang by throwing it away. Ethical dilemmas just keep intruding. That's why this publication was prepared. It is designed to give planners a way to hone their ethical skills and develop a workable scheme for responding to ethical problems. A chapter in a separate publication, *Planning Made Easy*, by the author and Robert M. Joice, AICP, focused exclusively on ethics for planning commissioners. It is available from APA's Planners' Book Service.

As an ethical resource, this publication is intended to encourage discussion. It does not contain the definitive answer to every ethical question or problem. There is no such thing. The publication can help professionals clarify their ethical responses to the ever-present challenges of practicing planning. For example, you are the planning director and it is your job to make a recommendation on a conditional use permit for a manufacturing plant that emits a chemical not regulated by the Environmental Protection Agency. Project opponents present information showing that the emission is a health hazard.

- What are the facts? Is there a health hazard?
- Is this an ethical issue for the planner?
- Are there genuine moral issues at stake?

Suppose the compound is a virulent carcinogen and is emitted in large quantities. Most people would probably agree it should be stopped. The general prohibition against knowingly harming other people would necessitate this conclusion. But, suppose the emission produces only mild respiratory problems in a small percentage of the population. Further, suppose that removing the compound is so expensive that the plant could not be built at all. Additionally, imagine there is a severe unemployment problem in your community. Will there be serious disagreement among the planning staff about the appropriate recommendation?

Planners rightly believe that they have an obligation to protect the physical health of the community. But doesn't the staff also have an obligation to be concerned with the economic health of the community as well?

In this instance, there are conflicts among competing obligations, both of which appear to be valid. The conflicts that give us trouble are not those between good and bad, but between competing goods, both of which cannot be fully realized.

When faced with two competing obligations, each of which appears to be justified, one approach is to try to find a way to satisfy them both. While it often is not possible to satisfy all moral requirements in a pure form, it sometimes is possible to satisfy them in a modified form.

Most general moral rules have an "all other things being equal" qualifier implicitly attached to them. In real life, all things are often not equal. For example, the threat to the safety, health, and welfare of the public may be both uncertain and minimal. Whether or not the emissions are in fact harmful may be a matter of controversy, and there may be, as of yet, no evidence that the emissions produce fatal diseases, only significant respiratory problems in a certain small percentage of the population.

Furthermore, the obligation to the community may include an obligation to its economic well being. So, the question is what in this case is the planner's obligation to the public?

This issue involves morals, ethics, and the law. The term "morals" refers to generally accepted standards of right and wrong in a society. Ethics refers to more abstract principles that appear in a religious, societal, or professional code. Moral and ethical statements are distinguishable from laws. The fact that an action is legally permissible does not establish that it is morally and ethically acceptable. The fact that it may be legal for the plant to emit the chemical doesn't mean that it is morally permissible to do so.

People often view ethical reasoning as fuzzy and imprecise, and it certainly is true that the qualitative thinking involved in ethics is not susceptible to the same kind of precision that can be achieved in arithmetic. For example, factual disagreements may be a component of an ethical dilemma. Answers are based on what can be known and documented. In evaluating moral disagreements, appeals are made to broader and more basic moral principles that are organized into theories. The three most common moral theories are utilitarianism, the Golden Rule, and deontological principles or:

- end-based decisions
- care-based decisions
- rule-based decisions

In end-based decisions (utilitarianism), actions are right when they produce the greatest total amount of human well being. A utilitarian analysis of a moral problem consists of three steps. The utilitarian must determine:

- the audience of the action or policy in question — those who will be affected for good or ill;
- the positive and negative effects of the alternative actions or policies;
- the course of action that will produce the greatest overall utility.

There are two drawbacks to the utilitarian perspective on morality. First, implementation of the utilitarian perspective requires extensive knowledge of facts, and sometimes this knowledge is not available. If we do not know the long-term positive and negative consequences of an action or policy, we do not know how to evaluate it from a utilitarian perspective. Sometimes utilitarians are reduced to a best-guess approach. This is not very satisfactory. Utilitarianism also can lead to injustice for some individuals. Mining operations that cause black lung disease in some of the

miners may produce more utility than harm from an overall standpoint, but would be unjust to the miners.

In making care-based decisions (following the Golden Rule), actions are right when they equally respect each human person as a moral agent. To consider the effects, you must place yourself in the position of those who could be affected by your actions. Philosophers have proposed a hierarchy of rights that should be protected through the application of the Golden Rule. The first is the most basic: life, physical and mental health. The second involves maintaining self-fulfillment through honest and truthful interactions. The third involves rights necessary to increase one's self-fulfillment, such as the right to property and to equal treatment.

Application of the Golden Rule morality involves these steps:

- Determine the audience for the action. (Similar to the audience whose rights are under the utilitarian analysis.)
- Evaluate the seriousness of the rights infringements each action will impose
- Choose the course of action that produces the least serious rights infringements

There are two principal difficulties with Golden Rule morality. First, it is sometimes hard to apply the rule in a way that leads to a clear conclusion. This is especially true if the rights violations are merely potential rather than actual, or if the action is only a slight infringement on a right. Also, Golden Rule moral philosophies can produce implausible results. To protect lives, cars can be made so safe that no one would be able to afford one.

Following rule-based analysis, or deontological principles, our actions must be translated into universal principles of action without regard for the consequences. For example, it is right for me to toss my biodegradable lunch leftovers out of the car window only if I believe it would be correct for everyone driving on this road every single day to do the same. Critics of this method of decision making argue that it can result in a mindless bureaucracy.

For most choices to be made by planners, the utilitarian model, with its emphasis on information, is the most useful. Let's return to the problem facing our planning director and briefly analyze the dilemma in terms of this theory.

**End-based Decisions/Utilitarianism**

Who is the audience for the conditional use approval? (Who will benefit and who may be harmed?)

**Beneficiaries:**

- Contractors who will build the plant
- Business owners from secondary and tertiary economic spending
- Residential property taxpayers as a result of an improved tax base that may reduce their burden
- Other companies that may now be able to locate in the community given that a precedent has been established
- Schools as a result of an increase in the tax base
- The unemployed and their families
- Purchasers of the product made by the plant
- The manufacturing company

**Losers:**

- Those with existing health problems that may be exacerbated or those who will have new health problems — primarily the elderly and children
- Adjacent property owners who may see the value of their property decline because of their proximity to a perceived health hazard
- Taxpayers who may have to cover the cost of increased health and social services to the ill, and the families of those who become sick
- Those who will pay higher taxes and utility rates to cover new infrastructure costs to support plant and related economic/residential development

Consider the positive and negative effects of the alternative actions:

| | **Positive** | **Negative** |
|---|---|---|
| **Approve** | Jobs | Loss of reputation as clean community |
| | Tax base | Some air pollution |
| | Economic development | Probable health effects for some percentage of the population |
| **Disapprove** | Protected health for the most vulnerable members of the community — elderly & children | Loss of jobs |
| | Avoid increased public health care costs | Discourage future economic development of similar jobs |
| | Preserve and build upon reputation as clean community | Loss of investment and spin off opportunities |

Decide which course of action produces the greatest overall utility. In this case, are there ways that the negative outcomes or costs can be shifted to the project and away from the community? If so, the end-based decision may be even easier, particularly if the plant were to offer to sign a legally-binding agreement with the community stipulating that it would:

- continue to look for new technologies that might, in the future, eliminate emissions of potential hazardous materials;
- fund annual physicals for those affected by the plant and be responsible for long-term health care for those individuals whose health is harmed by the plant;
- pay development impact fees to cover infrastructure improvements needed to support the plant;
- agree to operating stipulations that limit emissions during active daytime hours and permit them only during the night when children and the elderly are less likely to be outdoors.

With such an agreement in place, and considering the need for jobs in your community, it would be much easier for you as the planning direc-

tor to recommend the approval of the conditional use permit for the manufacturing plant.

## THE SOURCES OF OUR ETHICS

An ethical framework for decision making helps us respond to the feelings we have of being responsible to someone or something. We acquire such sentiments through the process of socialization. These feelings are manifestations of values and beliefs that we have acquired from family, friends, religious affiliations, professional training, and organizational involvement. Values are the most basic kinds of belief and they help determine how we behave. Over time, our values become more systematized and create within us a predisposition toward courses of action.

### Internal

Our most basic orientation to what is right and wrong is not derived from reading the AICP Code of Ethics. It comes, instead, from the conscious and unconscious lessons we were taught as children by our parents, our religious institutions, and our schools. We were instructed as to how people should treat one another. We were chastised when our behavior was inconsistent with the norm. Gradually, we adopted the values of our family, society, and country. Those values endure as we practice planning, and may account for our choice of planning as a profession.

In the planning culture of the United States, morals and ethics are distinct even though they are related. Morality is personal and in many cases private; ethics is professional and public. Moral codes, however, can influence our professional work. For example, growing up in a multi-generational family could pre-dispose one to examine the consequences of a proposed plan or project in terms of its impact on the elderly.

This publication approaches most judgments carefully. The AICP Code of Ethics clarifies your responsibilities to those you serve and to those with whom you share your profession. Your behavior will be judged as to how you perform in your role of planner.

### External

***Our Democratic Society.*** Planners are properly concerned about public involvement and community goal setting. Legislation and case law directly define the expanse and limitations of planning.

***The Organization.*** Organizations vary, but in one area they are all alike — they demand loyalty to their rules. The rules and expectations that

govern work life in a public agency may be quite different from those in a private business. Planners must make sure that the inward-looking demands of an employer do not overwhelm the outward-looking expectations of the profession.

***Professional Training.*** A first important contributor to your sense of planning ethics is the professional training and the formative experiences of the early years of your career. Planners educated in accredited planning schools throughout the United States share a common set of assumptions, outlooks, and expectations about one another and their field.

***Professional Standards.*** By joining AICP, planners choose to belong to a group with uniform standards for acceptance, experience, quality, and behavior. AICP members accept a higher level of personal responsibility for their actions.

### A Summary of the AICP Code of Ethical Conduct

For planners who have joined AICP, the adopted "Code of Conduct" establishes a set of community norms for guiding behavior. Key elements of the code appear below. For the full text, refer to Attachment II. The code has been in force since 1978, when first adopted by AICP. Since then, the code has been refined and enhanced through the adoption of amendments and advisory rulings. Adherence to the code is one requirement of membership in AICP. Procedures exist to provide counseling, to judge alleged misconduct, and to discipline members in the case of misconduct.

### Code Elements

**A.** Serve the public interest
   1. Have special concern for long-range consequences
   2. Pay special attention to inter-relatedness of decisions
   3. Provide full, clear, accurate information
   4. Give opportunities for meaningful citizen participation
   5. Expand choice and opportunity
   6. Protect the integrity of the natural environment
   7. Strive for excellence of design and conserve the heritage of the built environment

**B.** Perform work competently and independently
   1. Exercise independent, professional judgment
   2. Accept decisions of employer or client
   3. Do not perform work when there is a conflict of interest

4. Do not represent a client for a year after leaving public employment on a matter over which you had some influence
5. Do not solicit clients or employment through false claims
6. Do not sell services by implying ability to influence through improper means
7. Do not improperly use your power of office to seek a special advantage
8. Do not accept work you cannot perform
9. Do not accept work beyond your level of competence
10. Do not reveal information

**C.** Contribute to the development of the profession

1. Protect and enhance the integrity of the profession
2. Accurately represent views of colleagues
3. Review work in a professional manner
4. Share the results of experience and research
5. Establish the appropriateness of solutions
6. Contribute time and information to the development of others
7. Strive to increase opportunities for women and minorities
8. Do not commit an act of sexual harassment

**D.** Strive for high standards of integrity, proficiency, and knowledge

1. Do not commit a deliberately wrongful act
2. Respect the rights of others
3. Strive to continue one's education
4. Accurately represent one's qualifications
5. Analyze ethical issues
6. Contribute time to groups lacking planning resources

**Rulings**

1. Sexual harassment is unethical
2. Public planners should not have a stake in private development
3. Outside employment or moonlighting should not conflict with loyalty, energy, and powers of mind owed to one's primary employer
4. Information should be used honestly
5. Planners who know of unethical conduct must report it
6. Illegal conduct should be reported, even if it means revealing confidential information

### The APA Statement of Ethical Principles and Its Relationship to the Code

The APA Board of Directors first adopted a "Statement of Ethical Principles" in 1987 as a guide to all APA members. It complemented the AICP Code, but did not include all of the same elements. The statement was more specific in identifying ethical behavior for public planning officials. Over the next several years, the members of AICP and APA worked to craft a single statement of ethical principles. The American Planning Association adopted a "Statement of Ethical Principles in Planning" in May 1992. The full text of the statement appears in Attachment I. The statement, as distinct from the code, serves as a guide to ethical conduct for everyone who participates in the process of planning as advisors, advocates, and decision-makers. The introduction sets forth its intent by presenting a set of principles to be held in common by certified planners, other practicing planners, appointed and elected officials, and others who participate in the process of planning.

The code and principles contain many common elements. It is important to keep in mind that the code, which is a component of the ethical principles document, is formally subscribed to by each certified planner and includes enforcement procedures. The APA principles are advisory and members of the organization are expected to adhere to the standards although there is no enforcement mechanism. Nonetheless, there is significant value in having a unified statement. The aspirational contents of the planning professional's code are made clear to all and the standards that should inform the behavior of all participants in the planning process are set forth. For the reference of the reader, codes applicable to others in positions related to the planning process are provided including:

- The Social Responsibility of the Planner adopted by the American Institute of Planners
- ICMA Code of Ethics with Guidelines adopted by the ICMA Executive Board

### The Role of the Planning Commission in Establishing the Ethical Climate

The citizen who expects fair treatment from the "planning process" will not distinguish between the activities of the planning commission and the planning staff in making an assessment of the ethical nature of the work. Therefore, it becomes incumbent upon the community's volunteer and paid planners to work together to establish a climate that supports high ethical standards.

The members of the planning commission can help to reinforce a high standard of public confidence by:

- having open minds and exploring creative solutions;
- operating by adopted by-laws and rules of procedure that establish the legal minimum that all participants have a right to expect;
- discussing and adopting APA's Statement of Ethical Principles in Planning;
- respecting codes of ethics that govern the conduct of professionals;
- taking advantage of training opportunities to improve one's ability to do the job.

Citizens today are asking more questions of and expressing less confidence in their appointed and elected officials. Planning commissioners and planners together can help make the planning function in any community an example of how things ought to be done. Full, frank, and cooperative efforts are essential. Without the support of the planning commission, the planner is unlikely to be able to establish and nurture an ethical environment regardless of her or his personal intentions.

## HOW TO RECOGNIZE AN ETHICAL PLANNER

The ethical planner is rational. Such a planner can reason, judge, and decide with respect to the quality of behavior.

The ethical planner is self-determining. Despite the influences of others, the ethical planner is accountable for her or his actions.

The ethical planner recognizes errors in judgment. Despite society's propensity to promote self-esteem and its refusal to judge, an ethical planner is capable of acknowledging that a course of action was either contrary to his or her nature or unjust to others. The planner adjusts his or her behavior in response to this new information.

The ethical planner lives in a community. As a member of the family of planners in service to the public, an ethical planner embraces obligations to others.

The ethical planner seeks to avoid doing bad things, and acts in a constructive fashion to do good. For the ethical planner, the emphasis is on the affirmative dimension of his or her conduct. Ethical obligations extend beyond legal compliance because many types of impropriety, such as unfairness, deception, and hypocrisy, cannot be effectively prevented by enforcing rules.

If, after reading the above paragraphs, you recognize yourself as the ideal ethical planner, you can either stop reading or plan to be the instruc-

tor for local ethical training programs. For those who wish to educate themselves further, we will now examine how this book can help you learn more about and practice ethical problem solving.

## TOOLS FOR LEARNING ABOUT ETHICS

There are many ways of learning planning ethics — reading, attending lectures, and listening to the experiences of others. Ever since the first fires were built in caves, storytelling has been a powerful teaching tool. This publication relies on parables, stories about problems and how they can be solved. Each scenario presents one or more ethical issues for consideration. These ethical issues are the author's interpretation of the dilemma based on the information provided in each scenario. In the belief that a strengthened ethical awareness can develop through an understanding of colleagues' views, these scenarios were developed to encourage discussion. It is vital that planers talk to one another about ethical dilemmas. While many parables have the answer included in the story, the scenarios used in this document do not. Instead, the reader must decide what to do.

### Reading and Responding to the Scenarios

Planners are challenged to consistently and systematically analyze situations to develop a basis for informed ethical judgment. Rarely will planners be confronted with a dilemma such as the one described above whereby a plant that may emit carcinogens wants to locate in town. Much of the ethical conflict will be of a more basic variety that is guided by the code. In these situations, planners must first recognize what the ethical issues are. Next, they must examine and rank their values with respect to a particular decision. Planners perform their work in an environment that allows for a broad range of administrative discretion. As a consequence, planners need some benchmarks for relating the various, and sometimes competing, claims of different values that can enter into official actions. There are steps that lead to practical moral reasoning by which planners can evaluate the appropriateness of a particular course of action. These steps will help the planner develop a keener moral imagination. The steps allow a planner to integrate internal sources of values with external demands while maintaining a sense of integrity.

1. Define the problem. This sounds obvious, but it is nonetheless crucial. Think about the issue. What are the critical issues posed? Where is the conflict with the code? For example, the difficulty may lie with the administrative procedures of an agency that preclude adequate public

review and comment. These procedures create a process that you deem to be unethical given the AICP Code's requirement for meaningful citizen input.

Next, consider who else is involved with the ethical issue? It could be your employer, your co-workers, the natural environment, the public or, as in the example noted above, multiple stakeholders. Identifying all of the relevant parties will help you think about what actions you might take, and what the consequences of those actions might be.

The ethical problem cannot be analyzed or resolved absent a clear written statement. The discipline required to take this first step will greatly facilitate completing the next elements.

**2.** Clarify your primary goal. Look at the situation at hand and suggest where or how you might make a difference. For example, if your goal is to expose corruption among local elected officials, a far more public and emphatic course of action is required than might otherwise be the case.

**3.** Examine all the facts in light of this primary goal and your problem statement. Focus upon the particulars most relevant to your goal. Be prepared to search out more information to improve your understanding of what may be pertinent.

**4.** Brainstorm alternative courses of action that you might pursue. Develop ways you could improve the situation. During this phase of your ethical analysis it may prove helpful to consult with a colleague. The American Institute of Certified Planners maintains a list of members available and qualified to consult with you. You can access these individuals by contacting the AICP staff at 202-872-0611. Depending on the nature of the issue, local contacts may prove valuable. The professional development officer of your APA chapter will be able to identify appropriate individuals.

**5.** Evaluate the alternatives and the consequences that may result from your course of action. Compare these alternatives to the code. It will help to organize the review process and highlight points you might have missed. You should understand the moral reasons for and against a course of action. Ethical dilemmas are complex, and different elements of the code may pertain to a single set of circumstances. You will need to do a conscientious balancing based not only on the facts and context of a particular situation, but also on the precepts of the entire code.

**6.** Select the preferred course of action and give it another test: publicity. How would you defend this decision in public if asked to do so? Finally, subject your alternative to a gut check. Does it feel right?

7. Implement your plan of action. The course of action you select must be one you can achieve. If you are not able to implement the preferred alternative, go back and re-examine your choices and select another.

These steps are similar to those undertaken in many types of planning analyses. They are recommended here because they work to help identify and analyze choices. The preferred course of action is the one most consistent with the requirements of the code, and that has the greatest potential for a personally satisfying decision. In the section that follows, the technique is described as it might be used on the job.

**Sample Scenario: What Are You Willing to Do to Keep Your Job?**

The following scenario is presented to allow the reader to test the techniques for ethical analysis suggested above. Extensive commentary is included to illustrate the thought process.

You're a newly hired planner and the boss drops by your office to chat one Friday afternoon. He mentions that a development review assignment will be on your desk early the following week. He says, "Mr. Jones has a small subdivision proposal. He was the treasurer of the mayor's last re-election campaign. The mayor just called to remind me of his support for good new development and his belief that Mr. Jones' subdivision would be an asset to the city. I told the mayor that I did not foresee any problems." As the director gets up to leave, he turns and, smiling, says, "Have a nice weekend. Relax and come back to work ready to do your job. See you first thing Monday morning."

Although new to the agency, you are not new to the profession. You believe that the director has ordered you to make a favorable recommendation on Mr. Jones' subdivision. You are extremely uncomfortable. You wonder what you should do next.

1. Define the problem. The mayor's relationship with the applicant seeking development review is subverting the normal process of analysis and recommendation. Your boss has alerted you to the relationship and encouraged you to offer a favorable review.

2. Clarify your primary goal. You would like to keep your job and to behave ethically. Given this goal, you will seek resolution without confrontation.

3. Examine all the facts. In this case, you are missing several pieces of information. For example, the project might actually conform to all of the development requirements and the mayor is correct in his assessment

regarding the project's desirability. Also, what is the director's reputation? Is he usually a "good guy?" Or is there a history of staff coercion? This absence of information dictates your immediate course of action — collecting more data

**4.** Brainstorm alternative courses of action. You consult with trusted colleagues. You eventually come to the conclusion that the director is asking you to make a finding unsupported by the facts of the case. You weigh the alternatives in terms of the requirements of the code. Five aspects seem most relevant. (See page 16.)

- **A.3** Provide full, clear accurate information. In full, clear and accurate information were to be provided, you could not recommend in favor of the project.
- **B.2** Accept decisions of employer. The code stipulates that when the employer is asking the planner to do something illegal, that does not serve the public interest, the planner is not bound to follow the decision of the employer. In this case, the code requirement would not apply.
- **D.1** Do not commit a deliberately wrongful act. If it is wrong, if you believe it to be wrong, you may not act on the option even if directed to do so.
- **D.5** Analyze ethical issues. You are required to make your decision within the framework of the ethical stipulations of your profession.
- **Advisory Ruling No. 5** Planners who know of unethical conduct must report it. Not only is the director asking you to do something unethical, you are charged to report this unethical conduct to the AICP (assuming the director is a member).

**5.** Evaluate the consequences. (See page 16.)

**6.** Select the preferred course of action and give it another test: publicity.

Based on all of the factors set forth, you decide that you will ask for a meeting with the director to explain your position and to ask for a response. If the director remains unmoved, you will decline the assignment. Adding the step of making absolutely sure there is no misunderstanding makes you feel comfortable with how you would explain or defend your actions if asked to do so.

| Alternative Courses of Action | Possible Outcomes |
|---|---|
| Hear no evil. See no evil. | Keep job/lose integrity. |
| Do full analysis to see what the subdivision proposed is really like. | You have more specific info about whether or not the project is in compliance. By supporting your argument with facts, the likelihood of a favorable outcome increases. |
| Clarify what the planning director really wants. | You may find out that you misunderstood or overreacted. |
| Resign | Unemployed with a loss of income. |
| Prepare a memo to the file that outlines the assignment you have been given. | Establishes a paper trail in the event of future problems. |
| Confront the planning director. | Unclear. You will clarify your personal stance but may damage future working relations. |
| Consult with others. | Find out if the inference is standard operating procedure or whether you have misunderstood the conversation. You may find moral support as well. |
| Delegate upwards. Ask your boss to take the lead on this. Explain that, because of your new status, you are unsure of your ability to do the assignment. | The director might refuse and your days could be numbered. The director might accept and you would be off the hook. The director might chose to reassign the task to someone else. |
| File grievance. | You are likely to lose such a grievance. You may retain your integrity, but you will have to resign because the work environment will be extremely uncomfortable after a grievance procedure. |
| Check personnel policies for protection. | Understand your rights and responsibilities, and those of your employer. |

7. Implement your plan of action.

You call the director's office and make an appointment. You also begin reworking your resume understanding that you have embarked on a course of action that may well cost you this job.

## HOW TO REACT TO A POSSIBLE ETHICAL LAPSE

What behavior is expected when you are notified, either officially or unofficially, that you may have violated the code? First, resist the temptation to argue. Your primary responsibility is to retain an open mind and respond only when you are able to do so calmly and thoughtfully. If there are points of confusion that may have resulted in a misunderstanding, you should make every effort to explain what has occurred. Be prepared to apologize for even having inadvertently created the appearance of unethical conduct. Second, turn to the code for guidance as to your general conduct when confronting an accusation.

- A planner must strive to provide full, clear and accurate information on planning issues...
- A planner should strive for high standards of professional integrity...

Suppose a cordial, conciliatory response has not resolved the matter? You should avail yourself of the ethical resources available to you through your APA chapter. Seek out the counsel of your chapter professional development officer. Explain the circumstances surrounding the issue and offer a scrupulously candid version of your role in the events. In an open manner, ask whether the behavior might be reasonably construed as having violated the code. Be prepared for bad news. Experience has shown that such accusations are rarely made unless there is a strong basis for the charge. When there is an aggrieved party, that person usually has deep-held personal feelings in addition to an understanding of the code. If the answer to your inquiry is affirmative — that you may have violated the code — you should begin immediately to prepare a more thorough and heartfelt apology. You also must seek ways to make restitution or to resolve the problem you may have created. A formal letter of apology acknowledging wrongdoing (even when not intentional) can help calm the waters. Consult with the professional development officer to brainstorm alternatives for redress.

Professionally, your goal in these difficult circumstances should be to resolve the matter before charges are filed with the AICP Executive Director. Once that has occurred, an apology may not stop an investigation and issuance of a formal complaint. An apology and attempted

redress could substantially reduce the ire of the complainant and he or she might choose either to withdraw formal charges or to not file them at all.

Finally, even when an investigation yields a determination that there has been a code violation, the recommendation regarding what level of action should be taken by the AICP Commission will undoubtedly be influenced by a sincere effort to acknowledge wrongdoing and repair the damage you have created. A well-scribed mea culpa combined with aggressive actions to remedy a wrong will make your life easier and help restore your ethical posture.

The section below, which describes how an ethics charge is handled by AICP, provides other comments on your expected conduct in response to various phases of the ethics procedure.

## PROCEDURES UNDER THE CODE OF ETHICS AND PROFESSIONAL CONDUCT: HOW TO SEEK ADVICE, AND TO FILE AND RESPOND TO CHARGES OF MISCONDUCT

The players who give life to the AICP Code of Ethics and Professional Conduct are the planners and members of the public who report violations; the AICP Executive Director; the AICP Ethics Committee (which has four members appointed by the AICP President, plus a chair who is a member of the Commission); and the AICP Commission.

### Steps In the Procedures

***Informal Advice.*** Requests for informal ethics advice may be made either to the executive director or a chair of a Chapter Professional Development Committee. Any advice given informally is not binding on AICP. Nevertheless, a planner who has sought and received such informal advice after making full disclosure of all relevant facts is unlikely to be severely disciplined, if disciplined at all, should it turn out that the advice was wrong.

***Formal Advice.*** The executive director may issue formal advisory rulings on the propriety of a planner's conduct. Requests for advisory rulings must be in writing and must contain sufficient details, real or hypothetical, to permit a definitive opinion.

As a matter of practice, the executive director will issue a formal advisory ruling if the request is from a planner seeking advice about proposed future professional conduct. On the other hand, the executive director

will decline to issue an advisory ruling if it is perceived that the request has been made instead of filing a formal charge of misconduct. The executive director reasons that the planner whose conduct is described in the ruling might be identifiable. The advisory ruling could thus be used to embarrass a planner who has had no opportunity to state a different version of the incident. When this occurs, the executive director will suggest that a formal charge of misconduct be submitted. If the person who made the request is a certified planner, the executive director may further stress an ethical obligation to file a charge of misconduct and refer the person to Advisory Ruling No. 5.

If the executive director issues an advisory ruling and the AICP Ethics Committee endorses it, the ruling will be published as commentary on the code and as a guide to its application. Even if it's not published, an advisory ruling is binding on AICP and may be relied upon, as long as there was full disclosure and the actual conduct does not vary. There is no requirement in the code that the AICP Commission approve advisory rulings.

***Filing a Misconduct Charge.*** Any person, whether or not an AICP member, may file a charge of misconduct. Certified planners who have "certain" knowledge of "clearly unethical conduct" by other certified planners have a duty to file a charge of misconduct. The threat of filing a charge of misconduct may not be used as leverage in dealings with other planners.

***Sending a Letter.*** A charge of misconduct should be made in a letter sent only to the executive director of AICP. The letter should identify the certified planner against whom the charge is being made and detail the conduct that allegedly violates provisions of the code. It should be noted that it is improper for a certified planner to send even a "courtesy" copy of the charge directly to the alleged offender. The executive director serves as the exclusive correspondent between the charging party and the respondent.

In the letter stating the charge, it is not necessary to cite the precise code provisions allegedly violated. Provisions of the AICP/APA Ethical Principles in Planning should not be cited, since they are not enforceable. The letter also should include documentation of the alleged misconduct. The documentation may be extensive, or it may simply be a newspaper clipping describing misconduct.

Anonymously filed charges also are permitted. Anonymous filing results in a number of disadvantages. An anonymous filer is not sent notification of the disposition of the charge, and has no right to appeal to the

AICP Ethics Committee if the executive director dismisses the charge. Anonymous filers have the option of furnishing an e-mail or post office box address in the event the executive director needs to reach them. There is nothing to prevent an anonymous charging party from later providing his or her identity. But the identity should be provided prior to the executive director's decision as to whether he will issue a complaint.

After receipt of the charge, the executive director will send a copy to the certified planner whose ethics are being questioned. That planner will now be referred to as the "Respondent." The executive director's cover letter will invite a general, informal response and may also request answers to specific questions. While the Rules of Procedure state no deadline for an informal response, the executive director customarily requests that it be submitted within 30 days.

***Responding to the Charges.*** The respondent, upon receiving a charge of misconduct, should decide whether to seek legal representation. It is not necessary to be represented by an attorney. If, however, the respondent feels a need for legal advice, it's advisable to seek legal consultation as early as possible, certainly before submission of an informal response.

Advisory Ruling No. 5 requires respondents to cooperate fully with the executive director's investigation. Unless a respondent plans to surrender his or her certification, which is always an option, it's advisable to put forth all of the facts and arguments that address the charge. It also is important to identify all witnesses. No purpose is served by expressing outrage and attacking the motivation of the charging party. If, at any time, the executive director determines that the respondent is retaliating against the charging party or any other person who cooperates with the investigation, the executive director may issue a complaint against the respondent.

After the executive director receives the informal response, or the established deadline passes without a response, the executive director will decide whether an investigation is appropriate. If the charge appears without merit, the executive director will dismiss it and send a letter to the charging party, if identified, giving an explanation for dismissing the charge. The respondent will receive a copy. The dismissal is final, unless the charging party appeals the dismissal to the AICP Ethics Committee within 30 days.

***Conducting an Investigation.*** If an investigation is warranted, the executive director will assign the complaint to staff. During the investigation, witnesses identified by the charging party and the respondent may be

interviewed. Normally there will be a request to interview the respondent. The executive director, however, will not make credibility findings. If, for example, the charging party says that the planner against whom the charge is filed claimed to have a politician in his hip pocket and the planner denies the allegation, the executive director will not determine which version is factual. If the case turns on determining which version is correct, the executive director is likely to issue a complaint and have the ethics committee resolve the credibility dispute. Because Advisory Ruling No. 5 requires that respondents provide the executive director with all information relevant to the charge, records must be produced as soon as possible. The respondent also has a duty to encourage others with relevant information, whether favorable or unfavorable, to cooperate. Advisory Ruling No. 5 provides that if the ethics committee determines that allegations against a respondent cannot be proved because of a lack of cooperation, the ethics committee may determine that the allegations should be considered proven. The rationale is that planners owe a duty to their profession to assist in an investigation. As AICP has no subpoena power, a respondent's cooperation is crucial.

If the investigation leads the executive director to believe that a complaint will not be sustained, the executive director will dismiss the charge in a letter, giving a full explanation of the reasons. The letter will notify the charging party of the opportunity to appeal within 30 days to the ethics committee of AICP. If an appeal is filed, the ethics committee will sustain or reverse the executive director's decision, or send the charge back for further investigation and/or reconsideration.

***Negotiating a Settlement.*** If it appears that the issuance of a complaint is likely and will be difficult to challenge, the respondent should consider an early settlement. There are several ways to settle an ethics proceeding in the early stages. If the charging party is personally aggrieved by the respondent's conduct, and a private resolution between the two would not be viewed as compromising code principles, the staff investigator may be willing to communicate reasonable settlement offers from the respondent to the charging party. The result could be a withdrawal of the charge with the blessing of the executive director.

Often, settlement discussions take the form of a negotiated "plea bargain." The code sets forth four levels of discipline. The mildest is a private reprimand. Because an identified charging party will be made aware of the private reprimand, there can be no assurance as to how private the reprimand will remain. A public censure, which is stronger than a repri-

mand, is published in an AICP publication, currently *Planners' Casebook.* Suspension and expulsion are the most severe forms of discipline. Notice of such actions are subject to publication by AICP. The goal of the respondent in negotiating a "plea bargain" is to convince the executive director and the ethics committee that they should settle for the mildest form of discipline appropriate to the alleged misconduct.

***Issuing a Complaint.*** When issuing a complaint, the executive director keeps the focus as narrow as possible. A complaint consists of numbered paragraphs containing recitations of alleged facts. Following the facts are numbered paragraphs of alleged violations. These paragraphs cite provisions of the code that the executive director believes are implicated. All of the allegations in the complaint are based on the results of the executive director's investigation and may be additional to, or different from, those initially relied upon by the charging party.

***Preparing a Response to a Complaint.*** The rules of procedure specify that an answer to a complaint is due 30 days from the date the complaint is received by the respondent. Unless the respondent can demonstrate extraordinary circumstances, the failure to deny any alleged fact within the specified time frame is deemed an admission of that fact.

In answering a complaint, a respondent is obliged to cooperate. It is neither sound nor acceptable to respond with what lawyers refer to as a "general denial." If the respondent does not know whether an alleged fact is correct, the respondent should say so, but only after making an effort to verify the truth. If a lack of knowledge prevents a respondent from conceding the truth of a fact allegation, the allegation will be considered in dispute. Unless specifically admitted, all allegations of violations are presumed to be denied. A respondent may explicitly deny the allegations of violations and state reasons why such violations cannot be sustained. Should he prefer not to, there will be a later opportunity for the respondent to send the ethics committee an argument as to why the code was not violated.

If an alleged fact is stated incorrectly in the complaint, the respondent should provide the correct version, if it is known. For example, assume that a respondent had become an investor, but not a partner, in a business venture. In a factual allegation in the complaint it is stated that: "Respondent became a partner in the business venture." The respondent should answer by denying that she became a partner, but acknowledge that she became an investor in the business venture. A candid answer would also disclose the details of the investment arrangement. For exam-

ple, "my investment was $25,000 and, in exchange, I was given a contract promising me 3% of the annual net proceeds of the business." Moreover, the respondent is free to add facts to the response that she perceives as exculpatory, such as: "I held no office or employment with the venture, nor did I have any input in its business decisions."

When the executive director receives the answer, it is compared to the complaint to determine if there are any material facts in dispute. For example, if a complaint dealing with allegations of a conflict of interest contains a fact allegation that the planner received double compensation for the same work from two different clients, the denial of double compensation in the answer would result in a "disputed material fact." On the other hand, if the same complaint contains a factual allegation that the planner sent the same work product to both clients and the answer denies that the work was "sent" but claims that it was "hand delivered" to the clients, there is no dispute as to a "material fact" because the mode of delivery of the double payments is not an essential element of a violation.

The executive director has the option of amending a complaint to delete any disputed facts, whether or not material. The executive director also may amend the complaint to restate fact allegations by verifying and adopting the respondent's version of what occurred. Since the executive director has the burden of persuading the ethics committee that an ethical violation has occurred, the executive director cannot risk deleting any contested allegations of fact that may prove material to the outcome of the case.

***Conducting a Hearing.*** If material facts are in dispute, the executive director must notify the ethics committee. The chair of the committee then may appoint one or more committee members to conduct a hearing. Normally, one member is appointed and is referred to as the "Hearing Member." A Notice of the Hearing is sent by the executive director who arranges the location and time of the hearing. The location is normally in the vicinity where the alleged misconduct occurred. The notice will contain a list of all disputed material facts to be resolved. The issues at the hearing will be confined to resolution of those facts.

Prior to the hearing, the executive director will furnish the respondent with a list of proposed witnesses and will respond to questions from the respondent as to the direct evidence to be produced. The respondent is expected to reciprocate. At the hearing, the hearing member will listen to and/or read the evidence submitted by the executive director and the respondent. The executive director has the burden of producing the witnesses and/or tangible evidence to establish that the disputed material

facts are correct as stated in the complaint. Once the executive director has produced such witnesses and other evidence, the respondent will be given an opportunity to produce witnesses and/or tangible evidence that controverts the executive director's evidence.

It always is preferable to have witnesses testify in person. If any witness cannot be available, an affidavit will be accepted. If the credibility of a witness affidavit is challenged, the hearing member may continue the hearing so that the party issuing the challenge may have an opportunity to further examine the witness on videotape. The videotape can be sent to the hearing member who will then have an opportunity to observe the demeanor of the witness in responding to cross-examination.

A recording device is optional. The hearing member may prefer to take notes. At the conclusion of the hearing, the hearing member must make findings as to the disputed material facts. The hearing member has the option of asking the parties to submit proposed findings. The standard of proof for resolution of factual issues has traditionally been the "preponderance of the evidence" or "which version is more likely than not?"

***Resignations and Lapses of Membership When Ethics Charges or Complaint Proceedings Are Underway.*** If an AICP member who is the subject of a charge of misconduct voluntarily resigns while a charge or complaint proceedings are pending, the charge or complaint (if issued) will be dismissed. However, the individual may not reapply for AICP certification. If membership lapses during an investigation due to non-payment of dues, the charge will be dismissed if issued. If a reinstatement request is made within the four-year period, the ethics matter will be reopened. If the former member does not apply for re-certification within the four-year period, application may not be made for re-certification.

***Action by the Ethics Committee.*** Under the rules of procedure, the ethics committee determines if the code has been violated on the basis of the admitted facts and, if a hearing was held, the findings of fact. The deliberations, therefore, require a review of the complaint, the answer, and the hearing member's findings. In addition, the executive director and the respondent will be invited to submit written arguments for the committee's consideration. The committee members will discuss the facts and issues, and then vote. When the deliberations are completed, the executive director or a committee member will be instructed to prepare a draft written opinion for the committee's approval. Once approved, the opinion will be sent to the respondent, the charging party and the AICP Commission. If the opinion exonerates the respondent, the matter is closed. If the opin-

ion concludes that there was blameworthiness, the ethics committee will issue concurrently its recommendation of discipline.

***Action by the AICP Commission.*** If discipline is recommended, it cannot be imposed without the affirmative vote of two-thirds of the AICP Commission. The commission must vote on the discipline within one year after the complaint has been issued. An invitation to appear in person or submit information in writing is sent to the respondent at least 30 days prior to the scheduled vote. If the one-year deadline is approaching, the commission may vote on the issue of discipline via teleconference. A respondent who prefers direct eye contact with commission members might waive the one-year requirement in exchange for an opportunity to appear at the next in-person meeting of the commission.

The commission's vote is final and, as recorded by the secretary, is forwarded to the respondent and the charging party.

## USING THE SCENARIOS

The next chapter includes numerous scenarios. Multiple scenarios are included for those portions of the code that practicing planners have identified as being major sources of ethical conflicts on the job. Note that the scenarios and commentary do not contain every possible response but, instead, put forth a number of possible approaches. The scenarios do not include an adequate level of detail to answer all questions. They are brief. They require a reader to make assumptions and select a course of action before getting on to the real work: sharing perspectives and insights with others.

The following section describes how to use the scenarios to learn more.

### As a Reader

Carefully read the scenario, go through the process and then compare your choice to the discussion in the commentary.

### In Workshops

***Format.*** A primary objective in preparing this publication was to pull together information that could be useful to organizations interested in holding educational programs on ethics. The scenarios readily lend themselves to such use.

Two types of scenarios are included in this publication. Scenarios are short problem statements and several should be combined for a single program. Discussion scenarios are longer and one or two could be the

basis of an entire event. The two types have been provided in the hope that they will appeal to the reader for use in different settings. In small groups, in chapter meetings, in local APA newsletters, the scenarios can be a springboard to discussion and an effective means of raising the profession's consciousness.

Chapters can present ethical scenarios for group discussion at professional development meetings. "Answers," in the form of commentary, are presented immediately following the scenario. The scenarios, commentary, and an answer sheet can be distributed to help organize the ethics program.

There are two ways the scenarios can be used in meetings.

*Small group alternative*

- Distribute copies of selected scenarios to members.
- Take ten minutes to study the material and gather responses from participants.
- Briefly restate the scenario and list the participants' responses to the ethical choices.
- Count the number of people selecting each response and record on a blackboard or a flip chart; calculate the percentage of responses by choice.
- Have the participants explain their choices. This is the heart of the exercise and the moderator must take care to make sure that the commentary is not dominated by just a few individuals.

*Large group alternative*

- Divide members into smaller groups.
- Assign each group a scenario to discuss and a recorder who will tabulate results.
- Allow for in-depth participation by individuals, but do not permit the group to force a consensus if one does not emerge naturally.
- Report back to the large group giving the major results and key reasons for the answers selected.

***Discussion Scenarios.*** The discussion scenarios, in contrast to the shorter scenarios, have no suggested answers. They lend themselves to an interesting dialogue, provided the moderator is well versed in the requirements of the code and is prepared to lead the commentary development. Another way of using the discussion scenarios is to assign roles and ask participants to describe what they would do next and why.

***Selecting Scenarios to Use in a Workshop.*** In choosing scenarios for a workshop, select ones that respond to topics of pressing concern. The Table of Contents is organized by the elements of the code so that you can

easily identify the ones of interest and relevance. One way to identify provocative topics is to consult with local planners. Another is to use the Internet to scan the headlines or do a keyword search (ethics) of the major daily newspapers in the geographic area where the workshop will be held.

***Appendix.*** The attachments in the appendix may serve as handouts for the workshop and can facilitate discussion or assist workshop participants who may not already be familiar with the code requirements. As a point of reference, ethical material from the International City Management Association is provided. This is included because conflicts with actions by city managers are often a source of ethical conundrums for professional planners. Having the ICMA Code in hand may assist in resolving those situations.

### A Word about the Moderator

The role of the individual who presents the material is critical to a successful chapter program. Care must be taken to draw out all participants and not to permit a single individual to dominate the conversation. Equally important is maintaining an evenhanded approach to recording responses and prompting more detailed answers. The moderator must be non-judgmental. The group must expand upon the ideas as it struggles to identify the potential consequences of alternative courses of action. For example, groups often approve a combination of alternatives or identify a new course of action. Such ethical creativity is to be encouraged.

Moderators also are encouraged to distribute evaluation forms to assist chapter professional development officers in planning other sessions on ethical matters.

Sessions should conclude with a group brainstorming of things that can be done locally to help improve the ethical climate. Frequently made suggestions include:

- Articles in chapter newsletters
- AICP Code posted in the planing office
- Planning commission adoption of ethical principles and annual training for new commissioners
- Ethics workshops
- Ethics brown bag lunches in the office
- Coaching/job search help for planners who lose their jobs
- Letters to the editor of major newspapers

## IS IT WORTH THE EFFORT TO TRY AND UPHOLD ETHICAL PRINCIPLES?

Newspapers report a plethora of bad tidings when it comes to ethics:

- 58% of physicians would lie to an insurance company to ensure medical care for patients
- 62% of parents say it is acceptable for them to help a child with a class project that is supposed to be done by a child alone
- 17% of parents say it is acceptable for children to obtain test questions in advance; 11% would accept copying another student's work
- 65% of high-schoolers say they would cheat to pass a test.

*The Journal of the American Medical Association* admits that nearly half of the drug reviews published since 1997 were written by researchers with undisclosed financial support from companies marketing the drugs.

But research also encourages us to pursue opportunities to think reflectively. Behavior is affected by the communities we build. For example, colleges find that a focus on ethics can curb cheating. It is apparent that lax ethical conduct is partly the result of believing that such behavior constitutes the norm: everyone is doing it. In those instances when integrity is stressed and codes of conduct are formally adopted, behavior improves. If people believe that unethical conduct is socially unacceptable, they are less likely to cheat or lie. Similar results were found by Elizabeth Howe in her work, *Acting on Ethics in City Planning.* Planning is performed in communities with a particular ethical climate. But those climates can change for both better and worse. Teaching, reading, and thinking about ethics will improve the milieu in which planning is performed. Finally, those who are most satisfied with their resolution of ethical dilemmas are those who undertake self-inquiry. Thinking about core values to resolve conflicts helps us focus on our most fundamental principles. In turn, this renews a larger sense of purpose for all our work.

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# Ethics and RFPs




A successful project requires a mutually supportive relationship between public agencies and private consultants, including communication and honesty throughout the project, starting with the Request for Proposal (RFP).

Yes, even before a project is undertaken — during the period when the project is bid out and proposals are received — planners have key ethical responsibilities to consider.

The following are real-world case studies relating to the RFP processes. They include specific aspects of the *AICP Code of Ethics and Professional Conduct* (/ethics/ethicscode/) that should be reviewed when considering a planner's appropriate courses of action. The discussion points in each case study are taken from actual discussions that have occurred during National Planning Conference sessions, while the conclusions were developed by the authors.

## Case #1

**SCENARIO**

After a public agency publishes a RFP, a planner at the agency reaches out to a consulting firm and encourages them to bid. He specifically tells the firm: "We're looking for your approach as it's different than what we've worked with before."

### CODE OF ETHICS CONSIDERATIONS

- Principle #2c: "We shall avoid a conflict of interest or even the appearance of a conflict of interest in accepting assignments from clients or employers."
- Rule of Conduct #8: "We shall not, as public officials or employees, engage in private communications with planning process participants if the discussions relate to a matter over which we have authority to make a binding, final determination if such private communications are prohibited by law or by agency rules, procedures, or custom.

### DISCUSSION

- Does it show some form of favoritism if the agency only reaches out to one firm in this manner?
- Is it a conflict of interest if the agency reaches out to *multiple* firms?
- Is the key issue that the RFP is released *before* the planner reaches out to the firm?
- Are there any other ethical implications if the agency (or its staff) speak to the firm *prior* to publication?

### CONCLUSION

If the reaching out to a firm was done before the RFP was published, the agency should consider addressing this request in the RFP; that is, the RFP should say the agency is looking for an innovative approach. Another approach is for the agency to consider "innovative" approaches or technique as something the proposals will be scored on.

In dealing with an RFP, you need to ensure that all communications between agency and firms are professional and transparent. Once the RFP is published, you should avoid discussing: the RFP, any desired qualifications, or the agency's "desires." You only should accept written questions during the RFP process, and you need to publish all of the questions and responses for all of the firms. This will all help to avoid "even the appearance of a conflict of interest," per the Code of Ethics.

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## Case #2

### SCENARIO

An agency releases a Request for Qualifications (RFQ) that highlights the need for a small team that will be able to focus on this project. After the Qualifications packets are received and reviewed by the agency, one firm is selected as the top respondent, due to its streamlined and focused team.

The agency then requests the firm to provide a full scope and fee. As part of its response, the size of the firm's project team doubles in number. Feeling burned, the agency now is forced to spend significant time negotiating the scope and fee, instead of proceeding with the project.

### CODE OF ETHICS CONSIDERATIONS

- Rule of Conduct #10: We shall neither deliberately, nor with reckless indifference, misrepresent the qualifications, views and findings of other professionals.
- Rule of Conduct #12: We shall not misstate our education, experience, training, or any other facts which are relevant to our professional qualifications.
- Rule of Conduct #15: We shall not accept work beyond our professional competence unless the client or employer understands and agrees that such work will be performed by another professional competent to perform the work and acceptable to the client or employer.

### DISCUSSION

- It is possible that expectations could change during a project; for example, a council or board could turn over and the actual work scope is greatly changed.
- Should you leave an open-ended part of the contract to allow for flexibility with a la carte work?
- Consultants often believe that agencies need to be more realistic when asking for more or different work that has budget implications.
- In contrast, agency staffs often think consultants need to be more mindful when crafting a scope and budget, to account for contingencies. This is particularly applicable



when the project team or fee is very different from what is originally proposed.

### CONCLUSION

Specificity must be your friend. If an agency desires a small team on a project, then that information needs to be included in the RFP/RFQ. And, if a firm knows it will need a larger team to complete a project, then that information needs to be conveyed in the firm's response to the RFP/RFQ.

From a non-ethics standpoint, this scenario may illustrate why some feel it is often better to issue an RFP — with a scope and budget — rather than requesting a statement of qualifications (RFQ).

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## Case #3

### SCENARIO

An agency releases an RFP. After reviewing the responses, the agency selects two finalists, while noting that both firms are listing the same large project as a reference. During the interviews, it becomes clear that a staff member — one with key expertise applicable to the agency's project — had switched between firms after completing the sample project. Now both firms are claiming the project as their key experience for this project.

### CODE OF ETHICS CONSIDERATIONS

- Rule of Conduct #1: We shall not deliberately or with reckless indifference fail to provide adequate, timely, clear and accurate information on planning issues.
- Rule of Conduct #12: We shall not misstate our education, experience, training, or any other facts which are relevant to our professional qualifications.

### DISCUSSION

- Does the project work stay with the planner or with the firm?
- Can the planner's new firm claim specific experience if the planner is now employed with another firm? This may depend on the size of the project team. Was the project only worked on by a single person, or were there other team members that still work at the firm?
- These problems also can happen when a Proposal moves from a planner to the firm's marketing department. How do we, as planners, ensure that words aren't twisted to create an unintended ethical conflict?

### CONCLUSION

A proposal needs to specify the role of the firm in a prior project, and whether existing or past team members were actually involved. Agencies need to direct questions about this during an interview phase — or while checking references — in order to determine a staff member's level of involvement in a reference project.

Agencies also may want to consider creating a template that requires firms to show the specific roles of staff members on projects that are used as references.

*This article is adapted from the authors' presentation at the 2017 National Planning Conference in New York City, entitled "RFPs and Responses for Successful Projects."*

***Top image:*** *Thinkstock photo.*

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#### SEPTEMBER 7, 2017

## By Shelby Powell, AICP, David Fields, AICP

**Tags:** American Planning Association, (/blog/?tags=1218) Ethics, (/blog/?tags=99) Planning History and Theory, (/blog/?tags=100) Ethics (/blog/?tags=1547)

Section 2

# Public Interest

## PUBLIC INTEREST

The following additional readings in this theme, Public Interest, will help you further develop your understanding of what it means to:

- Practice in a manner that respects the diversity, needs, values and aspirations of the public and encourages discussion on these matters
- Provide full, clear and accurate information on planning matters to decision-makers and members of the public, while recognizing the employer or client's right to confidentiality and the importance of timely reporting
- Acknowledge the inter-related nature of planning decisions and the consequences for natural and human environments
- Provide opportunities for meaningful participation and education in the planning process to all interested parties
- Provide independent professional opinion to clients, employers, the public, and tribunals
- Perform work only within your areas of professional competence

### Readings

1. Grant (2005) "Rethinking the Public Interest as Planning Concept" PlanCanada
2. Tait (2016) "Planning and the public interest: Still a relevant concept for planners?" Planning Theory 15(4)
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4. Valiante (2016) "In Search of the “Public Interest” in Ontario Planning Decisions" in Smit+Valiante "Public Interest, Private Property”
5. Ontario Municipal Board Decisions
    1. Oakville
    2. St. Catherines
6. OPPI Standards of Practice



# Rethinking the Public Interest as a Planning Concept

**by Jill Grant**

*Summary*

*Planners traditionally turn to the public interest as a way of legitimating their advice and activities. Is that appropriate? Some authors say the concept is an illusory ideal. Some suggest that the public interest has typically been linked to the concerns of the powerful. Others believe that experts can define it. A few argue that meeting the needs of the most vulnerable serves the common good. What are planners to do?*

*Sommaire*

*Traditionnellement, les urbanistes invoquent « l'intérêt » public pour légitimer leurs conseils et les activités. Est-ce convenable? Selon certains auteurs, la notion même est un idéal illusoire. Certains laissent entendre que l'intérêt public a typiquement été lié aux préoccupations des puissants. D'autres sont d'avis que les experts peuvent le cerner. Quelques-uns affirment que la satisfaction des besoins des plus vulnérables sert le bien commun. Que doivent faire les urbanistes?*

Our professional *Code of Practice* says that planners "acknowledge the inter-related nature of planning decisions and their consequences for individuals, the natural and built environment, and *the broader public interest*."[1] When prospective members of CIP take the oral entrance exam, they often face questions about the public interest. As planners, how do we understand and use the concept?

While the question is fundamental to our profession, the answer is far from simple. In the early years of modern town planning, we enjoyed considerable consensus about the common good. We no longer find such certainty. Today we recognize and embrace diversity. The realities of contemporary practice make us rethink our understanding of the concept of the public interest. We increasingly see the public good as an abstraction: necessarily fluid, tenuous and context sensitive. Our conceptualization of the public interest is inevitably framed by a particular space and time. It reflects cultural, professional and personal values. What one generation defines as "the common good" may not hold for subsequent generations.

## The Public Interest in History

Formal definitions describe the public interest as the objective of duly authorized governments carrying out activities necessary to the welfare of the community. Closely associated with the professionalization of the civil service, the term gives those working for government an ideal to serve. Although critics argue that government aims too often reflect the interests of capital or social elites, the machinery of the nation state alleges that decisions reflect the common good of all classes.[2,3,4] The public interest means more than the sum of competing interests, or even some way of "balancing" competing interests. It provides the ultimate ethical justification for the demands of the state on the individual. The public interest becomes a unifying symbol and social myth.

By the 1960s, the profession faced challenges to particular definitions of the public interest. In recent years, we ask questions about the merits of the concept itself. Yet, in practice, the public interest remains rhetorically significant. Used in discourse and debate as a way to explain and justify recommendations and outcomes, the concept provides a theorem for expert advice, and a calculus for the distribution of benefits and costs. Unfortunately, we cannot demonstrate the public interest through any straightforward formula.

The public interest is an essentially contested concept: people agree on its significance, but dispute its meaning and content.[5] Some argue about how to identify the public interest while others claim it does not exist.

## The Public Interest as Myth

Conceptualizations of the public interest appear within a particular constellation of values in time and space. In the 1950s, a broad popular consensus saw the public interest as growth and progress. Planners helped to redesign cities to accommodate rising affluence. We advised governments to tear down blighted neighbourhoods, rebuild civic

centres and accommodate the poor in upgraded public housing. We separated pedestrian and vehicular traffic. Our profession praised the resulting projects. Today we recognize that those solutions spawned new problems: urban sprawl, traffic gridlock, sterile landscapes. The failure of urban renewal and public housing projects exposed the fallacy of the post-war conceptualization of the public interest. Values change.

Since Paul Davidoff introduced the idea of advocacy planning, planners have acknowledged multiple interests.[6,7] The civil rights and feminist movements helped planners recognize the political context of our work. Advocacy planning involves the radical assertion of difference. It denies a single "public" interest while illuminating political choices. Each decade brings new players with their own views about what serves the public.

Although at one level planners accept competing interests as equally valid, we continue to appeal to the public interest when we need to offer advice or make decisions. As conventional conceptions of the public interest floundered, planning theory turned increasingly to examining the planning process. Mainstream planning theory worked toward developing a framework for articulating options that could serve the common good. If planners could no longer claim to have the skills to ferret out the public interest, then we would focus on helping community members to define it.

## The Public Interest as Process

John Friedmann[8] shifted attention to planning as a form of mutual learning where the process is as important as the outcome. Others have extensively developed and refined these ideas through the last three decades. Forester[9] argues that planners serve the public interest by open, honest and transparent communication in their dealings with the public and decision makers. Planners have the responsibility to inform, illuminate and listen—to help people achieve their own ambitions, and to speak truth to power.

In recent years, collaborative planning theory has gained adherents.[10] It suggests that stakeholders work together to define the public interest. Planning involves finding open and productive ways to resolve differences and find win-win scenarios. In this view, the consensus outcome represents the public interest.

Process views of the public interest define the role of the planner as facilitator. Strategic planning initiatives built on the concept as governments redefined their approach. However, in recent years we see concerns raised: if planners are merely facilitators, then what is our independent professional expertise? Planners' desires to strengthen professional standing through title restriction and licensing has brought renewed concern about clarifying the public interest.

## The Public Interest as Substance

Substantive theories assume that the public interest exists and that trained experts can recognize it. Such theories expound planning principles that promise good communities or healthier futures. As experts, planners define the public interest through applying the preferred planning principles.

The most popular of these normative planning theories are new urbanism and smart growth.[11,12] They define good urban form as a common benefit. They see the public interest as served by designs that include mixed use, compact form, reduced concentrations of poverty, transit orientation, and pedestrian-friendly and connected streets. Such principles currently dominate new planning documents in Canada.

Substantive normative theories are popular with planners because they offer clear formulae for professional expertise and authority. As history has proven, however, they are subject to debate and displacement. Even where consensus makes them popular at one point, as times change they lose favour. Unexamined normative theories promote particular values as if they were universal values. In so doing, they elevate some interests while demonizing other views.

## The Public Interest as Process and Substance

Planning has had a small radical theory movement within it for decades. Radical planning defines the public interest as overcoming the hegemony of the powerful by putting the needs of the most disadvantaged to the forefront. Creating a just society, some say, serves the public interest.[7,13] Good communication and good form are not enough to overcome unequal power. The radical planner's role is a controversial one: a guerrilla in the bureaucracy, fighting oppression. That few practitioners select this option is not surprising.

## The Public Interest in Practice

Can planners serve the public interest? As community advisors, we must make our values explicit and illuminate the ethical choices embedded within planning outcomes. Planning involves political choices about the disposition of land, facilities and resources. The outcomes are not necessarily win-win. Consensus is not always possible. Resources are increasingly limited. Our role involves exposing issues and options for those who make decisions and to those affected by the decisions. Our professional credibility depends on openness about our assumptions and transparency in process. We do not serve anyone's long-term interest by presuming that we know the formula for the good community.

Does this mean that planners cannot be leaders or visionaries, that we are stuck being process technicians? Not necessarily. But if we seek to implement a personal or professional agenda, then we are ethically obliged to do so explicitly, not behind a cloak of imputed "public interest". We must be clear about why we believe particular strategies are timely to achieve explicit community aims—and we must prepare to have history prove us wrong.

Players in the planning process often advocate their own normative positions as the public interest. Ultimately, however, outcomes are political choices. Tearing down poor neighbourhoods for redevelopment seemed a popular political choice in 19th-century Europe and again in 20th-century North America. Planning organizations have recently awarded prizes to those who designed

new urbanist schemes to rejuvenate public housing projects by mixing in market housing. In the United States, new urbanist planning principles have created beautiful new districts while facilitating the net loss of some 60,000 public housing units.[14] It is clear that neighbourhood renewal serves some interests, while hurting others. Planners who define the public interest in physical terms without considering the social repercussions of actions reap the whirlwind.

Feel free to debate the public interest with community members and colleagues, but recognize the challenges inherent in using it to defend any particular position. ■

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# Planning and the public interest: Still a relevant concept for planners?

**Malcolm Tait**
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## Introduction

As I write this, the fallout from the decision to grant the first planning permission for fracking[1] in the United Kingdom for 5 years rumbles on. The proposal to use an existing borehole to fracture the rocks 3000 m under the Yorkshire countryside was approved by the planning committee of the North Yorkshire County Council, despite them receiving 4375 letters of objection compared to 36 letters of support. Responding to the decision, John Ashton (2016), the former UK diplomat with responsibilities for climate change negotiations wrote,

> There is a growing feeling that the decisions that shape our lives are no longer being taken with us but imposed on us, by people who do not know how we live and who care more about their own narrow interests than about the public interest.

Yet in late 2014, the UK Government (which strongly supports the shale gas industry (and therefore the associated process of 'fracking')) responded to comments on their proposal to enable drilling companies to access the land deep underground, stating,

> We also consider that this proposal would allow development which we believe to be in the public interest. (Department of Energy and Climate Change (DECC), 2014)

It is, perhaps, revealing that both the proponents and the opposition to a controversial activity such as fracking can both invoke 'the public interest' in their favour. In Ashton's formulation, the public interest arises from a democratic process that enables people to express their concerns and knowledge of place. It conveniently sidesteps questions about the representativeness of those community members who participate. In the UK Government's formulation, however, the public interest is defined very differently as that

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which supports development and economic growth. Questions of direct democratic participation or particular local knowledge are swept aside as irrelevant in comparison to this over-arching goal, and objections about the uneven distribution of the rewards of growth are conveniently ignored. The market becomes the arbiter of 'the public interest', and it does so by resolving conflicting and pluralist conceptions of the 'good' via the pursuit of economic activity and profit (Jordan, 1989). The phrase 'public interest' is littered frequently through planning documents, often used to provide justification for a particular position, but with far less agreement as to which positions or standpoints might be in the public interest. We might, therefore, ask the questions 'Why is this idea applied to such different things, and therefore does it any longer hold meaning for planners?'

This collection of articles aims to explore this question, seeking new ways of understanding this contested concept, identifying its limits and possibilities. In doing so, it seeks to draw together theoretical discussion and in one article (Maidment) to present some empirical evidence as to how it is used. It also seeks to move beyond often rather sterile debates about the ways of identifying or defining the public interest, towards a critical examination of what it means to act 'publicly' and how this phrase relates to both the civil society and the state. At the heart of the broad discussion raised by the articles is the issue of democracy that is alluded to by John Ashton. In particular, the question of who should make decisions about which areas or territories brings into focus the capabilities of those (spatially) bounded communities affected by development and whether they are able to represent the public interest. If these communities cannot adequately make decisions about developments on their own, then who might legitimately make decisions in these situations? The three articles in this Part Special Issue arise out of a series of events, including a conference held in the University of Sheffield in 2012 and a roundtable at the Association of Collegiate Schools of Planning/The Association of European Schools of Planning (ACSP/AESOP) Congress in Dublin in 2013. They all respond to three over-arching questions that were debated in these forums and which provide a focal point for this Part Special Issue:

1. Is public interest still a relevant concept for planning and professional planners, and if so, what is the role of the professional planner in identifying the public interest?
2. How might communities identify and support the interests of those outside their own community, even if these clash with their own interests?
3. What is the role of the state in promulgating wider public interests against the wishes of individual communities?

At the heart of these questions is the issue as to whether the public interest can be rehabilitated as a useful concept for planners. All three articles agree that it can, but develop different and at times opposing views as to how this might be achieved.

## The end of the public interest?

While the phrase 'the public interest' is still commonly used to justify individual decisions and actions, it is also taken to justify the position of planners as professionals able

to both identify and serve the needs of the public. Both the Royal Town Planning Institute and the American Institute of Chartered Planners (among many) cite 'the public' or 'the public interest' as the object that their members must serve. Yet, despite such statements, many academics have critiqued the notion as outdated and outmoded, representing a professional, who through his (and the planner was normally conceived of as male) special training and knowledge was able to discern 'the public interest' and guide others in its pursuit. The figure of the rational planner, who was able through theoretical knowledge and patient reflection, to identify a transcendent interest that rose above sectional attachments has been identified as born from Enlightenment thought, reaching its apogee in the post–Second World War period. Yet, it is often argued that this was (and remains) deeply problematic:

> In this modernist view, the public interest was determined by the expertise of planners who (it was assumed) could dispassionately analyse a problem and arrive at a rational solution. Critiques based on issues of class, gender, and race have judged this particular view of planning and the public interest to be deeply flawed. (Sandercock and Dovey, 2002: 152)

To an extent, it might be argued that the notion of such a modernist planner is chimeric, representing a particular discourse of planning through the 20th century that did not chime with the 'reality' of acting in contexts of deep power relations and sectional interests (see, for example, Meyerson and Banfield (1955) for an early analysis). Yet, the discourse has nonetheless proved more difficult to sustain in the face of those critiques identified by Sandercock and Dovey; critiques that stem from ideas of identity and interest that are not easily reconciled with a stable, common good. Such critiques of 'the public interest' have tended to be advocated by those on the political left, particularly with a view to ensuring that minority groups are empowered to shape their own environments. The rise of public involvement as a means of conducting planning can, therefore, be seen to draw its intellectual strength not merely from traditional principles of democratic theory, but also from more radical approaches of empowerment and liberation that treat the public interest as the symbol of a problematic and injurious democratic compromise.

However, critiques of the public interest do not merely emanate from radical movements. The neoliberal promotion of the market as the central feature of societies can be viewed as an attack on existing arrangements in which the state played a significant role in organising society in the public interest. While hardly new, this mode of liberal individualism corrodes the idea of the public as defined through collective identification and political participation, in favour of the public who come into being solely through their involvement in markets (Jordan, 1989). This raises challenges for ideas of the state as actively playing a role in creating a good society, and thereby meeting the public interest. In turn, the position of planning at the heart of the state has become problematised for the way in which it intervenes in economic transactions, and therefore frequently diminishes the market's ability to meet society's needs. For example, public choice theorists, such as Mark Pennington (2000), view planning as inherently unable to meet the public interest, due to its capture by sectoral interests that inevitably cohere around the state.

The two positions articulated above on the public interest start from very different points and point to different resolutions of the key political conundrum of squaring

individual and collective interests. They lie at the heart of the contrasting uses of the phrase 'the public interest' by John Ashton and the UK Government quoted above. We might, therefore, ask whether such a concept has validity as an objective within a society, and if so, what might we do to reconstruct it such that it meshes with our contemporary concerns about democracy and participation in public life. In seeking to frame a response to these questions, and to the ensuing collection of articles, the second part of this Introduction will briefly consider the two elements of the phrase – 'the public' and 'interest', before moving onto argue that while planning theory has tended to concentrate on interests, it has placed less attention on 'the public' as a focus of its concerns. All the articles in this Part Special Issue, in distinctive ways, seek to move to thinking about what 'the public' means for the activity of planning.

## Interests and the public interest

We might approach the idea of interests and their relevance to planning from two different points. One might start from a conception of individuals holding an interest – either through reference to their stated wants or normatively through taking a decision that advancing 'a person's interests furthers that person's good or advantage' (Swanton, 1980: 83). Whichever of these two is dominant, 'interest' is conceived of as being fundamentally concerned with the individual. Much discussion of the public interest, certainly post-Enlightenment, is framed within the realm of the autonomous individual able to hold interests either subjectively or objectively. The public interest can therefore be conceived aggregatively, most famously through Benthamite utilitarianism, enabling a calculative logic to generate an understanding as to which actions are in the public interest. Alternatively, interests might be seen as formed through associations of individuals sharing common attributes, enabling a more pluralist or associational mode of deliberative governance. As Young (1990) notes, '[t]he association model … implicitly conceives the individual as ontologically prior to the collective, as making up, or constituting groups' (p. 44). Using the individually held interest as the starting point for articulating the public interest forms the foundation for much work in planning theory on the concept. It clearly shapes ideas drawn from utilitarianism, but it also shapes much participative theory, in which the critical consideration is whether there are processes that admit individual voices to a deliberative arena. Hanna Mattila's article engages with just this terrain, exploring the extent to which collaborative planning can look beyond the local and reach towards a greater engagement with underlying values, taking account of those outside the immediate context of consultation.

While both utilitarianism and participative democracy have a concern for procedures of decision-making, at some point we still need to consider the underlying content of decisions. This is particularly true in the field of planning, in which the outcome is uncompromisingly stark: either there is a supermarket on a plot of land or there isn't, either there is a new housing estate on the edge of a small village or there isn't and either there is drilling into a borehole in the rock or there isn't. This is not to deny that there can be effective measures to ameliorate the impact of decisions, or to reach compromises, but simply to state that planning, as a system, tends to create more readily identifiable 'winners' and 'losers' than many other areas of policy, where impacts may be less clear

because they are less obviously spatial. The nature of planning entails that the definition of the public interest among one group will prevail over the logic of another and, as we have seen with the twin examples that open this article, there is no value-free way of deciding which should win out. Ultimately, at some level, whether it is within the planning system or outside of it in the civil society or the market, decisions have to be made about the future, about definitions of the good and about the kind of social values that the decision should promote.

One final point might be made about how we conceive interests in our thinking about planning. Much of our thinking in this area draws from political theories that seek to understand transcendental and universal concepts, such as 'justice', 'rights' and 'democracy'. Analysis, therefore, proceeds from abstract concepts, definitions and typologies. There is much to learn from the debates of political philosophy and all the articles in this collection draw on theories of democracy, justice and rights. However, this is not the only means by which we might engage with such a concept. We might, alternatively, view our task as revealing the situated nature of these concepts, their histories and uses in relation to our contemporary concerns, avoiding as Raymond Geuss notes: 'a major danger in using highly abstractive methods in political philosophy is that one will succeed in merely generalising one's own local prejudices and repackaging them as demands of reason' (quoted in Kelly, 2011: 13). The public interest thus becomes less an abstract ideal that we argue over, and more centrally a concept that is shaped by its own history as an idea and its contemporary resonance. The article by Maidment tackles this problem through understanding how the idea of the public interest is actually used by planners, communities and governments in a UK case, while Purcell seeks to ground our thinking by calling for different 'habits of thought' that we can use within practical, everyday situations.

## Recovering the public in the public interest

As noted above, much of the debate in planning literature on the public interest revolves around the concept of interests and particularly the mechanisms by which we might reconcile individual and collective interests. While this has been useful in connecting it to ideas of the democratic process, it has also tended to downplay the significance of the 'public' dimension of the concept. What and who is 'the public' to which the concept is attached, and to what extent is 'the public' a universal or delimited group? To what extent can we define a 'public sphere' that enables us to conceive of a public interest? What does it mean to participate in the public sphere, and how does it shape our identity and actions? These are questions that are not asked as frequently with respect to the public interest and its legitimating function within planning, yet are clearly crucial. Of particular relevance to planning is the relationship of the state to the public realm, and the extent to which it should define the nature and shape of this space, as opposed to other societal arrangements. Mark Purcell, in his article, challenges the notion that the state should have a special relationship to the public and calls for alternative non-state modes of acting publicly. Alternatively, challenges to established ideas of the public sphere arise from neoliberal marketisation, and a conflation of the market and the public realm. Furthermore, considering the public element of the public interest raises interesting questions about

the scale and scope of the public under consideration. The fracking case outlined at the start of this Introduction illustrates tensions between nationally and locally defined interests, tensions that are at the heart of many planning decisions. In his article, Chris Maidment explores these tensions in greater depth, looking at the contested values underpinning the management of a national park.

These tensions might be viewed as particularly pertinent at the current moment. The classic thinking about the public sphere by Habermas (1989) in 'The Structural Transformation of the Public Sphere' points to its emergence as a means of responding to new mercantile and capitalist relations as well as new democratic thinking. In doing so, distinct separations between private and public identities are set up, with a public selfhood determined by a call to universal reason. Yet postmodern thought has called into question these boundaries and whether we can live separate private and public selves and has viewed personal identities as both private and public. The public sphere is thus a particularly contested realm. Hanna Mattila reflects in her article on the ways in which Habermas, in particular, has more recently attempted to reconcile issues of personal and group identity with the construction of universal norms. For him, the public sphere should be akin to a marketplace for communication, in which formal rules and informal practices combine. Yet, for others, the attempt to embed universal ethics, or to conceive of a singular 'public', at the heart of the public sphere is doomed to failure (Fraser, 1990).

There has been an increasing interest in planning theory in sketching out an alternative context in which the public interest is defined, moving it away from being the product of formal law. Much of this concern draws on ideas of virtue ethics, communitarianism and Aristotelian notions of the common good as formed within contexts by complex, social subjects (see, for example, Lennon, 2016). Such arguments view moral reasoning within communities as at the heart of defining the common good. For others, issues of the public realm, and in particular 'commons' are of renewed importance as a means of challenging neo-liberalism (De Angelis, 2007; Hardt and Negri, 2004).

At the heart of many questions about the public sphere is the scale at which moral reasoning occurs. For example, the figure of the city is crucial to Aristotelian and Thomist ideas of the public realm:

> [the city] is the seeker of … the highest among all human goods, for it aims at the common good, which is better and more divine that the good of a single individual, as is stated at the beginning of the Ethics. (Thomas Aquinas, quoted in Keys, 2006: 82)

Yet, how might such ideas of the city and community relate to later notions of the nation state, and the bringing together of national interest with public interest? The extent to which we identify a spatially delimited public realm as the generator of the public interest thus raises significant questions for planning as an activity that makes decisions that are invariably located in place. This Part Special Issue aims to go some way to addressing this, through discussions of the distinctive nature of participation in the public realm. All three articles engage with this problem in different ways: Mattila describes the means by which Habermas advocates institutions playing a crucial role in managing formal and generalised obligations against particular and local practices, while Purcell argues that the state should not occupy the role of the sole arbiter of relations within the

public realm, and Maidment describes the significant tensions between national and local articulations of the public interest in the United Kingdom.

## Articles in the Part Special Issue

The three articles contained in this Part Special Issue tackle the definition and articulation of the public interest in different ways. Hanna Mattila seeks to identify how the public interest is conceived in both collaborative planning and Habermas' work. While Patsy Healey's notion of collaborative planning draws on Habermas' work, Mattila carefully unpicks their differences. In particular, Healey and Habermas approach the issue of the public interest along different lines of thought, which reveal how they view the productive locus of public life differently. For Healey, it is the micro-practices of discursive deliberation in place that help form our understanding of the public interest. Collaborative planning is necessarily embedded in the particular and the local, which in turn are informed by, but also reproduce, the institutions that we use to frame our decisions. For Habermas, the general and the universal play a stronger role in shaping our behaviour and interaction, and in attempting to transcend the local scale, we should assume the point of view of the 'generalised other'. Mattila argues that this has implications for how we view the public sphere – whether it is a public sphere composed of particular 'stakeholders' coming together in places or a public sphere in which our interaction is shaped by generalised commitments to others governed by societal institutions. Collaborative planning may, therefore, benefit from taking Habermas' 'generalised interest' more seriously in tackling fundamental dilemmas of justice and democracy.

Chris Maidment takes a different approach to the public interest, starting instead with Dewey's (1954) famous formulation:

> The public consists of all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for. (pp. 15–16)

In starting with Dewey, Maidment seeks to uncover how the public interest is aligned with scale, and how we might deal with consequences of decisions, which inevitably have a spatial element. Unlike the other two articles in this collection, Maidment draws on detailed analysis of a case study of planning in action in the Peak District National Park in the United Kingdom. At the heart of this National Park is a tension between meeting and serving local needs (the park is an inhabited landscape of villages and small towns), and broader national interests of landscape protection and economic growth. The article examines how this tension is managed through the institutional make-up of the National Park Authority, revealing different democratic logics at play and difficult situations for elected politicians and professional planners to navigate. Maidment argues that such a case illustrates the diverse ways in which the public interest is invoked to justify particular decisions and institutional relations, but that it should not be abandoned as a concept in situations such as these, but should be the lodestone for more inclusive deliberation that is able to incorporate the interests of multiple publics in a common dialogue.

The state is central to most debates on the public interest. For example, Dewey's definition of the public requires some body to take account of the 'indirect consequences of transactions', and for him it is the state that occupies this role. Mark Purcell in his article questions the need for the state as a representative and guarantor of the public interest. He argues that we too often equate the public with the state in our everyday language and thinking, using phrases such as 'the public sector'. Purcell traces this thinking back to Hobbes and his conception of the state as a dominating power through which we, as citizens, should surrender our power. He argues that we should recover the meaning of democracy: the people (*demos*) recapturing their *kratos*, or power to create. This requires us to practise democracy (and planning) outside the state. Purcell acknowledges the challenge that this presents to the activity of planning, but calls for us to produce publics without the state through developing different 'habits of thought'. He argues that we already make meaningful decisions without the state, with our neighbours and even at large scales, such as in informal settlements. The difficult, but possible, task is therefore to change our habits and ways of thinking that rely on the state and to generate new ways of creating democratic publics.

While all three articles start from very different points and draw on diverse traditions to understand the public interest, they all agree that the concept is one of value, particularly in contemporary societies and for the practice of planning. Furthermore, they all stress the spatial nature of public interest and the need for planning to think and act beyond the local and the community. In doing so, they raise significant and new questions for planning about how we define 'the public' and the role of planners and the state in mediating and promulgating the public interest.

## Note

1. The proposal formally is for 'testing' of fracking.

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## Author biography

Malcolm Tait is Professor of Planning at the University of Sheffield. His work investigates how ideas of trust and the public interest shape and legitimate this field of practice.

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Journal of Planning Literature
2021, Vol. 36(4) 543–561
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# Defining Public Interest in Planning: A Review

**Hashem Dadashpoor[1] and Ailin Sheydayi[1]**

**Abstract**

Public interest as the main content and purpose of planning is a fuzzy concept in planning literature. The body of literature on the public interest is so complex and diverse that makes it difficult to define and use the concept. In this study, the various definitions are categorized to achieve a framework of the definition of public interest. In addition to being more comprehensive than previous studies, this categorization identifies the main dimensions of a comprehensive definition of public interest. It provides a suitable context for theorists and professionals to have a clear framework for defining the public interest.

**Keywords**

public interest, defining, planning theory, review

## Introduction

Public interest is one of the most challenging concepts in the history of planning theory and practice. It has been the main core of planning thought and the most crucial criterion for the justification and legitimacy of planning action (Heywood 1990). Nevertheless, what constitutes the public interest has always been debated. For some scholars, the public interest, regardless of its definitions and interpretations, is a pillar of public planning and decision-making (N. Taylor 1998; Alexander 2002a, 2010; Campbell and Marshall 2002; Moroni 2004, 2), while some define it as a term that lacks normative and negligible substance (Reade [1997] 2013; Schubert 1960; Pennington 2000). At a glance, the public interest is the primary substance and the goal of planning, which determines the planner's role in public policy-making (Campbell and Marshall 2002), and at another glance, it is defined as a means of expressing affirmation or acceptance of the public policies (Flathman 1966).

Since the public interest in any sense, at least theoretically (Grant 2005), is the main focus of planning (Alexander 2010), planners cannot act without a specific perception or definition of the public interest (Maidment 2016). The involvement of planning is traditionally justified according to the concept of public interest: "historically, the only common standard in the different forms of planning has been the public interest" (Mazza 1990, 48). However, what the public interest is, how it is defined, or the way it can be understood have received varied answers over time and in different contexts.

This challenging concept allowed the researchers to interpret it based on their own perception and employ their public interest version (Sorauf 1957). These personal versions often define the "process" of achieving the concept or even its "application" instead of defining the nature and content of the public interest. Different readings of the concept make it a floating standard or a superficial concept for instilling legitimacy in public measures.

Any critical assessment of the concept "public interest" must begin with a definition, but which definition? The attributed definitions are a complex, diverse, and inconsistent body of theoretical literature that in many cases even avoids providing a clear definition of the concept; thus, not only do they not respond to the various dimensions of the subject but it is not also possible to generalize them. Different definitions of this concept have made it a fuzzy but inevitable term (Tait 2012, 2016). Žižek states that planners differentiate themselves by sharing some vague terms, such as the public interest, whose meaning is unknown to anyone; everyone refers to them, and what binds them together is ultimately their common ignorance (Žižek 2002). In response to this issue and to obtain a basis for defining the public interest, numerous efforts have been made in the last past decades (Sorauf 1956; Banfield 1959; Held 1970; Howe 1992; Campbell and Marshall 2002; Alexander 2002a). However, defining the public interest based on one of its supporting concepts (e.g., ethics in Howe's [1992] typology) or the substance and procedure of public interest in the typologies of Campbell and Marshall (2002) and Alexander (2002a), these efforts fail to explain a framework that responds to all the dimensions and approaches of the public interest definition in planning theory and practice. To fill this gap, this study seeks to review and categorize valid definitions of the

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public interest and present them in the form of a new category of public interest definitions.

To this end, a central question must be answered: what dimensions and categories can be identified in the definition of public interest in the planning literature? Thus, we review various definitions based on their general approach and provide a useful context for explaining a comprehensive framework for defining the public interest in planning theory and practice.

The article is structured as follows. The next part of the article describes the methodology used to review the literature and analyze research resources' content. The third section presents a new category of definitions of the public interest based on the approaches or the prevailing context and adaptation of this categorization to the planning theory. It is concluded with the argument that there is no single definition of the public interest, and this concept is defined in any context influenced by the prevailing approach. However, presenting a comprehensive definition of the public interest requires a framework that provides a consistent answer to four specific questions: how is the public interest defined, by whom, by what process, and for what use?

## Research Methods and Materials

This study uses a systematic review to identify the articles that defined or conceptualized the public interest. A systematic review is an independent study since it tries to understand the existing literature by collecting, interpreting, explaining, and integrating the existing research and expand it by bridging the existing gaps (Rousseau, Manning, and Denyer 2008). This method often involves extracting the second-order concepts from the existing literature body and converting them into third-order constructs. First-order structures relate to the main narratives in the articles reviewed such as the text of interviews to examine a particular topic. The authors' interpretations of these narratives are second-order structures, and ultimately, our synthesis of second-order structures constitutes third-order structures. This process allows for translating the studies into each other and exploring the comprehensive hypotheses and concepts. For this reason, not all texts can be included in this type of study since the studies must be relevant in fundamental principles and concepts (Mays, Pope, and Popay 2005). As a result, using the articles obtained from the review process, an attempt is made to define the public interest in planning.

In a systematic review, determining the inclusion/exclusion criteria is essential to provide a transparent and documented process (Tranfield, Denyer, and Smart 2003). As an inclusion criterion, the English documents indexed at the Scopus database from 1940 when Rexford Tugwell explored the application of the public interest in modern planning to 2020 were searched based on the key words in the title, abstract, and key words sections. The compiled documents were examined in terms of the relevant title, abstract, and text to the research's purpose. Finally, those articles were selected that directly explained the concept of public interest, its dimensions and complexities, or indirectly defined this concept by studying the normative substance of plans in different fields. As an output criterion, articles should either explicitly define or explain the concept of public interest or, by examining the normative content of programs, implicitly define what public interest is.

The process of sample selection for this study involved five steps (Figure 1). In the first step, the research key words were selected by examining fifty samples resulting from a preliminary search of "public interest" and "common good" in Google scholar. Then, the most repeated key words of "public interest," "common good," and "Legitima*" as the descriptors of planning content were searched in the Scopus database in combination with the words "planning," "urban planning," "planning theory," "planning practice," and "planning profession" as the descriptors for the study of the concept of public interest. The initial result was 3,060 articles that were reduced to 103 articles over the exclusion process according to the output criteria.

In the second stage, through the review of the 103 articles remained in the first stage, the key words of "community interest," "commonwealth," "public good," "local public good," and "common interest" were added to the search process. A combined search for these key words provided 1,165 additional articles, among which fifteen articles were selected during the exclusion process. Examination of the articles at this stage revealed that except for public good, other key words were much weaker than the main key words of the research in explaining the concept of public interest; thus, namely the key words of commonwealth and common interest were removed from the research process.

In the fourth stage, from the review of fifteen selected articles in the previous stage, the key word of "communal interest" was obtained. The combined search for this key word resulted in a total of two additional articles, among which only one article remained for full-text analysis.

In the fifth step, the search for the key words and authors cited in the Google Scholar database could fill the potential gaps and ensure that all available resources were reviewed, mainly due to Scopus's limitations in searching for the resources before the 1960s. In this way, sixteen articles were added to this collection using the snowball method. A total of 145 articles were selected for final analysis. Of these, 122 articles were single author, forty-seven articles were theoretical, and the rest were empirical articles. Comparing how the concept of public interest is addressed in theoretical and empirical articles does not show a systematic difference.

We used the qualitative content analysis method with a traditional reading to analyze the articles. Qualitative content analysis is a research method for subjective content interpretation of textual data through the systematic classification, coding, theming, or designing the known patterns. In this approach, classes were directly extracted from the data text (Hsieh and Shannon 2005).

For this study, the different cited definitions of "public interest" and the unique definition provided in each article were extracted and tagged with the conceptual labels in the first stage. The conceptual labels with similar semantic loads were grouped within the categories. The commonalities of these

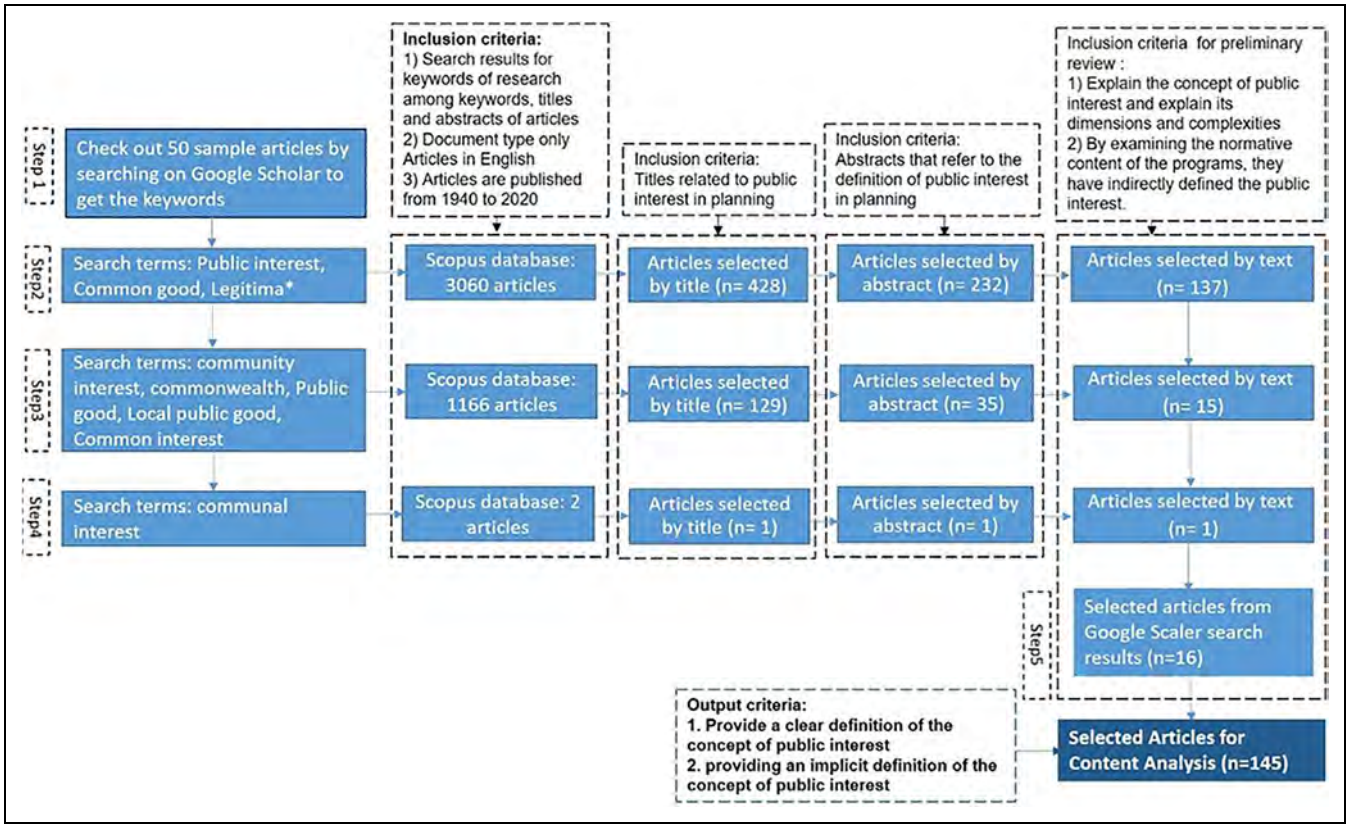



**Figure 1.** Systematic review process.

categories formed the main categories as the main types of definitions. For example, Bentham's (1973, 17–22) definition of the public interest can be labeled "the sum of individual interests," and the definition of Meyerson and Banfield's (1955, 324) individualistic public interests can be defined by the conceptual label "the greatest benefit to the majority." The emphasis of both conceptual labels on "providing the greatest benefit to the greatest number" leads us to place them in a larger category, "teleological ethic." The same process runs for other definitions. For instance, conceptual labels that collectively refer to the public interest as the moral commitment of planners fall into a larger category called "deontological ethics." Finally, since both the categories of "teleological ethics" and "deontological ethics" are the types of normative ethics, combining these two results in a new category of definitions based on the planning ethics (Table 1).

## Defining Public Interest in the Planning Literature

Any critical evaluation of the idea of public interest must start with a definition but which definition of public interest? The definitions related to this concept, first, are outspread and based on theoretical approaches or different fields of practice, and second, they fail to express all the term's semantic differences. As a result of qualitative content analysis of research resources, all definitions can be categorized into four different categories (rows in Table 1), indicating differences in the definition approaches. The ones presented in the category are also separable in explicit or implicit definitions (columns of Table 1). Explicit definitions directly address the nature and content of the public interest, and implicit definitions refer to a group of definitions that move to define the concept acquisition procedures and commit to these procedures instead of defining the concept's content. Many attempts to define the public interest are more of a process of experimentation, exploration, and scrutiny in order to achieve it (Steele 2020) than to provide a complete definition of the concept. In justifying the acceptance of these two sets of definitions, we can refer to the debate of Salet (2019) and Lennon (2017, 2019) in accepting the ethical participation of procedures when seeking the validity of the public interest.

Ethical procedures, either according to Lennon (2017) "shared moral frameworks," or according to Salet (2019), public norms versus "purposive aspiration" or normative content, show different orientations toward the public interest. Public norms see the public interest as the result of accepting ethical frameworks that determine right and wrong, while purposeful action based on outcome prescribes a specific solution.

Another clarification about the category is the explaining words and terms that are used to refer to public interest. By examining the planning literature, the public interest has not always had its current name. Common good, the legitimacy of planning, the public good, and the communal interest are the

**Table 1.** Definitions of Public Interest.

| Main Category | Category | Definition | | References |
|---|---|---|---|---|
| | | Explicit Definition | Implicit Definition | |
| Definition based on planning ethics | Deontological | | Public interest is the primary commitment of planners to society, which is formulated through continuous and open debate | Howe and Kaufmann (1979); Howe (1992); American Planning Association (2009); Jamal and Bowie (1995); Loh and Arroyo (2017); McKay, Murray, and Hui (2011); McKay (2010); Pløger (2004); Rawls (1971); and Stollman (1979) |
| | Teleological | Public interest is the greatest happiness of the greatest number | | Bentham (1973); Meyerson and Banfield (1955); Baron, Pettit, and Slote (1997); Held (1970); Barry and Rees (1964); Mill ([1861] 1962); and Altshuler (1965) |
| Definition based on normative planning substance | Criterion for justification | Public interest is the main purpose of planning based on global and legal values of planning and equivalent to the increased well-being in the area under planning | | Altshuler (1965), Klosterman (1980), Gaupp (1969), Alexander (2002a), Downs (1962), Leys and Perry (1959), and Booth (2002) |
| | Pluralistic aggregation | Public interest is the aggregation of multiple and contradictory values, which reflect broad social values | | Bentham (1973); Meyerson and Banfield (1955); Baron, Pettit, and Slote (1997); Held (1970); Barry and Rees (1964); Mill ([1861] 1962); and Altshuler (1965) |
| Definition based on the planning procedure | Neutral | | Public interest is the result of an open and democratic dialogue process without the need for intervention | Habermas (1984, 1987, 1996), Rawls (1971), Dryzek (1990), Grant (1994), Barth (1992), and Sandercock and Bridgman (1999) |
| | Consensus-based procedure | | Public interest is the consensus of the various interests that are achieved in a communication process | Mattila (2016, 2018), Healey (1992, 1997), Innes (1995), Innes and Booher (2015), Forester (1993), Sager (2012a), and Flyvbjerg (1998) |
| | Conflict | management-based procedure | | Public interest is the compromise, reconciliation, or balance of multiple interests that result from a communication process |
| Hossain and | | Hackenbroch (2018), Murphy and Fox-Rogers (2015), Pacione (1990), Hillier (2002), Mouffe (1995), Knight (1992), and Connolly (2002) | | |
| Definition based on political discourse governing planning | Welfarist | Public interest is the unitary interest of the people as a whole, determined by the political and social elites | | Oppenheim (1975), Alexander (1992), Meyerson and Banfield (1955), Schubert (1960), Ocheje (2007), and Tugwell (1940), |
| | Liberal democracy | | Public interest is the liberal government's commitment to a process that pursues social progress by maximizing individual choices | Pacione (1990), Alexander (2004), Bentham (1973), Mill ([1861] 1962), Winkler (2011), and Nozick (1974) |
| | Neoliberalism | Public interest is the balance of competing interests achieved through bargaining | | Murphy and Fox-Rogers (2015), Sandercock and Dovey (2002), Hossain and Hackenbroch (2018), Sager (2012b), and Davoudi, Galland, and Stead (2020) |

most frequently used terms in the planning literature that sometimes are used instead of or refer to the term public interest. Although, all of these terms convey the shared meaning of something, the content of this sharing and how to share it is different. For example, the common good is usually regarded as a "collective and indivisible thing" or society's interests as a whole and is more closely associated with communist ideals for human well-being, while public interest can be related to the "set of private interests" and, as a result, have a more individual look (Murphy and Fox-Rogers 2015). Dagger (1997) points to the distinction between the use of the word "Good" versus "Interest," arguing that the user of the word Good versus Interest in the combinations of the "Public good" and "Common good" emphasizes common, conscientiousness, and moral aspects, as opposed to the individual and utilitarian aspects that are added to the term public interest (Alexander, Mazza, and Moroni 2012).

Ignoring differences in productivity (Brown, Msoka, and Dankoco 2015; Klaufus 2018), some sources equate the public interest with the public good and mean something that society has access to. The whole society pays its cost, and its benefit belongs to society (e.g., Hendriks 2009; Bradley 2019; Olsson 2008; van der Molen 2015; Webster 1998). However, it defines public goods as the nonexcludable and nonrivalrous goods. In contrast, public interests can be related to the supply of public goods and the distribution of competitive goods; hence, in cases where the public interest and the public good are used interchangeably, the emphasis is on communal interpretations of the public interest.

Although the common good and the public good both refer to communal interpretations of the public interest, one of the most important conceptual differences between the two can be considered "ownership." Common good is recognized by local experts as a community-owned property run by local authorities. However, once ownership is transferred to a public institution (e.g., a municipality or a ministry), it is generally regarded as a public good (Šmid Hribar et al. 2018). Common good as a matter in social ownership is more of a normative moral concept than public good as a factual matter and in the ownership of public institutions that community members share in its use.

Another issue about the conceptual distinction of the terms used for the public interest relates to the distinction between communal interest and public interest. Communal interest expresses citizens' commitments to each other (Winkler 2011) and requires understanding shared destiny and well-being for unitary society members. If it is the public interest, it is defined as both unitary and plural (the sum of individual interests). As a result, by examining words and expressions that refer to the concept of public interest in the planning literature, one can identify the four words "good" versus "interest" and "common" versus "public" that their use indicates the implicit orientation of the concept. The use of the word common emphasizes common social aspects. In contrast, the word public includes individual aspects in addition to common concepts. The word good emphasizes the moral aspect of the concept, while interest refers to utilitarian concepts in addition to moral concepts. As a result, public interest can be considered a comprehensive term for expressing different dimensions and conceptual tensions around the issue.

In this study, according to the given goals to discover the different categories and dimensions of the definition of public interest in examining the resources, minor differences and narrow boundaries between the phrases are omitted. The term public interest is used to explain the concept. Although it is not possible to determine a definite relationship between the use of words and the orientation of the concept, in examining the different types of definitions of public interest, we try to show the compatibility of each of these terms with different types of definitions.

## *Definitions Based on Planning Ethics*

Public interest is fundamentally an ethical concept, and the definition of the substance of public interests depends on the prevailing ethical theory in planning (Pløger 2004). Due to this moral quality of public interest, some people accept the policies that run counter to their interests (Flathman 1966; Held 1970). In planning, the way public interest is defined closely relates to professional ethics' general topic (Howe 1992). According to the principles of the code of ethics and professional conduct and the American Planning Association (2005), serving the public interest is the primary responsibility of planners. Thus, many planners define public interest as a moral principle. In professional ethics, the main question is about the independence of professional ethics from "ordinary" ethics—that is, whether the specific norms and principles that individuals need to adhere to in their professional role are in line with social (contextual) norms or they need to define distinct norms versus social norms (Goldman 1980). In response to this question, Friedmann (1989) argues that for society to follow planners' decisions, professionals must follow the same ethical norms. Professional ethics must be accountable for conventional or ordinary ethics (Gewirth 1986; Howe 1992). As a result, the planning's professional ethics are either consistent with or responsive to ordinary ethics.

A noteworthy point in the ethical definition of public interest is that even if planners act as ethicists, ethical evaluation of their actions is always tricky (Campbell and Marshall 2002). Since, first, the definition of moral values belongs to a particular context, thought, or group and cannot be neutral and generalizable. Second, as planners are often unable to predict ethical values' probable consequences, their adherence to professional ethics remains theoretical (Pløger 2004). To overcome this problem, we need to know what definition of ethics and public interest prevails in each context and planning system (Alexander 2010). Content analysis of the literature suggests two different ethical frameworks for defining the public interest.

*Deontological ethics.* In the deontological definition of the public interest, this concept is emphasized as the moral obligation and

duty of planners instead of emphasizing the substantive outcomes on the ethics (compliance with values) of planning procedures and commitment to universal ethical principles such as justice and fairness (Alexander 2002a; Wamsley et al. 2016; Campbell and Marshall 2002; Lennon 2019; Mualam and Alterman 2018; Howe 1994). In deontological moral theories, right takes precedence over good (Chambers 1996), so the public interest is defined as a higher moral principle to which the planner is committed to serving, and as a result, good is achieved.

Within this definition, planners traditionally consider themselves advocates of the public interest (Woltjer 2001, 65; American Institute of Certified Planners 2005). Deontology pursues conformity to duty and moral law along with the motivation for obeying the law and claims that any plan and program should benefit all citizens (Pløger 2004; South African Planning Institute 2005; Moore 1978; International City/County Managers Association 1995; Royal town planning institute 2007). Consequently, it considers the public interest to be an objective, unitary, and common nature determined by planners based on public norms in an ethical debate for use in public decision-making. Due to the emphasis on the communal aspects of the concept in deontological definitions, in addition to the term public interest, communal interest and common good can partially explain the definitions of public interest based on deontological ethics.

All deontological ethics-based definitions of public interest, instead of providing a clear definition of the public interest, refer to the public norms obtained in the public interest due to planners' moral commitment to these norms. Providing the public interest of planners' moral commitment in an open democratic process is based on justice and fairness to society (McKay, Murray, and Hui 2011), and the normative content of this interest can change depending on the time and context of planning. The public interest in a deontological definition legitimizes the planning process and considers this legitimate process's outcome fairly.

Recourse to deontological definitions of the public interest can be found in post-1960s planning theory and the transition from value-free planning to value-oriented planning and more specifically in theories of advocacy planning (1965), equity planning (1982), or aid planning (the 1970s) in the UK and later in communicative planning theories.

*Teleological ethics.* In this category, the concept of public interest is defined according to the values underlying the outcomes of action—here, the outcome of planning actions, regardless of the process and tools of its realization, should benefit the majority of people. This definition specifically relates to utilitarian ideas and maximum profits for the majority (Mill [1861] 1962). In the context of teleological ethics, the public interest is the aggregation of individual interests that increase or reduce individual pleasure (Bentham 1973; Campbell and Marshall 2000, 2002; Howe 1992; Banfield 1959). The public interest in this definition is subjective, pluralistic, and consequentialist, as determined by the government or formal planners in rational decision-making and policy-making.

Held (1984, 143) argues that "The concepts of welfare and public interest, essential for evaluations of political decisions, are probably best understood in [consequentialist] terms." Consequentialism evaluates "good" before ethics and ethics based on a consequence, by which the decision that brings the greatest benefit to the greatest number is considered moral. In consequentialist definitions, the public interest is a concept that legitimizes the consequence and practice of planning. Baron, Pettit, and Slote (1997) introduce consequentialist theories and utilitarianism as the most relevant ethical theory to planning and policy-making. In this theory, the action's consequences are more important than the motivation of the decision maker or the inherent nature of an action. The scale of a good public policy is how much it benefits the general public or creates a balance between good and bad. To realize the public interest, it is necessary to know what benefits and costs the people attribute to a given policy and whether the benefits outweigh the costs or not (Bentham 1973, 1948; Held 1970; Meyerson and Banfield 1955). As a result, given the public interest's individualistic and utilitarian nature in these definitions, the concept is best described as public interest.

In the critique of the consequentialist definition of the public interest, it must be said: this theory assumes that people express their preferences. However, in a situation where a public policy grants a collective interest, it would benefit people not to express their preference, hoping that other people could bear the costs of lobbying for a policy. Then, they would enjoy the benefits of the "free-rider" (Samuelson 1995; Olson 1965; Campbell and Marshall 2002). As a result, the costs and benefits of achieving public interest are not the same for everyone. While utilitarians have sought to reduce the harms of this policy by recruiting the politicians who are sensitive to the democratic values, the rights, and ethics of the society, or by compensating for those got harmed by the policies (Campbell and Marshall 2002), the biggest drawback of the consequentialist definition of public interest is that to achieve the best for the most people generally means to ignore the interests of the minority. Although the legitimacy of the consequence and practice of planning is pursued in some ways in all planning theories, the most apparent manifestation of consequentialist definitions of the public interest in planning theory can be seen in the first half of the twentieth century in the tradition of social reform (Friedmann 1973) and then in the second half of the twentieth century in pragmatic planning theories.

## *Definitions Based on Normative Planning Substance*

When discussing the ontology of the public interest, we must distinguish between the procedural and substantive aspects. A deeper understanding of the public interest requires understanding the concept's normative substance (Friedmann, Nisbet, and Gans 1973). In the substantive context, the public interest is an acceptable norm for public planning and policy-making (Alexander 1992). Our norms in any planning

process must be clarified since, without norm, we take on the risk of a vicious relativism anywhere (Albrechts, Barbanente, and Monno 2019). Planning theory and practice are necessarily based on a specific definition of the public interest. Over the past century, from the beginning of modern planning until today, various theoretical and contextual streams have caused a change in the thought and practice of planning and, consequently, a change in the concept of public interest. These conditions have weakened the public interest position as the normative substance of planning and its denial as a meaningless concept (Moroni 2004, 2018; Lennon 2017).

Before 1950, and under the rational planning paradigm's domination, the public interest was accepted as a normative fact in planning. However, from the 1950s to the 1970s, pluralists' attack on the public interest in the critique of rational planning subsequently challenged the public interest as a criterion for justifying rational planning. As a political philosophy, pluralism recognizes diversity in the policy-making body, which enables the peaceful coexistence of different interests. Davidoff's advocacy planning theory is the most obvious manifestation of the influence of pluralism on planning theory, which emphasizes the reform of institutional structures to enable balanced competition of interests and attention to the interests of minorities. Then, in the 1970s and 1980s, "communicative turn" in planning theory, influenced by Habermas' (1984) "communicative action" theory, completely changed the orientation toward the concept of public interest. In the communicative action theory, the public interest was reflected not in the normative planning substance but in the participatory procedural justice.

Finally, in the 1980s, influenced by the emergence of neoliberalism in a liberal-individualist context, previous notions of the public interest were rejected by citing a shift in the planner's role, from the public regulator to the entrepreneur and policy broker (Campbell and Marshall 2002). A neoliberal society embraces a commitment to the public interest but understands it through the charter of economic competition, efficiency, and entrepreneurship. Theoretical turns from the second half of the twentieth century influenced by value pluralism have provided a good space to deny and challenge the concept of public interest: in a pluralistic context, there is no common value on which interests are based. Moroni (2004, 2018), in response to the denial of the concept by pluralists, argues that the definition of the public interest does not require the convergence of all values, but that convergence in "framework-issues" makes it possible to define the public interest. According to Alexander (2002a), the best convergence is achieved on a smaller scale and in communities with limited members.

Content analysis of the study reveals two distinct groups of definitions based on the public interest as a normative substance of planning: One that is "Criteria for evaluating and justifying planning action," and another one "Pluralistic aggregation of different interests." The common denominator of these two categories is their being context-based (Healey 1992; Cerquetti et al. 2019; Chettiparamb 2018; David 2019) definition of community values varies at any time and place.

*Criteria for evaluating and justifying planning action.* In these definitions, the public interest is defined based on the universal and legal values of planning, as the primary goal of planning and the equivalent of increasing prosperity in the planning area. The public interest justifies planning as an activity restricting some private rights (Alexander 2002b, 2007; Moroni 2004). The public interest is a norm for planning and a criterion for evaluating plans, programs, and policies, which helps planners defend their inevitable decisions in logical and empirical contexts (Klosterman 1980; Alexander 2002a). As a result, these definitions of public interest have an objective, unitary, and communal nature defined by the government and formal planners in a rational decision-making process.

In this definition, the public interest must provide an indicator to measure planning action's success or legitimacy. According to Tait (2011), acting in line with the public interest is an essential feature of the planning profession; thus, the first way is to measure the achievement of social goals and values that define the public interest. Public goals represent the public interest, thus provides a criterion for evaluating and justifying planning policies and actions (Altshuler 1965; Vasu 1979). Alexander (2002a) introduces a threshold benefit criterion for evaluation of plans in terms of their implications for the residents of the area under planning: a program that does not improve the well-being of the residents (or reduces welfare), in case of negligence in the public policy considerations, contradicts the public interest. As a result, in this category of definitions, according to the common and unitary nature of public interest as a criterion for evaluation besides the term of the public interest, the terms common good, public good, and communal interest can also express the concept.

In addition to evaluation, justification and legitimacy of planning action is another criterion by which the public interest is defined. The public interest is a good goal for legal action that legitimizes planning (Alexander 2002b; Campbell and Marshall 2000; Booth 2002; Moroni 2019; Mualam and Alterman 2018). Planning theorists generally see legitimacy as a structure composed of planning norms and values. The public interest is a set of values that justify public action (McAuslan 1980; Campbell and Marshall 2002; Alexander 2002a; Häikiö 2007; Bozeman 2007; Flathman 1966; Z. Taylor 2019; Cuthbert 1991) and express the ability of the public sector to gain public support for public policy (Caulfield and Minnery 1994).

Consequently, no policy is in the public interest if it contradicts the minimal elements of the value structure that defines society, namely the constitution and traditional democratic values and principles (Downs 1962). The planning law has been determining the public interest and how to protect it since 1909 and the birth of the first planning act: Housing, Town Planning, & c. The public interest has always been the main subject of the planning law. The Urban Planning Act of 1947 then defined planning as an evaluative regulatory function (Cullingworth and Nadin 2003), giving people a more significant role in

serving the public interest. In the evolution of planning theory, the definition of public interest as a criterion for evaluating and justifying the planning practice maintained its position as the core of planning until the 1990s. Since then, the communicative turn and emphasis on procedural definitions of the public interest have diminished the concept's role as a criterion for evaluating and justifying planning action.

Legitimacy is simultaneously a procedural problem and a substantive problem (Albrechts, Barbanente, and Monno 2019). Klein, Mäntysalo, and Juhola (2016) argue that the support of multiple paradigms for planning procedure removes the ambiguity in the procedural legitimacy of planning (Klein, Mäntysalo, and Juhola 2016, 10). The substantive problem of legitimacy is also solved by measuring the effectiveness and efficiency of measures to achieve the public interest. In this regard, actors' participation with sources of knowledge and capital enhances the planning system's capacity to respond to the public interest (Falleth, Hanssen, and Saglie 2010; Hytönen 2016). As a result, the act of planning has legitimacy if it pursues the public interest through a combination of different procedures in a transparent and accountable system.

*Pluralistic aggregation of different interests.* Defining the public interest as a criterion for evaluating and justifying planning action stem from the assumption that the public interest is associated with increasing all parties' well-being affected by the program. These definitions have simplified and reduced the scope of the problem to create an applicable criterion. The application of these criteria is limited to relatively small and straightforward plans. However, the more complex plans or projects involving diverse interests or conflicting values require a pluralistic approach for defining the public interest's content, reflecting the society's collective or group values. In this definition, the public interest consists of criteria and norms that reflect broad social beliefs and values; and since public interest is embodied in groups that, like all modern voluntary associations, are functionally specific, it acts more as the pluralism factor than the unifying factor of society (Graziano 1996). Consequently, in this definition, public interest has a subjective, individual, and plural nature that planners determine in a technical and bureaucratic process in the form of a pluralistic aggregation of different interests. Pluralistic aggregation is the most direct democratic idea of public interest (Howe 1992). In this view, public interest means protecting the individuals' freedom in the pursuit of their idea of a good life, and to ensure peaceful coexistence of multiple individuals with different ends (Alexander, Mazza, and Moroni 2012), which guarantees the legitimacy of the planning consequence and action.

The definition of the public interest as the sum of individual interests embraces the idea of Thomas Hobbes, John Locke, David Hume, and Adam Smith that people move in a "state of nature" with self-motivation based on self-interest and constant conflict of interest through "invisible hand" leading to the interaction of individual interests and ultimately organizing them in the service of society. Consequently, the main issue is how to collect individual preferences and determine the public interest, which requires analytical methods to identify and aggregate individual preferences (Howe 1992; Held 1970; Meyerson and Banfield 1955; Campbell and Marshall 2002; Moroni 2006; Alexander 2002b).

The pluralistic aggregation method assumes that anyone who is influenced by an issue or policy expresses his/her preferences rationally and freely or is politically active to solve the individual preferences' aggregation and determine the public interest. However, from one side, in a situation where a public policy bestows a collective interest, it will be in the best interest not to express a preference in the hope that other people can bear the costs of lobbying for that policy (Olson 2012). On the other, the transaction occurs between those who have the facilities and resources to participate in the political transaction, so in this process, the interests of the deprived and unrepresented people are ignored.

Besides, this definition of the public interest is always criticized in terms of reductionism (equal consideration of all ideals, needs, expectations, and their expression in the form of individual preferences), unidimensionality (transformation of different preferences on a quantitative and measurable scale), equal consideration of preferences (giving equal weight to different preferences), and ignorance of distributive effects (Moroni 2006, Alexander 2002a).

To solve the problem of aggregation of individual preferences, economists have introduced various analytical methods such as cost-benefit analysis (Lichfield 1960, 1964), planning balance sheet analysis (Lichfield 1971), and community impact evaluation (Lichfield 1988, 1994, 1996) that each of them has somehow tried to solve the problem of achieving public interest through pluralism by filling the existing gaps. The definition of public interest based on the pluralistic aggregation of different interests is most closely related to utilitarian ideas in planning theory and its manifestation in the tradition of social reform, incremental planning, and the comprehensive rational planning paradigm. In this definition, the planner is a neutral technician who conducts scientific analysis to increase economic prosperity and productivity as public interest (a goal set by politicians). The application of these definitions can be seen both in decision-making and in evaluating the impact of decisions.

According to recent studies (Maidment 2016; Mattila 2016; Moroni 2019), what should be considered in applying the pluralistic definition of public interest is the issue of scale. At a large scale, which does not allow for pluralistic aggregation of individual/group interests, the public interest is based on unitary and universal definitions and values (such as criteria for evaluation and/or planning law). At the micro-/local scale, where considering the local community's plural interests is possible, the public interest may include a pluralistic aggregation of different interests.

## Definitions Based on the Planning Procedure

In its procedural sense, the public interest is characterized by the political decision-making or planning process. Describing this procedure, which is in favor of the public, reflects the

universally accepted standards. In the categories of Alexander (2002a) and Campbell and Marshall (2002) of the public interest, the procedural public interest is called a dialogical approach. The dialogical approach regards the public interest as an interactive process between the stakeholders and the plan's parties. In this definition, the public interest is the accurate result of political conflict in consensus or compromise with private interests. The definition of public interest based on planning procedure is influenced by the communicative turn in planning theory. There is no essential and fundamental public interest that ultimately puts planning at people's service (Healey 1997; Hillier 2003). This definition roots in Habermas' concept of communicative action and legitimize the planning process.

Habermas's (1996) concept of moral discourse relates to a process of reasoning focused on the overlap of generalizable interests—which has become (by his proponents) a more general theory of the formation of the public will. Habermas's communicative action is based on the "unavoidable presuppositions" of a debate such as the "ideal speech situation." In this unrealistic situation, conditions such as "freedom of access, equal rights to participate, trustfulness on the part of participants, and the absence of coercion" are fully realized (Habermas 1993, 56). According to the debate's presuppositions, competent speakers in Habermas communicative action have a positive attitude toward mutual claims and use linguistic communication to achieve mutual understanding/awareness. They implicitly ignore the speakers' idiotic tendencies (Habermas 1984, 15–18) and consider the consequence of communication in an "ideal speech situation" as fair.

Another philosophical context of this definition is Rawls' (1971) theory of justice. This theory assumes that in a society of free and independent individuals, "there are many contradictory and unbelievable perceptions of the good" (Rawls 1982), and creating the right for all citizens to participate in the planning process guarantees the public interest. In this definition, all individuals' right to participate in an impartial planning procedure is the best way to ensure the public interest. Consequently, in this reading of the public interest, the emphasis is on norms and procedural rules, and the dialogue is recognized as a means to the public interest.

*Neutral procedure.* In these definitions, under the influence of Habermas's communicative rationality, the public interest results from an open and democratic process of discourse. Since communication is the "main source of legitimacy" (Sager 2012b), the output of a legitimate communicative process conforms to the public interest. Forester (1998) argues that the public interest is not a description of good or the output of decisions and actions cited in the context of this definition. The public interest, in this definition, is the procedural justice used in policy-making. Habermas's communicative action theory and the deliberative democracy show that a genuinely democratic process's primary goal is to identify the common good (Dryzek 2002). Although Habermas has no definite idea of the public interest, he refers to it in other philosophical terms. In the communicative action theory, Habermas's (1984) view of the public interest is based on the "generalizability of interests," which can provide a sound basis for coordinating and modifying collective action. Habermas' communicative action shows that subjective interests are not fixed and predetermined in the planning debate and can evolve logically through discussion (Mattila 2016). Consequently, based on Habermas's communicative action theory, these definitions presented the public interest in the plural and intersubjective nature, defined by the people's participation in an open, democratic, and neutral decision-making process.

In opposition to the utilitarian view of the public interest, Habermas (1987) argues that the utilitarian agreement is not endowed with the authority of the public interest, and we cannot claim that it is recognized by the public as a public interest. Habermas's emphasis is on the generalizability of the debate in which generalized interests can be seen as public interest even stronger than the public interest of utilitarians.

In his critique of Habermas's definition of the public interest, Bengs (2005a, 2005b), similar to Pacione (2013), argues that the definition of public interest as "the collective interest of all"—results from an open, communicative process—makes the planning limited to the mere communication and devoid of norms. Whereas, in communicative action theory, Habermas argues that the subject of the public interest with the term "generalizability of interests" can provide a reasonable basis for coordinating and modifying collective action. The public interest gained through discussion is quite distinct from individual and sectoral interests (Habermas 1987, 1993). Generalized interests can be considered as public interests in an abstract and context-free way. As a result, it may be possible to moderate this critique of Habermas' definition of the public interest as "process priority over substance."

Another critique is the inclusive critique of the flow and outcome of communication. Communicative action, although it seeks to create a cohesive community emphasizing the pursuit of individual will in the communication process, pursues an inclusive individuality (Mattila 2016, 2020). Albrecht (2015), in response to individualism in communicative action, introduces the concept of coproduction. Coproduction forces citizens to engage in problems other than their own. As a result, "sensing together" in which relying on the conflict's positive aspects contributes to a common interest.

Habermas's theory, and subsequently the definition of the public interest as the product of a neutral and impartial process, has been the basis of communicative theories in planning and a procedural reading of public interest. Despite criticisms of Habermas' definition, new researches (Maidment 2016; Tait 2011; Mattila 2016) still demonstrate this definition's inevitable function on a large scale of planning (where consensus is not possible due to multiplicity of interests).

*Consensus-based procedure.* Drawing on Habermas's criticism, these definitions question the possibility of a just outcome from an open and democratic process, equating the public interest with the consensus from the communicative process. One of

the reasons for Habermas-based theories' multiplicity is a novelty of his idea of public interest, which provides an essential viewpoint for the legitimacy of planning (Campbell and Marshall 2002; Moroni 2004; Sager 2012a). Given the multiplicity of interests, communicative planning theories distance from Habermasian ideal speech situation and emphasize the planner's role as a facilitator of consensus in the public interest. Although communicative planners see the public interest as a contextual matter that belongs to a culturally homogeneous society (Healey 1997), they still argue that public interests can and should be created based on dialogue and reflect society's diverse and pluralistic interests. The public interest in this definition has a pluralistic and intersubjective meaning. People under the guidance of a planner define that in a consensus-based procedure. Furthermore, since it includes both individualistic and communal concepts, the best term to refer to the concept is the public interest.

In the communicative process, to gain consensus for the common good, the government and, more broadly, the planners should facilitate a logical debate between different stakeholder groups (Forester 1989; Innes 1996; Sager 1994; Healey 1992, 1997). The concept of consensus in this context does not refer to the Habermasian consensus, which is ideally based on undistorted, open, and inclusive processes of dialogue and debate (Mattila 2018). Instead, the consensus is achieved by controlling and directing the dispute to the public interest.

One of the Habermasian definitions of the public interest criticisms is the overoptimism and overemphasis on the communicative procedure and the disregard for the norms and values with which participants enter into dialogue. However, in the consensus-building process, considering what is "good" as a result of planning or what corresponds to the public interest is more important than the procedural concerns to ensure that all participants' interests are observed in this process (Hopkins 2010; Hanssen 2010).

For communicative planners, institutionalization facilitates the realization of public interests or the generalization of interests by facilitating communication between planners and stakeholders (Healey 1997; Taylor 2019). Thus, communicative planners suggest that governmental and nongovernmental actors involved in the democratic planning process can, through institutionalization and communication with stakeholders, reach a consensus that reflects the public interest.

The definition of public interest based on the consensus-based procedure can be traced to Patsy Healy's collaborative planning theory. Like Habermas, Healey refers to the public interest and argues that the public interest can and should be created based on dialogue and reflects different and pluralistic interests. In contrast to Habermas's moral philosophy, based on generalizability, Healey emphasizes contextualism and attention to cultural differences and the diversity of discourse in the communicative process (Healey 1992, 1997), leading to a fairer outcome to the debate. In collaborative planning theory, the public interest is defined as a consensus of concrete interests in a communicative process.

*Conflict management-based procedure.* Critiques of consensus-based procedure purport that it is practically impossible to reach a consensus in a context of conflicting interests, and what is accepted as consensus is the product of secrecy or the elimination of opposite voices (Mouffe 1995, 2000; Hillier 2002; Flyvbjerg 1998). Accordingly, they argue that public interest is not the result of consensus; instead, groups' bargaining power (Hossain and Hackenbroch 2018) in a conflict, where all individuals have an equal chance to be heard (Moroni 2018), determines the public interest.

Although the process of communicative planning, at least theoretically, should lead to a consensus on what serves the public interest, it seems unlikely to eliminate, in practice, all areas of conflict that competing groups have for their cities and regions. A consensus-building approach cannot resolve competing views and reflect the complex reality of decision-making (Hopkins 2010). There is no consensus on different interests; instead, what is achieved as public interest is a compromise, agreement, or balance of individual and pluralistic interests made in a conflict management process by the people through the planner's mediation and bargaining.

According to Mouffe (1995), the "critical question" is not how to reach a rational consensus but to move tendencies toward "democratic plans." To this end, "differential democracy" is the best political tool to remind that the public sphere is as much a scene of consensus as it is a scene of conflict (Connolly 2002). Prioritizing competition over consensus, democratic differential processes enable the participants to maintain their autonomy and diversity as long as it is compatible with the joint plan (Hillier 2002).

In a pluralistic context, most references are made to define the common good, the balance of different competing interests, and the minimization of development's adverse effects (Murphy and Fox-Rogers 2015). Since the 1980s, under the influence of neoliberalism, the scholars' views on the common good have distanced away from the ideals of planning theory, and the planners manage legitimacy by supporting benefit groups (Mattila 2018; Margalit and Kemp 2019). Nevertheless, planning in the neoliberal age is still legitimized by the principles of the common good. The common good resulting from an agonistic and political process is manifested in the concept of public interest by distancing itself from communal concepts and taking individualistic and utilitarian aspects. As a result, in this definition, public interest means balancing the competing interests accepted through compromise and agreement by managing the conflicts by planners in a communicative process.

"Agonistic planning" with a critique of participatory democracy and depoliticization in Habermas's theory (Bond 2011; Gunder 2003; Hillier 2002, 2003; Pløger 2004, 2018; Gualini 2015) considers "conflict" suitable alternative to "agreement." In this way, this approach enables the participants in the debate to maintain their autonomy and difference as long as it is compatible with the joint plan (Hillier 2002). In this case, the public interest at best temporarily resolves the dispute (Lennon 2017). What agonist planning suggests rather than consensus is a

"contradictory consensus" (Mouffe 2013) that is achieved through compromise, compatibility, or a balance of multiple interests.

## Definitions Based on Political Discourse

Planning is recognized as a rational activity that generates public interest in a political context (Yiftachel 1998). Political ideologies in planning act as self-evident and unavoidable principles through legitimacy strategies to justify particular beliefs and values and guide planning discourse through policies and institutions (Davoudi, Galland, and Stead 2020). Identification of "public" or "private" interests is problematic since these terms are covers for political discourse often used to camouflage the interests of political sovereignty (Fox-Rogers, Murphy, and Grist 2011). Each political discourse delineates a distinct professional model that points to different legitimacy sources and outlines the different values and ideas about the public and private sectors' role in realizing public interest (Tait 2012). Like Flathman (1966), who defines the public interest as the product of individuals and interest groups' ongoing political activity in the ruling political system, Harmon (1969) considers the public interest as a unique and fluid matter determined by political flows in a dynamic process.

Therefore, there is no specific moral basis for the public interest to emphasize the concept itself in this definition. Instead, this concept is the output of the prevailing political discourse ethics. The public interest depends on a political ethic that governs all individuals in a given realm. The ethics of different political regimes and, consequently, planning regimes determine how the public interest is observed. The planning regime plays a mediating role in the realization and implementation of public policy values. However, it should be noted that political ethics and public ethics are defined in a mutual relationship (Maidment 2016; Moroni 2004). On the one hand, through determining the program's values and norms, the political discourse governing the society and planning system determines what and how to pursue basic concepts such as justice, equality, and so on (top-down). On the other hand, society's values define how political action is pursued for realizing the public interest (bottom-up).

*The welfarist political discourse.* Within the welfarist political discourse framework, there is an objective, unitary, and communal public interest recognized by the elite planner and realized in a centralized planning system. Communal ideas for the public interest focus on issues in which all community members have a common share (Meyerson and Banfield 1955). In this definition, recognizing the public interest, which is best expressed here by the term a common good, requires special knowledge. Those who have attained this knowledge–the planners–are entitled to make policy on behalf of the other (Sager 2012b, 25). Even without considering the people's opinions, this definition emphasizes the legitimacy of the planner. In this definition, the public interest is determined by the social elites not because of the difficulty of accumulating multiple interests but because of the planning elites' skill in using scientific and rational frameworks. This approach believes that a communal public interest can be identified through rational processes and criteria for decision-making and evaluation of planning proposals (Alexander 1992).

In continuing socialist ideas, in the early 1920s, with the introduction of social–democratic or welfarist ideas, professional planning was defined as an activity in the "public sector," which relies on the concept of working for the public interest. The distinction was that, contrary to socialist elitist ideas, the realization of public interest became a political process of judging between divergent interests as the government's duty to provide welfare (Tait 2012; Pacione 1990). In this discourse, public interest always corresponds to the government's interests and is often presented as an absolute virtue in the form of state political actions (Ocheje 2007). Moreover, planning as a state power seeks to resolve conflicts between interests by institutionalizing the bureaucratic power relationships and introducing public interest as a meta-ethical presupposition. Such a definition of the public interest came at the height of comprehensive planning and in a context where planners' ability to identify the public interest and the legitimacy of planning action was rarely questioned.

*The liberal democracy political discourse.* In the context of liberal democracy, the public interest is constructed as a pluralistic matter in democratic public debates under the supervision and control of an elected government that represents the people's interests. Campbell and Marshall (2002) have identified two concepts of public interest concerning liberalism. In Bentham's utilitarianism, it was assumed that only the individual could know his (her) interests and that the only constant test of the consequences of action was the person's pleasure or pain (s) affected. In response to the ambiguity, considering the individual as the sole source of self-determination may lead to a rejection of the government's influence in the public interest. Bentham (1781) argues that government action in the field of public choice can be considered by the principle of usefulness if the tendency to increase society's well-being is more significant than to reduce it. Bentham acknowledges that everyone has both individual and communal interests. However, since most people prefer to pursue their interests over the public interest, the government has to act through rational laws to persuade or force citizens to act in the public interest. Although individual-centered utilitarianism "debate" is considered, it places the government as the reviewer for public choice questions. It is the government that decides what constitutes the greatest happiness (Campbell and Marshall 2002).

The second concept is taken from the ideas of "James Mill," "David Ricardo," and "John Stuart Mill" in the reinterpretation of utilitarianism. Mill ([1861] 1962), in his version of utilitarianism, by defining the interest as an objective matter that can be measured, leaves the determination of the public interest to the people's representatives, who are the representatives of the different interests. With the presence of representatives of different interests and the imposition of restrictions, there is the

possibility of adjusting for conflicting interests in a possible political bargaining process (Benn and Peters 2013), and the public interest is defined as a balance of multiple interests.

In both interpretations, the role of government is to maximize individual choice opportunities. Individual freedom leads to the most incredible human well-being in the long run but only insofar as this individual freedom does not harm others. The "free market" is a tool that makes the top choice possible, and the provision of public services should correspond as much as possible to market forces. The government must also protect the social interests and collective goals (Winkler 2011). The policy-making and decision-making process in liberal democratic thinking is shaped and controlled by the government. Under this model, the legitimacy of decisions is based on the idea that planners or elected representatives represent constituencies' interests (Hendriks 2009). Thus, their actions are in line with the public interest.

Liberal individualism is the moral underpinning of the public interest (Nozick 1974), which emphasizes the procedural aspect of the individual's right to participate in the planning process. Consequently, in liberal discourse, the public interest with an individual and pluralistic nature is defined as the liberal government's commitment to social development and the increase of individual choices. In democratic public dialogue, the public interest in the liberal approach is built under the elected government supervision and control as the public interest representative. It pursues the legitimacy of the outcome by establishing a legitimate and ethical participatory process.

*The neoliberalism political discourse.* Today, the impact of neoliberalism, beyond the economic policy, is visible on urban institutions and urban development processes. Also, the impact of neoliberal ideology has been highlighted not only on government organizations and their activities but also in the concept of public interest (Cheyne 2015). Neoliberals advocate for free-market solutions to most problems (Clarke 2004). In this discourse, government planning is seen as an intrusion and a violation of the voluntary realm of contractual relations between individuals. Nevertheless, through incentives, entrepreneurship, economic freedom, and attracting private-sector investment (Sager 2011), the neoliberal government has a significant role in guiding the capital flows and the private-sector stakeholders. Thus, neoliberal society commits to the public interest but understands and expresses it distinctively. Here, stakeholders in the free-market context are the focal point of the definition of public interest. The planner's role is to coordinate and facilitate relationships between the competing groups, and the public interest is derived from the balance of competing views (Hendriks 2009; Lennon 2017).

In this context, the planners' Doxa must inevitably change (Davoudi, Galland, and Stead 2020). This change of identity means maintaining the role of planners as defenders of the public interest. Simultaneously, the concept no longer has its traditional meaning and is "a balance of multiple and competing interests in a market-oriented economy" that ultimately preserves the status quo and hegemony of capital by legitimizing planning action.

The impact of neoliberalism in planning theory is manifested in the form of a scattered set of views, prejudices, theories, and ideas under the umbrella of less planning. Neoliberal planning does not mean not interfering in matters, but in dealing with urban issues, it pursues intervention and adjustment through market mechanisms and distances itself from bureaucratic, centralized, and governmental interventions that reduce individual choices. As a result, the concept is reflected in the term public interest by distancing oneself from communal concepts and prioritizing the individualistic and utilitarian aspects.

In neoliberal discourse, professional planning is within the private sector, and the public interest is best served by politically neutral experts (Tait 2012; Shevellar, Johnson, and Lyons 2015). The situation becomes complicated for the planners when confronted with political conditions in which they have no room to express their expert opinion; this is when political officials and market forces dictate the planning decisions. Under these circumstances, planners cannot support public interest (Penpecioğlu and Taşan-Kok 2016), and working to serve the public interest is not easy. Because under authoritarian policies that make the planning a tool for profit-oriented projects, planners cannot reach a consensus on their definitions of the public interest and the public interest that the market defines.

## Discussion

The public interest is the content, the main goal, and traditionally the factor of planning legitimacy (Moroni 2018). As a result, planning theory and practice are necessarily based on a specific reading of the public interest. A review of the literature shows that over the past eighty years—since 1940, when Rexford Tugwell introduced the importance of the concept of public interest in planning—influenced by theoretical, social, and political streams, we have witnessed numerous turns and paradigm shifts in the thinking and practice of planning, as a result of which a change in the concept of public interest as the primary goal and the normative substance of planning is inevitable. So, we are faced with a complex and diverse body of literature on the public interest and distinct definitions of the concept.

In this regard, Howe's (1994) study shows the conceptual differentiation of public interest in the professionals' definitions and the effect of diversity, complexity, and incongruity of theory on professionals' perception. The results of Howe's in-depth interviews with ninety-six public agency planners show that, although most of them claim to use the concept of public interest in their work, there is no uniformity in their definition. In all definitions, their main task was to serve the public, but it is not surprising that there are different interpretations of how people acquire knowledge of interest or good (Howe 1994, 60). Howe's study suggests that despite using the same term of public interest, each professional speaks of its version of the public interest, which is probably formed based

**Table 2.** Fundamental Questions in Defining the Public Interest.

| Fundamental Questions | Examples |
|---|---|
| What is the nature of the public interest? | Is the public interest a unitary or plural concept? |
| | Is the public interest a subjective or objective concept? |
| | Is the public interest a moral or consequentialist concept? |
| Who defines the public interest? | Do state or official planners define public interest? |
| | Do the people define public interest? |
| | Do special interest groups define public interest? |
| | Do elites define public interest? |
| By what process is the public interest defined? | Does a democratic and neutral process define the public interest? |
| | Does a consensus-based process define the public interest? |
| | Dose a conflict management process define the public interest? |
| | Does a rational decision-making process define the public interest? |
| What is the use of public interest? | Is the public interest defined for use in public decision-making? |
| | Is the public interest defined for use in identifying the plan's goals? |
| | Is the public interest defined for use in legitimizing planning decisions? |
| | Is the public interest defined for use in organizing the planning procedure? |
| | Is the public interest defined for use in evaluating the plan? |

on professionals' links with different theoretical and contextual streams.

Therefore, based on a systematic review and qualitative content analysis, this study attempts to review the complex and diverse literature on the definitions of public interest in the theory and practice of planning. This review includes identifying four main categories of public interest definitions: definitions based on planning ethics, definitions based on normative planning substance, definitions based on planning procedure, and definitions based on the political discourse. Each of these categories represents the dominant approach in defining the public interest. An examination of the types of definitions shows that each has a consistent and distinct answer to the four questions: what is the nature of the public interest? Who defines it? By what process is it defined? And what is it used for? (Table 2). The definitions given in the categories are distinct in terms of the nature of the public interest, the person who defines the public interest, the process by which the public interest is defined, and the application of the public interest.

To clarify the application of this framework in preparing a comprehensive definition of the public interest, we briefly provide the answers to these four questions based on the new categorization (Table 1).

The first category of definitions (definitions based on the ethics in planning), by adopting a theoretical approach, defines the public interest according to the ethics governing the theory and practice of planning. In this category, definitions based on deontological ethics consider the public interest to have a unitary, objective, and ethical nature defined by planners based on the public norms in an ethical debate for use in public decision-making. Conversely, teleological ethics consider the concept as a subjective, pluralistic, and consequential nature that the government or formal planners define in a rational decision-making process as a criterion for evaluation or planning goals.

The second category of definitions (definition based on normative planning substance) based on the acceptance of public interest as a substantive norm of planning defines the public interest as a criterion for evaluating and legitimacy of planning action for the concept; here, it has an objective, unitary, and consequentialist nature that the government or formal planners define in a rational decision-making process to legitimize the act of planning. Also, by defining the public interest as the product of a pluralistic aggregation of different interests, it is seen as a subjective, pluralistic, and consequential concept that is defined by all individuals and groups affected by the program in a technical and bureaucratic process for use in decision-making and evaluating the impact of decisions.

The third category of definitions (definitions based on the planning procedure) is based on the theoretical approaches that govern the planning procedure. There are three distinct definitions of procedure-based public interest, all of which deal with the first and second questions. They give the concept of an intersubjective, pluralistic, and moral nature that, given the communicational aspects of the definitions, involves all individuals and stakeholders in defining the public interest. Despite the common opinion in response to the first and second questions, the distinction of definitions here is based on their different orientations in response to the third and fourth questions. In the context of procedure-based definitions, the first category—definitions based on Habermas's theory of communicative action—defines the public interest as the communicative process's main goal through a democratic and neutral process. The second set of definitions, based on the critiques of Habermas' theory, defines the public interest as a goal and a criterion for organizing the planning process through a process of consensus building or mediation by the planner. Finally, the third category, based on criticisms of the consensus-based procedure, sees the public interest as an intersubjective, pluralistic, and moral concept that is defined by all individuals and interest

groups with an emphasis on the bargaining role of the planner through conflict management procedure as a goal and a criterion for organizing the planning process.

The fourth category of definitions (definitions based on political discourse) introduces the prevailing political context as an effective factor in defining the public interest. Three definitions of the public interest can be distinguished from the prevailing political theory. In welfarist discourse, the public interest has a unitary, objective, and moral nature that is defined by the social and political elites in a rational and bureaucratic decision-making process, and it is used to legitimize the practice of planning in a centralized planning system. Liberal democratic political discourse believes in the concept of a subjective, pluralistic, and moral nature that is built by people in the democratic public debates under the supervision and control of the elected government as a representative of the public interest, which is also pursued as the government's commitment to society. Finally, neoliberalism's discourse sees the public interest as a subjective, pluralistic, and consequentialist concept defined by stakeholders under the free-market mechanism as the main actors in a conflict management process that is mediated by a planner. Although it is defined as the goal of planning, practically, it helps maintain the status quo and consolidate the hegemony of capital.

As a result, the presented category of definitions of the public interest can be a suitable context to explain a comprehensive framework for defining public interest in planning. Although there is no consensus on the definition of the concept in planning theory and practice, by examining the categorization of the public interest definitions, we can say that a definition of public interest is comprehensive and acceptable when it provides a coherent answer to the four basic questions presented. Based on this framework, theorists and professionals can answer these questions (and possibly more questions) to determine the position of their version of the public interest in the theory and practice of planning and have a clear framework for presenting their definition of this concept.

## Conclusion

From the beginning, the concept of public interest has been an essential criterion for the justification and legitimacy of planning action and the central core of planning thought (Heywood 1990). Nevertheless, what constitutes the public interest is constantly debated, so it has become an ambiguous but inescapable term (Tait 2012, 2016). Any critical assessment of the concept of the public interest must begin with a definition. But the definitions attributed to the concept of public interest are a complex, diverse, and inconsistent set of theoretical literature that, in many cases, cannot provide a clear definition of the concept. As a result, not only does it not fit the various dimensions of the subject, but the generalization is also impossible. Therefore, theoretical attempts to answer this question have failed to successfully explain a comprehensive framework that responds to all the dimensions and approaches governing the planning theory and practice. To fill this gap and answer the research question, we systematically reviewed the various definitions of public interest and provided a proper context to explain a comprehensive framework for defining the public interest in planning theory and practice.

Although we have tried to formulate the input and output criteria in defining the systematic review process so that all relevant resources are covered, some definitions of public interest may be inevitably omitted due to the scattering of literature on the subject. Furthermore, not all of the extracted definitions directly define the concept and are more of a process of examining to define the procedures for achieving the concept and committing to these procedures. Given that a significant portion of the resources covers these implicit definitions, by accepting these definitions alongside explicit definitions of the concept, this categorization includes four main categories: Definitions based on planning ethics, definitions based on the normative planning substance, definitions based on planning procedure, and definitions based on the political discourse. Definitions given in the categories are differentiated in the nature of the public interest, the person who defines it, the process by which it is defined, and the definition's application.

In addition to being more comprehensive than previous studies, this categorization recognizes the main dimensions of a comprehensive definition of the public interest and provides an appropriate framework for the theorists and professionals. On the one hand, by connecting to theoretical or contextual approaches, they can determine the position of their version of the public interest in planning theory and practice and, on the other hand, have a clear framework for presenting their definition of this concept. Finally, the proposed categorization can provide a useful framework for sorting out the public interest definitions based on similar answers to the four questions or compare professionals' definitions of the public interest in different institutional and functional fields. It can also be valuable to examine how peripheral concepts such as power, justice, and institutional structures influence public interest's definition.

### Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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# 4

# In Search of the "Public Interest" in Ontario Planning Decisions

MARCIA VALIANTE

The "public interest" is a concept at the heart of land-use planning law. Historically, it formed the rationale for regulation. Constraints on the development rights of private landowners were justified as being necessary to protect the common good, seen as the collective interest of communities in orderly physical and social development. As noted in the introduction to this volume, land-use restrictions became increasingly necessary as Canadian cities grew and municipal governments using existing powers and landowners using private law doctrines[1] either did not, or could not, manage the externalities of rapid urban expansion. Imposing restrictions on real property rights without needing to pay compensation for any loss in value[2] was justified on the ground that segregating incompatible uses and controlling building construction would avoid the creation of nuisances and thereby benefit all properties in an area.[3] At the same time, restrictions on the timing of construction would allow for the orderly progression of new construction, in lockstep with the provision of public infrastructure such as roads and sewers, thereby protecting the financial viability of municipal governments.

The public interest continues to play an important role in planning law today. It is a key criterion for public decision makers in evaluating the merits of individual planning and development decisions. This requires a case-by-case determination of whether a particular project serves the public interest. In so doing, decision makers are asked to find a balance among collective

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interests (in restricting how land is to be used or in requiring the provision of certain amenities), the rights of landowners in being able to develop their lands as they please, and the rights of owners opposed to development in protecting their property values and quality of life. At issue in these cases are competing interests, priorities, and values, as defined by the many participants in the decision-making process. Thus, it is "not a scientific process but one that must necessarily choose among different sets of values."[4]

This chapter explores the notion of the public interest in planning, in particular how it is identified, assessed, and determined, how conflicting interpretations of the public interest are resolved, and how public and private interests intersect in planning decisions. The context is Ontario, which has a complex planning law structure that involves the institutionalized interplay between provincial and local interests and values. Ontario is unlike US states in the strong influence of the provincial government, and it is unlike other provinces in the powerful role played by the Ontario Municipal Board (OMB), the appellate tribunal that makes the final decisions on most controversial developments. A focus on Ontario allows for competing perceptions of the public interest to come to the fore and be seen in high relief.

The OMB has referred to planning as a "delicate balance between two noble and competing objectives": that is, between the public good and private interests, neither of which should become the exclusive or singular end.[5] Until recently, provincial planning legislation gave little direction to decision makers on which matters are relevant to the public interest or how to achieve a fair balance between competing interests. Decision makers developed their own criteria.

Over the past decade, however, Ontario's planning law has undergone dramatic reform. One signature of this reform is the provincial government's imposition of a highly prescriptive policy direction. At the heart of this direction is the identification of broad subject areas of "provincial interest" and "provincial policy." This is the clearest articulation yet of the substantive public interest that the province expects to be achieved through operation of the planning system. In the large and highly populated region around Toronto, known as the Greater Toronto Area, or the expanded area around the western end of Lake Ontario, known as the Greater Golden Horseshoe, multiple layers of provincial policy guidance have been added, directing where and how development will, and will not, be allowed to occur. The highly prescriptive nature of these provincial directives is in sharp contrast to current trends in Canadian municipal law, in which municipalities have been delegated ever broader powers and autonomy. As discussed by Stanley

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Makuch in the previous chapter, it also marks a shift in the legal culture of planning for property owners, who have few opportunities to challenge the restrictions on their rights through administrative or judicial systems.

Despite the central relevance of the public interest in Ontario planning law, and despite this new guidance privileging the provincial over the local and reducing the discretion of decision makers, determining where the public interest lies in an individual case remains challenging, and the answer is often unpredictable. It certainly continues to be a contested concept. In arguments and decisions in individual cases and in legislative debates, different visions of the public interest are apparent, and different views on who should ultimately determine its meaning clash repeatedly. One fundamental disagreement is over whether final planning decisions in the province should be made by democratically elected municipal councils, informed by the values and preferences of local residents, or by the OMB, the provincially appointed and quasi-judicial tribunal, informed by expert evidence and removed from local politics. Recent attempts to reform the OMB have failed to resolve this disagreement. Tensions are also evident between different private interests – particularly developers and existing residents – between private and community objectives, and between experts and laypeople.

This chapter considers the role of the province, local councils, and the OMB in articulating the public interest in the current framework before concluding that in Ontario there are multiple public interests at play, such that it is virtually impossible to speak of one agreed public interest in Ontario planning law, that procedural opportunities to participate do not fully account for all of the multiple interests, and that private economic and property interests heavily influence the outcomes of development decisions nominally made in the public interest.

## Concept of the Public Interest

Although the public interest, at least rhetorically speaking, provides the legitimizing foundation for planning law, and is relied on to justify individual decisions, there is much scholarly debate about its meaning, how it is determined, and even its very existence. At one time, the ability of a planning expert to identify the singular public interest was largely taken for granted. Now, "this traditional idea is … under severe attack ... It is in fact today a commonplace in the planning field to say that 'the public interest does not exist.'"[6]

All democratic governments and agencies exercising statutory power make decisions guided at least in part by some notion of the public interest. Despite

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its pervasive importance in public decision making, "the concept of the public interest is notoriously slippery. Virtually every treatment in the literature – even those that are squarely supportive of the idea – begins with the caveat that the public interest is susceptible to many different interpretations and approaches."[7] Alexander identifies different conceptions of the public interest:

> Today we identify various concepts of the public interest, which differ in several ways. They can be divided between substantive interpretations – concerned with the content of actions and their consequences – and procedural ones, which focus on the quality of the decision-making or planning processes. We can also distinguish between aggregative approaches … and unitary, deontic and dialogical ones. Each concept reflects a theory that implies a different interest base and a different practice.[8]

The traditional sense of the public interest in the Anglo-American tradition was as a unitary concept. It was thought of as representing a community's collective values, transcending the interests or identified preferences of individuals and beyond the ability of individuals to achieve by acting alone. It seems that, at one time, there was a rough consensus that this singular interest could be objectively determined for planning decisions through reference to both expert knowledge and public preferences, much as it is in eminent domain law in the United States and other jurisdictions, for example. This is what Patrick McAuslan refers to as the "ideology of the public interest": that is, as determined by government administrators operating under a legislative grant of broad discretion: "The ideology of the public interest is translated into laws which confer wide powers on administrators to do as they see fit and which either provide no redress or appeal (for how can there be redress against an administrator who is advancing the public interest) or redress within the administrative system only."[9]

Utilitarian philosophers influenced another view of how to determine the public interest. They argued that the interest of the public as a whole is the aggregation of the subjective preferences of individuals that produces the greatest satisfaction. This means that a decision is in the public interest if, taking into account the intensity with which preferences are held, it maximizes benefits or minimizes costs for the greatest number. This approach depends on experts to identify the optimal combination of costs and benefits, balancing private and public utility.[10]

However determined, a unitary public interest is no longer broadly accepted by planning scholars and practitioners. It is criticized as being

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empirically wrong, even "perverse,"[11] because of irreconcilable interests in any modern community: "The interests of the various individuals and groups within our societies are today too varied to possess any significant area in common. It is therefore impossible that planning intervention can operate simultaneously to everyone's benefit."[12] The traditional view has also fallen victim to the postmodern rejection of universal values and any form of privileged knowledge and to neoliberalism and public choice theory that privilege the legitimacy of individuals pursuing their own welfare and discredit the legitimacy of a collective public interest.

This view also fails to engage contemporary scholarship challenging democratic legitimacy in the making of public decisions in complex societies, in particular the literature on deliberative democracy. This scholarship, based on the work of Jürgen Habermas and others, critiques liberal democratic approaches to decision making based on power and self-interest and challenges representations of the public interest based on the aggregation of individual preferences. Deliberative democratic theory emphasizes an ideal whereby agreement on a common purpose or the general public interest can only be achieved through open and reasoned deliberation of competing claims by all those potentially affected by a decision:[13]

> Central to this understanding of democratic deliberation are the ideas of reasoned debate, public justification, and political equality. Collective choices are to be made through reasoned discussion rather than by blind acceptance of the views of established authorities, by deals concluded among vested interests, or by recourse to intimidation. As participants deliberate, they advance arguments and listen to counterarguments; they employ critical reason to weigh alternatives and make judgments.[14]

Because of the multiplicity of interests potentially affected by planning decisions, it is now more common for planners to refer to plural public interests rather than a singular public interest. This view demands that decision makers find ways of identifying and balancing the competing, possibly conflicting, interests at play. This has led many scholars to turn from a focus on the substantive content of the concept of public interest to a focus on improving the *process* of making planning decisions. They argue that procedural norms facilitating involvement of and dialogue among all major stakeholders ensure that the debate will be expanded to include a broad range of participants, facilitating innovative approaches, consensual resolutions, and rational outcomes that will result in advancing the public interest.

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The underlying assumption, consistent with principles of democracy in our political system and "fairness" in our legal system, is that those affected by a decision have a right to be heard before the decision is made and that broad rights of participation help to secure institutional accountability. Open and equal participation not only informs but also legitimizes the final outcome.

McAuslan argues that this type of public participation also has a substantive dimension. By including a wide range of participants, greater attention has to be paid to broader social, community, and ecological needs and concerns than was usually the case in the past. In this sense, broad participation challenges the traditional approach to planning, in which the primary concern is limited to balancing private property rights and government-controlled determinations of the public interest, consigning multiple social and environmental considerations to the background.

Although a focus on procedure has had an important impact on planning law and practice, it too is subject to criticism, on the ground that it is unrealistic in practice to expect that all affected stakeholders can be identified, equally informed, and empowered to participate effectively. In addition, compromise by nature is ad hoc and thus might provide no principled guidance for future decision makers. It is also overly optimistic to expect that deep divisions between individuals' and groups' interests and values can always be overcome through dialogue.[15] As Ferejohn has noted,

> [t]he diversity of a plural society suggests that what is in the common interest would have to take account of the actual diversity of interests and views within society but that, even after full deliberation, there will often be no complete agreement as to what is the best course of action. Thus, the fact of pluralism forces a recognition that sometimes decisions will have to be taken prior to the formation of a deliberative consensus and such decisions will stand in special need of justification to those whose views were rejected or ignored.[16]

In other words, the reality of the planning process requires that decision makers justify their decisions on the basis of clear criteria in order to ensure their legitimacy.

Despite these significant difficulties with the concept of the public interest, and the challenges with identifying and applying it, the public interest "remains the pivot around which discussions concerning the purpose and role of planning must turn."[17] This is because planning is about the application of government policy to particular land-use problems and choices.

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These choices affect not just how individuals can use their own properties but also how the larger community will change and at what pace, what quality of life will result, which spillover effects on the environment will be tolerated, and so on. Decisions must be made every day in response to changing circumstances – whether demographic, economic, political, or environmental – and in response to privately initiated development proposals. The public interest, however elusive, however conceived and determined, remains the key value that justifies and legitimizes individual decisions in the face of diverse and conflicting values and interests. It might no longer be possible to find a resolution to a planning problem that "operates simultaneously to everyone's benefit," if ever it was, but it should be possible to find a resolution that supports public policies arrived at through democratic means. The central instrumental choices in any planning regime include who participates, who defines the public interest, and which factors legitimately shape its determination.

## The Public Interest in Ontario Planning Legislation

Planning legislation in Ontario does not reflect a coherent concept of the public interest. However, it does contain both substantive and procedural markers to help guide decisions. The primary statute, the *Planning Act,*[18] does not refer directly to the public interest as an objective of the planning system in the province and uses the expression "the public interest" only once, in connection with approval of registered plans of subdivision.[19] Instead, Ontario's planning system is led by prescriptions of *provincial* interest. The *Planning Act* contains provisions that provide opportunities for public deliberation and enable decision makers to identify and evaluate diverse views on how the public interest will be served at different scales, locally, regionally, and provincially, and in both comprehensive planning exercises and site-specific development approval decisions. As discussed below, having these opportunities available has not been enough to guarantee that robust public deliberation is achieved in practice.

Most planning authority in Ontario is delegated from the province to municipal councils, on the ground that it is primarily a local matter. However, the province has always held back some of that power, providing a role for the Minister of Municipal Affairs and Housing to offer advice and oversight and allowing review of most municipal planning decisions by the provincially appointed OMB. The major elements of the planning system include comprehensive "official plans," adopted for each municipality to

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guide development decisions, and zoning bylaws that implement the official plans, both of which are subject to amendment on a site-specific basis. Detailed plans for new development requiring the subdivision of land or the establishment of condominiums must be approved. Other elements include approvals of minor variances from zoning bylaws, of land severances, and of individual site layout. Permits issued at the local level, following provincial standards, are required for building demolition and construction.

Procedurally, municipalities are bound by a common law duty of fairness when making certain planning decisions.[20] In addition, the legislation requires prior consultation with affected agencies and the public.[21] The statutory procedural requirements emphasize open participation, reflecting a desire to hear from multiple publics. The *Planning Act* and regulations specifically direct municipalities to provide broad public notice of proposed official plans and amendments, proposed zoning bylaws and amendments, and subdivision plans, with more restricted notice for minor variances and lot severances, usually limited to neighbouring landowners. Generally, before a municipal council can make a planning decision, it must publicly disclose detailed information and hold a public meeting, at which it must allow every person who attends, without restriction, an opportunity to make a submission. Failure by council to follow a fair process is a ground for quashing a bylaw.[22] Many Ontario municipalities also have planning advisory committees, with community representation, that review planning proposals in advance of council deliberation and make recommendations to council. In Toronto, this role is played by the "community councils." Once a municipal council has made a decision, the proponent and "any person" who made an oral or written submission on the proposal is then eligible to appeal the decision to the OMB.

In Ontario planning decisions, recognition of the public interest goes beyond simple participation and process guarantees. The public interest also finds substantive expression in legislation and policy and forms a central criterion for evaluating projects and making decisions. Through the *Planning Act* and other statutes, the province has developed a hierarchy of policies and interests that shapes planning decisions. Over the past decade, these policies and interests have expanded and become ever more prescriptive. Taken together, these statutes, plans, and policies can be seen as the Ontario government's view of the collective interests to be pursued through the planning system.

First, the *Planning Act* identifies a set of "provincial interests" that municipalities and the OMB must "have regard to" when they make planning

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decisions.[23] These areas are so broad that few matters are not, at least potentially, within the scope of a provincial interest.

Second, the statute authorizes the development of "provincial policies" by the Lieutenant Governor in Council. Once these policies are formally adopted, all planning instruments – official plans, zoning bylaws, and so on – and all decisions made by local councils and the OMB must be "consistent with" them. Under this authority, the province adopted the *Provincial Policy Statement, 2005* (*PPS*).[24] The *PPS* addresses the issues listed above in more detail and includes a large number of specific requirements and restrictions. The *PPS* "provides for appropriate development while protecting resources of provincial interest, public health, and the quality of the natural environment. [It] supports improved land use planning and management, which contributes to a more effective and efficient land use planning system."[25]

The *PPS* recognizes the "complex inter-relationships among environmental, economic and social factors in land use planning."[26] The policies fall under three broad categories: Building Strong Communities, Wise Use and Management of Resources, and Protecting Public Health and Safety. These are the determinants of the "long-term prosperity and social well-being of Ontarians."[27] The policies in the *PPS* reflect strong provincial support for "smart growth," touched on in the introduction and taken up in detail in Pierre Filion and Anna Kramer's chapter. For example, the *PPS* requires that

- growth be directed to areas already settled rather than to undeveloped lands;
- prime agricultural land and natural heritage features and systems be protected from development;
- planning authorities establish and implement minimum targets for intensification and redevelopment within already built-up areas;
- planning authorities plan for and protect employment areas and provide a range of housing types and densities necessary to meet projected requirements of the regional market area; and
- planning authorities support energy efficiency and improved air quality through land-use and -development patterns that promote compact form and a structure of nodes and corridors.

These expressions of provincial interest and provincial policy are potentially ambiguous and arguably contradictory, when applied to a particular circumstance, leaving scope for interpretation. For example, the choice of how to ensure both economic growth and natural heritage protection is

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subject to multiple potential outcomes in individual cases. The *PPS* states that the policies should be approached as an integrated set that is not contradictory; nevertheless, there is room for interpretation by local councils and the OMB.

The policy was established by the provincial cabinet, and, despite direct impacts on the rights of landowners, there is no mechanism for challenging the *PPS.* It is reviewed every five years[28] through a process that has included extensive public consultation, but once adopted it cannot be challenged collaterally in an appeal of a planning matter. Even the consultation process for the draft policies cannot reasonably be said to be deliberative, in the sense that all participants work together toward a reasoned determination of the common interest. In fact, according to the Environmental Commissioner of Ontario, many of the most basic assumptions and policy directions of planning in the province are off the table in these consultations.[29]

Third, in addition to these directions in the *Planning Act,* the province has adopted other legislation and plans that directly affect planning decisions in some parts of Ontario. For example, statutory plans protect the iconic landscapes of the Niagara Escarpment and the Oak Ridges Moraine by effectively prohibiting most development within sensitive areas. These plans in turn trump local plans and bylaws within their geographic reach by requiring that all planning decisions within their boundaries be made to "conform with" the plans' provisions.[30] Some areas of Ontario are subject to the provincial Greenbelt Plan or the Lake Simcoe Protection Plan, which also take precedence over local plans.[31] The province's (and indeed the country's) most densely populated region, known as the Greater Golden Horseshoe (or GGH), is governed by the provincially written GGH Growth Plan adopted under the *Places to Grow Act, 2005.* This act similarly requires that all planning decisions within the region conform to the GGH Growth Plan, which prevails to the extent of any conflict with a provincial policy (including the *PPS*), a local official plan, or a zoning bylaw.[32]

These various plans directly affect the rights of private landowners. Yet, with the exception of the Niagara Escarpment Plan, owners have no right to challenge their lands' inclusion within the boundaries of the plan, their land-use designations, or the policies that apply. Boundaries are established by regulation, and there are statutory restrictions on changing them. For example, in the *Greenbelt Act,* the area designated as a greenbelt was established by regulation and applied retroactively. As Makuch points out in his chapter, there is no appeal of a land designation, and the *Act* excludes any cause of action, right of compensation, or damages for any

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loss incurred as a result of the designation or the policies in the plan. The boundaries can be amended on the initiative of the Minister but only if the effect is not to reduce the total area within the greenbelt. Adjustments of the boundaries are expected to be made only as part of the ten-year review of the plan.[33]

Finally, the province retains residual power to control planning decisions in individual cases. The Minister of Municipal Affairs and Housing has the power to intervene in any case before the OMB in which a "matter of provincial interest," as set out in s. 2, might be adversely affected.[34] If a declaration of provincial interest is made, the final decision on the application is made by the cabinet, not by the OMB. In addition, the Minister can issue "Minister's Zoning Orders" for any land in Ontario, under s. 47 of the *Planning Act.* These orders prevail to the extent of any conflict with a municipal bylaw. In practice, these powers are not often invoked.[35]

## The Role of Municipal Councils

"Provincial interest" might dominate, but it is not the exclusive indicator of the public interest in the Ontario planning system. There continues to be an important local component. Under the *Planning Act,* each municipality's distinct collective interest should be reflected in its comprehensive official plan. Although this plan is constrained by the obligation that it must be consistent with provincial policy, it is designed to provide greater detail and more specific guidance about the direction of local community development and redevelopment missing from, or ambiguous in, the broader-scale policies. Zoning bylaws that regulate individual parcels of land must then conform to this plan. These bylaws regulate the uses of land, lot sizes, the height and density of buildings, setbacks, parking requirements, and so on. The use of private property is thus directly affected. Individual owners' land-use choices must comply with these restrictions, or the owners must apply to the municipality for an official plan amendment and bylaw amendment or for a minor variance, on a site-specific basis. In Ontario, these site-specific development applications are common.

As a result, the local municipal council initially determines the public interest on a development application.[36] However, the availability of broad appeal rights, combined with the nature of those appeals, ensures that the ultimate decision on controversial development proposals is often made by the OMB. Even if council has not made a decision by the deadline to do so, a developer can appeal to the OMB for approval of a project.[37]

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The *Planning Act* provides no guidance to municipal councils on how to balance competing interests. It does, however, contain procedural requirements. For example, municipalities are required by law, prior to making a decision, to provide information on a proposal to the public and to afford an opportunity for any interested person to make a written or oral submission in a public meeting. There might also be opportunities for the public to consult with municipal planning staff and the developer. Those who participate at that stage have a right to appeal to the OMB if they disagree with council's decision to approve a plan or project.[38] There is no restriction on the kinds of concerns that can be raised before council.

This open approach to making planning decisions at the local level allows any individual or group to self-identify as interested in or affected by a pending decision and to step forward to provide a particular view and attempt to influence the project design or the approval decision. Thus, this approach appears to fit well with the concept of the public interest as that developed through dialogue and consensus among all affected stakeholders. At its best, this approach does allow an opportunity for a wide range of views to be gathered and publicly debated. In practice, however, there are often relatively few interests that participate in these processes. Those that do are often business interests or groups with vested interests in the outcome, such as neighbourhood associations in established residential areas seeking to prevent new development or to temper its impacts, usually referred to as NIMBY participants.[39] Often it is socially and economically marginalized residents who fail to participate.[40]

Of those who do participate, the level of information and knowledge will vary. Some participants will have well-articulated concerns and objectives, grounded in evidence, while others will only raise questions or express vague fears about the potential impacts of a development on their interests. Furthermore, the open participatory approach cannot be said to come close to the ideal of reasoned deliberation. There is no requirement that consensus among participants must be developed, or even attempted, before a decision can be made. Nor is there any mandate for council to attempt, in any formal sense, to discern the preferences of a majority of residents.

Some participants will be motivated primarily by the potential for private gain, or the preservation of private interests, while others will be motivated by broader community interests.[41] Even those who express a desire to preserve the status quo and thus protect their private interests – the classic NIMBY participants – will not be necessarily entirely self-interested but will often express concerns about health impacts from increased traffic and

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noise, degraded aesthetics, privacy rights, and so on, which help to define local values and quality-of-life standards. However, the legislation provides no guidance to municipal planning staff or councils on how to weigh the diverse expressions of interest that they receive.

Beyond the public process that must be followed in reaching a decision to amend an official plan or zoning bylaw, the *Planning Act* allows municipalities to negotiate agreements with developers that modify or enhance the generally applicable scheme. The courts long ago held that, because of the impact on private rights, a municipality cannot make its planning approval conditional on factors not provided for or implied in the statute.[42] Thus, for site plan agreements, for example, a municipal bylaw providing for them must afford "the certainty which an owner or prospective owner is entitled to have as to the use to which he may put that real property."[43] The legislation also allows for "bonusing" agreements, under which a municipality allows extra height or density, beyond what is allowed in a bylaw, in return for amenities provided by the developer that benefit the public.[44] The *Planning Act* requires that a municipality include policies in its official plan before negotiating such agreements but otherwise provides little guidance.[45] These agreements are controversial.[46] In Toronto, the ward councillor is involved in the negotiations, so he or she can heavily influence the determination of which benefits to ask for to advance the public interest. The types of community benefits provided under these agreements often cannot be demanded from property owners through the zoning bylaw, such as aesthetic elements (streetscapes or public art), playgrounds, or social services (daycare, affordable housing).

Although Ontario planning legislation restricts the scope of council decisions within areas of provincial interest, it is within the discretion of council alone how to balance competing interests and determine whether a proposal is in the public interest, in what is effectively a political judgment. If council *denies* an application, then according to the *Planning Act* it must provide an explanation, but no explanation is required if it *approves* an application. Legitimacy is assured primarily through political accountability to residents:

> [A planning decision] is made by an elected council accountable to its constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to their own … This decision is moreover tempered by the municipality's charge to act in the public interest ... What is in the public interest is a matter of discretion to be determined solely by the municipality.[47]

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There is an enduring belief that economic and social elites exercise dominant influence over municipal councils and that councils are concerned more with the economic benefits of development than with other priorities. Historically, "land developers, businesses, and homeowners whose views dominated municipal councils reinforced the value placed on private property" and ensured that priority would be given to economic growth and development rather than environmental protection or social integration.[48] Even when developers do not participate in an individual decision, the dependence of municipalities on property taxes as their primary source of revenue ensures that new development is given priority. In addition, municipal elections are often fought over development issues, and developers contribute significant funds to the campaigns of local council candidates, in the hope of favourable consideration in the future.[49] As a result, one cannot assume, even where there is broad participation, that all those who participate will have the same degree of influence on council when it makes its decision on a planning matter.[50] Yet, in sharp contrast, many developers argue that municipal councils are overly influenced by local electoral politics and the emotional appeals of powerful residents, so that councils often fail to make a rational decision on the planning merits of a proposal.[51] Others suggest that councillors will avoid making an uncomfortable political choice in favour of a development in order to ensure their re-election, knowing that the ultimate decision about the project will be made by the OMB – a "useful scapegoat."[52]

## The Role of the OMB

When a decision of council is appealed to the OMB, the nature and complexion of the process change significantly. It appears open because any person who participated at the council stage can trigger an appeal; however, the *Planning Act* requires that, at the OMB, an appeal or objection be based exclusively on an "apparent land use planning ground," or it can be dismissed without a hearing.[53] Thus, many issues, concerns, and values that might have been considered by council must be either abandoned or reformulated in a way that will qualify as a legitimate "land use planning ground." The OMB has commented that legitimate planning grounds must amount to more than "apprehensions couched in the language of land use planning" to be "worthy of adjudication by the Board."[54]

In an appeal, the OMB does not conduct a review of the council decision analogous to an appeal in court; instead, the legislation provides that the

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Board conduct a fresh assessment of the merits of the proposal, in what is known as a "hearing *de novo.*" It convenes a formal hearing and makes its decision based on the evidence presented by the parties appearing before it. The province has removed political oversight of OMB decisions, so the only appeal of a Board decision is to the courts, on a question of law alone.[55]

Over its long history, the OMB's role in planning matters has shifted from a central one in the approval of all zoning bylaws to a more limited one in a decision that is appealed or a matter that is referred by the Minister.[56] The courts have accepted the OMB's authority to establish policies to guide its decisions.[57]

The OMB applies two criteria when deciding whether to approve a site-specific amendment to an official plan or zoning bylaw that will allow a development project to go ahead: the outcome must represent "good planning" and be in the "public interest." These criteria are not expressed in legislation, but they are implied.[58] In a leading case from the 1960s, the Ontario Court of Appeal stated that, despite differences in wording of different sections of the *Planning Act,* "the duties of the Board are precisely those of the Minister" and are the same whether considering a bylaw enacted by council or a proposal refused or not considered by council:

> In all such cases broad questions of policy come into play. The function of the Board as well as the function of the Minister is administrative in character. The decision to be made transcends the interests of the immediate parties ... The Minister or the Board is not deciding a *lis* in the sense that the issue is confined to those for or against the proposal but he or it has to consider the safety, welfare and convenience, *i.e.,* the interests, of the public in the municipalities affected … The decision is not a decision upon the objections to the proposal; those objections may be, and frequently are, of validity and importance; they may, however, be overruled upon the larger considerations of administrative policy.[59]

In interpreting recent legislative changes, the court concluded in a similar way:

> [T]he appeal process before the Ontario Municipal Board is not merely a *lis* between parties, but a process requiring the OMB to exercise its public interest mandate. The decision to be made by the Board transcends the interests of the immediate parties because it is charged with responsibility to determine whether a land planning proposal is in the public interest.

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> At first instance, that public interest is determined by Municipal Council, but on an appeal the Board has the obligation to exercise its independent judgment on the planning merits of the application and to assess the proposal and the positions of the parties from the perspective of applicable legislation, regulations, provincial plans, the provincial policy statement, official plans and by-laws and even the potential impact on neighbouring municipalities. In doing so, it brings its own expertise to bear.[60]

The Divisional Court has stated that it expects the OMB to provide a clear rationale for why its decisions are in the public interest: "At the core of the Board's decision-making in planning cases is the determination of the public interest ... Those engaged in the planning process are entitled to know the appropriate weight and consideration to be given to provincial policies as well as to official plan policies in decisions concerning land use planning."[61]

John Chipman's comprehensive study of OMB decisions over three periods between 1971 and 2000 concluded that, in determining whether a project met the criteria of good planning and the public interest, the OMB often conflated the two ideas, so that a project accepted as reflecting good planning principles would usually be found to be in the public interest.[62] In determining what is good planning, the Board relies on the opinions and evidence of planning experts, but it is expected to make an independent determination and not merely adopt the evidence of any one expert.[63]

According to Chipman, the Board historically looked to the decision of a local council as the "most authentic expression" of the public interest in the case before it.[64] This was a recognition that the collective interest in appropriate development of land is most clearly expressed in the local official plan and zoning bylaws. However, in cases in which a council refused an application for an amendment to a zoning bylaw or official plan to accommodate a proposed development, or simply failed to deal with an issue, according to Chipman's study, the Board tended to give no special consideration to the views of the municipal council and to treat the case more as a *lis* between parties, with the municipality as merely one of the parties.[65]

In a recent case, the OMB noted that there are "multiple public interests" that it must balance. According to the Board, these multiple interests include

- the "local interest of the surrounding community that would be affected";
- the "municipal interest, which has land use control on an affected area and has the moral and legal responsibility to maintain, among other things, public health and safety of the inhabitants";

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- the "[p]rovincial interest" regarding overall planning; and
- the "environmental interest" and public health and safety.

The Board stated that "[a]ll of these public interests coexist within a fine balance in our society. Therefore, special care must be taken … to ensure that one 'special' 'public interest' does not unfairly prevail over another 'public interest.'"[66]

The structure of the legislated appeal process itself influences which expressions of the public interest even get presented to the Board. The OMB bases its decisions on the evidence before it. If an issue is not raised at all, or is raised but there is little or no evidence supporting the interest, or if a group with a particular interest, such as tenants or youth, is not represented in the hearing, then the issue or interest could be downplayed or neglected.[67]

Because of the formality and adversarial nature of the hearing process, and the financial stakes involved, only the most motivated and well-funded parties can stay involved over what might be a lengthy hearing.[68] In some cases, participation costs can add up to hundreds of thousands of dollars, and there is the risk of an adverse costs award.[69] Citizens' groups cannot initiate an appeal unless they are incorporated; if they are unincorporated, then an individual from the group must bring the appeal. Thus, many members of the public and public interest groups find it difficult to afford to appeal or be "parties" in OMB hearings. Nevertheless, public groups commonly do appeal or participate in controversial cases. One way in which they do so is as "participants." This status allows them an opportunity to present their views to the Board orally or in writing but without full rights to make motions, present evidence, cross-examine witnesses, make arguments, and ask for reviews of decisions.

At a hearing, the evidence is directed at the question of whether the proposed development represents good planning. Many studies have concluded that, because of the technical nature of the evidence considered in making such a determination, to be an influential presence in an OMB hearing requires the presentation of expert evidence, particularly expert planning evidence.[70] Without expert evidence to substantiate their concerns, parties and participants are less likely to carry the day.[71] As one citizen described it, anyone can appeal to the OMB, but "what are the real chances of success for the average person if on the other side of the issue there is a corporation or indeed a municipality fully backed by lawyers and professional witnesses? Let us be frank with one another: not much." Unless a group of residents can convince their council to adopt their views, or unless they can put forward

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expert evidence, it is usually fair to say that their chances are "slim to none, and slim left the building decades ago."[72]

It is the Board's policy that there is no hierarchy of rights between public and private interests: that is, neither the public interest nor private rights should be the exclusive or even priority goal of planning, because to give one priority could undermine the other. Rather, in the Board's view, planning decisions should attempt to *balance* the public good and private interests.[73] "This policy recognizes that planning decisions, no matter how benevolent or farsighted their intent, can easily become 'an unwitting and unquestioning tool to extinguish or debilitate the proprietary interests of an owner.'"[74]

The protection of private property rights is not an express objective in Ontario's planning statutes or policies. Rather, it seems to form a foundational part of the culture of planning law, linked to the historical evolution of planning and zoning laws in the province. For example, an early version of the *Municipal Act* that first established the zoning power provided that the Board could approve the amendment or repeal of zoning bylaws only if satisfied that doing so would be "proper and expedient" in view of the "desirability of the [provision] … *in the interests of the owners of the land in the district affected* and of the community as a whole."[75] This provision appears to have reflected the policy of the time that a primary purpose of zoning was to protect the existing amenities and values of properties, especially in residential areas.[76] In Toronto, the practice was to favour the individual property interest over the community interest, even after the statutory provision was removed in 1941.[77] As zoning became more integrated with planning in the 1950s, the community interest became more central to the Board's decision making. However, practice throughout the 1960s confirmed the continuing importance of this historical purpose of zoning,[78] and it continues to be important today.[79]

The Chipman study also found that the OMB often considered the *private* property interests of immediately affected neighbours to be relevant to its determination of the *public* interest:

> Its concept of the public interest has thus included, at one end of a continuum, those matters it believes to be of general benefit to society as a whole, such as the protection of good agricultural land and of the environment generally, and the provision of social housing. At a step below this level of generality, the OMB has considered the public interest as being the interest of a broad but geographically defined community, such as the residents of a municipality ... At the other end of the public-private continuum are

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> those decisions in which public and private interests have become indistinguishable. The Board has held that there is a public interest in maintaining the character of neighbourhoods, particularly single-family residential neighbourhoods.[80]

Chipman concluded that, despite its stated view on the need to balance public and private interests, the Board in practice regularly accorded *less* importance to the broader public interest than to certain private interests, particularly when projects would be built in premier residential areas.[81] Chipman found that, if the adverse impact of a zoning change on immediate neighbours outweighed a more diffuse public benefit, then the OMB tended not to approve the change.[82]

Although the OMB continues to apply its own policies, the province has narrowed its discretion by demanding greater adherence to advancing "provincial interests," such that the role of protecting private interests might have shifted considerably. In conjunction with the recent changes to the planning system, the Ontario government also attempted to reform the OMB and adjust its role in making such decisions. Behind the changes was the claim that the Board had not consistently given priority to provincial policies, which it had been required to "have regard to" when making decisions since the 1983 overhaul of the *Planning Act*.[83] Thus, the government made the provincial policies and plans discussed above binding on the Board to the same degree as on municipal councils: that is, its decisions now had to be "consistent with" provincial policy, "have regard to" the provincial interest, and "conform with, and not conflict with," provincial plans. In some cases, when the Board failed to apply the appropriate test, the courts struck down its decisions.[84]

In addition, as a result of criticism that the OMB was too readily overriding the decisions of democratically elected municipal councils, the government amended the *Planning Act* in 2006 to require the Board to "have regard to" the council decision under appeal and the supporting documentation considered by council in making its decision.[85] At the time that this provision was adopted as part of a package of reforms, the government indicated that its purpose was an attempt to transform the role of the OMB from the primary decision maker to an appellate body. While accepting that an "independent body like the Ontario Municipal Board is best situated to manage these types of appeals where there is a need to balance the broader public interest of all Ontarians," the Minister of Municipal Affairs and Housing also stated that "I can't repeat that often enough. The OMB

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should not be a primary decision body, but should deal strictly with appeals of matters that come before council, on which a council decision is made, and whether or not that decision is in accordance with the provincial policy statement and the municipality's own official plan."[86]

Exactly how much deference the Board must give to a local council's view of whether or not a project is in the public interest was uncertain until settled in late 2009 by the Divisional Court in a case dealing with an amendment to the official plan of the City of Ottawa. Ottawa argued that s. 2.1 of the *Planning Act* requires the Board to give deference to a council's decision and not overturn it unless it is clearly unreasonable. However, the court disagreed and held that the language used by the legislature indicates that only "minimal deference" is to be given to council decisions. That means that the OMB needs to "at least scrutinize and carefully consider the Council decision, as well as the information that was before Council … The Board also ought to carefully and explicitly consider the specific reasons expressed by Council. However, the Board does not have to find that the Council decision is demonstrably unreasonable to arrive at an opposite conclusion."[87] Moreover, according to the Court, the language used by the legislature is not sufficient to accomplish the stated intent of the Minister to change the OMB from the primary decision maker into an appellate tribunal.

This decision papers over a perennial debate in Ontario about the nature of planning decisions and about who – whether democratically elected councils or an independent tribunal – should make those decisions.[88] Not surprisingly, therefore, the continuing ability of the OMB to override a local council's interpretation of where the public interest lies in a development decision is controversial for many municipalities and landowners and continues to spark debate and resentment. Although many argue that the Board provides an "important counterbalance to the political sentiments of local councils" by providing a "forum in which a fair decision can be made on the planning merits of a proposal,[89] "[c]ynics view the OMB's purpose as providing the development industry [with] a portage at the whitewater of public concern."[90] Thus, the *Minto* decision fails to resolve these concerns about the legitimacy of planning decisions.

The decision also seems to run counter to the main currents of municipal law as they have developed over the past fifteen years or so. In Ontario, as elsewhere in Canada, the legislature and the courts have recognized the political and legal autonomy of municipal governments and their entitlement to deference, particularly in the making of local policy.[91]

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## Conclusion

The Ontario land-use planning system recognizes the public interest as a key factor in planning overall and a key determinant of individual land development decisions. Provincial legislation mandates decision-making procedures that grant a diversity of voices an opportunity to inform those decisions. The institutional structure ensures that at a minimum competing, and sometimes fundamentally opposed, views of the public interest come into play in decision making. Both municipal councils and the OMB seek to identify the public interest when reaching their decisions. Both look to participants, including experts and members of the public, for guidance.

The types of interests raised in planning matters usually reflect a range of concerns: from private values, such as property rights, privacy, and personal autonomy, to public values of equity, sustainability, and efficiency. It is the role of decision makers at every level to identify and weigh these different elements and reach a conclusion about whether a particular project advances the public interest.

The public interest as interpreted by a local council is based on (at least potentially) a dialogue with a diverse cross-section of local society and a weighing of competing factors. This choice must be influenced by provincial policy, established local planning policy as expressed in the official plan, and technical advice from planning staff, but, because a council is an elected government, the decision is ultimately a political one, balancing numerous competing viewpoints and considerations of what is best for the community. Yet, in practice, many voices are not heard at this stage, and private interests can be highly influential.

The public interest as interpreted by the Ontario Municipal Board is based on the planning merits of an application, its consideration of the municipality's decision and its own policies, and its interpretation of provincial policy. Because of the nature of the process, this forum is more restrictive in practice in terms of who is heard and which issues are raised. It is also one that privileges expert knowledge and de-emphasizes the political context of land-use planning. In many cases, this latter determination of the public interest prevails.

There are deep disagreements over whether this is an effective, fair, and accountable system. The present structured relationship between councils and the OMB continues to be criticized despite provincial reforms. In terms of effectiveness, there is no empirical evidence to demonstrate that having the OMB make final decisions results in better planning outcomes than if

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councils alone made those decisions. In terms of accountability, a number of criticisms are levelled. To public interest groups, the nature of the Board's process is exclusive and overly protective of developers' interests. Municipal councils resent intrusion by the Board into what they see as local matters and their area of authority, for which they are politically accountable to electors. They complain that even well-reasoned and popularly supported council decisions are vulnerable to successful appeals to the OMB. Others in turn criticize the overly political nature of local planning decisions and rely on the Board for an objective and well-informed assessment of the planning merits of a proposal. Whatever one's views, these negative perceptions challenge the legitimacy of the Ontario planning process.

The risk with council decision making is that the choice will reflect local politics, narrow interests, and the next election more than the planning merits of an application and the interests of the broader public in the long term. This is a strong argument for having a mechanism to challenge arbitrary or unreasonable decisions. The risks with having the OMB decide on a development proposal are that local priorities, voices, values, and political accommodations will be ignored and that the full spectrum of multiple public interests will not be articulated.

Because the system allows for site-specific amendments to overall plans, and because the province's policy-making process is so closed, participants at every level are restricted to raising concerns about a specific proposal and have no forum in which to debate the logic of the prevailing approach to growth and development and the underlying assumptions about the benefits that are supposed to flow inevitably.[92] The assumptions and beliefs that underlie current planning discourse are thus sheltered from public debate.[93] Nor is there an opportunity to question, or a mechanism to redress, the cumulative impacts of multiple, site-specific approvals. As the Environmental Commissioner of Ontario has pointed out, "[o]ften the approval processes degrade into a battle where opponents of an undertaking pursue proxy issues, such as the possible presence of an endangered species, because the larger issues cannot be discussed. This is a path to frustration, waste and delay."[94]

The structure of the planning system is ultimately in the hands of the province, which has made significant changes to that system. Although it has determined that municipalities deserve to exercise broader powers and greater autonomy in most jurisdictional areas, the province has narrowed municipal discretion over which planning choices will fulfill the public interest. The provincial reforms have expanded the menu of factors that must

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be considered and shifted the scale of the factors making up the public interest away from the local level and toward the regional and provincial levels. In this top-down approach, municipalities and individuals cannot question the province's priorities or its interpretation of the public interest.[95] The legitimacy of the process and its claim to be in the public interest therefore hinge on the striving of councils and the OMB to protect and expand opportunities for participation for a diversity of voices, especially from traditionally unrepresented interests, and to commit themselves to providing clear and principled reasons for every decision.

In land-use planning, tensions are inevitable among the multiple interests of "the public." Competing visions represent different interests and values, from the wholly private to the broad public; different scales, from the local to the provincial; different time frames, from the present generation to future generations; and different types of knowledge, from the technical to the experiential. All of these interests and values are best served by procedures that guarantee broad and meaningful participation rights and a substantive standard against which to measure decisions. The elements of the standard should be identified in legislation or formal policies, and adherence to the standard should be demonstrated at all levels through the requirement for decision makers to provide reasons for their decisions. Providing reasons that identify, analyze, and advance as broad a range of values and interests as possible helps to ensure consistency in decisions and foster greater public understanding, and acceptance, of planning policy and decisions.

## Notes

1 Bruce Ziff's chapter takes up some of these issues in more detail.

2 As discussed in the introduction to this volume, in Canada there must be both a taking away and an acquisition of use of the land by a public authority for compensation to be payable. See *Canadian Pacific Railway Co v Vancouver (City),* [2006] 1 SCR 227. Former Ontario cabinet minister the Honourable John White justified the lack of compensation this way: "[Although it does seem inequitable], at the same time, when it is done in a community on behalf of the public at large, I suppose the community, and, thereby, I, myself, as a member of the community, gain some value." The public pays for infrastructure, which adds value to private lands, but that increase in value is not recouped by the public. "The public shouldn't have to pay for losses in value too." John White, "Ontario's Land Use Regulations," in *Law Society of Upper Canada Special Lectures: The Changing Face of Land Use and Development* (Toronto: Richard DeBoo, 1974), 121–41, at 131. In addition, property rights are protected through the protection of existing uses. See s 34(9) of the *Planning Act, infra* note 18.

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3 *Euclid v Ambler Realty* (1926), 272 US 365. In US law, the prevention of nuisances was an exercise of the "police power," which allowed states to regulate without having to pay compensation to landowners for what was argued to be "takings" of their lands. In practice, zoning protected residential neighbourhoods from incursions by noxious uses, including, famously, apartment buildings in single-family residential areas. In Canada, in the absence of constitutional protection of private property rights, the zoning power was recognized by the courts as an exercise of legitimate provincial jurisdiction under s 92(13) of the Constitution, "Property and Civil Rights." Courts did limit municipal use of the power in cases of arbitrary or unjustifiable interference with private rights.

4 Mary Louise McAllister, *Governing Ourselves? The Politics of Canadian Communities* (Vancouver: UBC Press, 2004) at 162.

5 *Russell v Shanahan* (OMB), Review Panel, dated 3 September 1998.

6 Stefano Moroni, "Towards a Reconstruction of the Public Interest Criterion" (2004) 3(2) Planning Theory 151 at 152.

7 Leslie A Pal and Judith Maxwell, "Assessing the Public Interest in the 21st Century: A Framework," paper prepared for the External Advisory Committee on Smart Regulation (Government of Canada), Canadian Policy Research Networks, January 2004 at 3.

8 ER Alexander, "The Public Interest in Planning: From Legitimation to Substantive Plan Evaluation" (2002) 1(3) Planning Theory 226 at 228.

9 Patrick McAuslan, *The Ideologies of Planning Law* (Oxford: Pergamon Press, 1980) at 4.

10 Heather Campbell and Robert Marshall, "Utilitarianism's Bad Breath? A Re-Evaluation of the Public Interest Justification for Planning" (2002) 1(2) Planning Theory 163 at 175.

11 Carolyn Wells, "A Public Interest Framework for Public Policy Development: A Property and Urban Planning Perspective," paper presented to the Australasian Political Studies Association Annual Conference, 24–26 September 2007, Monash University at 4.

12 Moroni, *supra* note 6 at 153.

13 See, e.g., Joshua Cohen, "Deliberation and Democratic Legitimacy," and Jon Elster, "The Market and the Forum: Three Varieties of Political Theory," both in James Bohman and William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997) at 67 and 3, respectively.

14 James Meadowcroft, "Deliberative Democracy," in RF Durant et al, eds, *Environmental Governance Reconsidered: Challenges, Choices, and Opportunities* (Cambridge, MA: MIT Press, 2004) 183 at 184.

15 Campbell and Marshall, *supra* note 10 at 181. In his chapter, Makuch argues that, even for property owners with a direct interest in a planning decision, current procedure allows their exclusion from public planning participation.

16 John Ferejohn, "Instituting Deliberative Democracy," in Ian Shapiro and Stephen Macedo, eds, *Designing Democratic Institutions* (New York: New York University Press, 2000) at 79–80.

17 *Ibid* at 163.

18 RSO 1990, c P.13.

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19 *Planning Act, ibid,* s 51(24)(b). Section 1.1 sets out the *Act*'s purposes: "to promote sustainable economic development in a healthy natural environment … ; to provide for a land use planning system led by provincial policy; to integrate matters of provincial interest in provincial and municipal planning decisions; to provide for planning processes that are fair by making them open, accessible, timely and efficient; to encourage cooperation and coordination among various interests; to recognize the decision-making authority and accountability of municipal councils in planning." The public interest is a criterion for decision making under other statutes. See *Niagara Escarpment Planning and Development Act,* RSO 1990, c N.2, s 6.1(3), regarding amendments to the Niagara Escarpment Plan.

20 *Congrégation des témoins de Jéhovah de St-Jerôme-Lafontaine v Lafontaine (Village),* [2007] 2 SCR 650 at para 3. The content of that duty will vary from case to case.

21 Section 61 of the *Planning Act* provides that, in passing a planning bylaw, council is performing a "legislative" function but is required to provide a fair opportunity to participate.

22 *London (City) v RSJ Holdings, Inc,* [2007] 2 SCR 588 at para 40.

23 These interests are the protection of ecological systems, including natural areas, features, and functions; the protection of agricultural resources of the province; the conservation and management of natural resources and the mineral resource base; the conservation of features of significant architectural, cultural, historical, archaeological, or scientific interest; the supply, efficient use, and conservation of energy and water; the adequate provision and efficient use of communication, transportation, sewage, and water services and waste management systems; the minimization of waste; the orderly development of safe and healthy communities; the accessibility for persons with disabilities to all facilities, services, and matters to which this *Act* applies; the adequate provision and distribution of educational, health, social, cultural, and recreational facilities; the adequate provision of a full range of housing; the adequate provision of employment opportunities; the protection of the financial and economic well-being of the province and its municipalities; the coordination of planning activities of public bodies; the resolution of planning conflicts involving public and private interests; the protection of public health and safety; the appropriate location of growth and development; and the promotion of development designed to be sustainable, to support public transit, and to be oriented to pedestrians. *Planning Act, supra* note 18 at s 2. This section was first added to the *Planning Act* in 1989.

24 *Provincial Policy Statement 2005* was adopted by Order in Council 140/2005. A new PPS was adopted following the writing of this chapter. The new PPS 2014 reinforces the themes of PPS 2005 and is not discussed in detail. If not adopted under s 3, other provincial policies (for example, the Ministry of the Environment's set of policies relating to Land Use and Compatibility) are not binding but only advisory. See *Re Town of Newmarket Zoning Bylaw No. 2008-63* (2010), 65 OMBR 445.

25 *PPS, ibid* at Part I: Preamble.

26 *PPS, ibid* at Part III: How to Read the Provincial Policy Statement.

27 *PPS, ibid* at Part IV: Vision for Ontario's Land Use Planning System.

28 In 2010, the Minister of Municipal Affairs and Housing commenced formal review of the *PPS*: *ibid.*

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29 Environmental Commissioner of Ontario, *Planning Our Landscape, 2004–2005 Annual Report* at 41–47.

30 *Niagara Escarpment Planning and Development Act, supra* note 19: *Oak Ridges Moraine Conservation Act, 2001,* SO 2001, c 31.

31 *Greenbelt Act, 2005,* SO 2005, c 1; *Lake Simcoe Protection Act, 2008,* SO 2008, c 23.

32 *Places to Grow Act, 2005,* SO 2005, c 13, at s (1). If there is a conflict between a direction in the Growth Plan and a provincial policy with respect to the natural environment or public health, the direction that provides more protection prevails. See s 14(2).

33 *Greenbelt Act, supra* note 31.

34 *Planning Act, supra* note 18 at s 34(27)–(29).

35 Minister's Zoning Orders have been used for areas of northern Ontario without municipal organization and for controlling specific planning issues in southern Ontario. For example, a Minister's Zoning Order was used to prevent new urban development on lands designated as rural or agricultural within the greenbelt study area pending consideration of the *Greenbelt Act* by the legislature. See O.Reg 432/03.

36 Decisions on variances and severances are made by a "committee of adjustment" appointed by council; most other planning decisions are made directly by councils. Until relatively recently, all municipal official plans were approved by the Minister of Municipal Affairs and Housing. Now, certain official plans still require provincial approval, but for others approval authority has been delegated to regional and county governments, or decisions are exempted from requiring further approvals. Municipal decisions about official plans continue to be appealable to the OMB.

37 *Planning Act, supra* note 18 at s 22(7.0.2) – 180 days for requests to amend official plans; s 34(11) – 120 days for requests to amend zoning bylaws.

38 If council refuses to approve a change, or fails to make a decision, then only the applicant for the change can initiate an appeal. However, once an appeal is launched, objectors can participate in the OMB hearing.

39 NIMBY is an acronym for "not in my backyard."

40 See, e.g., Barbara M Illsley, "Fair Participation: A Canadian Perspective" (2003) 20 Land Use Policy 265.

41 Geraint Ellis, "Discourses of Objection: Towards an Understanding of Third-Party Rights in Planning" (2004) 36 Environment and Planning A 1549.

42 *Etobicoke Board of Education v Highbury Developments Ltd,* [1958] SCR 196. Discretion must be exercised judicially.

43 *Canadian Institute of Public Real Estate Companies v Toronto,* [1979] 2 SCR 2 at 10.

44 These are authorized under s 37 of the *Planning Act.* This provision is mostly used in Toronto and growing regions rather than in smaller municipalities.

45 The *Planning Act* only refers to "facilities, services or matters," but the City of Toronto has detailed guidelines about its use of the provisions, including the matters and facilities that it will seek in such agreements.

46 One question is whether there is a need for a "nexus" between the benefit and the project. There are also questions of transparency, fairness, and judicial oversight and concerns about the *ad hoc* nature of development decisions. See, e.g., Ed Morgan, "The Sword in the Zone: Fantasies of Land Use Planning Law" (2012) 62 UTLJ 163.

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47 *Congrégation des témoins de Jéhovah de St-Jerôme-Lafontaine v Lafontaine (Village), supra* note 20 at para 6.

48 McAllister, *supra* note 4 at 155. The reasons for this are a matter of some debate. See, e.g., Christopher Leo, "Are There Urban Regimes in Canada? Comment on Timothy Cobban's 'The Political Economy of Urban Redevelopment: Downtown Revitalization in London Ontario, 1993–2002" (2003) 12(2) Canadian Journal of Urban Research 344.

49 Robert MacDermid, *Funding City Politics: Municipal Campaign Funding and Property Development in the Greater Toronto Area* (Toronto: CSJ Foundation for Research and Education, 2009).

50 See, e.g., John B Sutcliffe, "Public Participation in Local Politics: The Impact of Community Activism on the Windsor-Detroit Border Decision Making Process" (2008) 17(2) Canadian Journal of Urban Research 57 (community group representing some of the city's wealthiest residents more influential on council policy decision than groups representing economically disadvantaged residents). Also see Illsley, *supra* note 40 (discussing the prioritization of developers' needs over community interests in planning for the Downsview Lands in Toronto).

51 Joe Vaccaro, Building Industry and Land Development Association and Ontario Home Builders' Association, testimony to the Legislative Assembly of Ontario, Standing Committee on Government Agencies, Agency Review – Ontario Municipal Board, *Hansard* (8 September 2008) at A550.

52 Aaron A Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development* (Toronto: University of Toronto Press, 2013) at 59–60, citing several studies.

53 *Planning Act, supra* note 18 at s 34(25).

54 *Re City of Windsor OPA No 67* (2009), 63 OMBR 181 at 185.

55 In previous decades, OMB decisions could be appealed to the provincial cabinet, but this right was removed in order to remove partisanship and politics from planning decisions. Later, the province added the power of the Minister of Municipal Affairs to intervene in planning controversies that raise a matter of provincial interest; once this occurs, the final decision will be made by cabinet, not by the OMB.

56 The OMB was established in 1906 as the Ontario Railway and Municipal Board. Its jurisdiction over planning and zoning was added gradually over the following decades. See, e.g., *City and Suburbs Plans Act, 1912,* SO 1912, c 43; *Planning and Development Act, 1917,* SO 1917, c 44; *Municipal Amendment Act, 1921,* SO 1921, c 63; *The Planning Act, 1955,* SO 1955, c 61; and *Planning Amendment Act, 1959,* SO 1959, c 71.

57 *Re Hopedale Developments Ltd and Town of Oakville,* [1965] OR 259 (CA). However, the Board cannot fetter its discretion by limiting its consideration to those principles and requiring that parties *must* comply with them.

58 Marie Hubbard, Chair of the Ontario Municipal Board, testimony to the Legislative Assembly of Ontario, Standing Committee on Government Agencies, Agency Review – Ontario Municipal Board, *Hansard* (8 September 2008) at A521.

59 *Cloverdale Shopping Centre Ltd v Etobicoke,* [1966] 2 OR 439 (CA) at 449, 450.

60 *Ottawa (City) v Minto Communities Inc,* 2009 CanLII 65802 (Ont. SCDC) at para 30.

61 *City of Toronto v 2059946 Ontario Limited* (Queen West Triangle) (2007), 228 OAC 143 (Div Ct) at paras 20 and 22.

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62 John G Chipman, *A Law unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002) at 33.

63 *Toronto (City) v Romlek Enterprises* (2009), 250 OAC 368 (Div Ct).

64 Chipman, *supra* note 62 at 29.

65 *Ibid* at 31.

66 *Re Town of Oakville OPA No 296* (2010), 64 OMBR 55 at 72–73.

67 The OMB has the authority to require a party to provide more evidence if it is not satisfied that there is sufficient information on which to base its decision, and it has done so in some cases. See, e.g., *Re City of Kawartha Lakes,* OMB File Nos PL 060772 and PL 070848, 12 January 2010.

68 In one hearing, a public interest group in opposition to a complex development proposal moved for an adjournment to allow it to seek funding to participate fully in a predicted twenty-five-week hearing, arguing that the high cost of participation by public interest groups precluded a fair hearing. The Board denied the motion, and the group was only able to participate intermittently in the hearing. Gail Swainson, "OMB Rejects Activists' Bid for Funding," *Toronto Star* (22 February 2006). Nevertheless, in its final decision, rejecting the group's position, the Board stated that the group's "limited participation and evidence at the hearing affected the weight the Board could ultimately give their position." *Re Lionheart Enterprises Ltd,* OMB Decision/Order No 3289, 23 November 2006 at 4.

69 Although the OMB rarely awards costs, an application for a costs award against a public interest party can have a chilling effect. In a recent case, a developer who was successful in getting Board approval applied for $3.5 million in costs to be paid by the losing local group and their lawyers. See *Re Kimvar Enterprises Inc* (2009), 61 OMBR 293. The Board accepted that "there is no question that the claim is unprecedented and the Board finds that an award of costs anywhere near the amount requested would create a chilling effect … [T]he public interest impact of a costs award is a relevant factor for the Board to consider in exercising its discretion. It is for this reason that the Board has restricted awards of costs to the clearest of cases, where the conduct complained of is unreasonable and improper" (at 314). Although the application was unsuccessful, it necessitated a hearing that rivalled the main hearing in length and preparation time.

70 Moore, *supra* note 52 at 68.

71 Theresa McClenahan, Canadian Environmental Law Association, testimony to the Legislative Assembly of Ontario, Standing Committee on Government Agencies, Agency Review – Ontario Municipal Board, *Hansard* (8 September 2009) at A545. In an illustration of this, the OMB in a single paragraph dismissed the evidence of sixty nearby residents participating in a hearing in which they objected to a proposed "big box" development in downtown Toronto on the ground that it would be incompatible with existing uses in the area because "no professional planning or other technical evidence was put before the Board to substantiate what are otherwise visceral reactions to an unwanted development." See *Smart Centres Inc v Toronto (City)* (2009), 61 OMBR 129 at 172.

72 Glenn Brooks, testimony to the Legislative Assembly of Ontario, Standing Committee on Government Agencies, Agency Review – Ontario Municipal Board, *Hansard* (8 September 2009) at A540.

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73 *Russell v Shanahan* (OMB), *supra* note 5.
74 *Russell v Shanahan* (2000), 52 OR (3d) 9 (CA) at para 24.
75 *Municipal Amendment Act, 1921, supra* note 56 at s 10 (emphasis added).
76 See *Re Hopedale, supra* note 57. The policy was expressed in terms of when the Board would interfere with a decision of local council: when "it was shown that their action was clearly not for the greatest common good, that it created an undue hardship that some private right was unduly interfered with or denied, [or] that they had acted arbitrarily on incorrect information or advice … or otherwise improperly" (at 264). Even the earliest planning legislation in 1912, allowing Toronto to prohibit the location of apartment buildings on certain streets, was accepted as being enacted "for the protection of those who, in residential districts, have built houses and laid out gardens which would be much depreciated by the erection of large and often unsightly buildings completely overshadowing them." *City of Toronto v Williams* (1912), 27 OLR 186 (Div Ct) at 191.
77 Peter W Moore, "Zoning and Planning: The Toronto Experience, 1904–1970," in Alan FJ Artibise and Gilbert A Stelter, eds, *The Usable Urban Past: Planning and Politics in the Modern Canadian City* (Toronto: Macmillan Canada, 1979) 316 at 334. Moore discusses attempts by Toronto City Council to have the amendment repealed and, when those attempts failed, to find ways around it through creative drafting of its bylaws.
78 See Jeffrey Sack, "Acting for Ratepayers," in *Law Society of Upper Canada Special Lectures 1974: The Changing Face of Land Use and Development* (Toronto: Richard DeBoo, 1974) at 245; and James F. McCallum, "Practice before Planning Board, Council, Municipal Board, and Minister," in *Law Society of Upper Canada Special Lectures 1976: Recent Developments in Real Estate Law* (Toronto: Richard DeBoo, 1976) at 165. Sack cites the view of Chair Kennedy that the OMB is an ombudsman "whose role was to protect minorities against the majority will. Wedded to this desire to protect minority interests has been a concern to safeguard low-rise residential communities against unwarranted intrusions by incompatible developments" (at 278). McCallum discusses the consistent refusal of the OMB to approve a change in land use that is "capable of reducing the amenities presently enjoyed or capable of changing the character of an established area." Even where the change would be advantageous to the municipality as a whole, the Board will not allow those "who would benefit" to do so "at the expense of those nearby who are entitled to have their rights protected" (at 174).
79 In the *Russell* case, at issue was the Board's policy that it would not approve a downzoning unless the municipality was willing to acquire the land or justified its action to the Board's satisfaction. Also see *Citizens Concerned for Michipicoten Bay v Municipality of Wawa* (2009), PL040025.
80 Chipman, *supra* note 62 at 34, 35.
81 *Ibid* at 45–49.
82 Adverse impacts can include increased traffic, noise, pollution, shadowing, and loss of property value.
83 The requirement shifted to "consistent with" for a short period in 1995 but was changed back to "have regard to" when the government changed. The current wording was reintroduced in 2005. The Board interpreted the phrase "have regard to" to

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mean that it needed to consider provincial policy but was not bound to follow it. According to Chipman's study, the OMB saw the policies as an expression of the public interest but weighed them against other matters of concern and its own policies in reaching a decision. *Supra* note 62 at 177–79. The Divisional Court has accepted the Board's view that the term means to "consider [the provincial policies] carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect … [and] then to determine whether and how the matter before it is affected by, and complies with, such objectives and policies, with a sense of reasonable consistency in principle." *Concerned Citizens of King Township v Township of King,* 42 OMBR 3 (Div Ct).

84 See, e.g., *Toronto (City) R&G Realty Management Inc* (2009), 63 OMBR 25 (Ont Sup Ct J).

85 *Planning Act, supra* note 18 at s 2.1.

86 Testimony of John Gerritsen, Minister of Municipal Affairs and Housing, regarding Bill 51, before the Legislative Assembly of Ontario, Standing Committee on General Government, *Hansard* (19 April 2006).

87 *Ottawa v Minto, supra* note 60 at para 33. The Court accepted that, where there were no expert reports or studies recommending refusal of a development, council's decision to refuse the development carried no weight and could be ignored by the Board.

88 Recommendations to reform the OMB to take away its primary decision authority date back to the early 1970s. See, e.g., Ontario Economic Council, *Subject to Approval: A Review of Municipal Planning in Ontario* (Toronto: Government of Ontario, 1973), which stated at 102 that "the proper route for citizen participation in municipal planning should not have to be through a provincially appointed tribunal. Citizen participation in policy making should be through proper policy-making channels, that is to say, political. It is for the municipal council to actually decide on zoning and other planning issues. It is the Minister to whom appeals should be addressed." The recommended role of the OMB would be to gather information through public hearings to help inform the final decision.

89 Michael Collins-Williams, Building Industry and Land Development Association and Ontario Home Builders' Association, testimony to the Legislative Assembly of Ontario, Standing Committee on Government Agencies, Agency Review – Ontario Municipal Board, *Hansard* (8 September 2009) at A549.

90 Brian Tansley, West Manotick Community Association, testimony to the Legislative Assembly of Ontario, Standing Committee on Government Agencies, Agency Review – Ontario Municipal Board, *Hansard* (8 September 2009) at A555.

91 *114957 Canada Ltee v Hudson (Ville),* [2001] 2 SCR 241; *Croplife Canada v Toronto* (2005), 75 OR (3d) 357 (CA). Section 8(1) of the *Municipal Act, 2001,* SO 2001, c 25, as amended, provides that the "powers of a municipality under this *or any other Act* shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues" (emphasis added). The Court in the *Minto* case agreed that municipal council decisions are entitled to deference by the courts but decided that the same rule did not apply to the OMB because of the provisions of the *Planning Act* and the Board's expertise in planning matters.

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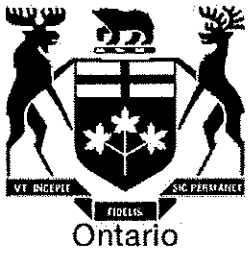
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92 Environmental Commissioner of Ontario, *Annual Report 2006–2007* at 50.
93 Julie-Anne Boudreau, Roger Keil, and Douglas Young, *Changing Toronto: Governing Urban Neoliberalism* (Toronto: University of Toronto Press, 2009) at 114.
94 Environmental Commissioner of Ontario, *supra* note 92 at 50.
95 Although the public is consulted during the development of these policies and plans, there is no ability to appeal or challenge them once they are adopted and no mechanism to challenge the province's interpretation in a particular case. Also see David Pond, "Ontario's Greenbelt: Growth Management, Farmland Protection, and Regime Change in Southern Ontario" (2009) 35(4) Canadian Public Policy/Analyse de politiques 413.

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




2015 CanLII 49338 (ON OMB)

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

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

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

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

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

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

**APPEARANCES:**

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

2015 CanLII 49338 (ON OMB)

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

## BACKGROUND

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

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

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

## LOCATION

[4] At the conclusion of the hearing, the Board visited the site (with the consent of

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

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

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

[7] Each of the townhouses has a private integral garage. In addition to the private

2015 CanLII 49338 (ON OMB)

internal garages accessed from a private internal road from Brock Street, there are a total of four surface parking spaces for visitors.

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

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

[10] Directly opposite the subject lands on Brookfield Road are a group of about one dozen modest two-storey row houses, which could have been developed in the mid-to-late 1970s. These are part of a complex of about 60 similar row houses on lands south of Lakeshore Road West between Brookfield Road and Garden Drive to the west. This complex can be accessed from either Brookfield Road or Lakeshore Road West (via Maurice Lane). Between Garden Drive and Dorval Drive to the west is St. Jude's Cemetery. The cemetery fronts on Lakeshore Road West. The north/south running Dorval Drive, Garden Drive and Maurice Drive all dead end at Lakeshore Road West.

2015 CanLII 49338 (ON OMB)

2015 CanLII 49338 (ON OMB)

[11] South of the row houses that front on the west side of Brookfield Road are three single family detached homes. Immediately south of these is the entrance to Lakewood Drive. Lakewood Drive is an upscale, well-treed street that meanders west from Brookfield Road and dead ends some distance further west at the cemetery. The large single-family detached homes on this street were developed some time after most of the homes on Brookfield Road.

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

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

[14] The block east of Brock Street on the south side of Lakeshore Road West is developed with a standalone Harvey's restaurant anchoring a single-storey strip plaza with about a dozen tenants. Starbucks is one of these tenants. This plaza has double rows of paved parking on both its north and south sides. The north side parking is separated from Lakeshore Road West by a landscaped strip. The two rows of parking

on the south side of the plaza abut a fenced-off cleared strip of land approximately 15 m wide running between Brock Street and about 25 m west of Brant Street. South of this strip of vacant land, between Brock Street and Brant Street are the rear lot lines of the well-maintained single family homes fronting on the north side of Burnet Street.

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

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

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

**THE TOWN'S POSITION**

[18] The Town submitted that at four-storeys the proposed structure is too tall for its site, situated as it is at the top of a gully. With four-storeys the structure would read from the back gardens of the lower block of townhouses at 98 Brock Street as six-storeys high and would loom unacceptably over the lower block of townhouses. In addition, shadows from the fourth floor of the proposed structure would cause an unacceptable adverse impact on the occupants of several of the lower block of townhouses.

2015 CanLII 49338 (ON OMB)

[19] The Town indicated during the hearing that it would however support an application for a residential building with a maximum of three-storeys and 12 m in height, exclusive of mechanical penthouse. This would constitute, it maintained, an acceptable compromise between the By-law standard and what the Applicant has proposed, and would represent an appropriate transition to the neighbourhood to the west and to the townhouses to the east.

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

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

**THE POSITION OF ANNEKE FEBERWEE**

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

2015 CanLII 49338 (ON OMB)

2015 CanLII 49338 (ON OMB)

**THE POSITION OF WILLIAM ARDELL**

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

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

**THE PARTICIPANTS' POSITION**

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

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

Lakeshore Road West at least as far as the west side of Maurice Street. As noted above, Schedule O, which is the Kerr Village District Land Use map in Livable Oakville, delineates the boundaries of the CBD.

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

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

**THE APPLICANT'S POSITION**

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

**MATTER BEFORE THE BOARD**

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

2015 CanLII 49338 (ON OMB)

2015 CanLII 49338 (ON OMB)

**CORE ISSUE**

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

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

**EVIDENCE AND FINDINGS**

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

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

[35] In order for the Board to carry out its function (which is to make decisions which reflect the public interest) the Board must rely on objective and impartial opinion

evidence. That includes the evidence of a municipal planner who may have an opinion on matters at issue in the appeal that are contrary to the view or position of her employer. Many Board decisions have confirmed or emphasized this obligation, as the appearance of a municipal planner who appears under summons is not uncommon.

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

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

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

[39] Ms. Anderson explained that Zoning By-law No. 2014-014 ("InZone"), which implements Livable Oakville, was adopted by the Town in 2014. However, because a

2015 CanLII 49338 (ON OMB)

number of Oakville landowners have appealed it in its entirety, InZone is not yet in force. InZone zones the subject lands "H25 CBD Sp. 349". H25 is a holding category; CBD is the applicable zoning; Sp. 349 is a special provision in InZone that is identical in effect to Sp. 625 in the in force By-law. Sp. 349 restricts development on the two northerly parcels of the subject lands to seven, two-storey townhouses, no more than 9 m in height.

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

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

[42] She explained that there is such a stable residential area, which is defined by the Town as an area of low density detached residential homes, immediately south of 87 Brookfield Road. Because it touches the stable residential area to the south, the 87 Brookfield Road portion of the subject lands is restricted by Town policy to a maximum of three storeys (and 12 m).

2015 CanLII 49338 (ON OMB)

[43] She pointed out that the lands immediately east of the subject lands are also designated CBD in Livable Oakville. While these lands are currently developed with townhouses, they are not considered part of the stable residential area. The significance of Ms. Anderson's evidence is that Livable Oakville does not limit the height of the portion of the proposed structure on the two northerly parcels to three-storeys (and 12 m) because it would not border a stable residential area.

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

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

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

2015 CanLII 49338 (ON OMB)

[47] The Board qualified Paul Johnson, who was retained by the Applicant, to provide opinion evidence on land use planning.

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

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

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

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

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

2015 CanLII 49338 (ON OMB)

during the summer months when the sun is at its highest point.

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

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

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

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

2015 CanLII 49338 (ON OMB)

minimizes the shadow impact on the adjacent townhouses.

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

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

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

[59] Mr. Johnson's evidence was that after landscaping is complete, the parking structure would not protrude more than 1 m above grade at the rear. This point was disputed. However, the Board accepted Mr. Johnson's evidence and finds that after the proposed site grading the underground garage will not unacceptably offend the views of the residents of the townhouses. The Board would also point out that pursuant to s. 41 of the *Planning Act* ("Act"), final site grading is determined at the Site Plan Approval phase of the application process. The Site Plan is not before the Board in these proceedings.

2015 CanLII 49338 (ON OMB)

2015 CanLII 49338 (ON OMB)

[60] The concept plans indicate a ground floor level outdoor retail terrace over a portion of the underground garage adjacent to Lakeshore Road West. Mr. Cuming testified that the proposed terrace, which would be located on a portion of the proposed underground garage extending perhaps 5 m beyond the main parking garage structure, would constitute a nuisance to the residents of the townhouses to the east and should therefore also be eliminated. The proposed terrace and the elevations showing the parking garage are found in Exhibit 4, Tab 4.

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

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

[63] Policy 6.5.3 provides that:

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

[64] Policy 6.4.2 provides that:

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

2015 CanLII 49338 (ON OMB)

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

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

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

[68] On the evidence of Mr. Johnson, the Board finds that the proposed four-storey structure stepping back on the east and south and set back 14 m from the east property line represents an appropriate transition to the townhouses to the east and would be compatible in scale with the surrounding area.

[69] The planners also spoke to the consistency of the current proposal with Provincial policy respecting the more efficient use of land as well as Provincial policy on the development of more compact, pedestrian-oriented urban areas that make more efficient use of existing infrastructure. Mr. Johnson explained that the Lower Kerr Village District area is rapidly urbanizing and intensifying. He advised that intensification represents a cornerstone of Provincial policy and is encouraged by Provincial, regional and local policy. All of the planners who testified at the subject hearing agreed, however, that intensification *per se* was not at issue in these proceedings, and that the Town is on track to meeting its Provincial and regional obligations in that respect.

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

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

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

2015 CanLII 49338 (ON OMB)

**SECTION 2.1 OF THE *PLANNING ACT***

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

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

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

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

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

2015 CanLII 49338 (ON OMB)

these documents that supports a particular position, but rather what constitutes Provincial policy on the matter.

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

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

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

**AUTHORITIES**

[81] Counsel submitted jurisprudence in the form of a number of cases they considered to have application to the matters at issue in these proceedings. After careful consideration of these cases, the Board finds that overwhelmingly they re-affirm the Board's obligation and duty to come to an impartial decision based on the evidence

2015 CanLII 49338 (ON OMB)

presented and the principles of good planning, unfettered by inappropriate outside influence. These decisions also reinforce the notion that it is incumbent on the Board to consider the area context in coming to its decision. This Panel did that.

2015 CanLII 49338 (ON OMB)

**CONCLUSION**

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

[83] This Board heard evidence from Mr. Cuming, the land use planner retained by the Town, in favour of the Town's proposal to reduce the height of the portion of the structure on the two northern parcels from four storeys to three. Apprehension was raised that unacceptable adverse impact on both the townhouses to the east and on the wider community south of Lakeshore Road West between Brock Street and Brookfield Road would result if the new building were allowed to have more than three storeys. The Board heard no fact-based evidence in support of these apprehensions. On the other hand, the Board heard (and accepted) evidence-based testimony in support of the opposite view, which is that the proposed four-storey structure stepped back on the upper levels where it overlooks the lower level of the 98 Brock Street townhouses, is compatible with and represents an appropriate transition to those townhouses. The Board also heard and accepted the evidence of Mr. Johnson and others that the proposed step backs and setbacks from the nearest lot line of the stable residential area to the south represents an appropriate transition to that area. The Board accepted the evidence of three professional planners that the four-storey proposal constitutes good planning.

2015 CanLII 49338 (ON OMB)

[84] Mr. Cuming expressed apprehension that there could be adverse impact from noise created by future residents or future restaurant patrons using an outdoor terrace on the Lakeshore Road frontage of the proposed new building, but he did not give any fact-based evidence. Again, the Board heard only unsubstantiated apprehension that the peace and tranquility the residents of the townhouses currently enjoy would disappear if people were allowed access to a terrace to eat and drink *al fresco*. The Board accepted the evidence of three professional planners that the proposed outdoor terrace also constitutes good planning.

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

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

**INTERIM ORDER**

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

[88] The Board also orders that InZone (Zoning By-law No. 2014-14), which is the adopted but not in-force Zoning By-law at the time this decision was issued, shall also

be amended substantially in accordance with the zoning by-law to be drafted specifically to implement this decision.

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

*"C. Hefferon"*

C. HEFFERON
MEMBER

2015 CanLII 49338 (ON OMB)

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

ISSUE DATE:

**Feb. 26, 2009**

Ontario

PL060850

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

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

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

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

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

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

| | |
|---|---|
| Subject | Refusal of Heritage Permit |
| Referred by | Port Dalhousie Vitalization Corp. |
| Property Address/Description | 16,20,20A,22 Lock Street, 1 Hogan's Alley, 12 Lakeport Road, 11 Main Street |
| Municipality | City of St. Catharines |
| OMB Case No. | PL060850 |
| OMB File No. | M070073 |

**APPEARANCES:**

| **Parties** | **Counsel*/Agent** |
|---|---|
| Port Dalhousie Vitalization Corporation | M. Noskiewicz*<br>I. Andres* |
| PROUD (Port Recognizing Our Unique Heritage) | J. Pepino* |
| City of St. Catharines | A. Poulin* |
| Jeff Loucks et al | J. Loucks |
| Regional Municipality of Niagara | M. Kyne* |
| Hank Beekhuis | |
| Dorothy McKenzie | |
| Albert Berry | T. Hildebrand |

**DECISION DELIVERED BY SUSAN B. CAMPBELL AND ORDER OF THE BOARD**

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

The site is currently developed with a number of buildings: the Austin House hotel, Erskine's Pharmacy and the Hydro Building on Lock St., the Rum Jungle and the Jail House on Main St. and the Port Mansion (McGrath and Union House Hotels) on

Lakeport Rd. E. The buildings and all the open spaces within the subject site are part of the Port Dalhousie Heritage Conservation District (the "PDHCD").

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

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

**The History of These Applications:**

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

As was its legal right, PDVC revised its development proposal and submitted a new application to amend the City's OP and ZBL in February 2006. The Board heard evidence from a number of witnesses that this revised proposal came forward after Mayor Rigby formed a committee of citizens to attempt to work with PDVC on such a

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

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

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

City Council then held public meetings on June 13, 14, 15, 20, 21 and 26, 2006. Council heard 65 people speak in opposition to the proposal and 53 people, including

PDVC representatives speak in favour of the proposal. After these public meetings a further staff report was prepared for Council's consideration (Exhibit # 5e, TAB 7).

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

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

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

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

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

Staff then gave Council options on how to proceed:

1. ask the OMB to dismiss the appeals; that is, support the original decision of Council;

2. recognize the appeals as valid and repeal By-laws 2006-227 and 2006-228. Staff noted that Council would be required to have a public meeting before repealing the by-laws (emphasis added);

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

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

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

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

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

With respect to Counsel's submission that the public interest to which the Board must have regard, is expressed through a vote in a municipal election, the Board finds that this is not the case. The public interest to which this Board must have regard is expressed through planning documents like the Provincial Policy Statement, the Growth Plan for the Greater Golden Horseshoe, municipal official plans and secondary plans and regional official plans. These documents result from a thoughtful and

comprehensive consideration of the long term health and viability of this Province and the municipality in question. Public opinion as expressed in the heat of municipal elections or passionately contested Board hearings is not necessarily synonymous with the public interest.

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

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

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

With respect to the heritage permit and site plan applications, Council decided to request that PDVC submit these applications although staff had made no recommendation on the issue. The previous Council had received advice that such applications were not required to make a decision on the OPA and zoning by-law applications (Exhibit # 5e, p.508).

Finally, when Council made its decision on the heritage permit application it decided that it did not want to receive a report from its planning staff. This was the uncontradicted evidence of Paul Chapman, Director of Planning Services for the City. Rather, it chose to receive a "flow-through report' from the Acting Chief Administrative Officer of the City (Exhibit # 5f, TAB 26). This report set out only the conclusions of the St. Catharines Heritage Committee and the PDHDAC, both of which recommended denying the application. Council refused the heritage permit.

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

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

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

During the course of the hearing the Board specifically asked Council for the City, the City Solicitor, why Council did not repeal the By-laws if it did not support the PDVC

proposal and agreed with the appellants. The City Solicitor displayed admirable candour when she replied “who can say why politicians do what they do”. Council for PROUD attempted to proffer reasons for Council’s actions, but the Board indicated that as she did not represent the City, her conjecture on this subject was irrelevant.

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

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

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

The Board finds that the process of the new Council does not bear scrutiny. Put colloquially, it does not pass the “smell test”. The waiver of the provisions of a procedural by-law which is undoubtedly intended to guarantee fairness is extremely troubling to this Board. A process which avoided a mandatory public meeting in which all voices could have been heard, and which would have required Council to consider

comprehensive reports, including that of its expert staff, is **not** a process in keeping with the intent of the *Planning Act*. It is not a process giving rise to a decision to which this Board will have much regard.

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

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

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

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

The District Guidelines, also referred to during this hearing as the "Port Dalhousie District Plan", "follows on from the Port Dalhousie Heritage Conservation District Heritage Assessment Report that described the heritage characteristics of this Welland Canal port lakeside community in the City of St. Catharines. The report also provided a rationale for the boundary of the proposed district" (Exhibit # 5d, TAB 5, p 156).

The District Guidelines contain an explicit statement of purpose: “the purpose of this document…is to provide guidance in the care and protection of the heritage character of the Port Dalhousie Heritage Conservation District”. The document went on to state “it is worth emphasizing that these are ‘guidelines’. They are intended to provide an objective minimum level of appropriateness for physical change over the coming years” (Exhibit # 5d, TAB 5, p.156.).

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

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

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

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

The Board has reviewed the December 2003 decision of the Board carefully; there is no indication in this decision that the District Guidelines or “District Plan” was before the Board or that the Board in any way considered the merits of that document. The Board considered and made a decision only on By-law 2002-180 which designated a mapped area as a heritage conservation district.

The history of this designation of the PDHCD is germane as the legislature enacted significant changes to the *Heritage Act* in 2005 (the "New Heritage Act").

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

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

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

It is the position of PDVC that the District Guidelines, created under the old *Heritage Act*, do not have the same status as a heritage conservation district plan as required by the new *Heritage Act*. Counsel for PDVC did not argue that district plans which predate the new *Heritage Act* by definition lack the elevated status. Rather he argues that as the new *Heritage Act* sets out a process by which a municipality may adopt such a district plan for the purposes of the new *Heritage Act*, that process must be followed by a municipality for the district plan to be afforded the elevated status. The City has not followed this process with respect to the District Guidelines; therefore the District guidelines do not constitute a district plan for the purposes of the new *Heritage Act*.

The process by which an existing district plan may become a district plan for the purposes of the new *Heritage Act* is set out in section 41.1 of that Act. Section 41.1(2) provides "if, on or before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, the council of a municipality had passed a by-law designating one or more heritage conservation districts, it may pass a by-law adopting a heritage conservation district plan for any of the designated districts".

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

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

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

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

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

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

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

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

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

submissions may also be made. The enactment of a by-law adopting a heritage conservation district plan is appealable to the Board.

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

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

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

Mr. Blozowski confirmed that the City was aware of section 41.2(1)(b) of the new *Heritage Act* when it passed the by-laws which are now the subject of appeal. He

confirmed that there is no record of Council having received any legal advice at the time of passage that the by-laws would offend that section of the new *Heritage Act*.

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

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

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

The City Solicitor argued that "evidence of the adoption of the guidelines as a district plan are (sic) found in the second recital of By-law 2002-180, and in the Minutes approved by Council". Further, she argued that the Board decision on the appeal of the

designating by-law was somehow evidence that the District Guidelines had been adopted as a district plan by the City.

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

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

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

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

Having reviewed Counsel's submissions and the provisions of the new *Heritage Act* the Board finds that the District Guidelines do <u>not</u> constitute a district plan for the specific purposes of section 41.2(1) and (2). This does not mean that the alarmist claim of Counsel for PROUD that all pre-2005 heritage district plans or guidelines are

rendered “ineffective and useless” is correct. Specifically, in the City of St. Catharines, pursuant to policy 7.10.7 of the OP, in reviewing proposals for change in the Port Dalhousie Heritage Conservation District, the City “will be guided by the applicable heritage conservation district plan”. The District Guidelines are neither ineffective nor useless; they have a specific status under the City’s OP.

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

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

The Board finds that the process for adopting a pre-2005 district plan is not a mere technical procedure; it affords substantive rights to owners of property in a heritage conservation district. The preservation of built heritage is vitally important in this province. Because of that the new *Heritage Act*, allowing for district designation and the adoption of a district plan can result in the loss of property rights. That loss of rights is justifiable as the preservation of built heritage is of such consequence. However, the loss of such property rights can only happen after a transparent public process has taken place. Section 41.1 guarantees such a process. If a designated heritage conservation district is to be subject to a district plan which requires by-law

consistency and in fact makes a district plan determinative, the required fair public process must be followed. Otherwise district guidelines or a district plan retain the status afforded by the OP. In St. Catharines the District Guidelines are intended to "guide" City Council (and this Board) in reviewing proposals for change in the heritage district.

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

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

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

The Board must note that if the City believed it had a "moral contract" with its citizens, reflected in the District Guidelines, the new *Heritage Act* gave it a mechanism to ensure that this "moral contract" was affirmed and in fact afforded superior legal status. This Board has been given no authority through any statute to enforce "moral contracts". If the City believes that the District Guidelines constitute a "moral contract" it

should have followed the provisions of section 41.1 of the new *Heritage Act* and adopted the District Guidelines through a by-law.

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

**The Relevant Planning Policy Regime**

The *Planning Act*:

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

therefore finds that in a case involving *Planning Act* instruments and a *Heritage Act* permit, the matters are inextricably linked.

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

The Provincial Policy Statement:

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

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

Mr. Martindale on behalf of the City and Mr. Morgan on behalf of PROUD did not seem to read the PPS with this direction in mind. Exhibit # 20, Mr. Martindale's witness

statement and Exhibit # 225, Mr. Morgan's witness statement make reference only to one section of the PPS: Policy 2.6, Cultural Heritage and Archaeology. In his oral evidence, Mr. Martindale spoke to Policy 1.1.3.3, concerning intensification, but dismissed it as irrelevant as Port Dalhousie "has not been formally identified as an area of intensification".

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

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

Policy 1.0 – Building Strong Communities

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

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

Policy 1.1.3.1 provides "settlement areas shall be the focus of growth and their vitality and regeneration shall be promoted". "Settlement areas" are defined as "urban

areas…within municipalities that are (a) built up areas where development is concentrated and which have a mix of land uses". The Board finds that the subject property is located within a settlement area.

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

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

Policy 2.6 – Cultural Heritage and Archaeology:

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

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

"Significant" means "in regard to cultural heritage and archaeology, resources that are valued for the important contribution they make to our understanding of the history of a place, an event, or a people. Criteria for determining significance of resources…are recommended by the Province, but municipal approaches that achieve or exceed the same objectives may also be used".

All parties acknowledge that the Port Dalhousie Heritage Conservation District, as a district designated under the *Ontario Heritage Act* constitutes a cultural heritage landscape for the purposes of the PPS. Further, all parties agree that the Heritage District contains significant built heritage resources.

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

The Board notes that in *Birchgrove* the Board was dealing with individual structures, designated under Part IV of the *Ontario Heritage Act*, not a Part V designated heritage district. However, the Board finds that the logic in that decision is applicable to the consideration of proposed alterations in a heritage district. As with a heritage structure, not every element of a heritage district is of equal significance. The significant attributes of the heritage district should be identified in the district plan or in the case at hand, the District Guidelines. The PPS in defining "significant" necessarily calls for judgment to be used in determining significance. In calling for the conservation of "significant built heritage resources" and "significant cultural heritage landscapes", the PPS implicitly acknowledges that there may be built heritage resources and cultural heritage landscapes which are not significant and which do not warrant conservation. Such an interpretation allows for the balancing of a variety of provincial interests as mandated by the PPS.

Counsel for PROUD argues based on the evidence of Mr. Morgan that the Port Dalhousie Heritage District is a “significant cultural heritage landscape” in its entirety for the purposes of Policy 2.6.1. Therefore the entire district must be conserved. The only question to be asked is whether the PDVC proposal does “conserve” the District as required by the PPS.

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

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

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

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

<u>The Growth Plan for the Greater Golden Horseshoe:</u>

The Growth Plan came into effect on July 31, 2006. Ontario Regulation 311/06 deals with transitional matters for the purposes of the Growth Plan. Section 2 sets out deemed day of commencement. If one is dealing with an application for an OPA or zoning by-law amendment, the deemed day of commencement for the purposes of conformity with the Growth Plan is the date of the application. If one is dealing with an

adopted OPA and an enacted by-law, the deemed day of commencement is the day the by-laws were enacted. In the case at hand the by-laws were enacted after the Growth Plan came into effect. Therefore the Board's decision on all matters before it must conform with the Growth Plan.

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

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

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

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

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

It was the position of PROUD that the PDVC proposal is not subject to the Growth Plan as the applications were filed before the adoption of the Growth Plan.

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

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

The Niagara Region Policy Plan:

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

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

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

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

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

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

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

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

Counsel for PROUD submitted that nowhere in the Region’s strategic objectives is economic revitalization given “priority status”. In its report to Regional Council, Regional planning staff acknowledged that revitalization or growth is not determinative. Staff acknowledged that balance is necessary: “while economic development is an important part of the framework, the purpose is to guide change by providing a balance that will preserve and enhance what is special about Niagara while accommodating growth and new development” (Exhibit # 5f, TAB 17).

It was the opinion of Regional staff that the proper balance was not achieved by the PDVC proposal and that alternatives should be considered. Regional Council did not agree; it approved OPA 31 (Exhibit # 5f, TAB 18). Mr. Cambray who was responsible for the report of Regional staff was Commissioner of Planning and Development at the time the report was prepared. He has retired from the Region and he testified on behalf of PROUD at the hearing. The Region continues to support the PDVC proposal.

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

City of St. Catharines Official Plan:

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

In determining whether a development proposal conforms to the provisions of an official plan the Board must consider all relevant policies. Counsel for PDVC cited a number of cases which the Board finds instructive on this point. In *Belle Himmell Investments Ltd. v. Mississauga (City)* (1982), 13 O.M.B.R. 17 (Ont. Div. Ct.) the Court said "official plans are not statutes and should not be construed as such…in such a document there will almost inevitably be inconsistencies and uncertainties when considered in the light of a specific proposal. It is the function of the Board in the course of considering whether to approve a by-law to make sure it conforms with the Official Plan. In doing so, the Board should give the Official Plan a broad liberal interpretation with a view to furthering its policy objectives". In *Friends of Eden Mills v. Eramosa (Township)*, [1998] O.J. No. 2604 (Ont. Div. Ct.) the Court considered the above words

of *Belle Himmell* and went on to say "the policy objectives of an official plan are not restricted to heritage concerns; thus the 'broad liberal interpretation' cuts both ways…there must be a weighing and balancing of interests where there is no detailed and specific direction in the OP. The Council in dealing with the OP must not only deal with the heritage aspects contained therein but with the other non-heritage aspects; this will involve considering the guidelines which are set out very generally, not only as to heritage matters, but the non-heritage ones as well – and where there are inconsistencies and uncertainties to harmonize and rationalize in a reasonable way" (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) adequate and appropriately located parking facilities".

This policy goes on to say "it is also an objective of this Plan to increase tourism opportunities throughout the City to provide greater economic and social benefit to the community".

Policy 4.2.5.1, Design Criteria, provides “in order to conserve and strengthen the special identity and character of the historic commercial areas (including) Port Dalhousie, the zoning by-laws are to reflect the built form in those areas to ensure new construction within these areas will be compatible to the existing built environment in terms of height, bulk and building materials”. Proposals for commercial development are to be evaluated in terms of factors like adequacy of site size and shape; availability of municipal services; adequacy of public transit; adequacy of parking; compatibility; and the rehabilitation and preservation of existing buildings of historical or architectural significance.

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

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

Policy 7.9.2 speaks specifically to areas where “the streetscape pattern is relatively weak or there is no established pattern”. Design is to create “a more attractive urban form”. Certain criteria should be followed: overall massing should be broken up and if it cannot be, methods to achieve design articulation should be used. These include using materials, textures and colours which do not contrast with the surrounding landscape; avoiding single continuous rooflines; and breaking up continuous expanses of façade walls visually and physically.

Policy 7.10, Heritage Conservation is especially germane to development in the Port Dalhousie Heritage Conservation District. Section 7.10.1 provides that "cultural heritage resources" include buildings of historical, architectural, and contextual value and "human-made…urban districts or landscapes of historic and scenic interest". Policy 7.10.4 allows for the designation under the *Ontario Heritage Act* of heritage conservation districts. Policy 7.10.6 provides "within a designated district it is the intent of Council to conserve and enhance the unique heritage character of the area". In reviewing proposals for the construction, demolition or removal of buildings and structures or the alteration of existing buildings, Policy 7.10.7 provide "the City will be guided by the applicable heritage conservation district plan and the following general principles:

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

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

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

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

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

Policy 16 of the OP sets out the Neighbourhood Plan. It provides that the purpose of the Neighbourhood Plan is "to provide a framework for the development and redevelopment of the Port Dalhousie Neighbourhood". Obviously, the Board finds,

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

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

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

Policy 16.4 calls for “regional retail uses” to be concentrated in the Commercial Core. Policy 16.23 follows on this, directing commercial uses which serve a “city-wide function” for the Commercial Core. It is to be regarded as a “primarily commercial core characterized by retail and service commercial uses located at grade with a minimum setback from the lot line, and with a limited number of apartments located above (Policy 16.25). Residential uses are permitted in the commercial core “provided there is a commercial component and that such residential uses are located above or behind commercial establishments” (Policy 16.28.1). Policy 16.29 requires the provision of off-street parking for new development in the Commercial Core.

The significance of the historic character of the Commercial Core is highlighted in Policy 16.30: “in order to conserve and strengthen the special identity and character of the Commercial Core, encouragement shall be given to the protection and enhancement of those properties, buildings and features of architectural, historic and/or landscape value which are located in the Commercial Core. Any new construction, particularly infill development, within the Commercial Core should be sympathetic to the existing built environment in terms of height, mass, colour and materials”.

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

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

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

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

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

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

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

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

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

(b) The features within a designated district which give the area its distinctive character and, as such, contribute to the area’s merit as a Heritage Conservation District shall be

> conserved. These features may include the placement and relationship of buildings; the scale and character of the townscape and building groups; the architectural details of the buildings; the height and density of buildings; vistas, views and streetscapes. These features should be identified for Port Dalhousie and included in the Heritage Conservation District Plan.

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

> Notwithstanding that a Heritage Conservation District Plan shall be undertaken to help assure the sensitive development of Old Port Dalhousie, the municipality shall support the revitalization of this historically significant area by, *inter alia*,:
>
> (d) Encouraging the development of the commercial core for regional (tourism) oriented facilities in order to enhance the economic vitality of this historic area.

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

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

The revitalization or economic viability imperative is focused, through this policy, on the Commercial Core. Therefore, for development proposals for lands situated in the

Commercial Core of Port Dalhousie, this Board must do as it was directed in *Eden Mills*: it must "weigh and balance interests". Further, "where there are inconsistencies and uncertainties", the Board must "harmonize and rationalize (them) in a reasonable way".

Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change:

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

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

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

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

A conservation intent is set out in the District Plan:

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

considered heritage buildings and their defining features and/or materials are protected as part of a process of change and development.

Conservation priorities are also set out:

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

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

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

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

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

The Board finds that there is nothing in the District Study or Guidelines which indicates that the one-storey, mid-twentieth century Erskine's Pharmacy and Hydro Building form part of the "heritage fabric" of the Commercial Core. That fabric is explicitly described as being comprised of nineteenth and early twentieth century two- and three-storey terrace blocks and individual hotels, of red and buff brick in the Italianate style. This type of building forms the streetscape. The "open space" behind

the Lock and Lakeport frontages is not included in any description of the heritage or cultural fabric.

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

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

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

The Board must consider the relevant text of the District Guidelines (Exhibit # 5d, TAB 5). The purpose of the Guidelines is clearly set out: they are "to provide guidance in the care and protection of the heritage character of the (District)". The text provides "it is worth emphasizing that these are 'guidelines'. They are intended to provide an objective minimum level of appropriateness for physical change over the coming years. The guidelines are not prescriptive in determining specific design solutions for each

building or lot. Importantly, the guidelines steer away from matters of 'architectural taste' which is often subjective in nature".

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

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

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

Mr. Cuming gave what the Board finds to be interesting evidence on why this sixth conservation priority was included in the District Guidelines while it was not in the District Study. He testified that it was included as it was necessary to spell out the test of "no adverse impact". There was to be no adverse impact on heritage attributes as well as heritage buildings. The Board finds that a straightforward reading of the sixth priority demonstrates that it does more than set out a test for "no adverse impact". It

explicitly states that new development and construction are encouraged so long as there is no adverse impact on heritage attributes and the development will positively contribute to the character of the area. This demonstrates why the Board prefers to rely on the words of the Guidelines in seeking guidance on how to consider the applications, rather than on the testimony of the "author" of the Guidelines. The District Guidelines include, as a conservation priority, encouragement of new development and construction in appropriate circumstances. The Board does not accept Mr. Cuming's evidence on why the sixth guideline was added to the District Guidelines.

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

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

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

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

The Guidelines acknowledge in section 4.3.1 that commercial structures in heritage districts "present different conservation issues" and therefore certain guidelines directed at commercial structures are set out in section 4.3.2. This section focuses on

Lock Street and Lakeport Road, with no mention made of Main Street or the street with no name. The Board can only take this to mean that the significant heritage resources of the Commercial Core are located primarily on the referenced streets. In fact, the Board notes, the only heritage building located on those other two streets is the Jail House.

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

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

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

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

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

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

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

6. restoring a storefront to an earlier appearance using existing materials, building archaeology and archival photographs.

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

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

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

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

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

2. Signage should be sympathetic in size, shape, materials, placement and lighting to traditional motifs;

3. In multi-storey buildings contrasts between street level…and upper second and third floor facades should be emphasized through design treatments such as fenestration, floor to floor height and material selection;

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

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

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

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

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

The fact that the Guidelines include this particular restricted characterization of the District, the recommendation that the height permission be reduced to 9m, and such

a limited discussion of the Commercial Core causes the Board to conclude that the primary focus of the Guidelines is the residential area. This is not necessarily in keeping with the policy imperative of the Port Dalhousie Neighbourhood Plan which does speak to the crucial role the Commercial Core plays in Neighbourhood.

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

**Board's Findings:**

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

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

The Board heard evidence from witnesses who both support and oppose the PDVC proposal about the current condition of the Commercial Core. The Board accepts the evidence that the Core has become a centre for the consumption of alcohol, especially between Victoria Day and Labour Day. On the subject site alone, there are over 2700 licensed bar seats. The Board heard evidence that the "bar scene" brings

with it attendant problems of noise, public drunkenness, parking conflicts and destruction of private property.

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

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

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

Mr. Chapman also noted “the economic climate in Port Dalhousie is volatile because the vast majority of businesses are not sustainable over the long term. There is not a reliable customer base to provide stability to businesses from one year to the next. Without an improvement in the critical mass of commercial space, the area is expected to continue to suffer economically”. These concerns of Mr. Chapman were echoed by the Chamber of Commerce, the BIA, and a number of participants who support the proposal.

Mr. Chapman opined that “continuing economic decline will inevitably threaten the existing heritage resources. Without a viable economic environment, the objectives of the Comprehensive Development Strategy regarding community renewal will be difficult, if not impossible to achieve”.

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

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

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

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

The Board must note that these are not the words of the proponent or a consultant for the proponent; these are the words of the City’s Director of Planning Services.

It was the position of PROUD and the City, in the hearing, that PDVC had not adduced evidence about the economic viability of the revitalization proposal and "the entirety of PDVC's evidence with respect to the potential economic stimulus this proposal may provide is based on conjecture". Counsel for PROUD cross-examined a number of witnesses for PDVC on whether they had reviewed pro forma financial statements to satisfy themselves on the economic viability of the project, particularly the theatre component. PROUD called Janis Barlow, a theatre consultant, who testified about what she believes is the lack of viability of the theatre.

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

In the face of PROUD's argument that the economic feasibility of the theatre must be demonstrated, Counsel for PDVC submitted that there is no onus on his client to demonstrate economic feasibility and further "it is inappropriate for an approval authority to concern itself with the economic feasibility of a private project, as the subject matter is beyond its jurisdiction and area of expertise". Counsel cited *Jannock Properties Limited v. The City of Mississauga*, O.M.B.D. No. 0363 in which the Board was asked to consider pro forma financial statements. The Board noted "that it is unusual for either a municipality or this Board to receive evidence regarding the financial viability of a development proposal…Decisions regarding the timing and implementation of development proposals are traditionally left in the hands of private landowners, acting in

the free market". The Board went on to say "the issue of the economic viability of developing this site solely for employment uses…is not a valid basis upon which to determine the planning issue before the Board…The Board makes decisions about what type of use should be planned for over the long term, in accordance with the principles of good planning which reflect the public interest".

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

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

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

However the matter does not end here; the Board must determine whether the PDVC proposal correctly balances the above goal of growth and revitalization with the goal of conserving significant built heritage resources and significant cultural heritage landscapes.

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

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

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

As a corollary of this finding the Board is unable at the same time to accept PROUD’s submission that “in describing the character of the Commercial Core, the District Study opted to mention a few examples in an effort to capture the ‘essence’ of what constitutes the commercial core”. Either the Study and the Guidelines contain the content required by section 41.1(5) or they “capture an essence”; the Board finds that they cannot do both. If the Board accepted this submission, the significant heritage attributes would not be as set out in the Study and the Guidelines; they would be a

moving target. Counsel for PROUD attempted to buttress PROUD's position on this point by using an example cited by Mr. Cuming during testimony. He pointed out that the McGrath Hotel was not mentioned by name in the Study or Guidelines, but it is significant to the character of the Commercial Core. The Board finds this evidence and any argument based on it to be disingenuous.

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

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

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

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

Of these nine alleged heritage attributes, only Hogan's Alley is mentioned in the Study or Guidelines. It is part of a locational reference: the Commercial Core area is centred on Lakeport Road, Lock Street and Hogan's Alley.

The Board finds that the significant heritage attributes of both the Port Dalhousie Conservation District, in general, and the Commercial Core, in particular are as set out in the District Guidelines. PROUD and the City argued that PDVC attempted to substitute the analysis of Mr. Higgins, its expert in architectural conservation, of the District's heritage attributes, for that of the Guidelines. The Board has thoroughly reviewed the work of Mr. Higgins and all the heritage experts who testified in the hearing and cannot conclude that PDVC attempted any such substitution. Rather, the Board finds that Mr. Higgins prepared a conservation plan as directed by the PPS. He comprehensively reviewed in his Heritage Assessment Report, February 2006 (Exhibit # 13, TAB 5) the significant heritage attributes of the Commercial Core and the impact of the proposed development on these attributes.

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

Mr. Higgins' work on the PDVC proposal and his opinions do not stand in isolation. The City retained Michael McClelland to "peer review the urban design and architectural elements" associated with PDVC's proposal. Mr. McClelland is an extremely well qualified heritage architect with expertise in heritage planning and urban design. He reviewed Mr. Higgins' work and concluded that the Higgins report "draws further connections between the existing form of the commercial core and specific zones in order to better understand the existing relationships between these elements".

What then are the significant heritage attributes of Port Dalhousie, particularly its Commercial Core which must be conserved? These attributes are as set out in Part 2 of the Guidelines, District Character, specifically "The Commercial Core". They include the Lock and Lakeport streetscapes of nineteenth and early twentieth century two- and three-storey terrace blocks and individual hotels. The Austin House is vital to this streetscape, the Board finds. The Port Dalhousie Jail, perhaps the oldest jail in Ontario, is a significant built heritage resource.

Main Street in the Commercial Core and the unnamed road are not mentioned in the District Study or Guidelines. The evidence was that these streets have historically been the backside of the Commercial Core, providing a service area. On the evidence, they do not have a distinguishable streetscape. The open area bounded by these

streets contains the Rum Jungle and associated drinking areas. This area is not mentioned in the Study or Guidelines and even some witnesses for PROUD agreed that the Rum Jungle has no heritage value. To suggest that it does, strains credulity.

PROUD adduced evidence that Erskine's Pharmacy and the Hydro Building are of heritage significance despite the fact as both were constructed after 1950, neither is, by definition a "heritage building" for the purposes of the Guidelines. These buildings are not mentioned in the Guidelines; they are not two- or three-storey nineteenth or early twentieth century terrace blocks or hotels. The Board cannot conclude that they constitute significant heritage resources.

Some witnesses for PROUD suggested that the view from the Lake and the Harbour of the rear of Lock Street is a significant heritage attribute of the Commercial Core. Again, no mention is made in the Study or Guidelines of this view. The Board cannot conclude that the view is a significant heritage attribute.

The Board heard evidence from witnesses for the City and PROUD that Hogan's Alley, as it exists today, is a significant heritage attribute. As noted above, it is mentioned in the Guidelines only as a geographical reference. PROUD's witnesses asserted that Hogan's Alley is significant for its views and direct access to Lakeside Park and the beach. Again, no such significance is attributed to Hogan's Alley by the Study or Guidelines. The Board cannot conclude that Hogan's Alley, a service lane for the Commercial Core's businesses is a significant heritage attribute.

The Board heard considerable evidence about Port Mansion, located where the Union House and McGrath Hotel were originally situated. The Union House is specifically mentioned in the Guidelines' description of the Commercial Core, and both buildings were two or three storey nineteenth or early twentieth century hotels. All witnesses acknowledged that the Port Mansion, as it exists today, is the result of an extensive renovation undertaken in the 1980's. Mr. Higgins, the only witness who has systematically reviewed the interior and exterior renovations, testified that the two original buildings were entirely "gutted" in that renovation. Roof lines were changed, windows were replaced, and, most importantly, the Board finds, a nineteenth century façade was imported from Pennsylvania and iron railings were ordered from an American catalogue. It was the opinion of both Mr. Higgins and Mr. McClelland that these additions have no connection to the heritage of Port Dalhousie.

Mr. Higgins testified that the only elements of the original hotels which remain are the foundation footprint, an elevation difference between the two structures, sections of the south wall and some fragments of a party wall. He has extensively examined the fabric of the building and was of the opinion that due to severe disturbance during the 1980 renovation, and the use of inappropriate materials, the front façade is “doomed to structural failure and is nearly impossible to repair”. Mr. McClelland agreed that there are inherent problems in the building’s façade.

Witnesses for the City and PROUD, Messrs. Blozowski and Morgan, planners, and Mr. Goldsmith, a heritage architect, testified that they have observed only 12 to 15 bricks on the façade which show evidence of failure. They, on the evidence, had not been on the roof of the building, nor had they closely inspected the building. The Board must therefore prefer the evidence of Mr. Higgins on the condition of Port Mansion. He is an acknowledged expert on heritage masonry and he has actually inspected the building. The Board accepts his evidence that the Port Mansion is, for all intents and purposes, a 1980’s building with a failing façade and a façade which replicates nothing that is of heritage significance in Ontario.

Certain PROUD witnesses took the position that since the renovation in the 1980’s, Port Mansion has gained “iconic” status in Port Dalhousie, rendering it of heritage significance. If a 1980’s renovation with its imported elements is of such iconic status in the Heritage District, the Board can only ask why it was not mentioned in the District Study or Guidelines. Those documents, the Board was repeatedly told, represent a community consensus on what is of heritage significance in Port Dalhousie. The Board can only conclude that Port Mansion, like the Hydro Building, Erskine’s Pharmacy and the backside of Lock and Lakeport were not considered by community consensus to be significant heritage attributes until the PDVC proposal appeared.

Outside the Commercial Core, the low-rise character of the residential area of Port Dalhousie is clearly a significant heritage attribute for the entire District. The impact of the PDVC proposal on this component of the Heritage District is relevant to a determination of whether the PDVC proposal conserves the heritage attributes of the District.

Michael Kirkland, the architect of the PDVC proposal, testified in detail about PDVC’s development proposal, its constituent parts and his opinion on the appropriateness of the proposal for this specific site in Port Dalhousie. Mr. Kirkland

referred extensively to Exhibit # 13, the Application to Amend the City of St. Catharines Official Plan and Zoning By-law; Exhibit # 7, the Site Plan and Heritage Applications; Exhibit # 15, the Graphic Evidence Book; Exhibit # 16, the Design Primer; Exhibit # 17, the Visual Impact Study; a scale model of Port Dalhousie, including the proposal; and a myriad of other visual exhibits. He presented the Board with alternatives for the proposed development, one which includes publicly owned land, Hogan's Alley and a laneway at the northerly end of the site, and one which he described as a "mild variation" which does not require the use of public land. His preference is the proposal which includes the public land as it allows for a "comprehensive revitalization of the block"; it facilitates delivery and garbage access; and it provides good access through a publicly accessible court to Lakeside Park.

Mr. Kirkland's evidence on the proposal was exhaustive and it is well summarized in his Issues List Responses contained in his Witness Statement, Exhibit # 8, TAB 2. In his opinion the proposal is compatible with its context as the "scale of the heritage streets (Lock and Lakeport) is observed and replicated with infill buildings on those frontages". Colours and materials used complement the existing buildings (particularly the Austin House); the higher residential component is well back from the heritage streets, located on Main St. and the street with no name; the residential building "provides transitional built form, material and colour to facilitate sympathetic transition between lower and higher elements"; and the street wall buildings are built to the property line, as are the existing buildings.

Mr. Kirkland considered impact on the neighbourhood immediately adjacent to the development, and at a distance. In his opinion the revitalization of the Commercial Core will have a major positive impact. The visual impact of the development, especially the residential tower is "virtually nil" from the heritage streets in the core, due to the positioning of the buildings. The Visual Impact Study demonstrates, in his opinion, that there is no "ill effect" from seeing the building. Finally, in his opinion, the visibility of the project and its tower is positive, as it marks the location of Port Dalhousie and it signals revitalization.

In his opinion the proposal results in no negative impact on the heritage attributes of Port Dalhousie as the significant heritage attributes are conserved.

The open space afforded by the project in Hogan's Court, is in Mr. Kirkland's opinion a major benefit for Port Dalhousie. It opens a commercial area; it provides an effective path to Lakeside Park; and it can facilitate year-round animation.

Mr. Higgins was retained by PDVC to "assist Michael Kirkland in ensuring that heritage-related issues identified in our 2005 Heritage Assessment Report (on the Diamond Scheme) were properly incorporated into the new scheme". He subsequently developed the detailed Conservation Strategy for the heritage resources on the site, specifically for the site plan and heritage permit applications. As noted above, Mr. Higgins work was extensive and informed by a high degree of expertise. His evidence on the relevant issues before the Board is summarized in his Witness Statement, Exhibit # 8, TAB 7.

Philip Goldsmith, a prominent, well-qualified heritage architect, testified on behalf of PROUD, concluding that PDVC's proposal "does not have appropriate regard for the word or intent of the Heritage Conservation District Plan and guidelines". The proposal, in his opinion, does have an adverse impact on both individual heritage buildings and the cultural heritage attributes of Port Dalhousie. In particular, he is of the opinion that the new building façade beside the Austin House "diminishes the stand alone individuality of the historic hotel"; the replication of the McGrath-Union House "could potentially remove character of use and adaption over time"; the new theatre façade "is a cinematic modern work out of place in an historic setting"; and the tower "looms literally over the delicate but historically significant jail house". Mr. Goldsmith prepared on behalf of PROUD a Heritage Evaluation of the Proposal (Exhibit # 234).

Mr. Goldsmith specifically addressed the visual impact of the proposed development through a massing study, Exhibit # 237. The Board finds that this study undoubtedly informs all of his opinions about the PDVC proposal. Under cross-examination Mr. Goldsmith acknowledged that his massing model focuses exclusively on massing; it provides no details of the proposed buildings, the surrounding buildings or the general foreground and background. He acknowledged that because his models were just that, massing models, Mr. Kirkland's models and images were more representative of what a person would actually see. He agreed that his opinion on "compatibility" or "lack of fit" of the proposal was informed strictly by the massing issue, and he further agreed that compatibility cannot simply be determined by considering mass.

The Board has reviewed the evidence and work of all the qualified heritage experts on the vital issue of heritage conservation. Their evidence is informed by considerable expertise, exhaustive work and a good deal of passion, none of which this Board can fairly summarize in this decision. The Board finds that the fairest, most balanced and most persuasive evidence on the heritage issue was given by Michael McClelland. Mr. McClelland's work was not done on behalf of a proponent of development, nor on behalf of an opponent focused on heritage conservation. Rather his work was done on behalf of the City, the public authority charged with having regard to the adopted policy regime and the public interest.

Mr. McClelland's work on the Diamond Scheme (Exhibit # 5e, TAB 2) demonstrates that he knows the difference between a development proposal which includes a proposed tower which "would in effect dominate this heritage district and compromise the protected character of both the commercial and residential areas of the Port Dalhousie Neighbourhood" (Exhibit # 5e, TAB 2, p.44) and a proposal which "can be seen as furthering the objectives and priorities of the Port Dalhousie Conservation District Guidelines for Conservation and Change" (Exhibit # 5e, TAB 5, p.183).

The Board's reliance on the work of Mr. McClelland is buttressed by the reliance Mr. Chapman, and by extension, City Council placed on his work. The Board finds that the evidence of Messrs. Chapman and McClelland, witnesses working in the public interest and not for a proponent or opponent is convincing in this matter. In that regard, the Board finds that after reviewing in detail almost 300 exhibits and days of testimony, the most persuasive evidence is found in Exhibit # 5e, TAB 5, Mr. McClelland's Peer Review of the Revised Proposal and Exhibit # 5e, TAB 6, City Planning Staff Report on the Revised Proposal, and the testimony of Messrs. McClelland and Chapman.

The Board finds that the work of Messrs. McClelland and Chapman provided a firm basis upon which City Council made its decision with respect to OPA 31 and the zoning by-law amendment in June 2006. Section 2.1 of the *Planning Act* directs this Board to have regard to the decision of municipal council and any supporting information and material on which it relied in making its decision on a planning matter. As the Board found above, Council's decision was made following a thorough, fair and open public process in which the voices of all interested were heard, and after Council had the benefit of the comprehensive work of Messrs Chapman and McClelland.

In his peer review Mr. McClelland considered Mr. Kirkland's design and his supporting work including a visual impact assessment and shadow studies. As requested by the City, he had regard to the District Guidelines and the Region's Model Urban Design Guidelines (2005) and he provided an opinion on the "fit" or compatibility of the proposal in the context of the Port Dalhousie Heritage Conservation District. He specifically considered the proposed design for Hogan's Court in terms of "the integration of the project with Lock Street, Lakeport Road, Main Street and Lakeside Park". At the request of the City, he looked ahead to the site plan and heritage permit applications to consider how design and architectural elements could be secured. Finally, he considered the Heritage Assessment Report of Mr. Higgins to determine "the appropriateness of the criteria applied and the evaluation completed".

The Board finds that in doing his work Mr. McClelland considered all matters relevant to his brief, especially the District Guidelines. During the course of the hearing the Board heard considerable evidence about international charters and guidelines; the Board finds that Mr. McClelland's opinion was appropriately informed by such documents.

In considering the visual impact of the proposed development on the Heritage District Mr. McClelland opined that, with respect to views presented within the Commercial Core, "the new development is visible from the adjacent historic streetscapes of Lock and Lakeport but through the use of stepped setbacks and a balance of materials, it adds interest to the existing streetscapes without imposing a conflicting scale on the established form".

From the residential neighbourhood, up Main Street, Mr. McClelland was satisfied "that the proposed development will have no visual impact on most of the heritage district's residential area…This is important, as it is clear that the low built form character of the residential area of Port Dalhousie should be carefully guarded".

Mr. McClelland considered the District Guidelines and opined that they "recognize the nineteenth and early twentieth century architecture as a defining feature of the commercial core…" He looked in detail at the design considerations for new non-residential construction in the Guidelines and judged the proposed development. He opined that the podium base of the proposal around the perimeter of the development "establishes a positive relationship with the existing heritage fabric of the streetscapes along Lock and Lakeport…the use of decorative awnings and banners add visual

interest to the street wall…While the existing Guidelines assume 3 storey facades, it is our opinion that the proposed development's use of additional storeys at the base present an acceptable interpretation of these Guidelines. The setbacks along Lock Street and Lakeport Road create sensitive connections between the new construction and incorporate heritage buildings…the new development successfully respects the established scale of Lock and Lakeport and allows the historic three-storey façade pattern to remain as the defining feature of the commercial streetscape".

Mr. McClelland considers that the proposed development "completes" the existing commercial block and he is of the opinion that "the proposed development is successful in contributing appropriate infill design, maintaining the prominence of the historic street wall of buildings along Lock Street and Lakeport Road, and in promoting the core's vitality by providing the opportunity for appropriate retail, restaurant and entertainment uses".

Mr. McClelland noted that the "primary focus" of the District Guidelines is the residential component of the Heritage Conservation District, a proposition the Board finds to be correct. As a result, the Guidelines focus on building height in the residential area, ignoring the fact that buildings in the Commercial Core exceed the proposed building height of 9m. Mr. McClelland concluded "that a clear vision for appropriate heights in the commercial core is lacking in the current guidelines" and the Guidelines "while well-intended, (do) not provide a considered response to how change might manifest itself in the commercial area nor how the commercial core might grow to maintain, preserve and improve its economic viability". As an expert in heritage conservation matters, Mr. McClelland testified that such economic viability is a necessary precondition to conserving heritage resources successfully.

Mr. McClelland specifically considered the three, four, six and seventeen storey components of the proposal and opined that the "work of the Kirkland Partnership utilizes the progressive setbacks, an angular plane analysis and a balance of material, which in our opinion are in keeping with the guidelines of the Region's Model Urban Design Guidelines…and can be seen as furthering the objectives and priorities of the Port Dalhousie Conservation District Guidelines for Conservation and Change".

Mr. McClelland faced intense cross-examination in this hearing, dealing with the suggestion that his retainer by the City limited him in considering the impact of the proposed development would have on the heritage attributes of Port Dalhousie. The

Board finds that Mr. McClelland's nuanced, well-reasoned opinions were unshaken on cross-examination.

In October 2006 Mr. McClelland had an opportunity to respond to the Heritage Evaluation prepared by Messrs. Morgan and Goldsmith (Exhibit # 5f, TAB 14). He remained firm in his opinions, after having reviewed their work. In response to the assertion that the proposal does not comply with the PPS he said "it is our opinion that the Revitalization plan exactly addresses the conservation of heritage resources. The heritage values, attributes and integrity are retained through the careful protection, use and management of those resources". He went on to opine "the Revitalization proposes the opportunity for substantial improvements to elements within the site, such as the reuse of the Jail House and the restoration of Lakeport Hotel, a significant heritage building in a current state of disrepair. It is our opinion that such improvements will enhance public appreciation and recognition of the heritage values of the commercial core".

On the issue of a 9m height limit in the Commercial Core, Mr. McClelland was of the opinion that while this limit is appropriate for the residential area, "it is insufficient to accommodate or encourage new construction in the commercial core or to maintain the viability of the commercial area".

To the suggestion that the proposal does not comply with the City's OP heritage policies, Mr. McClelland responded "it is our understanding that the commercial character of the core is a heritage value and that sustainability of this use within the core is a more crucial characteristic than height".

To the suggestion that the proposal "is not supported by a strategy for dealing with the heritage impacts of the proposal", Mr. McClelland again noted that "a heritage easement agreement would be essential to the approval of the revitalization and that the easement would be required to include sufficient detail to fully outline all aspects of heritage conservation issues to the satisfaction of the municipality".

The Board finds that Mr. McClelland's work was one part of the exemplary foundation upon which City Council based its decision on June 2006. It performs the same function for this Board. Mr. McClelland's work was nuanced and even-handed, something vital to the cause of heritage conservation in this Province.

The second part of the strong foundation upon which City Council based its decision was the work of Mr. Chapman as set out in his reports to Council of May 15 and June 26, 2006.

As noted above, the May 15 report reviews that proposed development and the policy regime which must inform a consideration of the proposal. The report includes every possible appendix Council might want to consider in reaching its decision. The complexity of the project and the myriad of issues to which it gave rise were set out in a coherent manner.

With respect to the PPS, Mr. Chapman reviewed not just the heritage conservation policy, but also policies promoting sustainable development. In his opinion the proposal complies with the PPS.

He set out for Council relevant Regional policies, including policy 5.5 which provides that certain matters, like this development proposal fall within the mandate of the City.

As the individual with arguably the most experience working with the City's OP, Mr. Chapman set out for Council the policies relevant to the development proposal. He set the context for considering the proposal, noting "the Official Plan recognizes that the more intensive use of land and buildings is inevitable in a maturing urban area". He thoroughly considered all relevant policies, including those found in the Port Dalhousie neighbourhood plan and those specifically dealing with heritage conservation.

Mr. Chapman made it clear that both the St. Catharines Heritage Committee and the Port Dalhousie Heritage District Advisory Committee were of the opinion that the proposed development would have an adverse impact on the heritage character of Port Dalhousie. The reports of these committees were included in the Appendices to his report.

The report considers the merits of the proposal in terms of five major issues: use, servicing, parking, traffic and heritage and design. Each issue is exhaustively explored.

On the issue of use, Mr. Chapman was satisfied that the proposed uses "are in keeping with the purpose and intent of the Official Plan". Servicing was not an issue from the City's perspective. The parking and traffic issues as raised by Hank Beekhuis, a party to this matter will be considered below.

On the issue of heritage and design, Mr. Chapman reviewed the OP policies which the Board has set out above. He considered these policies, bringing his expertise on planning in the City, together with the opinions Mr. McClelland provided in his peer review. Fit, compatibility, heritage, height, adverse impacts, revitalization and use were all considered. Mr. Chapman concluded that the height of the residential component "remains the key issue". In this context he said the following:

> The issue is one of impact on the area resulting from introduction of building heights that are a departure from those existing in the area. The developer has presented arguments that the 17 storey height is tempered by an acceptable urban design that is sympathetic to the heritage elements of the built form and the existing streetscape. The design serves to enhance and highlight the heritage elements of the district, albeit not in a manner that was envisioned by the District Plan. The Peer Review completed on the architectural and urban design aspects of the project accepts this argument. The project is attractive and a desirable boost to the commercial core of Port Dalhousie and the overall City. In staff's view, the design 'fits' into the heritage district and offers an opportunity to enhance the historical elements of the community and creates a sustainable environment for these elements to be retained for future generations. The future of the City does not hinge on one project but this project could be another significant step towards a City that builds on its assets to create a better future for the overall community.

The Board adopts as part of its findings these words of Mr. Chapman. As the Board said above, balancing and weighing interests and policy imperatives is crucial to its determination of appeals like those now before it. City Staff in its report and City Council in its decision to adopt OPA 31 and Zoning By-law No. 2006-228 admirably demonstrated an understanding of this need for balance. No policy document relevant to the matters before the Board gives priority to either heritage conservation or growth and economic vitality. All policy documents mandate balance. Section 41.2 of the new *Heritage Act* may make the objectives set out in a heritage conservation district plan determinative, but for the reasons set out above, the Board has found that the District Guidelines do not constitute such a plan. In any case, the Board does not find that the PDVC proposal is contrary to the stated objectives of the District Study or Guidelines. The Board found above that the Guidelines require that new development must make a positive contribution to the heritage district. The above lengthy excerpt from Mr. Chapman's report summarizes how this goal is accomplished.

The Board finds that OP policies 7.9.1 and 7.9.2, while not heritage conservation policies, address the issue of a development making an area better than it found it. These policies speak to areas with "no established streetscape" or "where the streetscape is relatively weak". The Board accepts the evidence adduced by PDVC that

a large portion of the PDVC site suffers from a weak streetscape pattern. The PDVC proposal confronts this problem and makes it better.

With respect to the built heritage resources which are recognized by the District Guidelines, the PDVC proposal would appropriately revitalize them, leaving them better than they were found. The Austin House is to be restored and incorporated into a boutique hotel (adaptively reused); the Jail House is to be restored and given a prominent role in recognizing Port Dalhousie's Heritage (adaptively reused). The streetscape on the heritage streets, Lock and Lakeport are be revitalized with identified heritage attributes highlighted. The drinking terraces, which everyone agreed pose a problem for the heritage district, are to be replaced by a publicly accessible court with associated retail and restaurant uses.

Parking and Traffic:

Hank Beekhuis put considerable time and effort into the traffic and parking issues, attending much of the hearing. It was the position of Mr. Beekhuis, supported by a number of participants, that the PDVC proposal would cause both traffic and parking problems for the Commercial Core, the adjacent residential area and Lakeside Park. As a summer tourist destination, Port Dalhousie currently faces traffic congestion, particularly on summer weekends. In addition, parking on these weekends and in the evening when the "bar scene" is active, is a problem. As there is insufficient parking to serve the Commercial Core at such times, there is spill over into the residential area.

PDVC retained BA Consulting Group Ltd. ("BA") to provide transportation consulting services with respect to the external road network adequacy and improvement requirements, site access and on-site parking adequacy. Chris Middlebro, an engineer with BA testified on behalf of PDVC at the hearing. A summary of his evidence is found in his Witness Statement, Exhibit # 8, TAB 9. It was his evidence, based on the work the firm did, that traffic volumes during busy weekend afternoons would increase with the PDVC proposal and its theatre. However, it was his opinion that traffic operations at the Lock and Main and Lock and Lakeport intersections could be maintained at acceptable levels with a separation of through and left turn lanes at Lock and Lakeport. His evidence was that traffic demands during the summer evening period would be reduced with the proposed reduction in the "bar scene".

The City retained Paradigm Transportation Solutions Limited to peer review BA's work. Phil Grubb of Paradigm testified on behalf of the City during the hearing. He agreed that the proposed development would reduce late evening bar traffic and parking. The focus of his concerns was on parking on weekend afternoons in the summer.

Mr. Chapman addressed the traffic issue in his staff report of May 2006. He noted that "on summer weekends and when special events are occurring, there is traffic congestion in and around the core area. If the project were built as proposed, there would be more traffic on summer weekends during the day…there will be increased congestion then. The amount of traffic in the summer afternoon peak will still be less than the current summer night traffic. The increased traffic will cause some disruption for the public visiting lakeside Park or the commercial core. There is no evidence that the road system cannot deal with the volume of traffic".

Having reviewed the evidence of the expert and lay witnesses, the Board finds that the PDVC proposal would increase traffic in the core and probably the adjacent residential areas on weekend afternoons during the summer. However, it would decrease the traffic during the problematic evening "bar scene" period. Mr. Chapman concluded that "while there will be increased congestion on summer afternoons…traffic by itself is not a basis for recommending denial of the application". The Board agrees; there was no expert evidence adduced that the road system could not handle the increased traffic. Lakeport Road, Lock Street and Main Street are Regional roads. The Region attended the hearing in support of the PDVC proposal; it raised no concern about the operation of its roads.

The parking issue was also addressed by Mr. Beekhuis, some participants and experts on behalf of PDVC and the City. The City's position on the parking issue, like its position on the entire PDVC proposal, changed radically between May/June of 2006 and the time of the hearing. At the hearing the City took the position that the parking standard used by the City's Planning Services Department based on the recommendation of the Transportation and Environmental Services Department ("TES"), of one parking space for four theatre seats, is inadequate. The City's position at the hearing was that the PDVC proposal would result in a parking deficiency of between 120 and 145 spaces.

Parking was considered in some depth in Mr. Chapman's May 2006 Report. TES reviewed existing parking demand on summer weekend afternoons and summer evenings and projected demand with the PDVC proposal. TES determined that the deficiency would increase by 195 spaces on a summer weekend afternoon and decrease by some 870 spaces on a summer night.

Mr. Chapman noted in his report "the problem of inadequate parking for a commercial core at a lakefront location is not unique to Port Dalhousie. Parking spreading out from the commercial core into residential areas is common in other lakefront communities". He concluded, after assessing the Port Dalhousie situation, that "it is unreasonable to provide parking to meet peak demand that will sit empty the vast majority of the time. As outlined in the TES report, a balance must be struck between maintaining public open spaces and the provision of parking".

The solution to the parking problem recommended by TES and supported by the Planning Department is set out in Mr. Chapman's report. TES recommends reconfiguring the parking in Lakeside Park, at PDVC's expense, thereby adding between 30 and 50 spaces without encroaching on the Park. Additional parking areas were identified by the City on the east side of the harbour. The Planning Department recommended that as a condition of approval to the PDVC proposal, PDVC be required to operate a water taxi between that area and the Commercial Core and be required to cover the cost of that parking off-site.

PDVC took the position that is unreasonable to build parking to accommodate peak demand if that parking will sit empty the majority of the time. PDVC adduced evidence that the underground garage on the site will contain 235 parking spaces. This adequately meets the parking requirement for both the condominium building and the hotel. PDVC is not required to provide parking for retail and restaurant uses as there is a general by-law exemption in place for these uses.

PDVC argued that the 104 parking spaces required to meet the demand of a 415 seat theatre could be located off-site. In 2005 Paradigm, the City's parking consultant completed the Port Dalhousie Parking Study (Exhibit # 110) in which a variety of potential parking sites outside the Commercial Core were identified. These include sites in the east harbour area. The use of the east harbour area for parking would involve a walk of in excess of 15 minutes to the Commercial or the use of a water taxi.

PDVC confirmed through Counsel that it would work with the City to reconfigure the parking lot in Lakeside Park to provide 35 to 50 additional spaces and would provide the balance of the required spaces off-site to the City's satisfaction.

Having reviewed the evidence, the Board finds that the operation of a successful theatre on the PDVC property will result in the exacerbation of an already problematic parking situation in Port Dalhousie on summer weekend afternoons. However, the reduction in bar seating which would result from the development would improve the parking situation in the evening.

The Board finds that the proposition that one does not provide costly on-site parking to meet intermittent demand to be generally persuasive. Off-site parking, built and operated at the expense of a proponent of a development can be used to meet such intermittent demand. However, such off-site parking must be so reasonably and conveniently located that it will be used in preference to residential streets. The parking lot in Lakeside Park is so located and the Board finds that PDVC may work with the City to provide spaces to accommodate theatre parking in that lot. However, the Board finds that a parking lot located on the eastern side of the harbour, reached via a water taxi or a walk in excess of 15 minutes is not a reasonable solution to PDVC's parking shortfall. Therefore the Board finds that however many of the 104 parking spaces required by the theatre which cannot be accommodated in a reconfigured Lakeside Park lot, must be accommodated on site. The Board understands that parking spaces in an underground garage, located so close to Lake Ontario are costly, but that cost must be born by PDVC. If it were not, the cost of overflow parking on summer weekend afternoons, would be borne by residents in the neighbourhood adjacent to the Commercial Core. That would not be fair.

Alternative Proposals:

During the course of the hearing, the Board was presented with PDVC's preferred development proposal which includes public land (Hogan's Alley and a portion of the unnamed road allowance) and an alternative proposal which would not require the use of public land. As noted above, the Board has no authority to order the City to transfer ownership of any public land to PDVC. However it finds that the public benefits associated with the development of Hogan's Court in PDVC's preferred proposal are evident and it is the preferred proposal of the Board.

**Issues List:**

The answers to the questions posed in the Issues List are found throughout the body of this decision. In summary: the PDVC proposal complies with the *Ontario Heritage Act*, the *Planning Act*, the Regional Plan, the City's OP, the Neighbourhood Plan and the District Guidelines; the proposal represents good planning and is in the public interest; and the appropriate mechanism for securing the retention, maintenance and protection of heritage features on site is the Site Plan Agreement and Heritage Easement Agreements.

**Disposition:**

The Board finds that PDVC's development proposal constitutes good planning and is in the public interest and hereby approves Official Plan Amendment No. 31 ("OPA 31"), Zoning By-law 2006-228 and PDVC's site plan and heritage permit applications, with the following modifications and amendments and subject to the following conditions:

(a) Appeals of OPA 31 – The appeals of PROUD et al. are denied. The Board approves OPA 31 with the modifications contained in Exhibit # 289 and any further modifications arising from item e(ii) below;

(b) Appeals of Zoning By-law No. 2006-228 – The appeals of PROUD et al. are denied. The Board approves Zoning By-law 2006-228, with the amendments contained in Exhibits # 120 and # 287, any further modifications arising from item e(ii) below and the following modification to section 3(ii)(e) parking: Minimum required parking for the theatre shall be provided by either or both of the following: i) on-site underground parking; ii) off-site parking in the public parking lot in Lakeside Park, satisfactory to the Municipality;

(c) Site Plan Appeal – The appeal of PDVC is allowed. The site plan drawings (Drawings A-002, A-101 to A-107 inclusive, A-B01 to A-B04 inclusive, A-301 to A-303 inclusive, A-401 to A-404 inclusive) and landscape drawings (Drawings SPL-1 to SPL-4 inclusive (Exhibit # 7, Sections 5.1 and 5.3, as modified by drawings contained in Exhibit # 5f, pp.319-349) are approved subject to any revisions and conditions of approval arising from item e(iii) below and any

revisions arising from the necessity to provide additional on-site parking in the parking garage;

(d) Heritage Permit Appeal – The appeal of PDVC is allowed. The Board directs that a heritage permit issue for the demolition, alteration and new construction proposed in PDVC's heritage permit application, subject to such demolition, alteration and new construction being undertaken in accordance with the submitted Heritage Conservation Strategy (Exhibit # 7, section 6.0) and with the Heritage Easement Agreements to be entered into between PDVC and the City pursuant to item e(iv) below, and subject to all excavation being undertaken in accordance with the requirements of the Ministry of Culture as set forth in Exhibit # 175;

(e) Order Withheld – The Final Order of the Board is withheld pending the following:

(i) The City has decided whether to close and convey the required portions of Hogan's Alley and the unnamed road allowance to PDVC;

(ii) Any technical modifications and amendments to OPA 31 and Zoning By-law 2006-228 flowing from the City's decision on whether to close and convey the required portions of Hogan's Alley and the unnamed road allowance;

(iii) The site plan requirements of the City, including those identified in Exhibit # 43, are addressed to the City's satisfaction, and incorporated into a Site plan Agreement; and

(iv) The City and PDVC have settled the terms of the Heritage Easement Agreements.

The Board may be spoken to if difficulties arise and should be updated with respect to the issuance of its Final Order within four months of the date of this decision.

This is the Order of the Board.

"Susan B. Campbell"

SUSAN B. CAMPBELL
VICE CHAIR

# Ontario Professional Planners Institute
# Independent Profession Judgment
# Standards of Practice

## Overview

On the recommendation of the Discipline Process Review Committee, OPPI's Professional Practice and Development Committee has initiated a program to improve ethics and practice, in part through the development of Standards of Practice. These Standards of Practice are intended to promote higher professional standards and a better understanding of OPPI's Professional Code of Practice.

The following Standards of Practice have been approved by Council

- Independent Professional Judgment – September 2002, Revised 06/09, Revised 06/12
- Disclosure and the Public Interest – September 2003, Revised 06/09
- Trespass – September 2003
- Conflict of Interest – April 2005, Revised 06/09, Revised 06/12

Adopted Standards of Practice should be read collectively and should be considered a guide only. They are not intended to provide legal advice. Matters referred to the Discipline Committee will remain specific to OPPI's Professional Code of Practice.

# STANDARDS OF PRACTICE: Independent Professional Judgment

## 1. Discussion

Under our Professional Code of Practice, Members must provide diligent, creative, independent, and competent performance of work in pursuit of the client's or employer's interest and are required to: "impart independent professional opinion to clients, employers, the public, and tribunals." (Section 2.1).

Professional Planners are subject to subtle pressures in the workplace. An employer or client may suggest that "in the past we have been working well together but lately we seem to be at odds and we cannot promote or continue to retain your services if we are not working together". The comment may be expressed innocently as an expectation that the planner should advocate the position of the client or employer.

Independent professional judgment or opinion must be derived free of pressure, however subtle, or one cannot maintain the independence necessary to serve both the client and the public. Professional Planners need to distinguish an opinion from an administrative responsibility to implement directions by clients or designated authorities such as Councils.

One of the main misunderstandings of the public concerns a professional planner processing an approval earlier recommended against. Another misunderstanding is how a planner may have an opinion that is different to that of the public or council opinion. We have to constantly remind the public and employers that an independent professional opinion is an objective evaluation based on all the relevant information available and the planner's professional judgment.

A professional planner cannot provide an independent professional opinion in any direct or indirect circumstance where there is a personal or financial interest including receiving consideration based on an outcome. The professional planner should consider the following before rendering an independent professional opinion:

- Do I have sufficient information and resources?
- Do I have sufficient training and experience?
- Am I professionally objective?

The goal of the profession is to promote a standard of excellence that distinguishes Registered Professional Planners in Ontario and warrants the respect of the public. The most important distinguishing character of all Registered Professional Planners in Ontario must be our commitment to the professional code of practice in the pursuit of planning excellence. The Ontario Professional Planners Institute has the responsibility, through education and discipline, to maintain the highest standards of practice and ethics. We should promote and distinguish the value of an independent professional planning opinion certified to by the use of the professional stamp. The stamp and signature represents the collective reputation of all Members of the Ontario Professional Planners Institute.

## 2. Standard of Practice for Independent Professional Judgment

The Professional Planner in applying independent professional judgment cannot be an advocate of any position other than his or her professional opinion. The role of an advocate is to "plead the cause of another". The role of the planner is to provide independent professional judgment or opinion. It is therefore important to distinguish an opinion independently from the position of the employer or client even though they may be the same.

An opinion must be balanced and fair. Most issues have benefits and disadvantages or consequences. By stating both the benefits and impacts, a planner should present an opinion in a manner which allows the reviewer to understand the basis and reasoning for the opinion. Conditions are often identified to qualify the opinion where more work is necessary to support any assumptions or to manage identified impacts.

Independent professional judgment should be the end product of an evaluation process, openly and freely entered into with the application of research techniques and professional evaluation. The professional planner must measure the gravity and necessity of the circumstances, the resources available upon which to draw and be thoughtful of the rights and privileges of others within the overall public interest.

While not exhaustive, the following principles are intended to provide a greater understanding of the meaning of the term - independent professional judgment:

### Independent

- A planner shall not perform work if there is an actual, apparent or foreseeable conflict of interest, direct or indirect, or an appearance of impropriety, without full written disclosure including related work for current or past clients and subsequent written consent by the current client or employer.
- Zealously guard against conflict of interest or its appearance.
- While the primary responsibility is to provide a service to a client or employer, there is also a responsibility to the larger society (public interest) that may at times supersede a planner's responsibility to a client or employer.
- Remain free of associations and activities that may compromise integrity and damage credibility.
- Disclose unavoidable conflicts.
- Deny favoured treatment to special interest groups (private and public).
- Resist collateral or irrelevant pressure to influence your planning opinion.
- Reject bribery in all forms. Do not accept commissions or allowances, directly or indirectly, from clients or other clients or employers in connection with planning work for which you are responsible.

- A member shall not provide personally or through an associated planning advisory firm over which the member exerts a controlling interest what purports to be "independent professional judgment", orally or in writing, regarding property in which he or she has an ownership or pecuniary interest, direct or indirect – for instance, regarding property that is owned, directly or indirectly, by the member or by his or her family. Disclosure by the member of the fact of an ownership or pecuniary interest cannot "cure" the conflict of interest adequately to render it even theoretically possible that the member could render an "independent professional judgment". (Note: this prohibition does not apply where a member's pecuniary interests are sufficiently remote or insignificant.) Members may, however, pursue and argue in favour of legal measures regarding their own property (e.g., rezoning, minor variance, etc.), but in those cases members must explicitly and clearly state that they are not speaking as a professional planner, and that their opinions cannot be construed as independent professional judgment.

- A member is not prohibited from providing an "independent professional judgment" regarding property that is owned by the member's employer or business organization, so long as the member is paid by salary only, not by way of profit-sharing, and the member does not receive a bonus dependent on the result of the decision-making process. A decision-maker may decide to place less weight on the "independent professional judgment" provided by an employee of the applicant, or may benefit from a peer review process regarding that opinion.

- A member may disagree with the independent professional judgment provided by another member who is an employee of an applicant. But absent any evidence of bonuses, profit-sharing, or other benefit, inducement or pressure, that opinion should be accepted as independent professional judgment. Members should refrain from making the blanket assertion that, by definition, professional opinions offered by members in support of their employers' applications are not based upon independent professional judgment.

## Professional

- A planner must strive to provide full, clear and accurate information on planning issues to clients, citizens and governmental decision makers.

- A planner must systematically and critically analyze ethical issues in the practice of planning.

- A planner must act in accordance with the highest standards of professional integrity.

- Maintain a high quality of service and a reputation for honesty and fairness.

- Carry out tasks with honesty, provide accurate captions and never intentionally distort the truth.

- Express an opinion only when it is based on practical experience, education, judgment and honest conviction.

- Perform services only in areas of competence obtained through experience and/or formal education.

- Critically examine and keep current with emerging knowledge and fully use evaluation and research evidence in professional practice.

- Conduct yourself honourably, responsibly, ethically, and lawfully so as to enhance the honour, reputation and usefulness of the planning profession.

- Advise clients or employers when you believe a project does not meet basic planning principles or guidelines.

- All professional planners must promote professional excellence within the profession.

In summary, all professional planners must be aware of their professional responsibilities. The code of practice is intended to require a standard of excellence and practice to maintain the privilege of Members being exclusively referred to as a Registered Professional Planner in Ontario.

## Caveats

The professional planner is reminded that in the event of conflicts or impediments to the pursuit of excellence in service and the promotion of the primacy of the public interest, the Professional Code of Practice of the Ontario Professional Planners Institute is to govern individual decision making.

In the event that the professional planner belongs to two or more professional organizations, compliance with the dictates and performance obligations of each where engaged, is expected. In acting in the capacity of a professional planner, whether in a direct or incidental capacity, the Member is obligated to respect all standards applicable in the circumstances, including any higher standard or obligation, in the case of overlaps or conflict. In all such cases, it is the duty of the professional planner to meet or exceed the requirements of the Ontario Professional Planners Institute Code of Professional Practice.

# STANDARDS OF PRACTICE: Disclosure and the Public Interest

## 1. Discussion

The Preamble to OPPI's Professional Code of Practice, referring back to the Canadian Institute of Planners Statement of Values states:

> *"CIP Members seek to balance the interests of communities with the interests of individuals, and recognize that communities include both geographic communities and communities of interest."*

Professional Code of Practice Sections 2.7 and 2.9 collectively require that the Member ensure full disclosure to a client or employer of a conflict between the values or actions of a client or employer and those of the Code and that the Member must provide their professional recommendation in situations that may adversely affect the public interest.

In addition, the first Standard of Practice regarding Independent Professional Judgment established that:

> *"While the primary responsibility is to provide a service to a client or employer, there is also a responsibility to the larger society (public interest) that may at times supersede a planner's responsibility to a client or employer."*

Section 1.0 of OPPI's Professional Code of Practice states that:

> *"Members have a primary responsibility to define and serve the interests of the public."*

Section 1.3 further provides that:

> *"[Members shall] acknowledge the inter-related nature of planning decisions and their consequences for individuals, the nature and built environment, and the broader public interest."*

Professional Code of Practice Section 2.6 requires that the Member respect the client or employer's right to confidentiality of information gathered through a professional relationship.

There is no universally accepted definition of what constitutes the public interest. The ethical principles that define it come from two sources - the general values of society and the planner's responsibility to serve the public interest. An individual Member's morals, ethics and values reflect those of their community and professional training. The Member must also be cognizant of and respect the competing interests of individuals, corporations, municipalities and provincial ministries and agencies. Conflicts arise among competing obligations, which "prima facie" may all appear to be valid. At issue here is the dilemma between

the Code's direction of disclosing and balancing public interest issues with the contractual duty to observe confidential client information.

The purpose of this Standard of Practice is to further OPPI's commitment to ensuring that the highest standards of conduct and ethics are maintained, by increasing the awareness of Members' obligation under the Code to maintain professional integrity and promote and enhance the public interest. This Standard of Practice is intended to assist Members by providing an outline of the steps that should be taken in the evaluation of cases when disclosure of confidential information may be necessary in order to protect the public interest.

Guidance as to what matters are of a dimension to affect the public interest is embedded in statutes such as the Planning Act. For example, Section 2 of the Planning Act establishes that a lengthy list of public authorities, in carrying out their responsibilities under the Act, shall have regard to identified matters of provincial interest, including:

> *" . . .*
> *(h) the orderly development of safe and healthy communities; and*
> *. . .*
> *(o) the protection of public health and safety;*
> *. . . "*

The "public interest" concept is continued throughout the Planning Act. It permeates all of the component sections (Official Plans, zoning by-laws, minor variance, site plans and subdivision/severance). It is the duty of a Member to identify any adverse impacts on the public interest and evaluate mitigative efforts that are appropriate. In some circumstances, this investigation may reveal information that is confidential or privileged. Before revealing or disclosing such information, the Member is advised to comply with the following directions.

## 2. Standard of Practice regarding Disclosure and the Public Interest

As set out in the Standard of Practice regarding Independent Professional Judgment, the professional planner should consider the following matters before rendering an independent professional opinion:

- Whether the Member has sufficient information and resources;
- Whether the Member has sufficient training and experience; and
- Whether the Member is professionally objective.

Assuming that the three conditions noted above have been met, the following section outlines the steps that a Member should pursue respecting the disclosure of information received that would normally or specifically be considered proprietary or confidential.

In providing independent professional judgment, the Member must be free to disclose confidential information that is contrary to the public interest in order to evaluate the issues and provide a professional recommendation. If a contractual commitment would be broken by such disclosure, generally such disclosure must

be required by law or provided with the consent of the client. However, a Member is not entitled to hide behind a contract or refuse or neglect to reveal information that is relevant to the protection of the public interest. Disclosure guidelines are particularly relevant in the areas of the public interest related to public health or safety and respect for the rule of law. In those circumstances, the failure to disclose could negate the Member's duty to promote the primacy of the public interest and thereby constitute the basis of an offence under the Code of Practice.

Public disclosure must take place so as to preserve the standard of excellence that distinguishes Registered Professional Planners in Ontario and warrants the respect of the public. OPPI supports and recognizes that a professional planner has a responsibility to disclose matters that may have an adverse effect on the public interest, or where there is or is likely to be a violation of the law, without fear of professional disciplinary sanction. Further, if a Member is vested with, receives, or comes across information, whether received in confidence or not, the Member may have a legal or ethical responsibility to disclose this information if it could have an adverse effect on the public interest.

Major considerations to be carefully weighed must include − but are not necessarily limited to − the following:

- What is the level of risk to the public − is there an existing or imminent threat to public health or safety?

- Has there been, or is there likely to be a violation of the law?

If the answer to either one of the above is affirmative and the public interest is therefore potentially compromised in an adverse manner, then the Member must consider the following three questions:

a) Is there a positive duty in law requiring timely disclosure, e.g. an environmental spill of contaminant?

b) What are the disclosure terms of the employment contract? Do they include a mechanism for public disclosure, as part of an assessment, mitigation, conditions or a general due diligence requirement?

c) Are timely internal appeal procedures in place that allow for a speedy resolution of the matter?

In the case of the first, a Member is expected at all times to observe the law. In the other circumstances, where disclosure is not obligatory at law and there is no release by the employer, the Member is advised to pursue the following:

Step 1: If, following consultation with the employer, public disclosure is prohibited, the professional should consult with a trusted senior colleague of their choice who holds current, full OPPI membership in strict confidence. The independent Member consulted should have, or be provided with, significant knowledge of the subject matter at hand to render an independent perspective, but not be linked to any of the parties involved.

Step 2: Should the independent OPPI Member concur with the involved planning professional's assessment of the gravity and urgency of the situation, the next step would be to contact OPPI's Executive Director to obtain further counsel and assistance on proceeding with disclosure.

The communication with OPPI, whether oral or in writing, must be generic in nature and follow the standardized format below, outlining the situation without divulging any privileged information. Contents should include:

1) A concise explanation of how and why the professional has concluded that there is an imminent threat to public health or safety or a violation of the law, including the name and contact information of the Member who concurred with this professional opinion;

2) An affirmation that the employer in question has not provided a disclosure release and has neither a mechanism for public disclosure nor a timely internal appeal procedures in place to deal with the situation so as to avoid imminent danger to the public;

3) Confirmation that the Member has notified the employer/client first and provided a reasonable period for a local resolution, satisfactory to the Member; and

4) Any other information that could assist with avoiding or minimizing a potentially adverse public reaction against the Member or the planning profession in the event of public disclosure.

Step 3: Receive and act upon the counsel and assistance provided by OPPI in conjunction with other civil or criminal independent legal advice, if any, that the Member in his/her sole discretion considers appropriate in the circumstances.

The procedure outlined above should be followed in all cases so as to ensure a consistent approach in handling situations respecting disclosure of matters affecting the public interest going to issues of public health or safety or a violation of the law. Following this process will maintain the integrity and competence of the planning profession, and is proffered as due diligence on the part of the Member.

## 3. Caveats

a) In the case of a statutory obligation to disclose or protect information, the Member is expected to obey the law.

b) Where disclosed information received is germane to public health or safety or in violation of the law, the Member should notify the employer/client and then follow the above three step procedure if there is no action to effectively remedy the concern.

c) A departure from the approach suggested above is not recommended, it could be considered unprofessional and could be grounds for disciplinary action.

d) This Standard of Practice only covers the most serious cases of violations of the public interest − other means of redress should be sought for cases not involving imminent threats to public health or safety or a violation of the law.

e) Disclosure in order to protect the public interest should be strictly on a need-to-know basis and public information may be limited to the essentials required to recommend mitigation measures to prevent threats to public health or safety.

f) Independent legal advice should be considered before proceeding with disclosure in all circumstances where confidential information is shared which is or may be the subject of privilege.

g) A Member's contract for services or retainer letter should address that in the event that the Member's professional obligations conflict with the requirements of the owner, the Member's professional responsibility shall govern.

h) This Standard of Practice is not intended to substitute for a Member's obligation in law to do or refrain from doing any act or omission that he or she is required to perform by law. Where information is protected by laws of copyright, privilege, trespass, libel, slander, privity of contract or access to freedom of information, the Member must examine the confidentiality of information received in light of this Standard of Practice.

i) In the event that the professional planner belongs to two or more professional organizations, compliance with the dictates and performance obligations of each where engaged, is expected. In acting in the capacity of a professional planner, whether in a direct or incidental capacity, the Member is obligated to respect all standards applicable in the circumstances, including any higher standard or obligation, in the case of overlaps or conflict. In all such cases, it is the duty of the professional planner to meet or exceed the requirements of the Ontario Professional Planners Institute Code of Professional Practice.

# STANDARDS OF PRACTICE - Trespass

## 1. Discussion

OPPI's Professional Code of Practice states:

> *"Members have a primary responsibility to define and serve the interests of the public."*

The purpose of this Standard of Practice is to provide advice to planners regarding the existence of restrictions on access to property. While it might appear to some Members that entering onto lands for investigatory purposes is in the public interest, it is not the case in most instances. For example, before entering into a woodlot to conduct a survey of native plant species that might be affected by an adjacent development that the Member is involved with, it is mandatory that planners respect the legal restrictions on access to property. While municipalities may pass by-laws allowing construction access from neighbouring lands and certain other professions such as surveyors have limited access rights to property, planners have no statutory rights to enter upon premises, including lands and buildings, in the conduct of undertaking their work. Members must therefore obtain the consent of the owner and or occupant before entering upon or into such premises.

OPPI's Professional Code of Practice is silent on the specific issue of trespass. However, in consideration of the requirement for Members to recognize that resources are the property of individuals or private or public entities, planners must educate themselves as to the applicable restrictions on access to property. It is important that planners familiarize themselves with the provisions of the provincial Trespass to Property Act, R.S.O., 1990, Chapter T.21, as amended (the "Act") and the liability/risk assumption consequences under the Occupier's Liability Act, R.S.O. 1990, c.0.2 (collectively, the "Acts"). Note that extracts from these two Acts cited below are from the Acts (September, 2006), which may be amended from time to time. Members should therefore consult the Acts directly when trespass issues arise. Both Acts are available on the Internet by name search.

The Trespass to Property Act provisions defining when an act of trespass has occurred are as follows:

"Trespass an offence

*2. (1) Every person who is not acting under a right or authority conferred by law and who,*

*(a) without the express permission of the occupier, the proof of which rests on the defendant,*

*(i) enters on premises when entry is prohibited under this Act, or*
*(ii) engages in an activity on premises when the activity is prohibited under this Act; or*

*(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier, is guilty of an offence and on conviction is liable to a fine of not more than $2,000. R.S.O. 1990, c. T.21, s. 2 (1)."*

Prohibition of entry is defined in the Act as follows:

*"3. (1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,*

*(a) that is a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or*

*(b) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises. R.S.O. 1990, c. T.21, s. 3 (1)."*

Premises is broadly defined as follows in the Act:

*"1 (1) 'premises' means lands and structures, or either of them, and includes,*

*(a) water,*

*(b) ships and vessels,*

*(c) trailers and portable structures designed or used for residence, business or shelter,*

*(d) trains, railway cars, vehicles and aircraft, except while in operation. ("lieux") R.S.O. 1990, c. T.21, s. 1 (1)."*

Occupier is also defined in the Act as follows:

*"1 (1) In this Act,*

*'occupier' includes,*

*(a) a person who is in physical possession of premises, or*

*(b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,*

*even if there is more than one occupier of the same premises …"*

As a general rule, Members should always seek consent from the occupier before entering on premises, whether owned by the client, or other interest.
In addition to the offence of trespass, punishable by fine and damage awards under the Act, other consequences can follow.

Under the provisions of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, in instances where the entry is prohibited under the *Trespass to Property Act* or the occupier has posted no consent notice with respect to entry and has not otherwise expressly permitted entry, a person who enters the premises is deemed to have willingly assumed all risks.

In the event that posted or written consent is not obtained, Members should in all cases consider alternatives to the act of committing trespass. For instance, raising the concern with interested parties such as the local planning department in order to facilitate agreement for access is one alternative.

This Standard of Practice should be read in conjunction with the Standard of Practice regarding Disclosure and the Public Interest to ensure that privileged information is not inadvertently disclosed.

In all cases, a written agreement for access to protected premises should be sought to protect the Member against possible prosecution for trespass and complaints of unprofessional conduct.

Public sector planners are encouraged to amend development application forms to provide that the property owner in submitting the application thereby provides consent to municipal and relevant external agency review staff to enter upon the premises during regular business hours over the time that the application is under consideration by the municipality. Specific legal advice should be obtained for the conditions of entry.

Private sector planners are encouraged to include in retainer letters an acknowledgement of the right to enter the client's premises during reasonable times over the term of the project.

All Members must seek the permission of owners and occupiers of premises not otherwise accessible to the public.

## 2. Standard of Practice for Trespass

In all cases, OPPI Members must not violate the prohibition against trespass nor assume the risks or potential liability for such action. In instances where a planner is uncertain about the legal restrictions, specific legal advice should be sought.

In addition to inviting the possibility of a complaint or legal action against themselves, Members must always be mindful that their conduct is a reflection on the profession as a whole and must ensure that their behaviour is perceived to be ethical, in accordance with Section 2.2 of OPPI's Professional Code of Practice which requires that:

*"[A Member shall] work with integrity and professionalism."*

Section 3.5 requires that: *"[A Member shall] not in professional practice, extra-professional activities or private life, engage in dishonourable or questionable conduct that may cast doubt on the Member's professional competence or*

*integrity or that may reflect adversely on the integrity of the profession."*

## 3. Caveat

A departure from the approach suggested above is not recommended. It could be considered unprofessional and could be grounds for disciplinary action.

# STANDARDS OF PRACTICE: Conflict of Interest

## 1. Discussion

Section 1.0 of OPPI's Professional Code of Practice states:

> *"Members have a primary responsibility to define and serve the interests of the public."*

Planners need to be aware that in carrying out their duties, they may become involved in situations where their duty to serve the public interest is compromised or perceived to be compromised by competing priorities and interests. A planner must always be aware of his/ her responsibilities as set out in the Standard of Practice respecting Independent Professional Judgement:

> *"While the primary responsibility is to provide a service to a client or employer, there is also a responsibility to the larger society (public interest) that may at times supersede a planner's responsibility to a client or employer."*

- A planner shall not perform work if there is an actual, apparent or foreseeable conflict of interest, direct or indirect, or an appearance of impropriety, without full written disclosure including related work for current or past clients and subsequent written consent by the current client or employer.

- Zealously guard against conflict of interest or its appearance.

There is no universally accepted definition of what constitutes a conflict of interest. The ethical principle underlying it flows from the planner's responsibility to perform his/her responsibilities freely without influence and to the best of the individual's ability commensurate with the resources available to perform the task. When a planner becomes involved in a situation where there is a conflict of interest, which has not been disclosed, the planner effectively violates his/her obligation to the larger society and may violate a number of the provisions of the Professional Code of Practice.

The purpose of this Standard of Practice is to further OPPI's commitment to ensuring that the highest standards of practice and ethics are maintained, by increasing the awareness of Members' obligation under the Code to maintain professional integrity. This Standard of Practice is intended to assist Members by providing an outline of the considerations that Members must evaluate to confirm that in undertaking certain responsibilities, no conflict of interest of a personal nature would occur that would have the effect of adversely impacting on the Members' duties.

This Standard of Practice is to be applied in all situations in which a planner may find him or herself in an actual or perceived conflict of interest. It is not intended to supplant an employer's internal policies or procedures regarding an actual or

perceived conflict of interest. Planners must familiarize themselves with and work within these additional policies within their place of employment.

The Standard of Practice regarding Independent Professional Judgement sets out a number of matters that the professional planner should consider before rendering an independent professional opinion, including consideration of whether the Member is professionally objective with respect to his/her opinion. Reference must be had to the Standard of Practice: Independent Professional Judgment.

Specific instances where a personal conflict of interest would be involved include the following scenarios:

- when the Member, a spouse/partner, family Member or business entity with which the Member is associated is in a position to potentially benefit directly or indirectly from a certain outcome of a planning process; and

- when the Member is in a situation where personal or the member's controlling business relationships may place improper influence on the outcome of a planning process.

A conflict arises when the perception or potential for the ability of the planner to exercise the required independent professional judgement is undermined. Simply recognizing a conflict does not eliminate it, and declaring it may not resolve the conflict.

Planners often assume different roles in the performance of their duties and as they function as professionals in society. In some instances, professional opinions are required to be given in oral or written form, while in instances of processing matters, they may not be required to be given. In exercising independent professional judgement, whether or not opinions are required, conflicts can arise. Planners must determine what role they are taking on in any given circumstance and assess potential conflicts accordingly. Regardless of the role, this Standard of Practice applies.

Specific Professional Code of Practice requirements, which would be violated in the above circumstances, are as follows:

Section 2.8

> *"[The Member shall] ensure full disclosure to a client or employer of a possible conflict of interest arising from the Member's private or professional activities, in a timely manner;"*

Sections 2.10 – 2.14

> *"[The Member shall] reject and not offer any financial or other inducements, including prospective employment, that could influence or affect professional opportunities or planning advice;*

*[The Member shall] not, as an employee of a public planning agency, give professional planning advice for compensation to a private client or employer within the jurisdiction of the public agency without written consent and disclosure to the agency;*

*[The Member shall] not, as a consultant to a public planning agency during the period of the contract with the agency, give professional planning advice for compensation to others within the jurisdiction of the agency without written consent and disclosure to the agency in situations where there is the possibility of a conflict of interest arising;*

*[The Member shall] not, as a salaried employee of or consultant to any public planning agency, directly or indirectly advise the agency on the granting or refusal of an application which the Member has submitted or has an interest in to the agency; however, the Member may appear to present the application;*

*[The Member shall] not accept anything of value, or the promise of anything of value, including prospective employment, from any person when it could appear that the offer is made for the purpose of influencing the Member's actions as an advisor to a public planning agency."*

## 2. General Practice

Planners have an obligation to disclose matters in which they directly or indirectly have a personal interest. Personal interest for the purpose of this Standard of Practice is defined as:

*"Any personal advantage, real or perceived, that constitutes a personal or pecuniary benefit, gain or profit that is neither nominal nor in kind and which accrues to a Member or person directly or indirectly related to the Member as a result of involvement in a work, commission, planning process or decision, excluding reasonable and related contract for service amounts with the employer to whom the services are rendered."*

Appropriate and timely disclosure must take place so as to preserve the standard of excellence that distinguishes Registered Professional Planners in Ontario and warrants the respect of the public. The nature of disclosure will be different in each circumstance. Verbal declarations are required in a public forum such as a Committee, Council, or tribunal charged with making a recommendation or decision on a matter related to the Members opinion; the declaration could be in the form of written correspondence to affected parties and/or participants in a planning process if sufficient opportunity exists to communicate effective knowledge of the personal interest. The nature of the conflict will guide the type and extent of disclosure required. It should be clear that disclosure of the specific nature of the conflict is not required if it would result in the disclosure of confidential information to which the Member is privy.

Reference should be made to the Caveats respecting disclosure set out in this Standard of Practice. Instances where a Member becomes aware that a fellow Member may have an undisclosed conflict of interest of a personal nature means it is incumbent for the Member to bring the matter to the attention of OPPI's Discipline Committee.

Immediately upon disclosure to the offending Member that there may be a real or perceived conflict of interest, the Member shall not hold himself or herself out as providing an independent professional opinion in respect of the particular matter.

The failure to disclose to all affected parties a personal interest is the basis for a complaint under the Professional Code of Practice.

OPPI is aware that despite best efforts, Members may inadvertently acquire personal interests that may interfere with their exercise of independent professional judgement. Examples of such conflicts might include property inheritance or personal relationships of or with a person in a position of decision-making authority.

Special measures may be required and available to ensure no conflict arises through devices to limit access to information, securing of documents or other isolation measures in larger organizations. Should an inadvertent conflict arise, the Member should immediately and carefully consider the following questions:

- what is the level of risk that the affected decision-making process has or could be influenced by non-disclosure of the Members' conflict of interest – could the process be so unduly influenced that there could be an adverse effect on the public?

- Has there been, or is there likely to be a violation of Code of Professional Practice, contract or applicable law?

Additionally, a Member must also consider the potential impact of non-disclosure on the profession as a whole, given the profession's unique position of trust held by the public at large and in respect of the intended fairness of the planning process.

## Step 1

Forthwith upon learning of a personal interest in the course of the Member's work, services or employment, the Member should consult with a trusted senior colleague of their choice who holds current, full OPPI membership in strict confidence. The independent Member consulted should have, or be provided with, significant knowledge of the subject matter at hand to render an independent perspective, but not be linked to any of the parties involved. This procedure is appropriate when the Member has any doubt as to whether or not he or she is in a conflict of interest circumstance.

## Step 2

Should the independent OPPI Member conclude the existence of a potential conflict of interest, the next step would be to contact OPPI's Executive Director to obtain further counsel and assistance on proceeding with disclosure.

The communication with OPPI, whether oral or in writing, must be generic in nature and follow the standardized format below, outlining the situation without divulging any privileged information. Contents should include:

1. A concise explanation of how and why the professional has concluded that there is a potential conflict of interest, including the name and contact information of the Member who concurred with this professional opinion;

2. An explanation as to why disclosure to affected parties has not occurred.

**Step 3**

Receive and act upon the counsel and assistance provided by OPPI, which may involve consultation with an Ethics counsellor, in conjunction with other civil or criminal independent legal advice, if any, that the Member in his/her sole discretion considers appropriate in the circumstances.

The procedure outlined above should be followed in all cases so as to ensure a consistent approach in handling situations respecting disclosure of personal interests that have or may affect or be influenced by a Member's actions, presence or work.

Following this process will maintain the integrity and competence of the planning profession, and is proffered as due diligence on the part of the Member.

## 3. Caveats

a) A departure from the approach suggested above is not recommended, it could be considered unprofessional and could be grounds for disciplinary action.

b) Nothing herein shall diminish the requirement of compliance with the Professional Code of Practice of the Institute.

c) Disclosure in order to protect the public interest should be strictly on a need-to-know basis and public information may be limited to the essentials required to recommend mitigation measures and ensure awareness in persons who may wish to take remedial action.

d) A Member's contract for services or retainer letter should address that in the event that the Member's professional obligations conflict with the requirements of the client, the Member's professional responsibility shall govern.

e) In the event that the professional planner belongs to two or more professional organizations, compliance with the dictates and performance obligations of each where engaged, is expected. In acting in the capacity of a professional planner, whether in a direct or incidental capacity, the Member is obligated to respect all standards applicable in the circumstances, including any higher standard or obligation, in the case of overlaps or conflict. In all such cases, it is the duty of the professional planner to meet or exceed the requirements of the Ontario Professional Planners Institute Code of Professional Practice.

Last Updated: 2012 06 01

Section 3

# Professional Responsibility

## PROFESSIONAL RESPONSIBILITY

The following additional readings in this theme, Professional Responsibility, will help you further develop your understanding of what it means to:

- Be responsible to the public, clients and employers
- Be impartial about the diversity, needs, values and aspirations of the public
- Acknowledge the interrelated nature of decisions and consequences for the natural and human environments
- Exercise independent professional judgement
- Maintain ongoing knowledge and education
- Exercise professionalism, honesty, fairness, diligence, discretion and competence
- Maintain confidence and confidentiality
- Be aware of, and to disclose, potential conflicts of interest that may arise in situations such as moonlighting (i.e. “side hustle”), volunteering, and attending meetings

### Readings

1. Five Skills for Young Planners (Plan North West 2016)
2. Dear Dilemma (community conduct and confused member)
3. 2009 OPPI decision
4. Acknowledgement of Expert’s Duty – Ontario Municipal Board
5. Ontario Planning Appeal Tribunal Decision, (12 May 2021, Case PL180211, Paragraphs 183, 184 & 185.3, CRAFT Acquisitions Corporation and PITS Development Inc., City of Toronto)
6. Steil (2018) "When Planning, Politics, Public Interest and Ethics Collide" Plan NorthWest
7. Bulholzer and Steil (2018) "Professional ethics, lobbying and post-employment conduct" Plan Canada
8. Willson (2018) "Avoiding Wrong", ch. 9 in A Guide for the Idealist.
9. Fix (2018) "Starting with Humility. Creating Meaningful Public Engagement" PlanWest
10. SFU Centre for Dialogue (2020) "Beyond Inclusion - Equity in Public Engagement"

SUBMITTED BY Brendan Salakoh MCIP, MSCPL

# Five Skills for Young Professional Planners

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

## Communication

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

## Research and Analysis

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

## Interdisciplinary Approach

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

## Problem Solving

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

## Understanding the Planning Framework

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

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

About the Author

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# Community conduct

## Dear Dilemma,

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

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

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

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

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

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

*—Community minded*

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



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

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

MHBC
PLANNING
URBAN DESIGN
& LANDSCAPE
ARCHITECTURE

### Dear Community minded,

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

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

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

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

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

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

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

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

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

Yours in the public interest,

*—Dilemma*

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

PROFESSIONAL PRACTICE

# Crossing the line

## Dear Dilemma,

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

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

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

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

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

—*Confused*

### Dear Confused,

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

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

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

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

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

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

Professionally Yours,
—*Dilemma*

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

URBAN DESIGN

# A consultant's perspective

*By Christian Huggett*

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

### Challenging urban sites

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

# Summary of Determination and Decision

In the matter of a hearing under the ***Ontario Professional Planners Institute Act*** and in the matter of a complaint regarding the conduct of a MEMBER of the Ontario Professional Planners Institute and HOLDER of the Registered Professional Planner (RPP) designation.

***This matter was addressed by a hearing of the Discipline Committee conducted according to Section 15.10.3 of By-law 1-86 as amended.***

Pursuant to Section 2.3.14 of the Professional Code of Practice, a Member of the Institute brought an alleged breach to the attention of the Discipline Committee, which requires that any Member of OPPI report to the Institute the behaviour of any other Member believed to be in breach of the Code.

Specifically, the Complainant Member was concerned that the Member breached Section 2.2.1 of the Professional Code of Practice and was not in a position to impart independent professional opinion in respect of two projects, given the Member's multiple roles as a professional planning consultant and partner in a local planning consulting firm, as an elected School Board official, as an appointed member of the Conservation Authority, and as a local developer/builder, all within the same geographic area of the Member's practice.

In one project, the allegation involved having provided planning services and opinions in support of the project while also having an ownership interest in the project. In the second project, the allegation involved having provided planning services and opinions in support of the project while also serving on two local public interest boards, where the project property was located within the jurisdictions of both public agencies, where the school board had an ownership interest (it had been declared surplus and conditionally sold to a local developer) and where one of the planning issues included a Conservation Authority interest (the extent of an ESA).

There was no dispute as to facts and details about the two projects. The Member responded and maintained that there had been full disclosure to all parties of their interests and activities, that the declarations were sufficient to continue professional work on the projects and that in any event, no planning opinions were involved in either circumstance that breached the Code.

The Discipline Committee panel, on hearing the evidence and submissions, determined that the Member was not in a position to impart independent professional opinion in respect of the two projects, given the multiple roles involved, all within the same geographic area of the Member's practice. The roles have competing interests, which affected the ability to provide independent professional opinions. The continuation of work on one of the projects ultimately led to subsequent questions about the independence of the Member's work being raised in public forums, despite having provided interest declarations. It resulted in the public planning discussion unfortunately being clouded and distracted by conflict of interest discussions, taking away from a fulsome planning and public interest discussion.

The panel determined that there have been breaches of the Code that prevented the Member from providing independent professional opinions on two projects that the public could fully rely on. The panel directed that the Member complete an ethics course and that the Member be admonished from continuing the practice of professionally working on files that involve public agencies or boards on which the Member is appointed or elected and that are within the jurisdiction of that agency, or on files that involve any personal ownership interests. For such projects, following the appropriate disclosure, an independent project manager should assume day-to-day project responsibilities.



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Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

## ACKNOWLEDGMENT OF EXPERT'S DUTY

| Case Number | Municipality |
|---|---|
| | |

1. My name is…….(*name*)
   I live at the ……..(*municipality*)
   in the……..(*county or region*)
   in the ….....…….(*province*)

2. I have been engaged by or on behalf of…....……(*name of party/parties*) to provide evidence in relation to the above-noted Board proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   a. to provide opinion evidence that is fair, objective and non-partisan;

   b. to provide opinion evidence that is related only to matters that are within my area of expertise; and

   c. to provide such additional assistance as the Board may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date…… …….
Signature

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

**ISSUE DATE:** May 12, 2021 **CASE NO(S).:** PL180211

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

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

| | |
|---|---|
| Applicant and Appellant: | CRAFT Acquisitions Corporation and P.I.T.S. Developments Inc. |
| Subject: | Request to amend the City of Toronto Official Plan, Railway Lands West and Central Secondary Plans – Neglect or Refusal of request by the City of Toronto |
| Existing Designation: | Utility Corridors and Parks on Map 18 – Land Use Plan |
| Proposed Designated: | Site Specific (To be determined) |
| Purpose: | To permit a large-scale mixed-use development with a major park and open space component over the railway corridor |
| Property Address/Description: | Railway Lands between Bathurst Street and Blue Jays Way |
| Municipality: | City of Toronto |
| Approval Authority File No.: | 17 164359 STE 20 OZ |
| OMB Case No.: | PL180211 |
| OMB File No.: | PL180211 |
| OMB Case Name: | CRAFT Acquisitions Corporation v. Toronto (City) |

**PROCEEDING COMMENCED UNDER** subsection 53(14) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

| | |
|---|---|
| Applicant and Appellant: | Canadian National Railway ("CN") and Toronto Terminals Railway ("TTR") |

| | |
|---|---|
| Subject: | Application for Consent - Failure of the City of Toronto Committee of Adjustment to make a decision |
| Purpose: | To serve and merge the air right properties above rail corridor |
| Property Address/Description: | 18D York Street |
| Municipality: | City of Toronto |
| Municipal File No.: | B0025/19TEY |
| LPAT Case No.: | PL200140 |
| LPAT File No.: | PL200140 |
| LPAT Case Name: | Canadian National Railway v. Toronto (City) |

**PROCEEDING COMMENCED UNDER** subsection 53(14) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

| | |
|---|---|
| Applicant and Appellant: | Canadian National Railway (“CN”) and Toronto Terminals Railway (“TTR”) |
| Subject: | Application for Consent - Failure of the City of Toronto Committee of Adjustment to make a decision |
| Purpose: | To serve and merge the air right properties above rail corridor |
| Property Address/Description: | 18D York Street |
| Municipality: | City of Toronto |
| Municipal File No.: | B0026/19TEY |
| LPAT Case No.: | PL200140 |
| LPAT File No.: | PL200141 |

**PROCEEDING COMMENCED UNDER** subsection 53(14) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

| | |
|---|---|
| Applicant and Appellant: | Canadian National Railway (“CN”) and Toronto Terminals Railway (“TTR”) |
| Subject: | Application for Consent - Failure of the City of Toronto Committee of Adjustment to make a decision |
| Purpose: | To serve and merge the air right properties above rail corridor |
| Property Address/Description: | 18D York Street |
| Municipality: | City of Toronto |
| Municipal File No.: | B0027/19TEY |
| LPAT Case No.: | PL200140 |
| LPAT File No.: | PL200142 |

| | |
|---|---|
| **Heard:** | November 2 to 5, 2020 inclusive; November 9, 10, 12, 13; November 16, 17, 23 to 25, inclusive, 2020; January 18 to 22, inclusive; January 18, 19, 25 to 29, 2021 inclusive, February 1 to 5, 2021 inclusive; February 8 to 12, 2021, inclusive; and March 2, 3 and 4, 2021, inclusive. |

**APPEARANCES:**

| **Parties** | **Counsel/Representative*** |
|---|---|
| CRAFT Acquisitions Corporation<br>P.I.T.S. Developments Inc. | Ira Kagan<br>Kristie Jennings<br>Barnett Kussner<br>Denise Baker<br>Sarah Kagan (student-at-law) |
| City of Toronto | Brendan O'Callaghan<br>Joanna Wice |
| Grange Community Association Inc. | Max Allen* |
| Metrolinx Corporation | Jennifer Evola |
| Canadian National Railway Company<br>Toronto Terminal Railway Company Ltd. | Alan Heisey<br>Michael Krygier-Baum |

**DECISION DELIVERED BY WILLIAM R. MIDDLETON, T. PREVEDEL AND C. TUCCI ON MARCH 4, 2021 AND ORDER OF THE TRIBUNAL**

## Table of Contents


| | | |
|---|---|---|
| **1.** | **Introduction** | **Paragraphs** |
| **(a)** | **General** | **1-18** |
| **(b)** | **Tribunal rulings** | **19-21** |
| **(c)** | **Materials before the Tribunal** | **22** |
| **2.** | **The Test Governing an OPA Application** | **23-41** |
| **(a)** | **Position of the City of Toronto ("City")** | **23-30** |
| **(b)** | **Position of the CRAFT Acquisitions Corporation and P.I.T.S. Developments Inc. ("CRAFT")** | **31-33** |
| **(c)** | **Decision of the Panel on the OPA Test** | **34-41** |
| | **Analysis of the Evidence** | **42-185** |
| **(a)** | **Urban Design/Architectural/Landscape Design** | **42-86** |
| **(b)** | **Parks/Open Spaces: "The Parks Issue"** | **87-104** |
| **(c)** | **Engineering/Structural** | **105-119** |
| **(d)** | **Traffic/Transportation** | **120-130** |
| **(e)** | **Stormwater/Water/Sewage Servicing** | **131-147** |
| **(f)** | **Overall Planning Issues** | **148-185** |
| **3.** | **Conclusions: Decision and Orders of the Tribunal** | **186-200** |

## 1. INTRODUCTION

### (a) General

[1] The Parties to this proceeding are CRAFT Acquisitions Corporation and P.I.T.S. Developments Inc. (“CRAFT”), the City of Toronto (“City”), the Grange Community Association (“GCA”) and Canadian National Railways (“CN”) and Toronto Transit Railways (“TTR”), (collectively “CN-TTR”). Metrolinx Corporation (“Metrolinx”), an Ontario crown corporation, became a Participant following its withdrawal on July 23, 2020 as a Party to the CRAFT Official Plan Amendment (“CRAFT OPA”) application. This Local Planning Appeal Tribunal (“LPAT”, “Tribunal”, “Panel”) hearing proceeded in three phases: Phase I is the subject matter of another LPAT Decision issued on October 16, 2020 in case nos. PL180211/PL200140 and shall not be further referenced; Phase II was the presentation of CRAFT’s case-in-chief, commencing November 2, 2020; and Phase III was the presentation of the City’s responding case-in-chief, commencing on January 18, 2021, which ended with the oral arguments of all Parties on March 2, 3 and 4, 2021, based on their written final submissions as requested by this Panel. The proceeding involved 36 total hearing days for Phases I, II and III. The Panel reserved its rulings at the conclusion of final argument on March 4, 2021, and now delivers this Decision.

[2] By way of summary overview, except for Spadina Avenue and one small portion owned by the City in and on which the Puente De Luz Pedestrian Bridge (“PDL Bridge”) is located, CRAFT owns the air rights above the approximately 150 year-old downtown Toronto rail corridor now owned and operated by CN-TTR. That CN-TTR rail corridor has several tracks and marshalling yards used for the transit of rail freight and passenger trains such as GO Transit and VIA Rail (“Rail Corridor”). The Rail Corridor spans the area from approximately Blue Jays Way adjacent to the Rogers Centre in the east, to Bathurst Street in the west.

[3] The CRAFT air rights above the Rail Corridor (“CRAFT Property” or “CRAFT Site”) were first secured by CRAFT from CN-TTR on December 2, 2013 - well after the

City bought in 2007 from CN-TTR solely the modest slice of air rights the City required to construct the PDL Bridge. The City owns Bathurst Street as well as the PDL Bridge and Spadina Avenue and all air rights above them. Spadina Avenue, like the PDL Bridge, bisects the CRAFT Property from roughly north to south. Blue Jays Way borders the eastern edge of the CRAFT Site. It is a street located on land leased by the City which also is roughly oriented in a north to south direction as it curves around the Rogers Centre, which is a well-known large sports stadium and hotel complex.

[4] The Rail Corridor and the CRAFT Property were designated under the City's Official Plan ("OP") as a Utility Corridor. It has been recognized by the City and others for many years that the rather barren Rail Corridor could be eventually developed for different purposes. Indeed, the majority of the major land parcels surrounding the Rail Corridor have been designated Mixed-Use, and almost all of them are populated in part by large, tall office or residential towers with approximately the same range of heights as is proposed for the buildings under one conceptual example relating to the OPA application by CRAFT (i.e. the "Concept Plan" discussed at length in Part 2 below). Under the City's OP, two secondary plans, the Railway Central and West Secondary Plans, were promulgated by the City in 1994 for the very reason that development in the Rail Corridor has been contemplated for several decades. In fact, one portion of the air rights above the Rail Corridor not owned by CRAFT or CN-TTR is the portion owned by Metrolinx and it is already designated Mixed-Use. Presumably this is one reason why Metrolinx decided to remove itself from the application by CRAFT for an OPA changing the designation for the CRAFT Site to Mixed-Use in order to permit a significant development on the CRAFT Site, which is the subject matter of this appeal.

[5] The evidence before the Tribunal indicated that CRAFT began its internal planning process regarding a possible large mixed-use development in its air rights over the Rail Corridor as early as 2013. This first resulted in the internal presentation in 2014 of a development proposal for the CRAFT Site. CRAFT's planning representative Mr. Ian Graham later made a presentation to Mr. Gregg Lintern, then the City's Chief Planner on August 26, 2015. An initial concept plan was presented by CRAFT's

architect to the City's planning department on January 26, 2016. Correspondence continued to be exchanged by CRAFT with the City in March and April 2016 concerning the Rail Corridor planning process.

[6] Evidence tendered by CRAFT established that, to the surprise of CRAFT, its representative Mr. Graham was told not to proceed with a private OPA proposal for the CRAFT Site in a July 20, 2016 meeting with the City's planning department, attended by Mr. Lintern. It soon became apparent that the City had rather different plans for the CRAFT Property: the City's Mayor made an announcement on August 3, 2016 that a new public park would be built by the City on the CRAFT Site, to be called "Rail Deck Park". It is uncontradicted that several developers were invited to the public press conference for that announcement – with the exception of CRAFT, the owner of that property.

[7] The outcome of the August 3, 2016 announcement by the City's Mayor appears to be the December 8, 2017 City Council decision to adopt an OP amendment 395 ("OPA 395") which designated the entire CRAFT Site as Public Parks. This was to facilitate the creation and construction of Rail Deck Park. OPA 395 was appealed by CRAFT which led to the July 11, 2019 decision of the Tribunal in PL180210 ("Prior Decision").

[8] As noted, at the time of the City Mayor's August 3, 2016 announcement the City did not own the CRAFT Site. The City has also not taken any substantive steps over the last almost 5 years since then to negotiate the purchase of the CRAFT Property - or to commence expropriation proceedings to acquire it. Thus, little has happened since 2016 with respect to the actual creation of Rail Deck Park. It was informally suggested on a few occasions during the hearing that the overall anticipated project costs might be a relevant contributing factor. This first arose during the cross-examination of one of CRAFT's witnesses conducted by Mr. Max Allen representing GCA, when there was a brief reference to the possible $2B costs of building a version of Rail Deck Park – an amount that does not include the costs of acquiring the CRAFT Property.

[9] This Tribunal is not required to investigate the reasons why the City has not yet actively pursued the acquisition of any part of the CRAFT Property in order to proceed with Rail Deck Park. Certainly, CRAFT's counsel Mr. Kagan has expressed a few theories during his opening and final submissions as to why that has happened. However, this Panel need not make any findings on this curious topic in order to make a decision on whether to approve the CRAFT OPA. In any event, the Panel reiterates the observations of the Tribunal members who delivered the Prior Decision in 2019:

> [86] The City unqualifiedly acknowledges that the City is serious about proceeding with the [Rail Deck Park] project and fully understands that it will have to acquire the property interest [from CRAFT].
>
> [87] Of course, the preferred method of acquisition would be a transaction negotiated between the City and the Appellants on a consent basis. Nonetheless, the City, being a municipality, has the authority of expropriation. So, the City cannot demur here and allege an inability to acquire the property interest necessary to accommodate the project.

[10] Pursuant to the Prior Decision, CRAFT did not succeed in its appeal of OPA 395 with the result that the entire CRAFT Site became thereby designated as Public Parks. Counsel for the City and for CRAFT both now agree that the CRAFT Site is therefore currently "dually designated" because of the still-existing Utility Corridor designation which the CRAFT OPA now seeks to change to Mixed-Use. As further discussed in Part 3 below, the Tribunal's rulings in the Prior Decision were specifically without prejudice to the relief now sought in this application for the CRAFT OPA.

[11] The original CRAFT OPA was submitted on May 23, 2017 (along with 26 different supporting reports) and after the City's planning department indicated that it was incomplete, CRAFT then resubmitted it on August 24, 2017 (with three additional reports). Not long afterward, in October and November, 2017 the City's planning department and other City staff were preparing and submitting final reports and recommendations to City Council for the approval of Rail Deck Park and OPA 395 which, as noted in paragraph [7], was adopted on December 8, 2017 (in fact, the evidence of the City's senior planning witnesses was that preparatory work on Rail Deck Park had commenced years prior to that). On December 20, 2017 the City's planning

department provided some comments to CRAFT regarding the CRAFT OPA but at virtually the same time also sent its refusal report to City Council recommending denial of the CRAFT OPA ("Refusal Report"). Very shortly after that, at meetings held on January 31 and February 1, 2018, City Council accepted the Refusal Report's recommendation, and the CRAFT OPA was denied by City Council – also on February 1, 2018 a City Council bill was adopted to pass By-law No. 126-2018 regarding OPA 395 and Rail Deck Park. The Refusal Report recommendations stated:

> The development proposal raises significant planning concerns in respect to the Provincial Policy Statement (PPS), the Growth Plan for the Greater Golden Horseshoe, the Official Plan and Railway Lands Secondary Plans. The policy framework recognizes the downtown as an area that will absorb significant growth while at the same time recognizing the need to provide a full range of hard and soft infrastructure in step with growth to create complete communities. The PPS recognizes the Official Plan as the most important document to implement the PPS. The proposal is not consistent with the PPS and does not conform to the Growth Plan as it does not address the objectives of the plans to balance growth and infrastructure and poses potential challenges to sustain major transportation infrastructure with the addition of major buildings above the rail corridor. It does not conform with City of Toronto Official Plan policies to dispose of existing parkland and deliver a high quality built form and enhanced public realm… The proposal does not meet major objectives of the Railway Lands Secondary Plans including those to:
>
> - reduce the barrier effect of the rail corridor by creating new connections across the rail corridor and protecting views across the corridor north and south to adjacent communities and the waterfront;
>
> - ensure compatibility with the existing and future rail uses and activities in the rail corridor; create connections to and within the Railway Lands both east/west and north/south; and
>
> - contribute to an attractive, accessible and safe public realm and parks and publicly accessible open spaces which meet a high standards of urban design.
>
> City staff recommend refusal of the application as it does not meet Provincial and Municipal policies and does not represent good planning. [emphasis added]

[12] The City's Planning Department also recommended that:

> 1. City Council refuse application 17 164359 STE 20 OZ for an Official Plan Amendment (the CRAFT OPA) for all of the reasons (set out above) including:

a. the application does not conform with the Growth Plan for the Greater Golden Horseshoe;

b. the application is not consistent with the Provincial Policy Statement;

c. the application does not conform to the Official Plan including but not limited to policies related to structuring growth, the downtown, the greenspace system, transportation, built form and public realm, parks and open spaces, Utility Corridors, Mixed-Use Areas, and Parks and Open Space Areas;

d. the application does not conform to the Railway Lands Central and Railway Lands West Secondary Plans including but not limited to policies related to major objectives, structure form and physical amenity, parks open space and pedestrian systems, transportation and circulation, environment, future development areas and Utility Corridors;

e. the application does not address the emerging directions from the TO Core Planning Study; and

f. the proposal is inconsistent with the Railway Lands Central and West Urban Design Guidelines and the Tall Building Design Guidelines.

2. City Council authorize the City Solicitor together with City Planning and other appropriate staff to appear before the Ontario Municipal Board in support of City Council's decision to refuse the application, in the event that the application is appealed to the Ontario Municipal Board.

3. City Council authorize the Acting Director, Community Planning, Toronto and East York District in consultation with the Ward Councillor, to ensure services, facilities and/or matters pursuant to Section 37 of the Planning Act, as may be required by the Acting Chief Planner, in consultation with the Ward Councillor are secured, should the proposal be approved in some form by the Ontario Municipal Board.

4. In the event this decision is appealed to the Ontario Municipal Board and the Board approves some form of development, City Council authorize the City Solicitor, to request the Ontario Municipal Board to withhold its order to ensure that the amendment contains policies requiring the use of the holding symbols in association with zoning by-law amendments, precinct plans and agreements, subdivision plans and agreements, environmental reports and agreements and public art plans, prior to the removal of the holding symbol to ensure that adequate servicing and infrastructure to support the proposal will be provided and secured. [emphasis added].

[13] The Tribunal observes that nowhere in the City staff's specific recommendations to City Council reproduced above are there any claims that the CRAFT OPA is: "premature"; fails to specifically designate and provide a large public park oriented in a

north-south direction; features excessive density and “over-development”; or does not provide sufficient policy direction on “master” or “precinct” planning. In this proceeding, however, each of these matters became major themes of the testimony of many City’s witnesses and of the City’s final written and oral arguments seeking the denial of the CRAFT OPA. The Tribunal also notes that none of the requests referenced in paragraph [12] above were made to the LPAT in connection with this proceeding.

[14] On February 6, 2018 CRAFT appealed the City’s refusal of the CRAFT OPA and the City has steadfastly continued to oppose it before this Panel. The other Parties to this proceeding, being CN-TTR, and the GCA support the CRAFT OPA. Metrolinx had previously been a party to the CRAFT OPA yet withdrew on July 23, 2020 as already noted. A range of uses is already permitted on the Metrolinx land and it does not require an OPA to permit a deck over the Rail Corridor - and the Metrolinx site is already zoned for a commercial building. On the other hand, Metrolinx remains a Participant in this proceeding and is engaged in commercial discussions and negotiations with CRAFT. Metrolinx has advised the Panel through its counsel that it does not oppose the current CRAFT OPA or any of its past versions.

[15] It should be noted that the CRAFT OPA was revised by CRAFT’s planning consultant Mr. Michael Goldberg on a number of occasions since the original application in May 2017 and the resubmission on August 24, 2017. The current CRAFT OPA now before this Tribunal for consideration was also again modified during this hearing and the latest version as appended to the final written legal argument of CRAFT’s counsel is set out at Addendum A hereto. While counsel for the City in final submissions described these changes as creating “…very much a moving target…”, he did not argue that it would be incorrect for the Tribunal to consider the version of the CRAFT OPA set out in Addendum A in determining whether to allow this appeal. On the other hand, Mr. O’Callaghan did argue that:

> The fifth version of the CRAFT OPA was submitted to the Tribunal by Mr. Kagan on Friday, February 26, 2021. This version of the OPA has included a suggested improvement from Mr. Bagley, the City’s Urban Design witness through his testimony. CRAFT, through its consultant and

> legal team have now made numerous changes to the draft OPA leading up to the hearing and within the hearing and now at the conclusion of the hearing. This is what the City means by premature. If substantive changes have to be made to the draft OPA as recently as three business days ago, that simply confirms that the OPA has not been thought through.

[16] CRAFT's counsel made no submissions about the history of revisions of the CRAFT OPA – no doubt in part because the City's counsel did not argue that those changes were of any consequence to this appeal. On the other hand, Mr. Kagan did argue based on the evidence tendered before the Tribunal that:

> As was evident in the cross-examination of every City witness, none of them proposed a single modification to the CRAFT OPA. They instead recommended that the appeal be denied outright. CRAFT was very troubled by the fact that the City raised concerns with the OPA but refused to ever suggest modifications which could have resolved their concerns.

[17] What Mr. Kagan meant by this became clear as the evidence was called before the Tribunal. At no point after the City Council's refusal of the CRAFT OPA in early February, 2018 did the City's planning department ever engage in a dialogue with CRAFT's representative to discuss or resolve the City's concerns or to suggest changes to the CRAFT OPA that would address the City's requirements. Mr. Goldberg, who was CRAFT's planning witness at the hearing, and whose evidence is more fully discussed in Part 3 (f) below, put it this way during his direct examination testimony:

> Well, the only thing I can make of this is that the City of Toronto...are recommending to this panel of the Tribunal that the application be refused outright. So, there is a bit of contradiction, they are saying it is premature…but they are not saying…it is not appropriate for mixed-use development. They are saying they have a whole raft or myriad of criticisms about details, but I do not believe that speaks to the designation of the lands…This is an OPA that sets this OPA application as but the first step in the process. And like… [other Downtown OPA applications such as]…The Well or OPA 395, or possibly even a number of other applications within the Railway Lands Central and West Secondary Plans, there remains many subsequent implementing steps should this OPA be approved to address the many details that have been raised in the context of this hearing. All City OPA issues are addressed now, in my opinion. The others, the details that others have expressed to you that are capable of being addressed later, will be or are capable of being addressed at the right time. [emphasis added]

[18] The Panel will return to these issues and others in its Conclusions set out in Part 4 below.

**(b) Certain Tribunal Rulings**

[19] CRAFT's counsel made requests to the Panel on January 11, 2021 for significant evidentiary rulings just days prior to the commencement of the City's case in chief on January 15, 2021. CRAFT sought to preclude certain testimony and the Tribunal requested that the Parties deliver written arguments on the issues raised. The relief sought by CRAFT's counsel was made in writing on January 18, 2021, at the request of the Tribunal. The relief sought was:

1. That all of the City's witnesses be excluded from attending (listening or watching) the portion of proceedings dealing with this matter and that all parties be ordered not to share these submissions, or the oral submissions, with those witnesses. This is required so that the City witnesses not tailor their evidence based on the submissions made;

2. That the Tribunal direct Mr. O'Callaghan and Ms. Wice that City witnesses who are qualified in the same field of expertise be prohibited from giving evidence on the same matter(s);

3. That the Tribunal rule that the evidence of John Gladki not be heard since it is not relevant to the matters in issue in this case or otherwise deals with matters already being covered by other City land use planners; and

4. That the City be prohibited from calling evidence on the potential difference in elevation between the CRAFT deck and the City's deck (for Rail Deck Park) since:

    a. The height of the City's deck has not been established.

b. In the alternative, if it has been established such information has not been made available to the public in which case it could not have been tested; and

c. This hearing is not a “beauty contest” between the CRAFT OPA and Rail Deck Park as was clearly stated by the Tribunal in its approval of OPA 395 and has been confirmed by Mr. O’Callaghan in this hearing

[20] After discussion with the Parties’ counsel, the Tribunal indicated that it would receive these requests as a motion for directions. The hearing was adjourned to permit this and returned on January 20, 2021 at which time the Panel delivered its oral decision in accordance with the written content set out below in this paragraph [20]:

Motion Ruling

1. Counsel for CRAFT sent to the Tribunal on January 11, 2021 an email requesting the Panel to address issues raised in correspondence between counsel for CRAFT and counsel for City;

2. The correspondence exchange between the two counsel dated back to December 23, 2020 which was approximately one month following the conclusion of Phase II Hearing in this matter, being November 25-20, 2020

3. Briefly put, CRAFT’s counsel initiated the above exchange expressing a concern re “significant amount of overlap in the City’s Witness Statements” and noting both “expertise overlap” and “opinion evidence overlap” among similarly credentialed City witnesses whose Witness Statements (“WS”) and Reply WS were filed months ago in accordance with the governing Procedural Order. He further stated as follows:

> All of this overlap creates an unfair scenario to my client. The City should not be entitled to call multiple planners, for example, who will deal with the same matter. I should be able to cross-examine one City planner on a specific topic and not have another City planner cover it again, later. This is especially troublesome when the second City planner is able to hear my cross- examination of the first. There are solutions to this unfairness and I have listed some of them below:
>
> a) Ensure that different witnesses in the same discipline do not cover the same topics.
>
> b) Call all of the same discipline witnesses at the same time, as a panel, so that they may be cross-examined together; or
>
> c) Have witnesses who testify later in the proceeding be excluded from hearing (or learning of) the evidence of those who proceed them.

4. CRAFT's counsel also attached a chart showing the "opinion evidence overlap" of 11 City witnesses. The City's counsel responded that:

> To be clear, it is my position that there is nothing improper about overlap of evidence or duplication of opinions in the witness statements. It is completely common, for example, for land use planners and urban designers/ architects to reach similar conclusions about a policy or guideline or issue on the issues list but for different reasons. Because their conclusions are based on different reasons or areas of expertise, then that oral evidence is completely appropriate and admissible. Additionally it is entirely appropriate for a witness in one area of expertise to comment and rely upon the evidence of any other witness in forming their opinions and conclusions as many of your witnesses have.

5. Nonetheless, Mr. O'Callaghan went on to state:

> Having said that, the City agrees that the exact same oral evidence from two experts with the same qualifications is not appropriate, and therefore the City will not be calling identical evidence from our experts in the same field. The City has chosen your Option 1 on page 2 of your letter regarding the structure of its oral evidence in their oral testimony

6. This did not resolve the issue and further correspondence ensued between counsel. CRAFT's counsel in its January 11, 2021 email to the Tribunal noted that it sought preliminary relief as follows:

> That all of the City's witnesses be excluded from attending (listening or watching) the portion of proceedings dealing with this matter and that all parties be ordered not to share these submissions, or the oral submissions, with those witnesses.

7. The Panel recognizes that a formal motion was not brought in accordance with the standard practice under Rule10 of the Tribunal's *Rules of Practice and Procedure* ("Rules"). However, matters such as these do arise during a hearing, as is referenced in Rule 10.10, and the Tribunal can also initiate its own motion in that regard under Rule 10.11. This "oversight" is not a barrier to entertaining the CRAFT motion therefore – and indeed it was the Tribunal who requested what was essentially motion briefing, albeit under a truncated timeline and process.

8. As part of its introductory comments on January 19, 2021, the Panel indicated that it was prepared to rule in favour of the preliminary relief sought concerning the "non-disclosure" of argument etc. to the City witnesses and Mr. O'Callaghan had no objections to this. The Tribunal now orders that this obligation shall continue throughout Phase III of this hearing – there has been no argument that any witness requires such information and there is at least a potential risk of the prejudice alluded to by CRAFT's counsel if it was disclosed as part of the final witness preparation done by the City's counsel

9. The Panel heard oral submissions from counsel for the Parties for approximately 3.5 hours and offered to sit for a longer period in the event that counsel required more time – however, they did not. The Tribunal also invited both counsel to file any additional brief submissions/

references they wished to be considered by no later than 4 p.m. on January 19, 2021, taking into account the abbreviated briefing schedule. Supplementary submissions were received from the City only.

10. After due consideration for the written submissions and oral argument of the Parties' counsel, the Panel now delivers its further rulings:

    a. The Panel notes its disappointment that the CRAFT motion was not brought more formally and in any event sooner than January 11, 2021 – on the other hand, the Tribunal recognizes that the Parties continued their discussions aimed at arriving at a resolution which may have contributed to this delay.

    b. The Panel notes that CRAFT's counsel did raise concerns at the time of the last Case Management Conference in October 2020 and in his opening statement. However, given how long these potential issues have apparently been "live" between the Parties it would have been preferable to deal with these matters after all WS and Reply WS had been received and, perhaps, at the time the PO was finalized. The Panel notes that at that juncture the issues that have only now been argued had crystallized - and there was no compelling reason to delay this type of motion until only a few days prior to the Phase III commencement

    c. In any event, the Panel is very reluctant at this late stage on the eve of Phase III to strike any written evidence as filed by the City or to preclude any City witnesses from testifying in this proceeding. On the other hand, the Tribunal does have concerns about some of the evidence that was the subject of Mr. Kagan's argument, including but not limited to the WS and Reply WS of John Gladki and other City witnesses. The Tribunal's ruling might have been

different had a timely motion been brought after the City filed its WS and Reply WS as some measures to ensure no possible prejudice to the City's case would have been available then.

d. However, the Panel now sets out the following directions to the City and Mr. O'Callaghan concerning certain apparently planned *viva voce* evidence of Mr. Gladki and other City witnesses:

(i) Except with leave of the Panel, all testimony of any City witness duly qualified in the same areas of expertise (e.g. planning or urban design or landscape architecture etc.) concerning Parks planning, design, parks policy framework, parks desirability in the Downtown etc. and otherwise in any way related to the Parks and open space elements of the CRAFT OPA ("Parks Matters") shall be delivered at the same time by a single panel of City's witnesses. Clearly, the City's counsel has the right to determine the make-up of that Parks Panel. However, subsequently, except with leave of the Panel, no City witness on that Parks Panel – or one who had not testified on that Parks Panel - shall give direct testimony on such Parks Matters. Nonetheless, a witness who had testified on that Panel may be called separately to provide evidence on other matters. Obviously, this does not cover matters and issues properly arising from cross-examination;

ii) Notwithstanding (i) above, the City's counsel is cautioned to avoid leading direct evidence on the same matters from any Parks Panel members who are duly qualified in the same field of expertise – the Tribunal has no need to hear repetitive, confirmatory opinion evidence from more than one

witness. The same caution applies to direct evidence from other witnesses duly qualified in the same field of expertise on other issues;

iii) As noted, Subsection (ii) above does not preclude counsel for the City from separately calling a witness on the Parks Panel at a subsequent point in the City's case to provide additional proper testimony related to other matters within such witnesses' WS and Reply WS – all as in compliance with (i) above;

iv) Counsel for the City is also cautioned to avoid wherever possible leading direct testimony that compares the City's proposed Rail Deck Park or any other aspect of OPA 395 to the CRAFT OPA including but not limited to the "parkland" or "open space" elements set out in the Concept Plan underlying the CRAFT OPA. The Tribunal considers it to be an undertaking of the City's counsel to the Panel arising from his numerous verbal and written assurances that he will avoid conducting in any way a "beauty contest" between the City's proposed Rail Deck Park/OPA 395 to any aspect of what is being proposed under the CRAFT OPA;

v) The City's counsel is also cautioned not to lead testimony that is directly or indirectly based on any evidence that is not already demonstrably in the public record regarding the height of any conceptual example of a public park that could be developed on the air rights/property owned by CRAFT. Certainly, the City may lead evidence that is now in the record of this proceeding that responds directly to contentions set out in the evidence of CRAFT witnesses.

vi) The issue of whether current written references to the City's Rail Deck Park set out in the WS or Reply WS of any City witness – or any other evidence for that matter - should be modified or removed shall be dealt with by way of a motion to this Panel brought pursuant to Rule 10, at least five days prior to the beginning of final argument in this Phase III of this hearing. The Tribunal requires the moving party to provide at least five full days' notice of such motion and to deliver a motion record in accordance with Rule 10.4 at the same time. The responding party shall have three days from receipt of the moving party's motion record to deliver its response to such motion, following which the moving party shall have two days to deliver its reply. Either Party may seek leave from the Panel to dispense with one or more requirements of Rule 10 in order to facilitate the expeditious determination of the issues raised by the motion. For greater certainty, if no such motion is brought before the Tribunal, the Panel shall consider all of the written evidence contained in the WS or Reply WS of all City witnesses – save and except for such evidence as may be ruled inadmissible by the Tribunal during the course of this hearing;

vii) The motion described in (vi) above shall be in writing only, except as otherwise permitted by the Tribunal. Thus, it may be brought at any time during Phase III subject to (vi) above;

viii) Nothing in the preceding rulings of the Tribunal shall limit or restrict counsel for CRAFT or any other Party from raising objections based on proper grounds to the testimony of any

City witness; or shall be deemed to be an “advance ruling” by the Tribunal on evidence admissibility; and

ix) The Tribunal may make an order excluding one or more City witnesses from hearing the testimony of other City witnesses, upon proper request by counsel for CRAFT or another Party.

[21] Following the motion ruling by the Tribunal as set out in paragraph [20], the hearing proceeded accordingly. Of course, from time to time during the hearing various evidentiary objections were made and the Panel provided immediate oral rulings on those. All such rulings are part of the record and are contained in the transcripts of this hearing and, therefore, they shall not be repeated in this Decision. No Party made any submission in their final written and oral argument that any of the Tribunal’s evidentiary rulings were unfair, incorrect or otherwise objectionable.

**(c) Materials Before the Tribunal**

[22] The following categories of materials were submitted to the Tribunal prior to and also subsequently during the course of the hearing of this matter:

1. **Joint Document Book** – comprising 16 volumes; more than 200 documents; and 18,584 pages; compiled by the Parties – the Index to the Joint Document Book is attached as Addendum C to this Decision

2. **Exhibit List** – this list comprises all documents that became exhibits in Phase II and Phase III of this proceeding and is attached as Addendum D to this Decision. Counsel for the City and for CRAFT each filed compendiums of the Witness Statements (‘WS”) and Reply Witness Statements (“Reply WS”) for all City witnesses and CRAFT witnesses, respectively, and these are described in the Exhibit List.

3. **Motion Materials of CRAFT and of the City of Toronto** – these materials are referenced above in paragraph [20] and comprised the CRAFT SUBMISSIONS RESPECTING CITY'S ORAL EVIDENCE AND WITNESS (AND REPLY) STATEMENTS, dated January 18, 2021; the CITY OF TORONTO REQUEST FOR DIRECTIONS, dated January 17, 2021; and the CITY OF TORONTO SUPPLEMENTARY SUBMISSIONS, dated January 19, 2021; and

4. **Final Written Submissions of CRAFT, of the City of Toronto and of the Grange Community Association** – submitted as requested by the Tribunal, comprising CRAFT CLOSING SUBMISSIONS PART I; CRAFT CLOSING SUBMISSIONS TRANSPORTATION EVIDENCE; CLOSING SUBMISSIONS (Rail Deck Design & Structure and Servicing); CLOSING SUBMISSION of the Grange Community Association Inc.; and CITY OF TORONTO CLOSING SUBMISSIONS.

## 2. THE TEST GOVERNING AN OPA APPLICATION

### (a) Position of the City

[23] The City argued in its final written and oral submissions to the Panel that various subsections of the *Planning Act* R.S.O. 1990 c. P.13 ("PA" or "Act") set out a number of tests or criteria that each must be applied by the Tribunal in considering the CRAFT OPA:

a. Section 2, which requires the Tribunal to have regard to matters of provincial interest;

b. Subsection 2.1(1), which requires the Tribunal to have regard to any decision of Council on the same planning matter

c. Subsection 3(5)(a), which requires the Tribunal's decision to be consistent with the in effect Provincial Policy Statement (“PPS”); and

d. Subsection 3(5)(b), which requires the Tribunal's decision to conform with applicable provincial plans in effect.

[24] Counsel for the City particularly emphasized that subsection 2.1(1) of the PA requires the Tribunal to have regard for decisions of municipal councils:

> When an approval authority or the Tribunal makes a decision under this Act that relates to a planning matter, it shall have regard to,
>
> (a) any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter; and
>
> (b) any information and material that the municipal council or approval authority considered in making the decision described in clause (a). [emphasis added]

[25] The City’s legal team noted that the City Council refused the CRAFT OPA on the basis that it was “premature” – a decision that the Panel therefore shall “have regard for”.

[26] Counsel for the City also argued that the Tribunal must also consider numerous policy requirements contained in the City’s OP and applicable secondary plans thereunder.

[27] The City’s counsel stated that The Railway Lands Central Secondary Plan (“RLCSP”) enacted under the OP has clear policy tests found at policies 10.5.1 and 10.6.2 pertaining to amendments to those plans

[28] Similarly, the City’s lawyers maintained that the other applicable secondary plan, the Railway Lands West Secondary Plan (“RLWSP”) has a policy at 10.3.2.3 which mirrors that of the RLCSP, and that there are further policy tests set out in 10.3.1.1.

[29] Finally, counsel noted that RLCSP Policy sets out additional matters pertaining to decking over the rail corridor that must be complied with.

[30] Obviously, in support of the City's position that the CRAFT OPA appeal should be denied by the Panel as "premature", the City's counsel argued that the OPA met none of the requirements and policies described in paragraphs [23] to [29] above. He concluded that the Tribunal must therefore "have regard for" the City Council's decision to deny the CRAFT OPA and must dismiss CRAFT's appeal of that ruling.

**(b) Position of CRAFT on the Applicable Test**

[31] CRAFT's lawyers agree as to what provisions of the PA and policies of the OP and its secondary plans apply but disagree with the contention that they have failed to meet them. Moreover, CRAFT's counsel argue that the City's legal team has overstated the effect of the "have regard to" aspect of the test referred to in paragraphs [23] and [24] above.

[32] CRAFT's counsel stated that the appropriate tests for the CRAFT OPA are as follows:

a. Does the CRAFT OPA have appropriate regard for matters of Provincial interest as required by section 2 of the PA?

b. Is the CRAFT OPA consistent with the PPS as required by section 3(5)(a) of the PA?

c. Does the CRAFT OPA conform with (or not conflict with) the Growth Plan for the Golden Horseshoe ("Growth Plan") as required by section 3(5)(b) of the PA?

d. Recognizing that it is itself an amendment to the City's Official Plan and the Railway Lands Central and Railway Lands West Secondary Plans, does the CRAFT OPA nevertheless implement those plans? (This test is not contained in the PA but arises from decades of OMB/LPAT jurisprudence), and

e. Does the CRAFT OPA represent good planning? (Again, not set out in the PA but arises from decades of OMB/LPAT jurisprudence.)

The Tribunal notes that the above elements are largely consistent with the City's proposed tests.

[33] However, CRAFT's counsel added a further refinement to highlight two essential "big picture" questions for the Panel to consider, given that this application solely concerns an OPA and not a rezoning or a site plan application:

a. Is the proposed Mixed-Use Areas designation appropriate?
b. Is development of the site feasible?

**(c) Decision of the Panel on the Applicable Tests**

[34] The Tribunal agrees that the applicable statutory tests are as set out by the City's counsel, summarized in paragraphs [23]-[30], inclusive above, as further elaborated upon by CRAFT's solicitors in paragraphs [32] and [33]. The Panel also agrees that it must consider the two "big picture" questions identified by CRAFT's counsel in paragraph [33].

[35] However, in the Tribunal's view, the "have regard to" test set out in subsection 2.1(1) of the PA does not require the level of deference that counsel for the City may be urging upon the Panel. Subsections 11 and 12 of the *Local Planning Appeals Tribunal Act*, S.O. 2017, c. 23 provide broad general jurisdiction and powers to the Tribunal to

make orders in respect of its exclusive jurisdiction under the PA. It is clear under subsection 22(7) of the PA that on this appeal by CRAFT, the Tribunal has the same powers as did the City in considering the CRAFT OPA. The fact that the City denied the OPA in no way binds this Tribunal to do the same.

[36] In the Ontario Divisional Court case of *Ottawa (City) v. Minto Communities Inc.*, 2009 CanLII 65802 (ON SCDC) ("*Minto")*, the City of Ottawa argued that, in the context of section 2.1 of the PA, the words "have regard to" imposed an obligation on the [then O.M.B.]… to afford considerable deference to municipal councils' land planning decisions…[and] that the OMB, as an appellate body, ought to apply the deferential standard of "reasonableness".

[37] However, in *Minto* the Divisional Court rejected the above proposition and instead ruled at paragraph 16 that:

> Questions of law that engage the specialized expertise of the Board, such as the interpretation of its own statute, attract a standard of reasonableness. In this case, the Board was interpreting one of its home statutes, the Planning Act, using its expertise in land use planning, its familiarity with the Provincial Policy Statement 2005 and its understanding of its own public interest mandate under the Act. [emphasis added]

[38] The Court in *Minto* went on to state:

> [Counsel for]… the City, points out… that if this court were considering a review of the decision by the municipality, without any intervening process before the OMB, great deference would have to be afforded to Council's decision. However, the main reason for such deference is the recognition that the court does not inherently have any expertise in land use planning decisions. On the other hand, the OMB certainly does. The OMB can therefore oversee or review planning decisions by municipal councils from the vantage point of its expertise. There is another important difference between the court and the OMB. Unlike the court, the Board may determine the appeal based on fresh and expanded evidence, rather than merely reviewing the record of what was before Council in making its decision. The OMB process affords the parties a full hearing that includes an opportunity to present evidence, including expert evidence that may not have been before the municipal council in making its decision… Furthermore, it is important to keep in mind that the appeal process before the Ontario Municipal Board is not merely a lis between parties, but a process requiring the OMB to exercise its public interest mandate. The decision to be made by the Board transcends the interests of the immediate parties because it is charged with responsibility to

> determine whether a land planning proposal is in the public interest…on an appeal the Board has the obligation to exercise its independent judgment on the planning merits of the application and to assess the proposal and the positions of the parties from the perspective of applicable legislation, regulations, provincial plans, the provincial policy statement, official plans and bylaws and even the potential impact on neighbouring municipalities... [emphasis added]

[39] Aston, J. for the Divisional Court thus concluded:

> The legislature used language that suggests minimal deference when choosing the words "have regard to", considering the many other expressions it could have used to signal the level of deference suggested by the City in this appeal. In my view the traditional role of the Board, and the broad powers it exercises, should not be altered radically without a [clearer]… and specific expression of legislative intent… In my view…the words "have regard to" do not… suggest more than minimal deference to the decision of Municipal Council. However, in the context of the Planning Act, and balancing the public interest mandates of both the Board and the municipality, I would agree… that the Board has an obligation to at least scrutinize and carefully consider the Council decision, as well as the information and material that was before Council. [emphasis added]

[40] The Divisional Court reached the same conclusion on the standard of minimal deference owed by the LPAT [OMB] to municipal council decisions in the case of *R & G Realty Management Inc.* v. *North York (City)* [2009] O.J. No. 3358 (“*R & G Realty”)*.

[41] This Panel is bound by the Divisional Court rulings in *Minto* and *R&G Realty* and therefore, recognizes its obligation to carefully consider the City’s decision to deny the CRAFT OPA, dated January 31 and February 1, 2018 and the information and material that was before the City Council on those dates. On the other hand, the Tribunal is not bound by that decision nor does it need to defer to the City Council decision in “having regard to it”. Moreover, the Tribunal obviously must consider and analyze the massive collection of new expert opinion evidence by both the City and CRAFT over the course of this nine and one-half week hearing – in addition to the written and oral submissions presented. None of that voluminous material or expert testimony was before City Council when it made its decision to deny the CRAFT OPA.

## 3. ANALYSIS OF THE EVIDENCE

### (a) Urban Design/Architectural/Landscape Design

[42] The City raised a myriad of issues in this proceeding, including with respect to design and architectural matters – whether collectively this amounted to a "throwing the kitchen sink" effort as rhetorically alleged in final argument by CRAFT's solicitors is immaterial. On the other hand, the City's approach led to voluminous filings by both CRAFT and the City and to very substantial oral testimony during the course of this hearing which spanned the period from early November 2020 to early March 2021. The Panel's challenge has been to reduce the discussion and analysis of such evidence to only those relevant issues which are required to be dealt with in an OPA proceeding in accordance with the applicable tests set out in Part 2.

[43] Central to the City's position advocating the denial of the CRAFT OPA were its criticisms of the conceptual plan prepared by CRAFT's outside architectural expert to demonstrate one example of the proposed development described by the policies and provisions in the CRAFT OPA. This concept plan soon became an enduring feature of this lengthy proceeding, incorporated into many of the WS and Reply WS as well as much of the oral evidence tendered by the City and CRAFT. However, that concept plan is not the instrument before this Panel for approval.

[44] The creator of the CRAFT concept plan is Moshe Safdie, who is a world-renowned architect and designer whose credentials over 55 years of professional practice are widely respected among members of his profession, including the City's outside architectural expert, Mr. Forth Bagley who during his cross-examination described him as "…one of the world's greatest architects…". Mr. Safdie has been the recipient of numerous awards, honorary degrees, and civil honors including the Companion of the Order of Canada, the Gold Medal from both the Royal Architectural Institute of Canada and the American Institute of Architects, the National Design Award for Lifetime Achievement by the Cooper Hewitt Smithsonian, and recently the Wolf Prize

in Architecture−awarded for a career motivated by the social concerns of architecture and formal experimentation. Mr. Safdie has taught at McGill University, Yale University and later became the Director of the Urban Design Program at Harvard University serving there as a Professor of Architecture and Urban Design for several years.

[45] Mr. Safdie's design and architecture projects include many large, complex and difficult developments certainly comparable to the challenges presented by the CRAFT Site in downtown Toronto over the Rail Corridor. Those projects include the design of large airport terminals in Singapore, Israel and Toronto in addition to complex commercial, resort and residential developments and landmark museums throughout China, the USA, Canada, Singapore, Israel and India. He has enjoyed a unique and longstanding reputation as one of the most outstanding creative design innovators of his generation and remains active and engaged in numerous ongoing projects. His Canadian projects include: Monde Residential Tower, Toronto, 2019; Lester B. Pearson International Airport, Toronto, 2007; Vancouver Library Square, 1995; Ottawa City Hall, 1994; Montreal Museum of Fine Arts, 1991; National Gallery of Canada, Ottawa, 1988; Quebec Museum of Civilization, Quebec City, 1987; and Habitat '67, Montreal, 1967.

[46] Notably, to assist CRAFT with its OPA application in accordance with the City's requirements, Mr. Safdie and his firm created a three-dimensional physical model of his potential design concept for the development of the CRAFT property along with a lengthy visual presentation and a large slide deck ("Safdie Concept Plan", "Concept Plan" or "Safdie/PWP Concept Plan"). The Panel found both the model and the visual slides to be an informative and impressive depiction of one possibility for the CRAFT Site. Beyond the comments of Ms. Bogdanowicz noted in paragraph [80] below, no City witness took serious issue with the level of design creativity and attractiveness of the Safdie Concept Plan.

[47] As required pursuant to the City's checklist given to CRAFT at the Pre-Submission Consultation meeting held on or about January 20, 2017, the purpose of the Safdie Concept Plan is solely to illustrate one way in which the CRAFT OPA could be implemented. However, as already noted, the Safdie Concept Plan seemed to instead

evolve into the focal point for the City's overall critique – notwithstanding the fact that the CRAFT OPA, and not the Safdie Concept Plan was clearly the only instrument before the Panel for its approval.

[48] As the hearing progressed, the Tribunal reached the opinion that the continuous commentary by the City and its experts about the Safdie Concept Plan, as interwoven with the criticisms of the CRAFT OPA, served to distract this proceeding from its sole and proper focus: the evaluation of the CRAFT OPA in accordance with the OPA tests set out in Part 2 above.

[49] The Safdie Concept Plan was introduced in Mr. Safdie's oral evidence before the Panel on November 4, 2020 when he testified remotely from his office in Cambridge, Massachusetts (due to the ongoing pandemic and quarantine restrictions for visitors to Canada). Mr. Safdie stated that he was first contacted by CRAFT in January 2020 and was then later formally retained on February 21, 2020. He described how it was important to him before accepting this retainer to: (a) be assured of no restrictions on his designs due to any predetermined density proposed by CRAFT or limitations on his ability to design something that would respect the location and importance to Toronto of the CRAFT property and the availability of parks/open space areas and (b) be permitted to engage a familiar, world-class "A-Team" of landscape architects (PWP Landscape Architecture) and structural engineers with whom he had previously worked on numerous high-profile and challenging projects around the world (Arup Inc.).

[50] Mr. Safdie's Concept Plan was eventually provided to the City on May 31, 2020. CRAFT's then representative, Mr. Ian Graham, wrote on June 1, 2020 to Gregg Lintern, Chief Planner for the City at that time, seeking a meeting to present the Plan and to discuss the possible resolution of CRAFT's appeal to the Tribunal. This overture was acknowledged by Mr. Lintern who advised Mr. Graham that Ms. Lynda Macdonald would respond to his invitation and enquiry. No such response ever arrived and no such meeting was ever arranged by Ms. Macdonald, a senior member of the City's planning department, whose testimony and evidence is described in Part 3 below. Much was made of this by CRAFT's counsel in his final submissions where he also

pointed out that the first City response to the Safdie Concept Plan was delivered only when the City delivered its WS's on August 24, 2020. The Tribunal need not draw any adverse inferences in these circumstances, but does observe that this appeared to be unusual conduct on the part of the City in the context of a large Downtown development proposal – and that is unfortunate that settlement discussions never occurred between the Parties

[51] The Concept Plan was Mr. Safdie's effort to provide an example of what could be developed on a "… [challenging site] …that is a very large parcel of land which disrupts the city. [and]…is certainly a barrier… that we won't be able to mend...because the city opposed any roads crossing over …". He noted that the site also featured "…the challenge of [various] levels because we know that we need to deck it... [and]…level differences that are always a challenge… [requiring us]… to be very clever in the way we create the kind of connectivities… that we would hope to achieve…".

[52] Mr. Safdie, who essentially used the term "park" to identify any public, open spaces, described in his direct evidence some of his key objectives underlying the Concept Plan as the following:

> …We said first we want to optimize the area of park. We want to get as large a park and also with contiguous areas so that it is useful. We said that we would like to integrate whatever commercial activity, and I mean by that, retail and entertainment and the park towards creating a synergy between them…creating something of much greater connection with nature and the outdoors… We wanted to optimize public access from all directions. From the south and from the north, from the east and the west and from the transit below...[something that would create]… various attractions that appeal to Torontonians of all ages, young people, older people and… we realized how important it is to create park spaces that are accessible and active through all of the seasons… And one of our objectives was to activate Front Street with retail as well as access points to the park in such a way that it would enliven the street and make it part of the network of lively streets of Toronto, which today it is absolutely not…(emphasis added)

[53] Setting out his further architectural design objectives, Mr. Safdie testified that:

> …I thought that there is going to be a question about the building mass because the sites around us are so intensively developed, overwhelming densities Toronto is allowing in the downtown and I realized that building more structures, more towers with more residential and possibly office, is

> going to create a question about congestion, blocking views, shadows. How might we make a design that minimizes that impact? Create maximum porosity. And as far as the environment of the project we thought that creating an environment that is pedestrian friendly was very important and that it should be all visible from the public realm… in creating a community or designing a future community of close to 3,000 households, hopefully many of them families, how would we create something that is going to be liveable, that is going to be attractive to them, that will allow for a sense of community…(emphasis added)

[54] Simply put, on the area of the CRAFT Site between Bathurst Street and Spadina Avenue, the Safdie Concept Plan features a collection of six towers, ranging from 43 to 46 stories high, oriented along Front Street at the north edge of the Site in its "West Block" (which can be compared to heights for six towers on the north side of Front Street that are existing and approved ranging from 15 to 46 stories, with little or no open or park-like spaces between them), including both residential, office, retail space interspersed with a myriad of open park-like spaces on various levels which work their way down to the southern edge of the site bordering the narrow City-owned Northern Linear Park strip, (including in some cases on open park-like spaces on the tops of elevated pedestrian walkways between certain towers). East of Spadina Avenue in the portion of the parcel between it and Blue Jays Way, called the Site's "East Block" are proposed three additional towers, ranging from 44 to 33 to 20 stories with additional pockets of public open park-like spaces (which can be compared to four towers existing or approved on the north side of the same block that are existing and approved ranging from 20 to 33 to 36 stories, with little or no open or park-like spaces in them). Due to its acquired importance during the hearing of this case, the Tribunal has provided a few excerpts from one depiction of the Concept Plan in Addendum B to this Decision. This is for illustrative purposes only and in no way implies an endorsement by this Panel of the Safdie/PWP Concept Plan.

[55] Both Mr. Safdie and Mr. Dermot Sweeney were qualified by the Panel to provide *viva voce* opinion evidence on design and architectural matters: Mr. Safdie (architectural design evidence) and Mr. Sweeney (urban design and architectural policy matters). Each also filed a WS and Reply WS.

[56] The key elements of Mr. Safdie's evidence as set out in his WS, Reply WS and in his oral testimony were:

a. "For many decades the railway tracks leading to Union Station, on the average 100 meters wide, bisected Toronto with an industrial cut in the urban landscape, brutally separating King St. West from the growing Queen's Quay lakefront development. While the elevated Gardiner Expressway also contributed to this barrier, it could easily be crossed. With deep retaining walls and lack of public realm at street level, the railway tracks are a dark and powerful barrier. Our concept plan sought to address these challenges."

b. Mr. Safdie's Concept Plan, in his words, aimed to balance the private development with the public interest in the following ways:

- "To optimize the area of the park, with wide and generous proportions.
- To integrate the park and commercial uses towards achieving the great synergy to the benefit of both activities.
- To facilitate and optimize public access to the park from all directions- South, North, East and West, and from the Transit Station below.
- To develop a functional and diverse park design that will attract Torontonians of all ages and from all walks of life.
- To enhance the public realm along the South side of Front Street with active landscaped street-fronts.
- To minimize the presence of building mass, and resulting shadows on the surroundings, while achieving maximum visual permeability from the adjacent neighbourhoods North to South, and vice versa.
- To orient the project to pedestrians by limiting all vehicular and service access to zones below the deck, not visible from the public realm.
- To design an exemplary urban development with high-quality public and local resident amenities, a design that sets a new standard, is an attraction in its own right, and even becomes a tourist destination."

c. The Safdie Concept Plan proposed to reduce the footprint of the towers and introducing bridging between the towers at various levels, with the

openings between towers serve as “urban windows” opening views from the King Street West district to the south towards the lake;

d. The purpose of the wide spaces between buildings was to afford light and views to the sky. Mr. Safdie described that “…the distribution of the towers in a zig-zag configuration frames dynamic views between towers as one moves through and around the site”;

e. The connecting bridges between towers provide landscaped roofs with recreational decks for residents with indoor and outdoor amenities, which, in Mr. Safdie’s opinion “…make for a highly sustainable development…”;

f. To maximize park area, the Safdie Concept Plan proposed a novel cross section that tucks the retail galleria under the park, noting that this was the same strategy successfully deployed at the Singapore Marina Bay Sands waterfront promenade. The Plan devised a truss that spans the railways and accommodates parking within it, the park level is lowered thus improving access from the surrounding developments. Finally, the two levels of retail galleries overlap the various levels of the park, in order to contribute to its animation and public use in all seasons. The proposed design is to create an indoor/outdoor shopping environment that is integrated with the park environment to create a new kind of improved public realm experience;

g. Along the south side of Front Street, the planned podium opens onto a wide sidewalk and public realm where nothing exists today. The Safdie Concept Plan’s goal is to preserve the grading of the City’s Northern Linear park while enhancing it by way of its integration with “…the much larger urban park over the rail deck, with easy access from the South by way of stairs and accessible ramps. The outcome is a park of almost 13

> acres. We believe the resulting development will give Toronto a great new attraction, with a balance of park and development…

[57] Another key element of the Safdie Concept Plan was the detailed landscape design prepared by Adam Greenspan of the firm PWP Landscape Architecture ("PWP"), based in Berkeley, California. Mr. Greenspan led the design of many of our significant projects over the last fifteen years in the United States and abroad, working for public and private clients, including public agencies, property owners, non-profit foundations and architects. He worked with Mr. Safdie on many of his high-profile projects worldwide as already briefly described above in paragraph [49] and Mr. Safdie described him as part of his "A-Team" on such important works. Recent projects of Mr. Greenspan included the National September 11 Memorial in New York City, Jewel Changi Airport in Singapore, the elevated Salesforce Transit Center in San Francisco, The Colorado Esplanade for the City of Santa Monica and Newport Beach Civic Center Park in California, as well as Barangaroo Headland Park in Sydney, Australia.

[58] Mr. Greenspan has a Bachelor of Arts in Studio Art and Sociology with Honors, 1994 from Wesleyan University and graduated from the University of Pennsylvania, School of Design with a Master of Landscape Architecture in 2001. His *curriculum vitae* contained details of more than 16 design awards and other achievements for the period from 1998 to 2019. He was qualified to provide opinion evidence on landscape design matters before the Tribunal, and testified on November 5 and 6, 2020

[59] Mr. Greenspan's essential conclusions from his WS, Reply WS and oral evidence before the Panel, which, in the Panel's view, were not successfully challenged in cross-examination, were as follows:

a. Greenspan/PWP proposed a scheme for the open space at the CRAFT Site that incorporates a varied landscape with many different plazas, gardens, play zones and experiences that are connected together so that visitors will be able to move across what is now the rail yard through a park in both the north/south and east/west directions, based on the

premise of creating a park landscape that is interwoven with the City itself to create a park with a synergetic effect to help maximize visitation and visitors' experiences year-round;

b. In light of Toronto's wide temperature range, the project is to have indoor and outdoor routes that cross the site and are open to the public. The park's adjacency to restaurants and retail was to allow people to connect with each other and promote both inside and outside activity and recreation;

c. At the street level, the design includes an "Urban Woodland Walk" merging with the existing City Northern Linear Park with tree planting, paving, lighting and furnishings, so as to expand "the impact of the park by creating a green threshold where pedestrians and cyclists can safely move east-west through the park setting". Pedestrian plazas "frame new and existing sculptures and become nodes within the park circulation system that lead to stairs, ramps or elevators that allow people to move through all park levels";

d. The design includes a "Great Plateau" as the main and widest terrace level where the largest lawn, and "many sizable plazas, playgrounds and attractions, such as art and a dynamic water plaza, will be located, with diverse and well connected spaces" and open air links between the north side of the site (Front Street) to the south side (Iceboat Terrace) at both Portland Street and Draper Street. The Great Plateau level is directly connected to the indoor spaces of the retail galleria through open facades/doorways;

e. A "Hilltop Promenade" one "step" above the Great Plateau is proposed to offer an active urban setting for people watching, meeting friends, taking walks and relaxing under the shade of trees to be planted. Interactive

water features enliven the promenade which by the nature of its elevated position makes it a promontory featuring views of surrounding City landmarks such as Fort York, Mouth of the Garrison Creek Park, and the CN Tower. This level would also connect to indoor air-conditioned spaces;

f. Finally, the landscape design includes a “Rooftop Park” to be developed with a broad range of amenities where people of can engage in active recreation such as basketball and/or tennis courts, fitness stations, a walking loop, edible gardens, playgrounds, and a winter ice rink; and

g. Greenspan/PWP’s goal “is to create sustainable landscapes, through their intelligent design, as well as by creating places that people love and care for, the relationships and opportunities within our scheme provide for a dynamic park that can be enjoyed for years to come” and Mr. Greenspan’s opinion was that “the open space elements of the proposed development represent a remarkable opportunity for the City of Toronto, its residents and visitors”.

[60] Mr. Sweeney was retained by CRAFT to provide architectural and urban design advice to support the preparation of the CRAFT OPA applications first made to the City on May 23, 2017. Mr. Sweeney was also actively involved in the design of the Safdie Concept Plan.

[61] Mr. Sweeney has been a licensed professional architect and a full member of the Ontario Association of Architects since 1988, a member of the Architectural Institute of British Columbia and a member of The Royal Architectural Institute of Canada. He testified that he had more than 36 years of architectural experience within Toronto, the Greater Toronto Area and across Canada. He was qualified without objection from any Party to provide opinion evidence on urban design matters to the Tribunal.

[62] In terms of the issues raised under section 2 of the PA by the City's lawyers as described in Part 2 (a) above, the essential urban design conclusions reached by Mr. Sweeney, and response, as contained in his WS, Reply WS and in his oral evidence were:

a. The CRAFT OPA does not exempt the CRAFT Site from City of Toronto urban design policies nor from its Tall Building Guidelines. Those policies and guidelines will continue to apply to the future rezoning and site plan applications. Moreover, the subject site is very large with ample space to deploy the buildings. There is no inherent reason why the ultimate development could not meet the City's urban design Official Plan policies or the City's Tall Building Guidelines;

b. The Safdie Concept Plan represents one (but not the only) way in which to implement the proposed CRAFT OPA. It appears that many of the City's urban design concerns appear to apply to that Concept Plan and not the actual proposed CRAFT OPA;

c. The Safdie Concept Plan is very well-designed and creates a new public sidewalk on the south side of Front Street, offers a preferred mix of uses, provides abundant amenities for both the residents/occupants and the greater community, provides critical public connections through the development from the King West Neighbourhood to the City Place Neighbourhood to the south, has minimal negative impact, provides two direct access points to the future GO Transit Station, eliminates the negative effects of the sunken rail corridor for all in this precinct (noise, visual impact and separation of two established areas that will greatly benefit from the new north/south connections and provides nearly 13 acres of open space (which could become a public park). By virtue of its location and proposed uses, the Concept Plan will reduce car dependency within the core of the City in an area very well served by public transit and

within walking distance of employment uses. Reducing car dependency is a valid urban design objective;

d. The Safdie Concept Plan not only “encourages a sense of place” but creates a very significant and desirable new set of high-quality public places that will serve the larger community and visitors to the City and the Plan’s design provides new access to these high-quality public open spaces from both established adjacent precincts north and south and allows each precinct to connect easily to the existing amenities, services etc. within the other precinct;

e. The Safdie Concept Plan is designed to facilitate greater public access to existing amenities while creating all new public amenities, much needed housing and employment uses. The Concept Plan will also transform the south side of Front Street from Spadina Avenue to Bathurst Street into a pedestrian friendly animated and enriched public realm;

f. The Safdie Concept Plan will create an important link from east to west while facilitating all new public and fully accessible north south links from Front Street to the open space and beyond to the City Place precinct;

g. The Safdie Concept Plan will create all new publicly accessible spaces that are of the highest quality, safe, accessible, attractive, and vibrant. The all new pedestrian sidewalk along Front Street will be animated by new retail venues, pedestrian access to the residential lobbies, the new transit station and unobstructed “accessible” passage through to the new open space and beyond to the City Place Community to the south.

[63] The Tribunal is of the opinion that the intense level of detailed scrutiny of the Safdie Concept Plan, as incorporating the PWP landscape designs, urged upon the Panel by the City was unnecessary and too often not directly relevant to the Panel’s

consideration of the CRAFT OPA under the tests proposed by the City's counsel. At times it seemed to the Panel that counsel for the City and the City's witnesses treated the Safdie/PWP Concept Plan as representing the "only way" the development proposed in the CRAFT OPA could ever be built.

[64] Perhaps as a result, a "Battle of Parks Preferences" emerged due to the City's sustained critical commentary about the nature of the open space/park-like aspects of the Safdie/PWP Concept Plan versus the opinion evidence offered by the City about the "fundamental need for a large park in the Downtown" – in turn based on the continual suggestion by the City's counsel and City witnesses that somehow the long barren and largely overlooked Railway Corridor with elevated air rights development potential is Toronto's "last best chance" for a large Downtown park. Although the Panel recognizes that the CRAFT Site is a very long and relatively large area, the evidence tendered in this proceeding did not establish that it was the "best" or "only" site for such a public park. Moreover, it was no part of the Tribunal's mandate to rule upon that issue in any event.

[65] Interestingly, the City's legal team repeatedly insisted that the difference of opinion outlined in paragraphs [63] and [64] was <u>not</u> the often-referred to and prohibited "beauty contest" between the City's Rail Deck Park proposed under OPA 395 and the CRAFT OPA. However, CRAFT's counsel termed this, and Rail Deck Park, as the "*Elephant in the Room*". Even accepting the position of the City's counsel, the Panel certainly received a good deal of both written and *viva voce* evidence from the City's witnesses to the effect that what CRAFT has proposed for open, park-like space in its OPA and in the Concept Plan is simply unacceptable in place of the "significant park" that is required in downtown Toronto. Moreover, counsel for the City devoted considerable attention to "parks matters" in its final written and oral submissions. The Tribunal is unaware of a recent OPA appeal case where the issue of parkland dedication and the nature of a possible future public park so utterly dominated and contributed to such a lengthy LPAT hearing. Certainly, no examples were cited to the Tribunal by the City.

[66] As noted above, it is not within the purview of this Tribunal to determine: (i) which Party has the better or more preferable park design proposal for the significantly elevated space over the 150+ year old Rail Corridor; and to then (ii) bestow its approval upon one of the competing park visions. Instead, the sole task of this Panel is to decide whether the CRAFT OPA satisfies the requisite elements of the agreed tests set out in Part 2 of this Decision. Notwithstanding this reality, for the sake of completeness, the Tribunal has found it necessary to summarily deal with the Parties' evidence and main legal arguments concerning parks issues in Part 3 (b).

[67] The Panel agrees with CRAFT's counsel that many of the City's issues and criticisms are not properly OPA matters and seem to be solely directed at the Safdie/PWP Concept Plan which, as already noted, is not subject to the Tribunal's approval. In fact, as noted by CRAFT's counsel, it was only because of the City's extensive Issues List that he took the unusual step of calling Mr. Greenspan to give landscape architecture evidence in an OPA approval case.

[68] The Tribunal also concurs that too many aspects of the City's critique of the Concept Plan are applicable to later aspects of the development process following the OPA stage, including the zoning, site plan and even the building permit stages, some examples being:

a. Location of driveways and bicycle parking, both site plan matters;

b. The height of the towers; of the podium along Front Street; and of the step-back from the podium; all being zoning matters;

c. The building setbacks from Front Street and Spadina Avenue, again typically zoning matters; and

d. The height of the deck required over the Rail Corridor – another zoning matter.

[69] In terms of design and architectural matters - which the Panel assumes also must relate to the evidence of Mr. Safdie and Mr. Greenspan above in paragraphs [49] to [59] inclusive - in his final written argument, the City's counsel stated that the CRAFT OPA was "premature" and ought to be denied:

> a. for failing to provide appropriate regard for the impacts of the proposed number of units and commercial gross floor area in creating a pedestrian barrier that disrupts the ability to create meaningful pedestrian and cycling connections in contravention of subsection 2(r) of the PA: "the promotion of built form that, is well-designed, encourages a sense of place, and provides for public spaces that are of high quality, safe, accessible, attractive and vibrant";
>
> b. [more generally], "for failing to have regard for the lack of urban design considerations and protections in the proposed policy, creating a policy framework that does not ensure that a resulting development will be well-designed, with a sense of place, that are of high quality, safe, accessible, attractive and vibrant". [emphasis added]

[70] The City's counsel did not cite specific support at that stage of his final submissions regarding the positions described in paragraph [69] above, but later quoted a very long excerpt of 26 paragraphs from the WS of the City's witness Mr. David Leinster dated August 24, 2020 which contained a number of conclusory opinions on these matters. As characterized by counsel for the City, Mr. Leinster's evidence was: "…with regard to landscape architectural and urban design concerns with the CRAFT concept plan with regard to the many negative impacts on the public realm, of the proposed elevated open space…"

[71] Mr. Leinster is a landscape architect who was called by the City as an expert witness. He was qualified to give opinion evidence on landscape design matters before the Panel on February 3, 2021 as part of a panel of City witnesses convened to provide design related testimony pursuant to the Tribunal's motion rulings noted above in Part 1 presumably in response to the evidence of Mr. Safdie, Mr. Greenspan and Mr. Sweeney. As another City's witness had done, at the outset of his cross-examination Mr. Leinster actually agreed with CRAFT's counsel that Mr. Greenspan and PWP have

a notable international reputation and that they do "…some pretty incredible work all around the world…".

[72] Mr. Leinster is a Principal of The Planning Partnership Limited and obtained a Bachelor of Landscape Architecture from the University of Toronto in 1985. He is also a Registered Professional Planner with the Ontario Professional Planners Institute and a Member of the Canadian Institute of Planners (but did not offer planning opinion evidence). Mr. Leinster has been practicing as a professional landscape architecture consultant since 1989 and a professional planning consultant since 2009. He is a past president of the Ontario Association of Landscape Architects, and his *curriculum vitae* indicated that he has won 11 awards in Canada for landscape architecture achievements and that the majority of his project involvement has been in Toronto, Ottawa and elsewhere in Ontario.

[73] Mr. Leinster admitted that not every PPS policy mentioned in his WS, Reply WS and direct examination concerning landscape design matters is meant to be implemented at the OPA stage, since there is a detailed zoning stage and site plan approval stage to follow: "…Yes, I would say I would agree that there are different policies for different levels of approval…". He also conceded on cross-examination that most of his evidence focused on the Safdie/PWP Concept Plan and not on the CRAFT OPA. Mr. Leinster further testified during cross-examination that: "…I think there should be a park designated on the CRAFT Site [in its OPA] …" and admitted that this was one of his key criticisms of the CRAFT OPA.

[74] Later during his cross-examination, Mr. Leinster admitted that at the OPA stage there is no requirement for the designation of a park nor its design criteria. As pointed out by CRAFT's lawyers in final submissions, Mr. Leinster also admitted during his February 5, 2021 testimony that the following elements of his opinion critical of the CRAFT OPA were actually <u>not</u> predetermined in the CRAFT OPA:

a. The height of the deck anywhere on the site;

b. The location or number of access points for pedestrians or bicycles;

c. The location of elevators, ramps or stairs

d. The length of the ramps or stairs;

e. The depth of soil; or

f. The storm-water management solution

[75] Mr. Leinster took the Tribunal through paragraphs 145-159 of his WS and opined that the CRAFT development failed to satisfy the policies in the Railway Lands West Secondary Plan but on cross-examination it was revealed that he improperly applied those policies to the lands west of Spadina Avenue.

[76] The other members of the City's urban design panel were Ms. Julie Bogdanowicz, an architect and urban designer employed by the City and Mr. Forth Bagley, also a noted architect who is currently based in New York. They filed a joint WS and Reply WS and each were qualified to give expert opinion evidence to the Tribunal on urban design matters.

[77] Ms. Bogdanowicz is a registered Architect with the Ontario Association of Architects with a Bachelor of Arts in urban geography and environmental studies and a Master of Architecture. She has been a sessional instructor at the University of Toronto's John H. Daniels Faculty of Architecture, Landscape, and Design. Ms. Bogdanowicz has worked in Toronto for 11 years, seven of them with the Urban Design section in City Planning. Prior to that, she worked in New York City for Tod Williams and Billie Tsien and more recently for Asymptote Architecture on the Marina Hotel located in Abu Dhabi at the Yas Island Formula One Circuit. While in Toronto, she also worked in private practice on the Mississauga Civic Square renovation, Toronto District School Board projects and the Regent Park Community Center (with CS+P Architects)

as well as the Globe & Mail Lands master plan and the 2015 Pan Am Athlete's Village (with KPMB Architects).

[78] Mr. Bagley is an outside expert retained by the City and a Managing Principal of Kohn Pedersen Fox Associates PC ("KPF"), a well-known New York-based architecture firm specializing in the design and delivery of impactful urban projects around the world. Since joining KPF in 2005, he led the design and management of many complicated urban projects, including: the masterplan and retail program of the Hudson Yards project in New York; the continuous development of Hong Kong's Landmark and Victoria Dockside districts; the massive new Changi Terminal 5 in Singapore and major components of the firm's Covent Garden masterplan in London, as well as a number of large mixed-use developments in the United States, Canada and throughout Asia. Mr. Bagley twice taught as the Eero Saarinen Visiting Professor at Yale University, where he also received 2002 Bachelor of Arts and a 2005 Master of Architecture degrees.

[79] As maintained by counsel for the City in final written and oral argument:

> The [City's] urban design panel were united in their concerns about the latest CRAFT concept plan. While the goal was to show at least one iteration of a development flowing from this OPA that would demonstrate policy implementation, ultimately, it failed, providing greenwashed blank walls.

[80] Despite this contention, the City's counsel devoted only a modest portion of his final submissions referring the Panel to the City's design critiques and the "concerns" regarding urban design and architectural matters dealt with in the Safdie/PWP Concept Plan or in the CRAFT OPA – i.e. other than with respect to the need for a public park to be located on the site and issues concerning the possible height of the deck underlying the structures depicted in the Concept Plan and the presence of a parking structure under that deck. Mr. O'Callaghan also repeated long excerpts from only Ms. Bogdanowicz's evidence in chief concerning her opinion that there was a "lack of proportion" and a "monolithic style" of development portrayed in the Concept Plan:

> So, the point we were making were the following two points when we talked about proportion. Proportion has to do with the height of the base

> building, which in our opinion...in my opinion is too tall relative to the width of Front Street. And in that case, proportion is not a subjective opinion because the City identifies exactly what it wants to achieve in its policies and guidelines. The latest concept does not have good proportions because the base building is at the same height with zero setback across the entire frontage and there are few breaks. There is no rhythm and there is no articulation…So, I feel like this drawing here [Exhibit 3, Tab 4, page 7] …very much shows the, sort of, linear extrusion of the base building here on Front Street while across the street at The Well there is breaks between the buildings, there is streets and open spaces and POPS dividing up the buildings and so you kind of generally have a bit more variety than what the CRAFT project is proposing…Further to this, when I talk about proportion and the monolithic scale, I was not talking about the project as a whole but I was specifically talking about the barrier effect and lack of mid-block connections, which we went over a little bit yesterday, and the lack of fit with special areas surrounding the site, which I will be expanding on next. So when I use the word "monolithic", I think this image really demonstrates the lack of articulation.

[81] Little effort by the City's legal team in their final oral and written arguments was devoted to the numerous issues raised in the WS, Reply WS and oral evidence of City witnesses concerning the adherence of the Safdie/PWP Concept Plan designs to the applicable provincial and City policies. In any event, the Panel is of the opinion that Mr. Sweeney in his WS, Reply WS and testimony provided a very thorough and effective response to those issues raised by City witnesses.

[82] In the circumstances, given the huge volume of evidence put before the Tribunal by the City and CRAFT, the Panel is constrained from providing an exhaustive review of Mr. Sweeney's opinions on matters that were not substantially dealt with by the City in final submissions. In any event, in the Panel's view, Mr. Sweeney's conclusions set out in paragraphs [62] a. to [62] g. above and in paragraphs [83] a. to [83] n. below were, in any event, not successfully challenged during cross-examination.

[83] The Tribunal further specifically finds that wherever Mr. Sweeney's opinions conflicted with the views expressed by Ms. Bogdanowicz, Mr. Bagley and Mr. Leinster, the Panel prefers and accepts instead the expert testimony and written evidence of Mr. Sweeney. Many aspects of Mr. Sweeney's evidence as accepted by the Tribunal are as follows:

a. The Safdie Concept Plan conforms to the policies of the Growth Plan (2019) cited by the City's counsel and witnesses;

b. The type and scale of the Concept Plan is very appropriate. The development is a mixed-use development providing much needed housing, a very significant amount of non-residential uses, and much needed retail and entertainment uses. The tower buildings are in keeping with the current and planned adjacent context both north and south of the site…. [and] exceed the City's Tall Building Guidelines requirements for tower design, including tower separation distances, tower floor plate sizes and typical podium/base building conditions. The Concept Plan also proposes an unusually high percentage of the overall land area for publicly accessible open space and private shared outdoor space/amenity;

c. The bridge connections proposed under the Concept Plan between some of the towers at the top or top 1/3 of the tower forms creates very desirable outdoor garden amenities for the residences, reduces the height of the towers and podiums/base buildings and thereby reduces shadow impact while adding unique visual interest and more shared indoor and outdoor amenities;

d. The Concept Plan conforms with the City's OP: Chapter 2 – Shaping the City, ii) 2.2.1.2.a) and 2.2.1.3.c) …the Concept Plan is first and foremost predicated on improving the public realm. The public realm from Bathurst Street to Spadina Avenue along the south side of Front Street receives an all new full pedestrian sidewalk complete with new trees and street-scaping that will be designed in conjunction with the City of Toronto… The Concept Plan will create new linkages between the King West/Wellington Place Neighbourhood and the currently isolated City Place Neighbourhood... The new north to south publicly accessible pedestrian/bicycle connections through the site will greatly improve

connectivity from the north to the waterfront, parks and amenities such as Canoe Landing Park, the Martin Goodman Trail, Toronto Music Garden and all waterfront amenities …[to the south]... The improvements to the public realm also include an approximate 13 acres open space … that further facilitates greater connectivity to Spadina Avenue from the rail corridor bridge, to the continuation of the park system to the south-west of the site including access to the "Mouth Of The Creek Park", Garrison Common and the Fort York grounds and facilities;

e. The Concept Plan conforms with OP Policy 3.1.1.1(d): Mr. Sweeney expressed his strong view that the Safdie Concept Plan proposes a new high quality public realm including all new animated public realm along the south side of Front Street, through block "accessible" pedestrian connections that continue the public realm of Draper Street, Portland Street and "The Well" Development to an all new publicly accessible open space and the City Place Neighbourhood to the south… [also] east west connectivity to Spadina Avenue and the public parks to the west along the rail corridor are greatly enhanced;

f. The Concept Plan meets the requirements of OP Policy 3.1.1.5(d). Mr. Sweeney testified that the Concept Plan proposes to transform Front Street from a single-sided street with no pedestrian sidewalk on the south side to a two-sided street with an all new pedestrian public realm sidewalk and streetscape. In addition, two new access points into the planned new Metrolinx/GO Station would be created along with access through the open space on the south side to the City Place neighbourhood south of the rail corridor. Front Street will thereby become a sustainable, economically vibrant, animated, and important east-west pedestrian street and no longer an underdeveloped, economically lifeless street;

g. The requirements of OP Policy 3.1.1.14 are also satisfied in that the Concept Plan, in Mr. Sweeney's opinion, has given careful consideration to ensure that all of the new public realm promotes public safety and security, and all of the new open space is fully engaged by the new buildings providing animation and "eyes on the street/park system". The new streetscape along the south side of Front Street is continuous and is animated with retail shops, entrance lobbies for the residential buildings, entrances into the GO Station/Galleria and open-air entrances to the publicly accessible through block connections leading to the public open space and to City Place to the south;

h. Mr. Sweeney's evidence emphasized that all aspects of Policy 3.1.1.15. of the OP are taken into account in the Safdie Concept Plan which features an indoor retail Galleria/GO Station concourse which runs directly above the planned new GO Station and is parallel to Front Street and intended to provide an indoor weather protected alternative to east-west pedestrian travel, fully accessible with multiple entrances from the north along Front Street and from the open space along the south;

i. The City raised a myriad of other policies under its OP which it seemed to contend were not met by the Safdie Concept Plan – or, presumably, the CRAFT OPA which is the actual instrument before the Panel in this proceeding. Those OP policies included but are not limited to 3.1.1.18, 3.1.1.19, 3.1.1.20, 3.1.2.1, 3.1.2.2, 3.1.2.3, 3.1.2.4, 3.1.2.5, 3.1.3.1, 3.1.3.2, and 4.5.2. In each of his responses during oral testimony and in his WS and Reply WS, Mr. Sweeny maintained that the Plan conformed with all of the cited OP policies, and the Tribunal accepts his evidence in that regard;

j. The City also raised issues alleging non-conformance with certain policies in the Railway Lands Central Secondary Plan, being: policies 2.1 to 2.5

inclusive, 3.1 to 3.7 inclusive, 10.6, 10.6.1, 10.6.2, 10.6.3. Again, Mr. Sweeney in his WS and oral evidence responded completely to these allegations and the Panel accepts his evidence;

k. Similarly, the City alleged non-conformance with many of the same policies in the Railway Lands West Secondary Plan, and in the view of the Tribunal, Mr. Sweeney's evidence in his WS and *viva voce* testimony refuted those City positions pertaining to policies 3.1 to 3.7 inclusive, 6.1 to 6.8 inclusive, and he also noted that "The finer details of the open space design will be the subject of a future site plan approval application to ensure full consultation with the City and conformity… [and I] will rely upon the evidence of Mr. Adam Greenspan with respect to the design and vision of the open space." (Mr. Greenspan's evidence is discussed above at paragraphs [49] to [59]);

l. In their Issues List, (although not specifically in final argument), the City also relied on the Tall Building Design Guidelines promulgated under the OP, specifically Guidelines 1.3 (in terms of angular plans, distances between towers, transitions and setbacks etc.), 1.4 (on sunlight access and shadowing, etc.), 1.5, 2.1 to 2.5 inclusive, 3.1.1 to 3.1.5 inclusive, 3.2.2, 4.1, 4.2, 4.3 and the Panel notes that Ms. Bogdanowicz also gave considerable evidence both orally and in her WS on these topics and guidelines. However, the Tribunal prefers the evidence of Mr. Sweeney where it contradicts Ms. Bogdanowicz's opinions, and accepts Mr. Sweeney's expert opinion that the CRAFT OPA conforms with these policies and guidelines;

m. The City also took the position in its filings for this case that the CRAFT OPA in the example presented by the Safdie Concept Plan failed to meet Objectives 3 of the Railway Lands Central and West Urban Design Guideline, the Block Specific Guidelines for Blocks 21 and 28 (Front

Street) and the Guidelines for the Parks and Open Space System. However, the Panel accepts Mr. Sweeney's opinion that both the CRAFT OPA and the Concept Plan satisfy all of the objectives of those Guidelines;

n. Finally, Mr. Sweeney in his WS and testimony rejected the general criticisms levied by the City and its witnesses under Issue 27 to the effect that the Concept Plan and the CRAFT OPA were not, from a design standpoint, appropriately integrated with the surrounding streets, properties and neighbourhoods – again, the Panel prefers and accepts his opinion in this regard.

[84] In final argument, counsel for the City argued, in apparent reliance on the evidence of the City's design panel of Ms. Bogdanowicz, Mr. Leinster and Mr. Bagley, that the CRAFT OPA failed to meet the requisite OPA test relating to "…urban design considerations and protections…", because it, and presumably the Safdie Concept Plan as well, "…creat[ed] a policy framework that does not ensure that a resulting development will be well-designed, with a sense of place, that are of high quality, safe, accessible, attractive and vibrant".

[85] The Tribunal instead prefers and accepts the opinion evidence of Mr. Sweeney in his WS and oral testimony that:

> …that the Concept Plan demonstrates compliance with all applicable urban design policies (both provincial and local) and to the extent required, with applicable City urban design guidelines. It is also my opinion that the Concept Plan represents good urban design and significantly improves the public realm…I continue to hold the opinion that the Concept Plan represents good urban design…
>
> …As the design is developed through the rezoning and site plan approval stages, the base of the towers will be further studied to create an appropriate level of engagement/ interface between buildings and the open space. It is equally important however to provide a good balance between quiet open space and fully engaged open space. This is a unique opportunity to create an unprecedented strong relationship between the open space and the proposed buildings without a public street between the open space and the buildings while also creating strong ties to four significant public streets. In my opinion, therefore, the open space will be engaged by the buildings and their occupants better

than the majority of public open spaces while also providing many alternative spaces for specific recreation and quiet enjoyment…

…[the Concept Plan does not represent a monolithic design]…The Proposal replaces a very significant urban barrier, being the sunken Railway Corridor, with a much needed and desirable new development coupled with a great community asset being the significant amount of publicly accessible open space and a network of strong connections between the currently separated districts north and south of the rail corridor. Great streets are sometimes monolithic and indeed consistency of street wall and built form along a street is considered very desirable. The breaks in a consistent built form or lower street wall become special and important. The breaks in the proposed street wall along Front Street, illustrated by the Proposal, occur specifically at the ends of Draper and Portland Streets and to a lesser extent at the planned crosswalk leading into The Well development…

…The Draper and Portland breaks provide pedestrians and cyclists the opportunity to continue directly south of these streets to the open space, to the City Place district beyond, to the Mouth of the Creek Park and to Fort York. These through block connections provide essential continuation of the existing street grid over the rail corridor. Given that the height of the air rights and the need to accommodate the trains below (including future electrification), the main level of the proposed Galleria must be raised above all the adjacent street levels. The Proposal then must provide for the necessary changes in elevation and does so while clearly communicating the through block public connections and while providing for easy transitions between levels with elevators, escalators, stairs and ramps that are carefully integrated into the design. The open space provides for the transition from the upper levels to the Northern Linear Park and beyond. The proposed podium is less than 23m in height with the residential towers above set back from the street wall/podium by 3m to 35m and separated from one another by more than is required by the Tall Building Design Guidelines. The overall result is not a monolith but rather a desirable and consistent street face broken strategically and obviously with playful and inconsistently placed towers above…

…The scale of the Proposal is consistent with much of the City Place district to the south and east and with current development within the immediate area including The Well development [directly to the north on Front Street]. The Proposal encompasses a large land area and is designed to free up the ground plane for publicly accessible open space. The Proposal provides an unparalleled amount of publicly accessible open space as a percentage of the total site area…

…The towers are separated from one another by amounts greater than that required by the Tall Building Guidelines. This greater separation of the towers, the deep setback from the street for some of the towers, and the lower than average podium heights combine to create a much more open and interesting scheme that is not overbearing or over scaled when compared to the development of much smaller parcels of land with tower forms in the area. This provides excellent proportion to the site. The larger land area combined with only six tower forms across an entire City Block represents excellent proportions… [emphasis added]

[86] In conclusion, based on the totality of the evidence accepted by the Tribunal as discussed and analyzed above, the Tribunal determines that there is no failure of the CRAFT OPA – or of the Safdie/PWP Concept Plan for that matter – to meet the urban design requirement elements of the OPA test set out in Part 2 ("OPA Test"). Although the City in this lengthy proceeding marshalled a good deal of often repetitive expert opinion evidence on urban design matters, for the reasons set out above, the Tribunal strongly preferred and accepted the evidence and expert opinions of the CRAFT witnesses Mr. Safdie, Mr. Greenspan and Mr. Sweeney over the contrary evidence and opinions of the City's witnesses, Mr. Bagley, Ms. Bogdanowicz and Mr. Leinster.

**(b) Parks/Open Spaces: "The Parks Issue"**

[87] As noted, a great deal of time was spent both before and during this proceeding on evidence and argument by the Parties concerning matters relating to open spaces and parks as reflected – or not included – in the Safdie/PWP Concept Plan and in the CRAFT OPA.

[88] In the Prior Decision concerning the same CRAFT Site was also dealt with related to the City's OPA 395 "Rail Deck Park" proposal, under a previous PA legislative scheme commonly referred to as "Bill 139". However, in the Prior Decision it was made clear by the reasons of Members Swinkin, Schiller and Bryson (the "Previous Panel") at paragraph [55] therein stated that the current appeal before this Tribunal, which by then had already been initiated by CRAFT:

> …is what is referred to as a legacy appeal under the [PA] and is not subject to the substantive and procedural changes wrought by Bill 139 amendments.

[89] The Previous Panel went on to note, significantly, at paragraph [56] of the Prior Decision:

> …The CRAFT appeal of its proposed official plan amendment is not before this PL180210 panel and this panel expresses no opinion on it. <u>The decision of the Tribunal in this OPA 395 matter is without prejudice</u>

> to, and should not derogate from, a full and fair hearing of the CRAFT proposed development in Tribunal case PL180211. [emphasis added]

[90] Both the City's lead lawyer Mr. O'Callaghan and CRAFT's counsel Mr. Kagan expressly adopted the ruling stated in the Prior Decision as described in paragraphs [88] and [89] above. As Mr. O'Callaghan stated in final written and oral argument:

> This hearing started with the emphatic position of the City that this appeal – this hearing – is not a beauty contest between the CRAFT proposal and OPA 395 (the City's OPA for Rail Deck Park).

[91] However, Mr. Kagan in final written and oral submissions stated his clients' concurring position a little differently:

> Through its Witness Statements the City says that this hearing is not a beauty contest between Rail Deck Park (OPA 395), which is approved and in force, and the CRAFT private development. We agree but this does not mean that Rail Deck Park is irrelevant in this hearing; on the contrary, it is the elephant in the room. If this Tribunal denies the CRAFT private appeal, OPA 395 will remain the governing policies for these air rights. Accordingly, this Tribunal should be fully aware of what that means before it renders this very important decision in this private appeal.

He further expounded, referring to the evidence and admissions of the City's own planning witnesses that:

> As a result of the 'Clergy principle' and as a result of the assurances Mr. O'Callaghan gave the LPAT when it heard the OPA 395 appeal, and as a result of the LPAT's own decision which specifically provided that OPA 395 was without prejudice to the existing CRAFT appeal, the Future Development Area policies in both [Railway Lands Central and West] Secondary Plans apply to this appeal. But OPA 395 deleted those important policies so if this Panel turns this appeal down flat there would be a lack of policies to guide private development. It would be the land use planning equivalent of CRAFT being set adrift in the vast ocean in a rowboat. [emphasis added]

[92] As already noted by the Panel, it is neither the obligation nor intention of this Tribunal to rule as whether the City's public parks preferences or the parks/open space proposals set out in the Safdie/PWP Concept Plan and CRAFT OPA are the best "park choice" for the CRAFT Site. Moreover, the Panel finds it unnecessary to recount in

detail all of the documentary and *viva voce* evidence presented on parks related issues by the Parties.

[93] However, given the volume of evidence presented and time spent by counsel for the Parties on the above-noted parks related matters, and the lengthy final written and oral submissions of both Parties' counsel, the Tribunal has found it necessary to summarize the essential evidentiary points and arguments of the Parties' counsel and to set out certain findings it has reached as follows:

1. The City has not established that it is necessary for CRAFT to designate a public park in the CRAFT OPA. In fact, there is no current basis in law for the City's proposition that it is entitled to any parkland dedication in relation to the CRAFT Site. This was admitted during the cross-examinations of Ms. Andrea Bake, who is the Project Manager with the City of Toronto Parks, Forestry & Recreation Division in the Parks Development and Capital Projects Division, Development Application Unit, Toronto and East York District and has been employed in this position for 15 months. She has a Masters of Forest Conservation from the University of Toronto and a Bachelor of Science with Honours in Biology from the University of Western Ontario. The same admission was also made by both Ms. Susan McAlpine and Ms. MacDonald (briefly referred to in paragraph [50] above), two very senior professional planners and well-respected members of the City's Planning Department who were qualified to provide more general opinion evidence to the Panel on land use planning matters which is discussed in Part 3 (f) below;

2. During his cross-examination of Ms. Bake, Mr. Kagan put to her his contention that the City's parkland dedication by-law does not apply to the CRAFT Site (as set out below in this paragraph [93] (6)) ("Parkland Exemption"). After some considerable reluctance, during an unfortunately argumentative and evasive period of testimony, eventually Ms. Bake

admitted that CRAFT's legal position is absolutely correct and that the Parkland Exemption applies to the CRAFT Site – however she was unable to avoid expressing her strongly-held view that nonetheless all of this seems "wrong" from a "policy standpoint" (a point also strangely repeated at length in the final submissions of the City's legal team along with other arguments). In fact, Ms. Bake also conceded that she knew that certain members of the City Planning department, including Ms. MacDonald and Ms. McAlpine, were also aware of the Parkland Exemption and that legal advice was sought on that very issue in connection with the City's preparations for this LPAT proceeding. The evidence before the Panel demonstrated that a need was recognized to amend the City's Municipal Code in order to remove the Parkland Exemption before this hearing began and before the City's case was prepared– which amendment, of course, did not happen.

3. As noted, the admissions of Ms. Bake summarized in paragraph [93] (2) above were also largely conceded and repeated by Ms. McAlpine and Ms. MacDonald during their cross-examination. Again, however, the Panel noted that there was some unnecessary hesitation by them to acknowledge this point, and apparent reluctance, in their testimony. The Tribunal found this to be counter-productive.

4. The Panel recognizes that in any hotly contested and important proceeding, it is natural for the witnesses for each Party to find themselves embroiled in the partisan environment thereby created. This is too often the case, notwithstanding the witnesses' obligation under the Tribunal Rules to provide independent opinion evidence, free of bias, in order to assist the Tribunal. Certainly, at times, the passionate views of Ms. Bake, Ms. McAlpine and Ms. MacDonald strayed very close to the permitted line in this respect. However, the Tribunal understands and accepts that their motivations were likely informed by their longstanding service to the City

and, by extension, their views as to how to best serve the people of Toronto. On the other hand, while the Tribunal empathized with this apparent commitment of Ms. Bake, Ms. McAlpine and Ms. MacDonald, the tenor and combativeness of their oral testimony negatively impacted the Tribunal's view as to the reliability of their opinions. Unfortunately, the Panel also reached the same view on several occasions regarding the testimony of Ms. Bogdanowicz, Mr. Mendes and Mr. Gladki as is further discussed below. However, the Tribunal found it unnecessary to conclude that any of these witnesses engaged in deliberate behaviour in breach of their duties owed to the Tribunal.

5. Despite the enormous time and energy spent by the City's legal team in pursuing the position that the CRAFT OPA must identify and designate the specific location and size of a public park on the CRAFT Site, the Panel is forced to the conclusion that this specific position is not supported in law and also notes that the City's counsel spent very little time in final written or oral submissions effectively dealing with what they portrayed to be a key issue. In fact, at certain points, counsel for the City seemed to ignore the admissions of City witnesses and the reality of the Parkland Exemption:

> …In any event, planning in Ontario is top down. From the Planning Act come the provincial plans and policies, which are implemented in the municipal plans, for which by-laws must conform. By-laws are required to conform with official plans, per section 24 of the Planning Act, the inverse is not true. The parkland by-law is not relevant to a consideration of what the statute allows for municipalities to require for parkland; the parkland by-law may be amended to require parkland dedications to be provided – and if the exemption were eliminated, that change is beyond the scope of an appeal to this Tribunal. The existence of that exemption does not dictate upwards to the official plan what its policies must be.

6. The Tribunal disagrees with the proposition stated above by counsel for the City in paragraph [93] (5). Instead, the Tribunal concurs with and

expressly adopts the conclusions stated in final argument by CRAFT's counsel that:

> The CRAFT air rights are exempt from parkland dedication. This is provided for in policy 11.14 of the Railways Lands West Secondary Plan and policy 11.6 of the Railway Lands Central Secondary Plan. Policy 5.6.6 of the City's Official Plan further provides that in the case of a conflict between the Official Plan and a Secondary Plan, the Secondary Plan prevails. Since the Secondary Plan exempts the CRAFT site from parkland dedication, it prevails over the more general parkland dedication policies in the Official Plan. Moreover, the CRAFT air rights are also exempt by virtue of section A in Schedule B, Article III of the City's parkland dedication by-law (which is contained within the City's Municipal Code)…That section provides that the parkland dedication provisions of the Municipal Code do not apply to the geographic area of The Railway Lands as described in By-law 612-85. Andrea Bake confirmed that the CRAFT air rights are wholly contained within the geographic area known as the Railway Lands in By-law 612-85…[and further]… confirmed that Exhibit 17 [in this proceeding] is that bylaw. [Ms. Bake conceded that]…the term "Railway Lands" in the definition section of the bylaw which defines that Railway Lands as "means that part of the City of Toronto located within the area delineated and designated by heavy lines on Map 1 contained in Appendix A to this by-law and referred to thereon as "Railway Lands"…Andrea Bake then confirmed that all of the CRAFT air rights are contained within the Railway Lands as shown on Map 1… Andrea Bake confirmed that the CRAFT air rights were exempt from parkland dedication… [emphasis added]

7. The Tribunal was puzzled by the final arguments made by counsel for the City concerning the Parkland Exemption. Mr. O'Callaghan seemed to be urging the Panel to somehow interpret CRAFT's position on this issue, and the CRAFT OPA itself, as tantamount to the instigation of an unlawful exercise of the Tribunal's jurisdiction. The City's counsel argues that the City cannot be "forced" by the Tribunal to accept cash-in-lieu of dedicated parkland on the CRAFT Site. He cited several cases to support the principle that section 42 of the PA, which gives the municipality the option to seek cash-in-lieu of land for parks purposes, leaves that election to the municipality and does not provide a mechanism for the LPAT to impose that choice on the municipality. He further characterized the issue as follows:

> We already know from the evidence of the City's witnesses and from the wording of the City's own OP regarding what is considered acceptable public parkland, that the elevated portions of the [CRAFT] site, not abutting public roads – do not qualify and therefore, the City will not accept these lands as public park…Thus for the Tribunal to approve CRAFT's OPA is a de facto decision by the Tribunal to force the City to accept cash-in-lieu of parkland for this site…Yet the requirement for the City to accept cash-in-lieu for this site will be the inevitable outcome if the Tribunal approves the OPA with the fsi quantum proposed by CRAFT.

8. Thus, the essential basis of Mr. O'Callaghan's argument, restated, is: "Since the CRAFT OPA could permit the development portrayed in the Safdie/PWP Concept Plan and because the City parks panel witnesses have testified that they will not accept as a public park any of the remaining CRAFT strata rights – therefore if the Tribunal approves the CRAFT OPA then it is forcing the City to accept cash-in-lieu of public parkland which is beyond its jurisdiction".

9. The Tribunal does not agree with the argument and characterization described in [93] 8. above nor does it agree that the evidence establishes that there is "no acceptable park site" on the CRAFT Property. That argument partly conflates the Safdie/PWP Concept Plan with the CRAFT OPA. Additionally, leaving aside the rather obvious "pro-CRAFT OPA denial" tone of the evidence of the City's witnesses who expounded on the "parks issue" as to what is or should be "acceptable" parkland - there was a profound lack of reliable, objective evidence before the Tribunal proving that there is no way to proceed with a development under the CRAFT OPA that could yield an acceptable public park site in the CRAFT strata rights. Obviously, the City cannot credibly maintain that elevations are the problem, since that is the undeniable nature of the CRAFT Property (upon which the City planned to build Rail Deck Park as noted in the Prior Decision approving OPA 395).

10. Moreover, in the Tribunal's view it is also incorrect for the City's legal team to insist that the "CRAFT Deck" under the CRAFT OPA must necessarily be higher than "a deck with only a park" (a rather vague concept that was also not appropriately established in the evidence in any event). In the Tribunal's opinion, the following statements in the City's written final argument are incorrect, or at the very least, misleading:

> …And while it is true that the OPA does not identify an elevation above sea level (ASL), the OPA clearly is proposing that the 6.5 metre tall parking garage be permitted over the entire site area. Mr. Safdie agreed with the deck height in cross-examination…it is an uncontested fact based on the evidence of Mr. Safdie and others, that the top of the decking structure will always be a minimum of 6.5 metres above the lowest point of where the air rights begin.

Firstly, even if it so provides, the Safdie/PWP Concept Plan is not the planning instrument at issue here – and the CRAFT OPA does not "demand" or propose an elevated parking garage across the entire CRAFT Site, nor does it prescribe any height for such a structure. In fact, to the contrary, it states in section 3.5:

> Parking for the combination of uses may be located above and/or beneath the surface of the decking structure, provided that any parking above the surface of the decking structure will be enclosed and such that vehicles will not visible from the public realm, enabling the surface of the decking structure to be optimized with non-residential and mixed residential\non-residential buildings and large contiguous areas of open space and public realm.
> [emphasis added]

Secondly, nowhere in the CRAFT OPA is it proposed that the only public parkland that could be created on the CRAFT Site must be located above an elevated parking garage. Thirdly, it is somewhat ironic to contrast the arguments made by the City's legal team in this hearing with the situation which exists under the City's now approved OPA 395: OPA 395 did not include details such as the precise height of the deck; what facilities would be built on the deck; nor did it finally determine the height of the deck for

Rail Deck Park; or even if the decking structure would include room for parking or service vehicles, since it did not expressly prohibit parking within the deck. OPA 395 simply designated the CRAFT Property as Parks and Open Space Areas and provided policies to guide the further detailed studies which would be required as part of the next planning phase(s).

11. Again with respect to a public parkland contribution, counsel for the City also raised the prospect that "…because the build out of the air rights will be phased, each individual owner or applicant who seeks to receive zoning by-law approval may be required to provide the City with the statutorily required parkland contribution…". This unique argument went on as follows: "…because there has been no master planning exercise at the OPA stage to identify the park on-site, the City will have no alternative but to seek a dedication of parkland from each applicant as the zoning by-law applications are filed for those smaller individual sections of the air rights as applications are submitted and reviewed…" Again, these vague statements do not accord with the actual provisions of the CRAFT OPA and do not constitute evidence in this proceeding. While phasing is noted in the CRAFT OPA as is a master planning process (both the subject of separate City arguments that they had been "left out"), there was no objective, reliable evidence before the Tribunal to support the above speculative argument of the City's legal team as to how (or when) the build out will occur and regarding the resultant impact on parkland contribution. The ad hoc remarks made during the testimony of Ms. Bogdanowicz and Mr. Bagley or alluded to by Ms. McAlpine and Ms. Macdonald about 'phasing' and possible future steps in the development process, also do not create a reliable evidentiary basis for these arguments, in the Tribunal's opinion.

[94] During the oral argument phase of final submissions, the Tribunal asked Mr. Kagan for CRAFT to put in writing his verbal response to the arguments made by the

City's legal team in their written submissions, as referenced in paragraph [93]. In those written submissions, he contended as follows:

1. The PA authorizes the City to require parkland dedication from a developer through either section 51 of the PA (i.e. subdivision approval) or through section 42 of the PA (i.e. redevelopment). In this case the Parties agree that solely section 42 is applicable;

2. Section 42 of the PA deals with "development" where there is no subdivision required…Section 42 permits a municipality to require that the developer dedicate land either at the standard parkland rate (5% for residential) or the alternative rate (up to 1 hectare of land per 300 dwelling units). Section 42 also permits the City to impose what is known in the industry as the "alternative rate" [meaning the "alternative requirement" set out in section 42 of the PA]. It is the alternative parkland rate which the City bases its argument of prematurity on in this case;

3. The "20%" parkland dedication and designation comes from section 3.2.3.5 of the City's OP which is the City's alternative rate at the OP level…in paragraph 60 of Andrea Bake's Witness Statement…she specifically refers to this as the City's "alternative rate" so there is no debate between the parties that the City is basing its 20% parkland designation on the 20% parkland dedication through the alternative rate. The number "20%" is not found in section 42… [of the PA]…but is found in section 3.2.3.5 of the City's OP. It is likewise implemented through section 415-23 of the City's Parkland Dedication By-law (Municipal Code). In both the parent Official Plan and the Municipal Code, the City has limited the alternative rate to a maximum of 20% of the site area for sites 5 hectares in size or greater;

4. The City demands that 20% of the CRAFT Site in effect be "double designated" Parks and Open Space Areas in the CRAFT OPA (i.e. since OPA 395 already designates the entire CRAFT Site for this use) based on the maximum "20%" parkland dedication requirement in section 3.2.3.5 of the City's Official Plan and section 415-23 of the City's Municipal Code. The City's argument goes as follows:

    a. The City is entitled to the maximum parkland dedication from CRAFT being 20% of its site.

    b. To protect for that ultimate dedication it requires that the CRAFT designate 20% of the site now as Parks and Open Space Areas.

    c. The City does not disclose where that 20% should be and argues that the CRAFT OPA is premature until that is determined

5. The City concedes that the CRAFT Site is exempt from the City's parkland dedication by-law but says, in effect, that does not matter and that the CRAFT OPA is premature unless and until it designates 20% of the site as Parks and Open Space Areas. CRAFT disagrees. The City argues that the Planning Act permits this dedication despite the exemption. The City argues that the exemption is "easily fixed". CRAFT disagrees;

6. The City argues that section 42 of the PA authorizes the City to demand parkland dedication from a developer and that the City can thus demand 20% from CRAFT, regardless of the Parkland Exemption. This is false. Section 42 authorizes the City to demand parkland at the alternative rate, through section 42 of the PA, provided the City has first:

    a. In force specific Official Plan policies dealing with the use of the alternative requirement (section 42(4) of the PA), and

b. Enacted a Parkland Dedication By-law (subsection 42(1) and 42(3) of the PA)

7. Unless both conditions are met, the City is precluded from imposing the alternative parkland dedication rate on CRAFT – the reason underlying this requirement in the PA is that the Official Plan policies provide merely the policy guidance for the by-law and the by-law provides the detailed calculation formula and rules. Those policies occupy only a page or so in the OP whereas the by-law is dozens of pages long. That by-law is the instrument which the City uses to calculate the parkland dedication 'invoice' served upon the developer as a condition of the building permit issuance;

8. Since both policy 11.14 of the Railways Lands West Secondary Plan and policy 11.6 of the Railway Lands Central Secondary Plan exempt the CRAFT Site from any parkland dedication (land or cash-in-lieu) and because Policy 5.6.6 of the City's OP provides that in the case of a conflict between the Official Plan and a Secondary Plan, the Secondary Plan prevails and therefore exempts the CRAFT Site from parkland dedication – i.e. it prevails over the more general parkland dedication policies (i.e. the 20%) in the OP. Thus the first condition in section 42 – no relevant in force OP policies - results in the CRAFT Site being exempt from parkland dedication (the Parkland Exemption restated);

9. The CRAFT Site is also exempt from parkland dedication by virtue of section A in Schedule B, Article III of the City's parkland dedication by-law (the City's Municipal Code). Since the City is statutorily precluded from imposing the 20% parkland dedication requirement on CRAFT, there is no foundation for the City's demand for 20% designation;

10. The City argues that there is an “easy fix” to their dilemma. CRAFT disagrees. In order for the City to impose a 20% parkland dedication on CRAFT, s. 42 of the PA requires that the City to:

    i. Amend policy 11.14 of the Railways Lands West Secondary Plan and policy 11.6 of the Railway Lands Central Secondary Plan to remove the existing exemptions. These amendments would be processed under s.17 of the PA which requires public meeting and provides for a right of appeal to the LPAT under section 17(24) of the PA. Moreover, as a precondition of that OP amendment, s.42 (4.1) of the PA requires that the City complete a Parks Plan. There is no evidence before the Tribunal that the City has completed or even started a Parks Plan; and

    ii. Amend its Parkland Dedication By-law. That amended by-law is subject to a right of appeal to the LPAT under s.42 (4.9) of the PA. Under s. 42 (4.15) and s. 42 (4.16) of the PA, on appeal the LPAT also has the authority to amend the alternative rate. Thus even if the City enacts a parkland dedication by-law maintains the 20% maximum rate for sites 5ha in size or greater, the LPAT might reduce it on appeal. [emphasis added]

[95] The Tribunal agrees with the positions stated by counsel for CRAFT as detailed in paragraph [94] above and rejects the arguments on those points made by the City’s legal team. The Panel therefore determines that the Parkland Exemption cannot simply be ignored in this case. The Panel is also of the view that it seems strange that the Parkland Exemption could be somehow removed by the City in the future so as to retroactively apply to the current CRAFT OPA. However, it is unnecessary for this Tribunal to make any advance finding or ruling as to the possible retrospective impact of any future changes made to the Municipal Code or otherwise – and the Tribunal expressly declines to do so.

[96] The Tribunal also finds no language in the CRAFT OPA which precludes the establishment of appropriate public parkland at a subsequent stage of the development process and notes that there is substantial, supportive content in the CRAFT OPA relating to parks – including public parks – as well as other park and open spaces. In particular, the Tribunal notes that:

a. the CRAFT OPA provides that: "…Map 18, Land Use Plan, is amended by redesignating [the CRAFT Site] from 'Utility Corridor Areas' to 'Mixed-Use Areas" – the Tribunal notes that it was uncontested by the City that the "Mixed-Use Areas" designation permits a public park and that this was admitted by Ms. MacDonald during her testimony.

b. one recent adjacent example of parkland dedication occurring on a site designated "Mixed-Use" without prior specific OPA park designation and location is The Well, a development at 400 Front Street West, about which several CRAFT and City witnesses testified;

c. the CRAFT OPA in its Introduction section 1.5 specifically states: "It is planned to include a range of Mixed-Use buildings and spaces containing residential, employment/non-residential, retail and services, community facilities, and considerable opportunity for parkland and open space providing respite, active recreational opportunities, and connections and linkages to the adjacent neighbourhoods and open space networks …The proposed range of residential and non-residential uses, combined with the significant amount of on-site open space linked to adjacent areas, advances the place-making objectives of the Official Plan, and supports the Growth Plan objective of creating complete communities". [emphasis added];

d. the CRAFT OPA further notes under its Site and Specific Areas Policies ("SASP") it is stated that : "…enabling the surface of the decking structure to be optimized with non-residential and mixed residential\non-residential buildings and large contiguous areas of open space and public realm…" [emphasis added];

e. in section 3.6 of the SASP, it is stated that: "…The development includes the opportunity for significant open space in the form of City parkland,

Publicly Accessible Private Open Spaces ("POPS"), and other private open space areas, accessed by a combination of paths, pedestrian ramps, stairways, escalators and elevators…" [emphasis added];

f. the entirety of section 4 of the SASP expressly deals with parks and open space under the heading "PARKS, OPEN SPACE, AND PUBLICLY ACCESSIBLE PRIVATE OPEN SPACE (POPS)":

> Public parks are permitted by the Mixed-Use Areas designation and may be acquired through parkland dedication under the Planning Act, other Planning Act tools, land exchanges, purchase, and any other available mechanism.
>
> A substantial portion of the total site area will be maintained as POPS and/or parkland. Subject to appropriate arrangements and agreements with the City, these lands will be open to the public and easements will be granted to the City at appropriate locations to ensure the POPS are open to the public.
>
> Provide for a minimum of 0.30 hectares (0.74 acres) of public parkland east of Spadina Avenue and a minimum of 1.28 hectares (3.16 acres) of public parkland west of Spadina Avenue in the "Mixed-Use Areas" if all of Northern Linear Park is effectively removed to permit decking…

While in the Panel's view it is undeniable that Northern Linear Park is an important public amenity, the reality is also that in its current form at the southern edge of the CRAFT Site, in front of very large, tall condominium complexes, it is really more of a long walkway rather than a typical multi-purpose urban park of the sort referred to in the evidence of Ms. Bake and Ms. Bogdanowicz in particular – this was clear from the evidence tendered to the Tribunal and was also quite evident during the site tour of the Rail Corridor that all Parties and the Panel participated in. From the evidence available to the Tribunal, it appears that Northern Linear Park would be integrated by the City into a much higher Rail Deck Park, if ever built by the City. Thus, there would seem to be a future opportunity for the City and CRAFT to reach a sensible agreement on something similar that would be in the overall best interests of all City residents in the surrounding area, including but not limited to those who could live in any

new residential development constructed on the CRAFT Site pursuant to the CRAFT OPA. Of course, this is not something that the Tribunal must consider nor is it a matter that must be decided upon at the OPA stage.

g. Under its Urban Design Guidelines in section 12, the CRAFT OPA states: "Urban Design Guidelines will be developed to the satisfaction of the Chief Planner and Executive Director, City Planning Division… in order to guide the design of the buildings and open space elements of the project. Urban Design Guidelines will guide development to implement the Official Plan and this SASP and assist staff in evaluating applications for Zoning By-law Amendment and Site Plan Approval…[and]… shall include the following elements and reflect the following matters: a) A Public Realm Master Plan for the site to implement the Vision and Major Objectives of this SASP, including the identification of all public and private open spaces, how the pedestrian network connects to and complements the public realm around the site, and how a coordinated, cohesive and connected public open space system is ensured…[and] Consider input provided by the City's Design Review Panel." [emphasis added];

h. The "Environment" section of the CRAFT OPA states at section 14.1: "…The comprehensive decking of the rail corridor and the development of the site represents an opportunity to expand and enhance the public realm and open space networks in the City. This Section contains policy direction to achieve the Vision and Major Objectives of this SASP. The design, development, and maintenance of the site, will support environment stewardship, connectivity and sustainability, through: a) Including, where appropriate, a range of active recreational areas and passive areas within the open space system; b) Provide connected planted areas that potentially support wildlife habitat; c) Ensuring adequate soil volumes to support health and mature landscaping and tree canopies; d) Reducing the urban heat island effect and increasing carbon

capture through a diversity of planting and landscape design treatment; e) Planting a range of native species to support biodiversity and reduce the need for intensive maintenance; and Incorporating innovative approaches to irrigation, ventilation, and stormwater management systems." [emphasis added]

i. Section 17.5 of the CRAFT OPA further provides: "In order to ensure orderly and coordinated development of the site, the owners/applicants will ensure that the necessary requirements and studies are completed and approved by Council and any other applicable approval authority, City of Toronto By-law No. ~~ -20~13 before permitting the construction of the decking structure or the development of the site, including the following: a) A detailed Public Realm Master Plan as described in this SASP will be prepared, which will include specific technical, development, and design details, and will inform the development of the site." [emphasis added]

[97] As the result of the motion rulings made by the Tribunal described in Part 1, the City's counsel decided to call Mr. John Gladki to testify from a land use planning perspective as part of a panel about parks issues related to the CRAFT OPA. Mr. Gladki is the President of Gladki Planning Associates, a firm he founded in 2010. Mr. Gladki is a former Director at Toronto's Planning and Development Department where he was responsible for developing the Official Plan and he has over forty years' experience working with government agencies and private sector organizations on local and area planning studies, local economic development, policy development, urban regeneration, affordable housing, and development approvals. Mr. Gladki obtained a Bachelor of Arts from the University of Toronto in 1972 and his Master of Environmental Studies, Planning and Policy, York University in 1974.

[98] Mr. Gladke has testified many times before the Tribunal and the OMB and was qualified without objection to provide opinion evidence to the Panel on only those land use planning matters related to parks-related issues along with Ms. Bake. This is so,

notwithstanding that Mr. Gladke delivered a WS and Reply WS that dealt with other planning issues. It was also the decision of City counsel to have solely Ms. MacDonald and Ms. McAlpine focus their direct oral testimony on "non-parks, general land use planning issues" so as to avoid the duplication concern dealt with by the Tribunal's motion ruling – their evidence is considered in Part 3 (f) below.

[99] The following summarizes Mr. Gladki's opinion insofar as it relates to parks planning matters, as derived from his WS, Reply WS and his oral evidence:

a. Over the past number of years the City has invested significant resources and effort to document the need for parks in the Downtown and the area immediately surrounding the site. The subject site was identified as a site of a major park. The City has considered but not yet initiated expropriation proceedings to secure parkland on the portion of the site east of Spadina Avenue;

b. Development on the CRAFT Site, as proposed, is not required to meet Downtown population and employment growth density targets to 2041 – it is conceded that a need in this respect is not a test for approval of the CRAFT OPA;

c. The area immediately surrounding the site as well as the Downtown as a whole have a significant deficiency in parkland provision per person and employee, which will grow worse as new development comes on stream in the future; the proposed development will exacerbate that deficiency and does not address parkland provision that meets the City's policy framework;

d. The proposed OPA provides for a density of 9.5 times floor space index ("FSI"), yet the concept plan submitted with the application illustrates

development at 5.1 times FSI (The Tribunal notes that it is now agreed by the Parties that the CRAFT OPA sets out a maximum density of 4.2 FSI);

e. The application does not illustrate the implications of 9.5 times FSI on the provision of parks and open space;

f. Even at a density of 5.1 times FSI, the concept plan does not illustrate the location of parkland, and shows an open space concept that does not meet City standards regarding connectivity, views, safety and accessibility;

g. The application does not adequately address the quantity, location, accessibility or general provision of parks as required by the PPS, Growth Plan and the OP;

h. The application does not meet the policies of the City of Toronto Official Plan regarding the Downtown, complete communities or provision of parkland;

i. The application does not adequately address the policies in the Railway Lands Central and West Secondary Plan policies; and

j. Mr. Gladki conceded during his cross-examination that he was unaware of the Parkland Exemption and that, therefore he admitted that there was no requirement that 20% of the CRAFT Site be subject to parkland dedication to the City;

[100] In the Tribunal's view, the criticisms of the CRAFT OPA described in the evidence of Mr. Gladki (and also Ms. Bake) above concerning parks and public realm planning were unconvincing. Moreover, the City was unable to provide to the Panel as part of its lengthy written and oral submissions any examples of recent OPAs that met

the apparent “standard” for the identification of public parkland now being demanded of the CRAFT OPA by the City’s planning staff and the City’s counsel. In fact, it was mainly CRAFT’s legal team who tendered examples of other neighbouring OPAs in this hearing during direct and cross-examination testimony – not the City. The Panel further agrees with CRAFT’s counsel that there is no need for the CRAFT OPA to specify a designated location for public parkland or any further details concerning a “public realm master plan” beyond what the CRAFT OPA currently contains. It is particularly noteworthy, in light of what City witnesses characterized in their oral testimony as the lack of “master planning” or “precinct planning” elements in the CRAFT OPA, that these elements were nowhere identified on the City’s Issues List prepared for this case. In any event, it is the Tribunal’s view that both such elements are acceptably referenced in the CRAFT OPA. It is the Tribunal’s view, as was partly framed in final submissions by counsel for CRAFT, that:

a. A public park is a permitted use in a Mixed-Use Areas designation, thus the proposed designation in the CRAFT OPA already permits a public park;

b. The CRAFT air rights are exempt from parkland dedication (for the reasons discussed above regarding the Parkland Exemption);

c. OPA 395 is in force pursuant to the Prior Decision and therefore already designates all of the CRAFT Site as Parks and Open Space Areas;

d. Thus, the Mixed-Use Areas designation proposed in the CRAFT OPA causes no prejudice to the City in terms of a possible future parkland contribution – on the other hand, the City’s request to have the CRAFT OPA specify a precise location of parkland (despite the Parkland Exemption) may have the effect of creating a future argument that the CRAFT OPA thereby prevents the erection of any building in such location

– which would be clearly potentially prejudicial to CRAFT and could create further protracted litigation before the Tribunal;

e. Given the City's claim that the CRAFT OPA must contain a precise designation of Parks and Open Spaces as well as the exact location of parkland sought by the City, the Tribunal found it puzzling that the evidence demonstrates that the City's staff never provided any comment as to where the City wanted the parkland to be located on the CRAFT Site. The argument by the City's counsel that somehow the City is not required to provide such input was uncompelling, in the Panel's view. For some strange reason that was never adequately explained by the City's legal team during the hearing, the City's witnesses and its planning department seemed to perceive that to do so would undermine their past and current adamant opposition to the CRAFT OPA;

f. The Panel also notes that the evidence demonstrated that in an earlier version of the CRAFT OPA rejected by the City, CRAFT had actually offered to designate most of the portion of the CRAFT Site east of Spadina Avenue for Parks and Open Space Areas. This proposal likely exceeded the calculation of possible parkland dedication offered by Ms. Bake during her cross-examination testimony (i.e. ignoring the effect of the Parkland Exemption);

g. Ms. Bake testified that without a Parks and Open Space Areas designation the City would be precluded from obtaining the public parkland to which it is entitled through subsequent development approvals. Neither this assertion nor a similar final argument made by the City's legal team has been proven to the satisfaction of the Tribunal;

h. To the contrary, it was admitted during the cross-examinations of Ms. Bake, Ms. Macdonald and Ms. McAlpine that the City has obtained onsite

parkland from other sites designated Mixed-Use Areas without any of those lands having had first “embedded” Parks and Open Space Areas designations in their governing OPAs. Otherwise, it would have made little sense for the City to have designated in its OP so much of its Downtown area as Mixed-Use;

i. The Panel was also struck by an exchange that occurred concerning both the parkland and the “parks-on-a-deck” issues during the cross-examination by the City’s counsel on November 24, 2020 of Mr. Michael Goldberg (whose evidence is discussed in much more detail in Section 3 (f) below) as follows:

> Q. Well, we are going to get to that in the fullness of time sir, but can we agree at this early stage of our discussion that the City was very clear in 2017 when they wrote the staff report, that they were looking for on-site parkland dedication?
>
> A. And I think we provided the opportunity for that.
>
> Q. Well, we are going to get to that, as well sir, but since we are on it, the only parkland that is being proposed is in an east/west alignment and it is elevated between six and nine metres above the surrounding streets and sidewalks, correct?
>
> A. Mr. O'Callaghan, you have already put in [evidence] a report authored by you to initiate either acquisition or expropriation of the east block. That east block is 1.2 hectares. Ms. Bake is asking for .88 hectares. Take that land as a parkland dedication, build whatever kind of deck you want on it and put a park on it. You have already expressed you want it as a park. That could be the parkland dedication. There may be other options too. [emphasis added]

[101] The Panel found it instructive to recall the further testimony of Mr. Goldberg during his re-examination by Mr. Kagan:

> Q. Okay, thank you. Mr. O'Callaghan asked you a great many questions about public park, and a public park going in a north-south direction on the west parcel. In your review of the City's witness statements or reply witness statements, did they ever request a public park in a north-south direction on the west parcel?

> A. No.
>
> Q. In your review of all of the material for this hearing, is there any Council resolution...so now, I'm not talking about witness statements, but I'm talking about a Council resolution...City Council resolution identifying a north-south park on the west parcel?
>
> A. No.

[102] Although the alleged “need for a north-south park” certainly was alleged during the oral testimony of City witnesses, and was featured prominently in the closing submissions of counsel for the City, the Tribunal is not persuaded by objective, reliable evidence that it has been established that such a park orientation is the sole acceptable form of public park on the CRAFT Site. In the Panel’s view, much of the City’s evidence on this issue was self-serving and deficient.

[103] In summary, the Tribunal is of the view that the dire predictions and “forever lost opportunities” arguments on these issues made by the City’s legal team against approval of the CRAFT OPA have been exaggerated. Taking into account all of the evidence before the Tribunal, it is apparent to the Panel that there has for many years been a good prospect for the City to obtain either a negotiated allotment of public parkland on the CRAFT Site or to acquire an appropriate parcel of the Site for that purpose. There is also no doubt that the City is well aware of the fact that it could have long ago purchased all or a substantial portion of the strata rights now owned by CRAFT (for example, at the time of its purchase of only the air rights portion it needed for the PDL Bridge). Finally, as the City has conceded, both before and after it took the unusual step of seeking approval for OPA 395 in order to build Rail Deck Park on property it did not own, the City has long had an opportunity to acquire all or part of the CRAFT Site by way of an agreement or through the expropriation process. That opportunity existed in 2016 when the Rail Deck Park initiative was first announced with great fanfare by the City and was once again reiterated in the 2019 Prior Decision of the Tribunal. This still remains the case today.

[104] It is not part the Tribunal's mandate to determine the underlying motivations for the City's decision-making, actions – or inaction – over the last many years concerning the CRAFT air rights and the City's professed desire for a large Downtown park, or for Rail Deck Park. Certainly, CRAFT's counsel spend a good deal of time exploring just that during his cross-examination of the City's witnesses, particularly Ms. MacDonald, Ms. McAlpine, Ms. Bake and Ms. Bogdanowicz. From time to time, including in both his opening statement and in final submissions, Mr. Kagan also offered certain theories about how that key parks issue is linked to the City's denial in early 2018 of the CRAFT OPA and of the manner in which it has forcefully opposed CRAFT's position in this case – some of which were derived from evidence led from public broadcasts relating to the 2016 Rail Deck Park announcements and views expressed by a City councillor decrying the CRAFT development proposal. However, in this Panel's view, the "true reasons and motivations" behind the City's steadfast, aggressive opposition to the CRAFT OPA over the last more than four years are not matters upon which the Tribunal must make findings – however peculiar the City's conduct may seem in comparison to the City's response to other similar OPA applications for adjacent and neighbouring development parcels and more generally in the past concerning Downtown Toronto 'terra firma' lands.

**(c) Engineering/Structural Matters**

[105] The Parties agree that the applicable OPA Test does not require CRAFT to provide content in the OPA to conclusively demonstrate each and every structural engineering detail of a proposed development. The Tribunal finds that the standard – which appears to have been accepted by the City - is that CRAFT need only show technical feasibility from a structural engineering standpoint. Given that the Safdie/PWP Concept Plan is one example of a proposed development under the CRAFT OPA, then CRAFT aimed to show its technical feasibility.

[106] The City raised a number of general yet vague engineering matters in the Issues List which were addressed in more detail in the WS and Reply WS filed by Janine

Turner and Peter McMillan. Naturally, this necessitated a response from CRAFT, as discussed later in this Part 3 (c).

[107] Ms. Turner was called to testify on January 28, 29 and February 1, 2021 as part of a panel with Mr. McMillan. Both Mr. McMillan and Ms. Turner have previously been engaged as the Design Manager and Project Manager respectively for several stages of the Rail Deck Park initiative eventually reflected in OPA 395 under the Prior Decision.

[108] Ms. Turner is a licensed professional engineer since 1986 and Vice President of Infrastructure – Major Projects, North America at Stantec Consulting Ltd., a multi-disciplinary engineering and architectural practice engaged in the design of transportation, transit, rail, community development, aviation, healthcare, and hospitality projects. She obtained a Bachelors' Degree in Civil Engineering from the University of Saskatchewan and has over 35 years of experience in engineering design and project management in the fields of municipal, transportation, transit, and aviation development, and is licensed across Canada (Ontario, Saskatchewan, Alberta, Nova Scotia) and in the United States (Michigan)

[109] Mr. McMillan is an architect, not an engineer, and thus could not provide opinion evidence on engineering matters to the Panel. Mr. McMillan is the Managing Director of McMillan Associates Architect Inc., an architectural practice engaged in the design of infrastructure, energy and aviation projects, among other things. He has a Masters' Degree in Architecture from the University of Michigan and a Bachelors' Degree in Technology (Architectural Science) from Ryerson Polytechnical Institute (now known as Ryerson University). Mr. McMillan has over 35 years of experience in architectural design, having been a registered architect since 1991 and having been active in private practice as a principal continuously since 1996 and has been registered to practice in Ontario (Ontario Association of Architects), Manitoba (Manitoba Association of Architects), Alberta (Alberta Association of Architects), Nova Scotia (Nova Scotia Association of Architects), New Brunswick (Architects' Association of New Brunswick) and Ecuador.

[110] In their joint WS, Ms. Turner and Mr. McMillan proposed to address various Issues List matters, including the following:

i. Information on the adequacy and feasibility of the supply and configuration of the on-site transportation facilities;

ii. Information on the impacts of such a development on the rail corridor uses and activities; and

iii. The implications on the proposed design with the removal of the 433 Front Street West parcel from this development site.

[111] The overall conclusions of Ms. Turner and Mr. McMillan reached in their WS were:

a. The proposed development relies fundamentally on receiving approval for variations and exemptions to critical rail and electrification standards and codes from Metrolinx;

b. The proposed development relies heavily on receiving a permanent easement on Front Street from the City of Toronto;

c. That the underlying geometric, rail, structural and stormwater implications and requirements of this development have not been thoroughly and adequately assessed;

d. There is insufficient information contained in the proposal to evaluate these solutions or potential solutions;

e. The feasibility of this development from these perspectives has not been established; and

f. Therefore, it is premature to consider this development application

[112] In their joint Reply WS, Ms. Turner and Mr. McMillan spent a good deal of time comparing various attributes of Rail Deck Park to those of the Safdie/PWP Concept Plan, on the apparent basis that certain CRAFT WS's did the same. On purely engineering and structural matters, they further concluded that they had concerns regarding the structural clearance assumptions of CRAFT's engineers relating to the interplay of the proposed residential and commercial towers and also regarding "portions of the core and foundation layouts" which they found to be "increasingly problematic". They also had concerns that under the proposed density of 9.5 (which is of course no longer sought by CRAFT in its OPA) it would be hard to support more towers within the operating rail tracks and that "…The September 9, 2020 objection to the application from the adjacent condominium corporation jeopardizes the structural concept in the northwest corner of the parcel east of Spadina…".

[113] The Panel notes that even though Ms. Turner was the sole City expert qualified to provide opinion evidence on structural engineering matters, and despite her credentials, she actually provided almost no direct testimony. The vast majority of direct testimony was instead given by the articulate Mr. McMillan, who, as noted is an architect and not an engineer. On cross-examination, both Ms. Turner and Mr. McMillan admitted that they had no substantial experience in designing or overseeing the construction of large multi-use projects, with high towers, built over an operating railway corridor.

[114] Counsel for the City in final written and oral argument made no specific reference to or reliance on the opinions expressed by Ms. Turner and Mr. McMillan as a justification for the denial of the CRAFT OPA. In other words, the City did not directly state in final argument that the Safdie/PWP Plan as one example of a proposed development under the CRAFT OPA, or the CRAFT OPA otherwise, failed to meet the standard of technical feasibility. That being the case, the Panel concluded that this suggested the City's legal team were no longer avidly pursuing that Issue and position

in this hearing. Nonetheless, the Tribunal reached a determination based on its weighing of the evidence tendered by the Parties that CRAFT has established technical feasibility from an engineering/structural perspective.

[115] CRAFT's expert structural engineering evidence was provided by Henry Jeens and Patrick McCafferty, who are professional engineers and who were both qualified to provide opinion evidence to the Tribunal on structural engineering matters. Mr. Jeens is an associate principal with Arup Canada Inc. in Toronto and leads its civil and rail engineering services on a broad range of transit and development projects, including projects integrating rail infrastructure and land development. Mr. Jeens heads the Arup Toronto integrated planning and civil engineering teams and has 16 years of experience in civil engineering. He graduated from the University of Cambridge in 2004 with a Master of Engineering (MEng) degree with First Class Honours.

[116] Arup is a world-renowned structural engineering firm with vast experience world-wide in designing and overseeing the construction of complex, challenging multi-tower projects including significant projects involving rail corridors. As Mr. McCafferty, an Associate Principal and the Structural Engineering Leader of the Boston office of Arup USA, Inc. somewhat amusingly put it in his direct testimony:

> …Well, we [at Arup] like to consider ourselves the preeminent building engineers in the world. How is that for not boasting? We do get involved in quite a large number of, sort of, iconic buildings. Marina Bay Sands being one of the most recent. Before that, we did the Bird's Nest for the Beijing Olympics. I mean, our firm started as the structural engineers of the Sydney Opera House. So, since our founding, we have been sort of at the forefront of innovative architectural structural engineering design, pushing the boundary as we go…

[117] Mr. McCafferty obtained his Bachelor of Science from Cornell University in 1995 and his Master of Engineering (Civil) from Cornell University in 1996. Mr. McCafferty was named by Consulting Specifying Engineer Magazine as among the top 40-under-40 building engineers in the United States, was a member of faculty in Massachusetts Institute of Technology's Department of Architecture, and has served as an advisor to Cornell University's Department of Civil Engineering. He is a frequent architectural juror

at numerous United States colleges and universities and abroad and is a faculty member at Harvard University's Graduate School of Design.

[118] Both Mr. Jeens and Mr. McCafferty have extensive international experience in designing and overseeing from a structural engineering perspective highly complex and challenging multi-use developments, and have successfully provided professional engineering services to clients around the world who specialize in the design and operation of rail infrastructure and services, including high speed rail, conventional rail, and rail-based local and regional transit services. The Panel was very impressed with the credentials and deep experience of Mr. Jeens and Mr. McCafferty and accepts their opinion evidence and conclusory findings wherever they contradicted the conclusions and opinions of Ms. Turner and Mr. McMillan. In summary, Mr. McCafferty and Mr. Jeens in their WS, Reply WS and during oral evidence stated the following:

a. They prepared a Preliminary Structural Engineering Analysis and Design of Deck and Towers Report May 29, 2020 (the “PSEADDT Report”) was prepared under my direct supervision. That report summarizes the work undertaken by Arup to establish the structural engineering technical feasibility of the proposed development. Their work included the preliminary structural engineering analysis and design of ten structurally independent high-rise towers and a multi-story structural deck which extends over the entire rail corridor. Working collaboratively with Mr. McCafferty, Mr. Jeens prepared a further Technical Rail and Decking Study, prepared by Arup, dated May 29, 2020 (the “TRDS Report”);

b. The proposed deck and high-rise towers are structurally feasible. The detailed reasons in support of that opinion are found in the PSEADDT Report;

c. The foundations of the high-rise towers are grounded to the base of the rail corridor and extend into the ground like any others in the City. These towers do not vertically bear onto the deck;

d. The deck itself is supported by a series of columns and walls which are likewise grounded to the base of the rail corridor and founded on deep foundations. Although not aware of any public detailed structural design being prepared by the City in support of its proposed Rail Deck Park (there was no such study in support of the City's OPA 395), they believe that the City's proposed deck would likewise be supported by columns and/or walls which are grounded to the base of the rail corridor;

e. The proposed development is structurally feasible whether or not the deck extends over the Metrolinx property (a property removed from the CRAFT OPA by request of Metrolinx prior to the hearing) and regardless of whether a residential or non-residential building is proposed for the Metrolinx property;

f. Preliminary structural engineering analyses of the high-rise towers and of the deck have accounted for an appropriate array of load combinations acting on the structures, including concurrent loads arising from accidental train derailment. The structural engineering design of the impacted systems appropriately accounts for such load combinations in accordance with the provisions set forth in Arup's TRDS Report;

g. CN and CP retain running rights through the rail corridor for freight traffic and that some freight traffic travels through the rail corridor presently (and is permitted to continue to do so). This also does not change their opinion respecting the structural feasibility of the proposed development;

h. Based on the Arup-designed proposed Rail Corridor track layout and the rail safety and risk mitigation assessment, they concluded that the CRAFT development and the proposed Corridor track layout accommodates proposed infrastructure and operational changes anticipated for the Corridor; addresses the requirements of statutory and non-statutory rail-adjacent development policy; and provides an equivalent level of risk mitigation to that provided by the standard of an earth berm and setback;

i. The CRAFT proposed development has been planned in accordance with the policies and provisions of both the Railway Lands Central Secondary Plan and the Railway Lands West Secondary Plan. Arup undertook the TRDS Report, which included a review of the Railway Lands Central & West Secondary Plans, the design of the proposed Corridor layout, and an assessment of derailment risks and design mitigations;

j. The proposed CRAFT development and the proposed Corridor layout maintains the existing and future capacity and safety of rail operations in the Corridor. Within the limits of the Confidentiality Agreement, the TRDS Report identified the proposed infrastructural and operational changes anticipated for the Corridor, including the development, Metrolinx-identified infrastructural and operational improvements including electrification, signalling upgrades, and new track work, more frequent GO Transit passenger rail services, and the addition of the Spadina-Front GO Station beneath the CRAFT air rights site;

k. In relation to track level access, Arup have been engaged with Metrolinx in relation to this project for four years including substantial technical coordination during 2020. Provision of appropriate access to track level is a key requirement and an appropriate approach agreed with Metrolinx. The existing access points, including that along Front Street have been maintained/re-provided by this development proposal;

l. In relation to the rail vertical clearances Arup have developed reduced vertical clearance that can be used in locations such as this. These reduced clearances are set out in the TRDS Report and these meet the technical requirements of providing an Occupancy Control System for GO trains. These details will be refined through the further design and planning approval stages as is usual in a development like this. The technical feasibility of the proposed development has been demonstrated and will be refined through these later processes;

m. The proposed design has widened the GO Regional Express Rail platform such that the clear platform widths are in accordance with GO standards while also providing additional space for structural support for the development above, as well a vertical circulation. This is an established approach for overbuilds and the plans provided with the TRDS Report and the Safdie/PWP Concept Plan indicate how this would work in coordination with other platform elements such as vertical circulation;

n. The design presented reflects the future changes and configuration required by Metrolinx. These changes, irrespective of the over-build, will result in changes and reductions to the existing access and maintenance arrangement in the yard and Union Station Rail Corridor. Though Arup's consultation with Metrolinx, Arup have established an alternative approach to access through the site that can meet both the needs of Metrolinx and the proposed CRAFT development; and

o. The PSEADDT Report and the TRDS Report addressed all key areas of rail engineering design that are relevant to assess feasibility at this stage of design. The level of detail and areas addressed were based on their teams' experience in this type of complex development. As such they were confident based on experience that sufficient information was presented to demonstrate overall feasibility. Messrs. Jeens and

McCafferty do not agree with the comment that there was insufficient information at this stage.

[119] In conclusion, the Tribunal had no difficulty in concluding that the proposals in the CRAFT OPA and Safdie/PWP Concept Plan example are technically feasible from an engineering and structural standpoint, based on the detailed, convincing and emphatic testimony of Mr. McCafferty and Mr. Jeens (and the WS's and Reply WS's), which, as noted, was preferred in all respects to the evidence and testimony of Ms. Turner and Mr. McMillan.

**(d) Traffic/Transportation Issues**

[120] As it had regarding structural engineering matters, the City raised a host of traffic and transportation matters on the Issues List and, to some extent, in the WS's and Reply WS's and testimony of its sole expert witness. Again, however, the unchallenged test to be applied in respect of these issues was one of feasibility only: CRAFT is not required at the OPA stage to propose complete proven solutions to any and all potential future traffic and transportation issues associated with a Mixed-Use development on the CRAFT Site.

[121] In final written submissions, the City's counsel spent only approximately six pages out of its 102-page argument dealing with traffic and transportation matters. The majority of that concerned only traffic and approximately four and one half pages of those six pages constituted mere recitation of only the direct testimony of John Mendes, a former City employee retained to provide expert opinion evidence on traffic and transportation matters. Oddly, no mention was made of Mr. Mendes' admissions made during his cross-examination nor was any attempt made to respond to his concessions at that time. The Tribunal finds that this practice is unhelpful, since the Panel must consider all of the oral testimony of each witness, not just the evidence led in chief. The purpose of final argument, especially where written submissions are made, is to be comprehensive although obviously it is well understood that counsel will be concentrate

on the points favourable to their positions. When a Party largely ignores the cross-examination testimony of its key witnesses in its final submissions, this does not assist the Tribunal's deliberations.

[122] Mr. Mendes is a Senior Consultant in the Transportation Planning and Advisory Services department of WSP Canada Group Limited, an engineering consulting firm specializing in, among other things, transportation planning and transportation impacts of land development. He joined WSP Canada in 2017 after having spent 30 previous years as a City employee most recently in the position of Director of the Transportation Services Division of the City's Scarborough District. He obtained both a Bachelor of Applied Science, Civil Engineering and a Masters of Engineering, Civil Engineering from the University of Toronto.

[123] In his WS and Reply WS, Mr. Mendes summarized his opinion as follows:

a. The Transportation Assessment Update ("TAS" and "TAS Update") prepared in support of this OPA application is incomplete. Among other things, it does not include an assessment of the maximum level of development ; it does not include an analysis of the critical intersections along Lake Shore Boulevard and at the ramps to/from the Gardiner Expressway that will be significantly impacted by the traffic generated by this development; it does not include an analysis of the parking garage driveways serving the Central and East blocks at their intersections on Front Street West and Blue Jays Way, respectively; and it does not include all developments in the area that will contribute to the background traffic volumes on the abutting streets;

b. The CRAFT consultant's conclusions indicate that the traffic generated by a lower scale of development at 5.1 times the area of the site cannot be adequately accommodated by the study area intersections that were analyzed at acceptable operating conditions on the basis of accepted

traffic engineering guidelines and standards. Finally, the consultant has not presented and assessed measures that would mitigate the traffic impacts of this development to acceptable levels; and

c. Therefore, it is premature, from a transportation perspective, for the Tribunal to approve the proposed OPA application at this time.

[124] As pointed out by CRAFT's counsel, City staff themselves did not provide WS's or testimony on transportation and traffic matters. Instead the City's counsel relied on the evidence of Mr. Mendes, who was at no point in time involved in the processing of the CRAFT OPA application. Moreover, after submission of the TAS or TAS Update described in paragraphs [128] to [130] below there were no apparent concerns relayed to the City's planning department by the City's engineering staff to the effect that the OPA was "premature" or ought to be denied. There were simply observations in the November 23, 2017 Development Engineering report to Ms. MacDonald and Ms. McAlpine that certain conditions ought to be imposed at the site permit stage and that further traffic studies should be conducted in the area of the development. Mr. Mendes himself did not prepare an independent, full traffic or transportation assessment report regarding the proposed CRAFT development.

[125] During his cross-examination on February 1, 2021, Mr. Mendes when asked whether the amount of detail required in a traffic study at the time of an OPA application would be the same as is required during subsequent rezoning and site plan application stages, admitted that the OPA test was different, stating:

> Not necessarily. There are often cases where it is done in stages; so the higher level review at the OPA stage and getting into more details as you go through rezoning and site plan. But often it is necessary, even at the OPA stage, to determine whether the proposed development is feasible and workable and complies with the relevant policies. And some level of detail is often required, not always, but often required to make that determination. [emphasis added]

[126] Then, in a revealing portion of his re-examination testimony on February 2, 2021 relating to the June 4, 2020 traffic study that he had prepared in support of an OPA application for a portion of a development site at 2200 Eglinton Avenue in Toronto, and had testified about during cross-examination (during a rather argumentative episode noted by the Panel), Mr. Mendes stated:

> …my conclusion in the study that I did submit did not talk about the feasibility of the [2200 Eglinton Avenue] project from a transportation perspective. All I did in my report is conclude that the development, that the site-generated traffic can be adequately accommodated by the area road network. [emphasis added]

[127] The Tribunal agrees with CRAFT's counsel that the highlighted passage of Mr. Mendes' testimony in paragraph [126] effectively summarizes a reasonable test of feasibility that is relevant to an OPA application. Moreover, it now also appears to be the test that the City's counsel either accepts - or does not specifically object to. Despite quoting at length from the evidence in chief of Mr. Mendes and his WS's during final written and oral submissions, the City's counsel did not deal with his admissions noted above in paragraphs [125] to ]126] inclusive, nor did he attempt to argue that this test of feasibility at the OPA stage was improper or inadequate. In any event, even if the City's counsel did not accept this feasibility standard, the Tribunal is of the opinion that it is in fact the correct test to be applied at the OPA stage and also that the conclusions reached in the CRAFT TAS and TAS Update as described below in paragraphs [128] to [130] entirely meet this standard.

[128] The TAS was prepared by Mr. Terry Wallace and Mr. Alexander Fleming. Mr. Wallace is the President of LEA Consulting Ltd., ("LEA") a Consulting Engineering firm specializing in Transportation. Over the past 30 years, he has been involved in projects requiring extensive transportation planning and traffic operations engineering for civil and municipal engineering design, Official Plan reviews, Secondary Plans, and corridor/traffic impact studies. He is a professional engineer and a graduate of Ryerson University. Mr. Fleming is also a professional engineer and is an Associate with C.F. Crozier & Associates Ltd., ("Crozier") a Consulting Engineering firm specializing in land

development and transportation, among other related disciplines. For 19 years, he has provided private and public sector clients with transportation engineering expertise on a wide range of residential, industrial, institutional and commercial development projects, including the completion of Transportation Impact Studies, Parking Justification Studies and the detailed design of roadway improvements to accommodate development-generated traffic flows. Mr. Fleming has a civil engineering degree from the University of Waterloo and a Master's in Business Administration from the University of Toronto.

[129] The Panel strongly preferred the evidence of Mr. Wallace and Mr. Fleming to the evidence of Mr. Mendes, who often strayed into partisan territory during his cross-examination. Again, while the Tribunal understands and appreciates the context that expert witnesses find themselves in, it does damage to the principles and objectives set out in the Acknowledgement of Expert's Duty when a witness is unable to sufficiently manage the impulse to largely focus his/her testimony in order to support the party that retained him/her.

[130] The Panel accepted all of the material findings and opinions of Mr. Wallace and Mr. Fleming, the key points of which are set out herein a. to gg. below (with emphasis added by the Tribunal to highlight certain aspects):

a. LEA was first retained by CRAFT in October of 2016 to complete the TAS for a proposed mixed-use development on the subject site with residential, office, retail and open space uses. The TAS was completed in May of 2017 and presented a multi-modal transportation review and assessment of the immediate and surrounding area, the findings of which supported the proposed CRAFT development;

b. Crozier was subsequently retained in April of 2020 to collaborate with LEA and other consultants retained by CRAFT, including land use planning, architecture and urban design to provide an updated TAS ("TAS Update") in support of a revised CRAFT OPA. The updated study reflected an

increase in residential units, as well as the removal of vehicular access onto Iceboat Terrace south of the subject site. The TAS Update was completed in May of 2020;

c. The proposed development has appropriate regard for matters of Provincial interest set forth in section 2, subsection (f) of the PA, and has adequate provision and efficient use of the transportation system for the reasons provided below, supported by the TAS Update;

d. The proposed development is located in an area that is well serviced by existing roadways, transit and pedestrian facilities. The arterial roadways abutting the subject lands are Spadina Avenue (major arterial), Bathurst Street (major arterial), Front Street West (minor arterial) and Blue Jays Way (minor arterial south of Front Street West; collector north of Front Street West). Other arterial roadways within the study area include Navy Wharf Court (minor arterial) and Bremner Boulevard (minor arterial) Additional lower-order public roads in the vicinity of the site include Fort York Boulevard and Dan Leckie Way, along with private roadways (with public access) such as Telegram Mews and Iceboat Terrace;

e. Major transit routes in the area are the King Street streetcar route, the Spadina Avenue streetcar route (Route 510), the Bathurst Street streetcar route, the Lake Shore streetcar route, the Harbourfront streetcar route and the Fort York-Esplanade bus route. Transit stops for all these routes are located within a walk of seven minutes or less from the subject property. Union Station and St. Andrew Station are located within a 15 to 20-minute walk, or via connection with local transit routes, and offers access to TTC Yonge-University-Spadina line, the Union Pearson Express, and numerous GO Transit Routes;

f. Cycling facilities in the area of the subject site are illustrated and described in Section 2.2 of the TAS Update. Dedicated bicycle lanes are provided on Fort York Boulevard, sharrows (shared lane markings) are provided on Spadina Avenue (north of Fort York Boulevard/Bremner Boulevard), and multi-use trails are provided parallel to Iceboat Terrace, Canoe Landing Park and along the Martin Goodman Trail. Puente De Luz bridge, which is proposed to remain, provides north-south pedestrian and cyclist connectivity between Front Street West and Fort York Boulevard;

g. The existing pedestrian network in the area is extensive and provides a significant degree of interconnectivity and permeability. The network consists primarily of sidewalks along public roads (north side of Front Street West, and both sides of all other public roadways) and is supplemented by multi-use trails and paths. An existing gap in the pedestrian network is the lack of sidewalk on the south side of Front Street between Bathurst Street and Spadina Avenue. This existing gap is proposed to be completed as part of the proposed CRAFT development via a 6 metre sidewalk on the south side of Front Street West;

h. Overall, there is a comprehensive transportation network in the area that supports all modes of travel to and from the subject site (walking, cycling, transit and auto);

i. As discussed in Section 6.1 of the TAS Update, existing mode splits (per the Transportation Tomorrow Survey (2016) data) indicate that approximately 24%, 19% and 24% of trips made by residents, employees and commercial visitors, respectively, were completed using automobiles either as a driver or a passenger. The remaining proportion of trips are forecasted to be completed using transit, walking and cycling. These assumed mode splits are consistent with existing travel characteristics in the area and indicate that users of the proposed development will make

efficient use of the existing transportation network as mobility is achieved across all modes of travel. Transportation Demand Management ("TDM") measures are proposed to be implemented through subsequent planning applications to target a further reduction in automobile mode share by 10%-15%;

j. The TAS Update also discusses forecasted automobile, active transportation and transit trips generated by the proposed development. The high proportion of transit, pedestrian, active transportation trips forecasted indicates a low reliance on the automobile and makes efficient use of the overall transportation network;

k. The CRAFT development accounts for integration of the Spadina-Front Regional Express Rail GO Station within the development, which is proposed to be the penultimate southbound stop on the GO line from Barrie to Union Station. This integration with the Spadina-Front GO Station facilitates the principles of Transit Oriented Development , which make efficient use of the overall transportation network, with reduced reliance on automobile infrastructure;

l. Section 7.3 of the TAS Update discusses the traffic operations associated with the proposed development, particularly the vehicular impacts on the study intersections. Supplementary analysis was also conducted in section 7.3.2 reviewing the impacts should access to Iceboat Terrace (via Dan Leckie Way) be permitted. In each of the scenarios that were assessed, it was concluded that the transportation network can support the proposed development and that opportunities for improved traffic operations exist via provision of vehicular connections to Ice Boat Terrace or potential intersection capacity improvements through signal optimization and/or revised lane configurations;

m. The CRAFT OPA proposes a mixed-use development, comprising office, commercial, hotel, residential, institutional and recreational uses, also ensures a high level of synergy among proposed and adjacent land uses to optimize the use of existing infrastructure minimizing external trips. Section 6.1 of the TAS Update forecasts internal trips resulting from the proposed mix of land uses. With the existing mode split and expected synergy among land uses, it is our opinion that the proposed development makes efficient use of the existing transportation system. As indicated earlier, subsequent to the preparation of the TAS Update we were advised that Metrolinx requested that its property (at the southwest corner of Front Street West and Spadina Avenue) be removed from the proposed OPA. We understand that the Metrolinx property currently enjoys a Mixed-Use Area designation. Metrolinx has indicated that it does not want to be restricted to non-residential uses. We have confirmed that this information does not change our overall opinion as expressed in the TAS Update;

n. The subject site is located in close proximity to significant adjacent existing, under construction and planned communities such as City Place, the Financial District and The Well. As a mixed-use development, the proximity of the proposed development to these other existing communities will encourage higher active transportation mode splits, of which these trips will utilize the active transportation network surrounding the site. Accordingly, the proposed development makes efficient use of the overall existing and planned transportation system;

o. The CRAFT development is, from a transportation perspective, in accordance with section 2(q) of the PA, being sustainable and supports public transit and is pedestrian oriented. The introduction of new residents and visitors to the non-residential uses will support public transit by increasing ridership, as there will be a demand for this travel mode. Given the existing and planned transit infrastructure in the area, the proposed

development, by the introduction of new residents and jobs within walking distance of transit including higher order transit, will be highly supportive of public transit;

p. Section 8 of the TAS Update details a proposed TDM strategy, to be implemented through subsequent planning applications (i.e. rezoning and site plan), in order to target a further reduction in automobile mode share by 10%-15% and support walking, cycling and transit as preferred modal choices. The provision of an appropriate supply of parking spaces will also contribute to a sustainable development that supports public transit use, walking and cycling. Providing too much parking can encourage higher rates of auto usage;

q. The PDL Bridge is proposed to remain and therefore the only currently existing north-south pedestrian and cycling connectivity across is maintained. However, Figure 7-15 of the TAS Update identifies six additional north-south pedestrian/cycling connections to/from Ice Boat Terrace across the proposed deck referenced in the CRAFT OPA and the Safdie/PWP Concept Plan thereby connecting Iceboat Terrace to Front Street West. The proposed internal pedestrian pathways offer four-season pedestrian connections. This will allow pedestrians to travel from Bathurst Street to Blue Jays Way indoors, thereby further enhancing the pedestrian experience;

r. The proposed CRAFT development promotes safe public streets, spaces and facilities that meet the needs of pedestrians and facilitates active transportation and community connectivity, all within the meaning of Policy 1.5.1 of the PPS 2020;

s. Insofar as Policy 3.2.2 of the PPS 2020 is concerned, Section 8.4 of the TAS Update identifies several TDM strategies to be incorporated into the proposed development that will contribute to increased non-automobile

mode share. The envisioned TDM strategies are intended to reduce automobile dependency and are expected to result in a reduction in vehicle trips by 10-15%. The CRAFT development also comprises a Transit Oriented Development that helps support the Transform TO – Toronto's Climate Action Strategy objective of active transportation accounting for 75% of trips under 5 km city-wide by 2050;

t. The CRAFT Site is located within 2 kilometres ("km") of existing residential and employment areas such as Liberty-King West, City Place and the Financial District. In addition, the proposed development plans for new office, residential, commercial, recreational, institutional and hotel uses, facilitating new destinations within 5 km of existing population and employment uses;

u. The CRAFT OPA proposals conforms to the Growth Plan (2019)" including Policies: 3.2.2.1, 3.2.2.3 and 3.2.3.4 and also satisfy all elements under Chapter 3 of the City's OP raised by the City on the Issues List;

v. The amount of loading spaces set out in the Safdie/PWP Concept Plan is short by 1 Type "C" loading space relative to the Zoning By-law requirements; however, in our opinion it is considered to be sufficient for the uses proposed due to the efficiency of a centralized loading dock system with shared loading provisions;

w. The CRAFT proposal is also in conformity with all relevant provisions of the Railway Lands Central Secondary Plan and the Railway Lands West Secondary Plan. The proposed development assesses several means to achieve automobile minimization principles as part of a TDM Plan for development of both Secondary Plans. Per Section 8.4 of the TAS Update, TDM strategies envisioned are intended to achieve auto minimization principles and further reduce vehicle trips by 10-15%. The TAS Update has been prepared and addresses the requirement that an

appropriate technical study has been undertaken from a transportation perspective. The TAS Update also addresses parking, access and the capacity of the transportation system;

x. There is compliance with the provisions of section 2.6 of the City's Tall Building Guidelines as on-site pedestrian infrastructure has been designed to be inviting and continuous through the proposed development. Multiple access connections to the public road network are available to facilitate pedestrian travel through and to destinations within the subject site. The proposed development provides for a continuous east-west connection through open space that is designed to be appealing to pedestrians. The proposed development will also enhance the pedestrian realm for both users within the site and others travelling through the subject site via shortened north-south travel paths. Short Term bicycle spaces will be supplied with direct access from the public street and bike facilities will be designed in accordance with Toronto Green Standard and Guidelines for the Design and Management of Bicycle Parking Facilities to support future rezoning and site plan applications as required;

y. The vehicular accesses are proposed at locations which minimize conflicts with pedestrian and cyclists, while providing direct connections to major corridors in the area to reduce impact to the local neighbourhood. With regard to ramps, the preliminary design shows that all ramps will be internal to the site for the West and Central Blocks and will meet existing rights-of-way at their existing grade. The vehicular access locations, internal access driveways, ramps to the above grade garages, pedestrian walkways, vehicle queuing and truck maneuvering movements for the proposed development are appropriate and acceptable from traffic safety, operational and pedestrian and cyclist perspectives, including both internal considerations and potential off-site impacts;

z. It is recognized that some queue lengths under future conditions do measure beyond the storage length of the intersection or turn lane. However, those intersections were already operating above capacity under future background conditions, given the level of background developments anticipated. While the proposed development without access to Iceboat Terrance will further increase vehicular demand at these intersections, the opportunity for non-automobile orientated modes available to this subject site would render the additional vehicular impacts acceptable. A sensitivity analysis was also undertaken to evaluate the traffic operations with an additional access point on Iceboat Terrace to the south (should such access be permitted). The future total conditions analysis conducted for accesses on both Front Street West and Iceboat Terrace demonstrates that operations would improve as lower traffic volumes would travel through the critical Front Street intersections with Spadina Avenue and Bathurst Street;

aa. Although the proposed development can be supported with Front Street accesses only for the West and Central Blocks, in our opinion traffic operations can be improved with the adoption of a one-way road system, or additional connections to Iceboat Terrace. While the proposed development will undoubtedly increase the volume of vehicular traffic onto the adjacent road network, the addition of vehicular traffic will ultimately reach the available roadway capacity resulting in inconvenience to drivers. This will encourage motorists to select alternative forms of travel, such as transit, in order to commute to the City core or force drivers to select alternate routes. This development-based modal and traffic diversion principle is consistent with the Ontario Ministry of Transportation Transit Supportive Guidelines which recognizes that vehicular congestion can be helpful in encouraging shifts to sustainable modal splits. Additionally, it states that high vehicular delays could be acceptable in high-density areas

that prioritize pedestrians, cyclists, and transit users over the private automobile;

bb. Insofar as section 5.2.1.4 of the OP is concerned, the transportation impacts to the Fort York Boulevard/Bremner Boulevard and Spadina Avenue and Front Street West and Spadina Avenue intersections attributable to the proposed development are acceptable. No material impacts to the exiting Spadina bridge and streetcar operations are expected as a result of the proposed pedestrian bridge over Spadina Avenue. The proposed CRAFT development alone will not accelerate the need for local transit improvements. However, the 49 other background developments considered within the TAS Update, in addition to CRAFT development will also support future transit improvements contemplated in the City's Waterfront Transit Reset Study, such as the local bus route along Front Street West, should they be implemented;

cc. From a transportation perspective, it is feasible to develop the subject site independently from the Metrolinx property. Of course a joint or co-ordinated development with Metrolinx is also feasible. In summary, with the elimination of the Metrolinx property from the OPA, a reduction in the number of required office loading facilities, office and retail parking spaces, and overall site trips would occur;

dd. The detailed analysis of the parking and loading facilities suggested by Mr. Mendes' WS, such as designs or vehicle maneuvering diagrams are not necessary at the OPA stage of the application and do not deal with "feasibility" and will be addressed as part of the rezoning and Site Plan Control Application stage;

ee. As discussed in Policy 17 of the draft OPA, while the development of the site is to be planned comprehensively, phasing plans and strategies are to be prepared as part of further development approval process. Therefore,

the transportation impact of each phase of development has not been assessed at this time, but rather, the TAS evaluated the overall feasibility of the proposal from a transportation perspective. It is our experience that it is common and appropriate to deal with development phasing associated with transportation infrastructure through the zoning process, not the OPA stage as suggested by Mr. Mendes. The proposed OPA requires these further studies prior to zoning amendments being approved;

ff. The four additional developments referenced by Mr. Mendes as having not been accounted for are not expected to materially impact future background traffic forecasts and operations. The original TAS included more than 30 background developments in the traffic assessment and the TAS Update included an additional 14 background developments to the future background scenario for a total of 45 background developments. Consistent with background transportation studies in the area that have assessed extensive background development traffic volumes, no growth rate was additionally applied to avoid overestimation of background traffic conditions. The removal of the Metrolinx lands from the CRAFT OPA did not result in an adjustment of those findings even though elimination of those lands would reduce parking, loading and trip generation for the site;

gg. Given the number of background developments anticipated for the area, the intersections were already operating at and above design capacity, regardless of the proposed development. Accordingly, wait times are expected where queues potentially block driveways. This is typical for this area. It seems contrary to prevailing policy and provincial and City objectives to oppose or deny a development which supports alternative modes of transportation where it might result in greater wait times for vehicle movements. "While we share the opinion of Mr. Mendes that where mitigation measures can be implemented to ameliorate traffic operations, these should be considered for implementation, we do not share his opinion that where

> traffic operations deteriorate as a result of increased pedestrian volumes, themselves a result of increased transit usage and walking, this indicates an unacceptable outcome. Detailed assessment of precise alternative routes or impacts of displaced non-local traffic is not necessary at this OPA stage. The concept is well accepted and that is sufficient at this OPA stage".

**(e) Servicing Issues: Stormwater/Water/Sewage**

[131] This is another area where, in the Tribunal's opinion, the evidence of CRAFT's expert must be preferred over the evidence of the City's employee. In summary, the Panel finds that from a feasibility standpoint, the CRAFT Site is clearly serviceable in terms of water, sewage and stormwater management.

[132] CRAFT's outside expert consultant was Mr. John Krpan, a Principal with the Odan/Detech Group Inc. and a consulting engineer with over 35 years' experience in all aspects of civil engineering. In particular, Mr. Krpan commonly works with the City's Engineering Guidelines and standards and has prepared and processed a number of functional servicing reports ("FSR") for official plan amendments, zoning by-law amendments and site plan applications in the City. He prepared a Functional Servicing & Stormwater Management Report dated May 29, 2020 ("FSSMR") which determined that it was feasible to service the CRAFT Site, in accordance with good engineering practices and all relevant City guidelines/standards.

[133] The Panel accepts Mr. Krpan's evidence as set out in his WS, Reply WS, the FSSMR and in his oral testimony before the Tribunal on November 16 and 17, 2021. His conclusions were not successfully challenged in cross-examination, and the Tribunal noted that he prepared a FSR for a site adjacent to the CRAFT property that was approved by the City for development, as noted in paragraph [134] 2. (a) below.

[134] Mr. Krpan's analysis and essential findings were as follows (with some emphasis added by the Tribunal):

1. To prepare the FSSMR, the Odan/Detech Group Inc. reviewed the CRAFT Site, collected data and evaluated the site for the proposed uses set out in the CRAFT OPA utilizing a scope of work involving the following:

    a. Collecting existing servicing drawings from the City in order to establish availability and feasibility of site servicing;

    b. Meetings/conversations with City engineers and the CRAFT design team;

    c. Evaluation of the data and presentation of the findings in the FSSMR in support of the CRAFT OPA application;

    d. Conducting flow and pressure testing of the existing water main;

    e. Modelling of water distribution in a partial (stand - alone) model using a series of hydrant tests;

    f. Modelling of storm sewers and stormwater management; and

    g. Modelling of the trunk sanitary sewer (downstream).

2. Mr. Krpan and his team at Odan/Detech Group Inc. reviewed available information for projects adjacent to or near the CRAFT Site in the City which had been prepared by it or by other consultants:

    a. The FSR for the development site known as “The Well” (440-462 Front Street West, 425-443 Wellington Street West, and 6-18 Spadina Avenue) prepared by The Odan/Detech Group, dated Sept. 20, 2016;

b. The FSR for 23 Spadina Avenue (Block 22) Concord Adex Developments, prepared by WSP, dated April 12, 2019;

c. Functional Servicing and Stormwater Management Report for 400 Front Street West, prepared by Cole Engineering, dated March 15, 2018;

d. Functional Servicing and Stormwater Management Report Commercial Development 488 Wellington Street West, prepared by Fabian Papa & Partners, dated December 19, 2016;

e. 517 Wellington Street West, Proposed Commercial Development, Functional Servicing and Stormwater Management Report prepared by MGM Consultants, dated May 15, 2019; and

f. Proposed Mixed-Use Residential/Commercial Development, 576 - 580 Front Street West at Bathurst Street, prepared by Al Underhill & Associates Limited, dated March 2017.

3. Mr. Krpan and his team also considered alternative servicing solutions for the CRAFT project. The alternative solutions were offered as options, similar to how the City conducts its Environmental Assessment studies. Option 1 is the preferred method which was settled upon with consultation with the Developer. The other options are offered as a refuge should the preferred option prove to be non-feasible during the final design. The options are detailed as drawings and are included in the various servicing models. Refer to Appendix F for the options. Servicing for the ORCA (CRAFT) project is technically feasible but further servicing details will be finalized through the rezoning and/or site plan approval processes. The matrix of the options suggested by Mr. Krpan was:

| | Water serviced from Street or Rail | Sanitary serviced from Street or Rail | Storm serviced from Street or Rail |
|---|---|---|---|
| **Option 1** | | | |
| East Block | Blue Jays Way | Blue Jays Way and Navy Wharf Court to Dome PS | Blue Jays Way to Spadina Trunk |
| Central Block | Front Street | Front Street | Front Street and Rail Lands |
| West Block | Front Street | Front Street | Front Street and Bathurst Street storm sewer thru rail lands |

| | | | |
|---|---|---|---|
| **Option 2** | | | |
| East Block | Front Street | Front Street | Rail Lands |
| Central Block | Front Street | Front Street | Front Street and Rail Lands |
| West Block | Front Street | Front Street | Front Street and Bathurst Street storm sewer thru rail lands |

| | | | |
|---|---|---|---|
| **Option 3** | | | |
| East Block | Front Street | Blue Jays Way to Front Street Trunk | Rail Lands |
| Central Block | Front Street | Front Street | Front Street and Rail Lands |
| West Block | Front Street | Front Street | Front Street and Bathurst Street storm sewer thru rail lands |

4. From the investigation set out in the FSSMR, Mr. Krpan concluded that the CRAFT Site is serviceable utilizing existing sanitary, storm and water main infrastructure within and adjacent to the site. Stormwater

> management can be accommodated with on-site storage as described in the FSSMR, which set out a table summarizing the stormwater management and servicing components of the development proposed under the CRAFT OPA.

[135] In reaching its conclusions, the Panel considered the critiques presented by the City on the servicing issue which were primarily delivered through the evidence of David Moyle. Mr. Moyle is a recent employee of the City since October of 2019, more than two years after the original 2017 CRAFT OPA, and became involved in this file in April of 2020, at which point he had been employed by the City for approximately six months. Mr. Moyle is a professional engineer with a Bachelor of Engineering from McMaster University. Under cross-examination, Mr. Moyle admitted that this is the first time he has dealt with a parcel of land that is made up of air rights and also his first experience being qualified to provide opinion evidence on civil engineering matters before the Tribunal.

[136] Neither Mr. Moyle nor any other member of the City's Engineering Department prepared a detailed technical analysis or report to refute – or even respond to - the very detailed findings and conclusions of Mr. Krpan. In an interesting passage during his cross-examination on Feb 8, 2021, Mr. Moyle testified as follows regarding the CRAFT OPA in relation to the servicing issue:

> I would say it is premature at this point in time. I think the onus is on the...the developer's engineer to demonstrate whether or not it is or is not possible.

Later, on February 9, 2021, when pressed by CRAFT's counsel on that testimony and that fact that he had never once used the term "prematurity" in his WS, Mr. Moyle then stated:

> I would like to, I guess, just clarify that, ultimately, yes, servicing is possible. But, again, it is the onus of the developer's engineer to demonstrate whether it is possible. Engineering has many solutions, and possible solutions, but ultimately I am not here to do the design work for the engineer. [emphasis added]

[137] In the Panel's view, while it empathized with the obvious and understandable discomfort and inexperience demonstrated by Mr. Moyle during his cross-examination, his testimony simply did not support any reasonable argument that CRAFT had been unable to prove through the thorough and significant work of Mr. Krpan the feasibility of servicing the CRAFT Site to enable the development proposed in the CRAFT OPA. In light of the cogent, well-prepared analysis set out in Mr. Krpan's FSSMR, and in the absence of any comparable analysis or convincing critique from the City, its engineering department or Mr. Moyle, the Tribunal wondered why it was even thought necessary for the site servicing issue to remain a point of contention between the Parties or why all of the associated oral evidence had to be called.

[138] The Tribunal also agrees with CRAFT's argument that the City's legal team focussed its attention on several tangential matters which it portrayed as somehow determinative of the issue of Site serviceability, all as set out in Mr. Moyle's testimony:

a. Any proposed stormwater service connection to the existing Metrolinx Pumping Station ("MX Station") is in contravention of the Municipal Code, which prohibits multiple properties from draining through a single service lateral;

b. Services cannot run under Spadina Avenue unless the City grants permission;

c. Services cannot run under Northern Linear Park unless the City grants permission; and

d. Services cannot be hung under the Blue Jays Way Bridge ("BJW Bridge") unless the City grants permission.

[139] The Panel concurs with CRAFT's counsel that the City has not successfully established that there would be any violation of the Municipal Code if the stormwater

service connection was made to the MX Station. As noted in Mr. Krpan's FSSMR and in his *viva voce* evidence, stormwater either hits a deck constructed under the CRAFT OPA or lands on the existing railway corridor, but not both. Thus, Mr. Moyle's contention that there is a looming, serious contravention of the Municipal Code which prohibits multiple properties from draining through a single service lateral is overstated and simply incorrect as it is based on the presumption that the CRAFT Site will be added as a second property to the MX Station as opposed to being substituted as the sole user/property instead of CN/TTR/Metrolinx as a rail operators.

[140] The City's Rail Deck Park proposal under OPA 395 would have faced this same servicing "problem" now suggested by the City's counsel, since it too proposed to create a deck structure. The fact that such a structure is not likely to contain multi-storey office or residential towers is irrelevant when it comes to stormwater dispersal and even water and sewage (assuming some sort of water and washroom facilities would need to be provided in a large urban park). CRAFT's counsel accurately notes that the City's 2017 engineering study prepared in part by Mr. McMillan to support OPA 395, had none of the detail sought now by the City in relation to the CRAFT OPA or as is set out in Mr. Krpan's FSSMR. Mr. McMillan's report merely stated:

> It is assumed that significant quantities of storm water which presently drain at the track level will be captured and redirected through a storm water management system integrated with the decking structure. It is assumed that this system will be connected to the street-level sewer system by different means and paths, with opportunity for storm water detention and rainwater harvesting at the park level. [emphasis added]

The Tribunal also concluded that those statements assume only a very loose test of feasibility at the OPA stage.

[141] In a similar vein, the Panel agrees with CRAFT's lawyers that the issue of running services under either Spadina Avenue or Northern Linear Park and the need for City permission is a red herring at the OPA stage and cannot properly be relied upon by the City to allege "prematurity" argument or otherwise argue for the denial of the CRAFT

OPA. The Tribunal rejects the notion that the City should be permitted to argue, particularly in the absence of any prior lawful determination by City Council, that such future permission will necessarily be denied. Any implicit suggestion that permission would only be granted in the OPA 395 scenario because the City prefers its own Rail Deck Park to the CRAFT development proposal would of course contradict the underlying rationale for the admission by counsel for the City that this proceeding is not to be a "beauty contest" between two competing proposals for the CRAFT Site

[142] Finally, the issues and arguments raised by the City pertaining to the possible option of hanging services under the BJW Bridge were also uncompelling, in the Tribunal's view. Leaving aside the improper "City permission" argument dealt with in paragraph [141] above, the Panel found that the manner in which this matter was presented in evidence and then argued by the City's legal team was perplexing.

[143] In his FSSMR, Mr. Krpan described the possible option of hanging services under the BJW Bridge as "Alternative 3". In fact, such services are already being hung under BJW Bridge as was (perhaps unwittingly) admitted by Mr. Moyle during his February 9, 2021 cross-examination:

> And what I can tell you is generally speaking, this is something that...it does exist. There are sewers and water main that hang from existing bridges and structures. But this is something that is very typically not permitted. It is really only in very rare circumstances, and typically reserved for critical pieces of infrastructure, just like the force main that is currently affixed to the Blue Jays Way Bridge, which services a substantial population, including the Fort York area and the Rogers Centre.

[144] In any event, at no point did the City's witnesses raise this issue / argument in a WS or Reply WS – it first arose during Mr. O'Callaghan's cross-examination of Mr. Krpan when he put it to him during the following sequence on November 17, 2020

> Q. All right. And I am advised that the Ontario Bridge Code does not permit the hanging of services, municipal services underneath bridges. Are you aware of that prohibition?

A. Which code?

Q. The Ontario Bridge Code.

A. Ontario Bridge Code?

Q. That is what I am advised.

[145] The Panel later on suddenly heard during the cross-examination of Mr. Moyle that actually the Ontario Bridge Code was inapplicable and that it was instead the Canadian Highway Bridge Design Code ("CHBDC") that the City was relying on – again despite the fact that this position had never before been set out in any WS or Reply WS of a City witness. Then, the Tribunal learned from Mr. Moyle that in fact this CHBDC did not set out a blanket prohibition at all, being merely just another instance where City permission is required. This became clear when Mr. Moyle admitted during his cross-examination testimony on February 9, 2021 that there are City design criteria that apply to such hanging installations:

> *Q. …So, you will agree with me that the City of Toronto wouldn't publish criteria setting out how suspended water mains are to be designed if such water mains are prohibited, would they?*
>
> *A. So, the area of the information you are highlighted [sic] would be in a situation in the event that the City did permit such installations. Again, we are not obligated to. It is at their discretion. But in the event that they did permit it, this would be the applicable guidelines [sic] of how it would be to be [sic] insulated, and what material would be used for the water main.*

[146] In the Panel's view, the manner in which these issues were raised and argued was regrettable. On balance, given the sheer volume of other evidence and issues and the large number of days committed to this proceeding, not to mention the resultant expenditures of time and cost, the Tribunal finds that it was unnecessary for these issues to have remained part of the City's case.

[147] As noted above, the Panel has wholly accepted Mr. Krpan's expert findings and conclusions concerning servicing feasibility for the CRAFT Site in respect of the development proposed in the CRAFT OPA - as exemplified in one example by the Safdie/PWP Concept Plan. The Tribunal therefore concurs with the position stated by CRAFT's counsel that it is uncontroverted that the OPA test applicable to site servicing

is feasibility, meaning “reasonably possible”, and that servicing is reasonably possible for the CRAFT Site.

**(f) Overall Planning Issues**

[148] The land use planning issues concerning parks/open spaces matters, which dominated this proceeding, have already been dealt with in Part 3 (b) above. However, were several other important land use planning matters concerning the CRAFT OPA that were in dispute between the Parties.

[149] The lead witness for CRAFT on land use planning matters was Mr. Michael Goldberg. Mr. Goldberg was a founding Principal of Goldberg Group in 2006, a land use planning consulting firm based in Toronto, engaged in a broad range of land use planning and development files on behalf of private and public sector clients across the Province of Ontario. He obtained a Bachelor of Applied Arts, (Urban and Regional Planning) from Ryerson University in 1983 and has worked as a land use planner for approximately 37 years. Mr. Goldberg has worked on hundreds of projects involving applications for OPA’s, zoning by-law amendments, site plan approvals, variances and land compensation matters – including numerous large mixed-use development proposed and approved in the City’s downtown area located nearby the CRAFT Site. He has been consistently qualified during his long career to provide expert testimony before the LPAT and its predecessor, the Ontario Municipal Board and was qualified without objection to provide opinion evidence on land use planning matters to the Panel.

[150] Mr. Goldberg was retained by CRAFT in January 2020 and was the main author of the most recent revisions of the CRAFT OPA now before the Tribunal for approval (set out in Addendum A). The main part of his testimony commenced on November 23, 2020 following his introductory/overview portion near the outset of Phase II of this proceeding earlier in November 2020.

[151] In his WS and during his direct examination testimony, Mr. Goldberg's evidence was that the CRAFT OPA fully implements the policies of the PPS 2020 and the Growth Plan, 2019 because:

a. It accommodates a more compact, intensified and transit supportive urban form, in the highest order of urban growth centre locations in Ontario, and within the evolving Downtown Toronto context of the CRAFT Site;

b. It makes more effective and efficient use of, and optimizes, the land base and infrastructure and includes affordable housing units suitable for families, employment opportunities, shopping for daily and infrequent shopping needs, day care and potentially other services, and considerable open space that could be public parkland or other publicly accessible open space. The scale of this site combined with the mix of uses amounts to a neighbourhood within a neighbourhood, that is universally accessible, age-friendly and that conveniently gives access to the necessities of daily life. As such, the proposal is a very good example of creating, or contributing to, a complete community on site, and within the broader complete community environment;

c. It optimizes the site's redevelopment potential while at the same time having appropriate regard for the site size and configuration, the surrounding and nearby area context, the non-development use of land such as the provision of open spaces, and the integration with the surrounding area neighbourhoods and community. Optimization is not maximizing the land use potential but rather is providing the most that is contextually appropriate. The aim is to strike the right balance between these opportunities and moderating elements, where once an optimized and appropriate balance is achieved, the proposal contributes to a complete community environment and is accomplished by the Safdie/PWP

Concept Plan – which is “one representation of how the policies could be implemented”.;

d. The proposed development is well-designed, promoting active, healthy communities. It has well-designed streets fostering social interaction and active transportation, and provides considerable open space areas enabling a wide range of passive and active recreational activities, and the creation of many new community linkages. The site is designed to link neighbourhood with neighbourhood and on-site open space areas with public parkland and off-site trail systems. The site is also located in Downtown Toronto, in close walking proximity to transit, employment and the richest mix of other uses, which proximity intrinsically promotes active transportation;

e. CRAFT’s proposed development appropriately integrates transportation, transit and land use planning. The Safdie/PWP Concept Plan is located in the Downtown urban growth centre, and introduces both residential and non-residential population within a short walking distance to the subway system, the Spadina Avenue and Bathurst Street surface transit routes that feed directly into the subway system, and the regional GO Transit system being adjacent to the planned GO Transit station on the Metrolinx site at Spadina Avenue and Front Street;

f. It will protect and maintain the rail corridor for its current and future operations while accommodating the development of the air rights above the rail corridor. The ingenuity, creativity and engineering of this assists in achieving many of the PPS and Growth Plan policy imperatives; and

g. The proposed development will contribute to the attainment of the housing and population targets of the City, if not exceeding them, as encouraged by the Growth Plan

[152] With respect to the applicable policies of the City's OP, Mr. Goldberg's opinion was:

a. The range of land uses proposed fall squarely within the range of uses permitted within the Mixed-Use Areas land use policies, including parks, open space and utilities. The application includes a range of uses that are aimed at reducing automobile dependency and meet the needs of the local community;

b. A considerable amount of new jobs could be created within the retail and service commercial space and the other non-residential building(s) and space proposed on site;

c. The Safdie/PWP Concept Plan used to illustrate the feasibility of this OPA application is one illustration of the height and massing which would conform with the proposed OPA, be consistent with the PPS, conform with the 2019 Growth Plan and conform with the City OP. During the zoning bylaw stage of approvals, the Concept Plan could be further refined. But for the Draper Street Neighbourhoods area, the subject site is surrounded by Mixed-Use Areas or the Fort York facility and open space to the west of Bathurst Street. The tower form of built form is established by the adjacent City Place, The Well and other lands on the north side of Front Street. The height and density illustrated, while conceptual, demonstrates the fit of the proposal within its context. Tall buildings of various heights coexist with each other in a compatible and fitting way for this Downtown environment. Appropriate built form standards have been applied to the Concept Plan to contribute to the compatibility of the proposal within its context;

d. Over the years, other lands immediately surrounding and contiguous with Draper Street have obtained City approval for tall mixed-use

developments. This includes the tall building developments of The Well and the office building of 495-517 Wellington Street and 510-532 Front Street. Both of these tall building redevelopments abut properties on Draper Street, and both of these developments cast some incremental shadows on properties on Draper Street. Like many other Neighbourhoods areas in the Downtown, and unlike many other Neighbourhoods outside the Downtown, there is a planning and urban design tolerance for tall buildings to be located adjacent to low-rise and low-density Neighbourhoods area. The Neighbourhoods designation of these Downtown low-rise areas/pockets, recognize the existing built form with such areas, while at the same time tolerating and permitting surrounding Downtown Mixed-Use Areas or Regeneration Areas from realizing and fulfilling the urban structure's planned function intended for Downtown and the urban growth centre;

e. The proposed base building together with the proposed towers along the south side of Front Street are appropriate both generally and, more specifically, in terms of their relationship to Draper Street. The largest gap or separation between towers on site, are located opposite or immediately south of Draper Street. In this location the tower separation is approximately 74 metres ("m") whereas the City's Tall Buildings Guidelines set out a standard of 25 m. This deployment of tall towers enables view corridors from Draper Street to the south and beyond the site and preserves significant sky views;

f. In accordance with the Built Form and Mixed-Use Areas policies, the proposed location and massing of the new buildings are appropriate to achieve the objectives of the City OP and adequately limit shadow impacts on adjacent Neighbourhoods, particularly spring and fall equinoxes;

g. The buildings along Front Street include a base building which frames the edges of the street and the potential park(s) and open spaces south of the buildings. The shadows and wind conditions have been satisfactorily addressed and will be further refined at later development approval stages;

h. The environment of this proposed development has been designed to be comfortable, and safe for pedestrians and there are a number of off-site parks and well as considerable open space on-site. Opportunities for green infrastructure including tree planting, stormwater management and green roofs have been provided in the proposal and will be further explored and refined at later approval stages;

i. A sufficient quantity and quality of both indoor and outdoor recreational space is provided for the future residents and the CRAFT Site is proposed to include a childcare facility. Transit is very close by in terms of the planned Go Station at the southwest corner of Spadina Avenue and Front Street, existing streetcar routes, and the subway system within walking distance to the east; and

j. An adequate supply of parking has been provided and all service areas are located beneath the surface of the decking structure and out of sight from the public realm

[153] In terms of the City's OP, Mr. Goldberg further opined in summary that:

> …the subject OPA application duly implements and conforms with the intent and policies of the City OP. Frankly, given the substantial size of the site and the significant work that has gone into this OPA application, it is hard to imagine how conformity with the City's OP would be impossible. Typically, it is the very small (re)development sites which find it challenging to conform with the City OP due to the problems associated with small site constraints, but that is not the case here. The proposed OPA does not exempt future rezoning and site plan applications from the myriad of City OP policies which ensure that the goals and objectives of

> the City OP are met. Likewise, the proposed OPA does not exempt these same future applications from the City's Tall Building Guidelines
> [emphasis added]

[154] Mr. Goldberg also considered the provisions of the Railway Lands Central and West Secondary Plans and was of the view that the proposed CRAFT OPA is appropriate and conforms to their provisions. He further concluded that the CRAFT OPA satisfies the intent and general guideline suggestions contained within City OP's Urban Design Guidelines under the Railway Lands Central and West Secondary Plans, recognizing that much of this will be further implemented at later stages of approval. He noted that the effect of the City's OPA 395 was to remove all policy guidelines in those Secondary Plans, however. This was also admitted by the City's planning witnesses, Ms. Macdonald and Ms. McAlpine.

[155] In terms of the City's 2013 Tall Building Guidelines, Mr. Goldberg's view was that the CRAFT OPA has had appropriate regard for them in the preparation of the Concept Plan from site organization and tall building perspectives. He concluded that to the extent applicable to this CRAFT OPA it satisfied, or is capable of satisfying, the specific and general guideline suggestions contained in those Tall Building Guidelines.

[156] Mr. Goldberg provided substantial additional detail in his WS, Reply WS and during his testimony and visual presentations to the Panel far beyond what can be usefully and practically summarized in this Decision. Mr. Goldberg was of the overall opinion that the policies set out in the CRAFT OPA and in the one example demonstrated by the Safdie/PWP Concept Plan represent and respect good planning principles. He was cross-examined thoroughly by Mr. O'Callaghan for the City but, in the Panel's opinion, Mr. Goldberg's conclusions and opinions withstood all lines of questioning and challenges.

[157] The Tribunal found Mr. Goldberg to be articulate, well-prepared and exceedingly thorough in his serious, coherent and highly credible consideration of all relevant Ontario and City of Toronto land use planning policies and principles applicable to the

CRAFT OPA and in his convincing rebuttals to the more than 150 sub-issues raised in the City's Issues List set out in the Procedural Order in this case.

[158] The Tribunal accepts Mr. Goldberg's written opinions and oral testimony to the extent of all conflicts with the opinions and conclusions proffered by the City's planning witnesses which included the City's senior employees Ms. MacDonald and Ms. McAlpine and the City's outside expert Mr. John Gladki. For the reasons discussed above, the Tribunal will not refer to or review the planning evidence set out in Mr. Gladki's WS and Reply WS except to reiterate that the Panel accepts the evidence of Mr. Goldberg over that of Mr. Gladki. Nonetheless, the Panel has decided to summarize below some of the City's contrary planning opinion evidence and to further explain why the Tribunal does not accept it.

[159] The bulk of the City's general planning evidence was provided by two of its senior employees, who both filed WS's and Reply WS's and who testified together in a panel before the Tribunal: Lynda MacDonald and Susan McAlpine. Some of their evidence on parks issues is described above in Part 3 (b).

[160] Susan McAlpine is a Senior Planner with the City of Toronto Planning Division, Toronto and East York District and has been employed with the City of Toronto for approximately 21 years. She has 27 years of experience as a Land Use Planner focused on development review. Ms. McAlpine has Honours Bachelor of Arts Degree in Geography from the University of Western Ontario (1985) and a Master of Science in Planning from the University of Guelph (1993). She has been the Planner assigned to this application since the CRAFT OPA was first submitted by the applicant on August 24, 2017.

[161] Lynda Macdonald is the Director, Community Planning, Toronto and East York District and has worked for the City of Toronto Planning Division since 1989. She has over 35 years' experience in Land Use Planning including experience as a consulting land use planner and landscape architect prior to joining the City. Ms. Macdonald has a Bachelor of Landscape Architecture from the University of Guelph and is Registered

Professional Planner and full member of the Ontario Association of Landscape Architects. She has also been a guest lecturer at the University of Toronto, Schools of Landscape Architecture, Architecture and Geography and at the University of Guelph, School of Landscape Architecture, as well as a guest critic at the Ryerson University, School of Landscape Architecture

[162] Ms. Macdonald's curriculum vitae also notes that she was: "Director Lead for the City's Rail Deck Park initiative and witness at the Rail Deck Park hearing leading to a successful outcome for the City (OPA 395)" and that she has also been "responsible for portfolio of planning applications across the West Downtown including the King/Spadina Area, Exhibition Place, Ontario Place and the Liberty Village Area Responsible for all planning studies and Secondary Plans in the West Downtown stretching from University Avenue to High Park including the Bathurst Street Built Form and Land Use Study"; and further that she "directed the review of all development applications in the Central Waterfront including the Concord Adex, CityPlace development (23 residential towers)". CityPlace is, of course, the massive, very tall condominium complex adjacent to the southern edge of the CRAFT Site on the other side of Northern Linear Park, right next to the Rail Corridor.

[163] Both Ms. McAlpine and Ms. Macdonald are senior members of the City's planning team and Ms. Macdonald in particular has very deep expertise and experience in dealing with a significant number of Downtown development applications for large, Mixed-Use proposals – and she has a long history of involvement with the CRAFT Site as well as with many of the neighbouring large projects.

[164] The main points of the joint general planning evidence of Ms. Macdonald and Ms. McAlpine as derived from their WS and Reply WS and oral testimony are summarized as set out below in italics. The Tribunal's findings follow each point.

a. *The CRAFT OPA has not addressed the policy framework set out Provincial Policies, the City of Toronto Official Plan, the Railway Lands Central and West Secondary Plans and*

*various other policy and guideline documents applicable to this part of the City. The CRAFT proposal as submitted is premature and does not provide the analysis or data to support the proposal or prove its viability. We opine that the proposal, as far as can be understood based on the material submitted, is overdevelopment and does not respond appropriately to its existing and planned context;*

[165] The Tribunal does not agree with these contentions and accepts instead the land use planning opinions and conclusions of Mr. Goldberg that the CRAFT OPA, including the exemplary Safdie/PWP Concept Plan, conform with all relevant policies of the PA, the PPS 2020, The 2019 Growth Plan, the City's OP and the Railway Lands Central and West Secondary Plans. The Panel also does not agree that at the OPA stage it is necessary for an applicant to definitively "prove viability" or to marshal analysis and data in the OPA on all aspects of the implementation and construction of the contemplated development. The test on an OPA is instead as set out in Part 2 above.

[166] The Tribunal also disagrees with the opinion of Ms. Macdonald and Ms. McAlpine that the CRAFT OPA represents "overdevelopment…which does not respond appropriately to its ...context." The Panel instead accepts the emphatic contrary opinions reached by Mr. Safdie, Mr. Goldberg, Mr. Sweeny and Mr. Greenspan in this regard. The Tribunal is of the view that the main thrust of the development proposal set out in the CRAFT OPA is entirely consistent with almost all of the adjacent planned or already approved developments in the Downtown Area (invariably approved on behalf of the City by Ms. Macdonald and Ms. McAlpine or their fellow planning department colleagues) – since but for that part of the Rail Corridor underlying the CRAFT Site, virtually all other parcels have been designated as Mixed-Use and now comprise tall, high density residential and commercial buildings.

b. *The CRAFT proposal is premature. It does not identify or assess the density requested and has not coordinated*

> *planning for infrastructure, parks, and other community services and facilities with the development requested. The proposal does not reflect the comprehensive master planning approach to land use planning that is essential for large scale developments on large sites, and fundamental to ensuring orderly development and complete communities*.

[167] The Tribunal does not agree with these opinions for the reasons expressed above in Part 2 and Part 3. On the planning issues, the Panel prefers instead the opinions, conclusions and findings of Mr. Goldberg. The Tribunal also finds that some of these opinions of Ms. Macdonald and Ms. McAlpine do not accord with the approach that they have taken toward other OPAs in the Downtown or even in the areas adjacent to the CRAFT Site – including but not limited to "The Well" on the north side of Front Street directly across from the CRAFT Site, the subject of OPA 317. Many of such apparent inconsistencies were very effectively raised by CRAFT's counsel during his cross-examination of Ms. Macdonald and Ms. McAlpine.

[168] Moreover, the Tribunal is of the view that the criticisms of the CRAFT OPA and the demands for additional granular data and details ignore the actual content already contained in the CRAFT OPA as well as the fact that many important additional issues will be dealt with in the future zoning and site plan stages of the development approval process.

> c. *In its current state, the site is not suitable for development. To create the platform for development a deck will need to be constructed to span the corridor. Changes to the railway infrastructure within the corridor, including new infrastructure to address rail safely and mitigation, will be needed to support the deck along with the towers above. New infrastructure will be needed to support the development from transportation and servicing perspectives, and*

> *community services and facilities and parks will be needed for the people that will live and work in this new neighbourhood. All of this will be need to be carefully determined and phased over a long period of time. This scale of development in this location, requires a comprehensive approach to land use planning to ensure that orderly development occurs and that complete communities are achieved, and importantly while ensuring that the main purpose of the rail corridor is not in any way compromised.* [emphasis added]

[169] The Tribunal points out that the City's legal team has already clearly admitted that the CRAFT Site is in fact a "development site", which seems to contradict some of the above assertions. The Panel prefers the detailed evidence and expert opinions of Mr. McCafferty and Mr. Jeens of the world-renowned Arup firm who concluded that from a structural engineering standpoint the CRAFT proposed development is clearly feasible. As already noted in Part 3 (c) above, The Tribunal does not accept the contrary findings of Ms. Turner or Mr. McMillan.

[170] The Tribunal further notes that the City's own OPA 395 also (necessarily) proposes a deck in the CRAFT Site above the Rail Corridor, and that OPA 395 contains very few details of its engineering or concerning the phasing of its construction. As discussed in Part 3 (c), and as Ms. Macdonald is certainly aware, no detailed engineering assessment approximating the analysis prepared by Mr. McCafferty and Mr. Jeens was carried out on behalf of the City to support OPA 395. Nor was such an assessment commissioned in order to respond to the CRAFT OPA and the impressive evidence of the two Arup engineers. In any event, the comprehensive analysis loosely suggested by Ms. Macdonald and Ms. McAlpine is not required to prove the requisite feasibility at this OPA stage. Finally, the Tribunal reiterates that it has accepted the clear and convincing expert opinion evidence of the following CRAFT experts: Mr. Fleming and Mr. Wallace on transportation matters; and Mr. Krpan on

water/stormwater/sewage servicing feasibility – in preference to the City's opposing experts, Mr. Mendes and Mr. Moyle, all as already discussed in detail above in Parts 3 (c), 3 (d) and 3 (e).

d. *The proposal does not reflect the comprehensive master planning approach to land use planning that is essential for large scale developments of this nature, particularly on this unique site above the rail corridor…The entire site is also proposed to be designated as Mixed-Use Areas with no area designated Parks and Open Space Areas within the site… No information has been provided on the mix of land uses proposed in the additional development or how many additional dwelling units will be included. No information has been provided on how this additional development will be serviced, its impacts on the transportation network, or the community services and facilities and parks that would be needed. No information has been provided on the impacts of this additional development on the railway uses below.*

[171] The Tribunal does not accept the above opinions and prefers instead the expert opinion and analysis to the contrary set out by Mr. Goldberg in his WS's and oral testimony. The Panel further agrees with him that there is appropriate content in the CRAFT OPA regarding the above-referred to details. The Panel finds that there is no requirement for the CRAFT OPA to designate "Parks and Open Space Areas" within the requested Mixed-Use designation sought for the entire CRAFT Site based on the analysis set out in Part 3 (b) above. The Tribunal notes that Ms. McAlpine and Ms. Macdonald admitted during cross-examination that many Mixed-Use designated parcels within the Downtown had no such further "Parks" sub-designation, yet still have public parks within them.

[172] The Tribunal finds that both the CRAFT OPA and the Safdie/PWP Concept Plan implementation example clearly set out numerous details concerning significant areas of park and open spaces in the CRAFT Site along with a wide variety of other intended community services and facilities. As noted, servicing and transportation feasibility has been established to the satisfaction of the Panel in accordance with the applicable tests.

[173] It was highly apparent to the Tribunal from the evidence of Ms. Bake and other City witnesses, and from the strenuous final written and oral arguments of the City's counsel, that the City wants on-site parkland dedication at the CRAFT Site. The Panel agrees with Mr. Goldberg's opinion that this could have been negotiated earlier by the Parties and also can be secured when further development applications are filed and is not required at this OPA stage. It is also open to the Parties to adopt an approach similar to that approved by the City under OPA 317 for the adjacent development at The Well by negotiating additional policy language to address this issue in the CRAFT OPA. As Mr. Goldberg pointed out, the City was supportive of OPA 317 designating the entire site as Mixed-Use Areas and the inclusion of a policy to establish a later negotiated parkland dedication either on or off-site. This example from OPA 317 was SASP 495, Policy (c) which included the following:

> ***Parkland Dedication***
>
> *c) The requirement for parkland dedication will be secured through land dedication or other arrangements. Dedicated lands will be designated City Parkland on Map 8A through subsequent Official Plan amendment. In the event that the applicant proposed an off-site parkland dedication, the applicant will be required to enter into a Letter of Agreement with the City clearly stating the commitment to prove an off-site dedication of a specific size in a specific location*.

[174] In the Panel's view, the City and CRAFT should be left with the task of considering whether to negotiate an arrangement similar to the above policy if and as they see fit, rather than have this Tribunal impose a provision that, upon reflection, neither Party may prefer. However, in the event that the Parties do agree upon a further amendment to the CRAFT OPA that they wish to have implemented, they may seek approval from the Tribunal for such further amendment.

e. *Supporting material related to shadows, viability of planting on the above corridor, open space, universal accessibility, provision or required parkland have not been provided… The proposal represents an inappropriate density in an area of the city which is already meeting the Provincial Growth Targets for the Downtown… The proposal does not represent good planning, is not consistent with the Provincial Policy Statement (2020), does not conform to A Place to Grow: Growth Plan for the Greater Golden Horseshoe (2019), does not conform to the City's Official Plan and the Railway Lands Central and West Secondary Plans*
[emphasis added]

[175] The Tribunal rejects the conclusions reached by Ms. Macdonald and Ms. McAlpine set out in subparagraph [174] e. above and confirms again that it has accepted instead the contrary expert opinions of Mr. Goldberg. The Panel also points out that the City's expert, Mr. Gladki acknowledged during his cross-examination that the apparent lack of a current need to meet Downtown Provincial Growth Targets is not part of the test applicable to the CRAFT OPA. The Panel also prefers the opposing evidence of Mr. Sweeney and Mr. Goldberg on design and shadow matters and the evidence of Mr. Greenspan on plantings and other landscape architecture matters.

[176] The Tribunal reiterates its findings set out in Part 3 (b) concerning the Parkland Exemption and does not accept the opinion that the CRAFT OPA must specifically designate the location of public parkland. As affirmed by Mr. Goldberg during his testimony, CRAFT has never refused to provide such public park space and the Tribunal will not repeat the discussion and analysis of these issues which has been explored at length in Section 3 (b) above. The Panel accepts the opinion of Mr. Goldberg that (i) the CRAFT OPA and SASP set out proposed policies addressing: Vision and Major Objectives; Parks, Open Space, and Publicly Accessible Private Open Space ("POPS"); Urban Design Guidelines; Public Realm Master Plan; Environment;

Community Benefits; and Implementation; and (ii) The CRAFT OPA will guide the further implementation of development and open space on the subject site and will guide what needs to be undertaken and at what stage of the development process.

[177] The Tribunal further accepts the following evidence of Mr. Goldberg over that of Ms. Macdonald and Ms. McAlpine and other City witnesses: (i) the City's desire to take the maximum parkland contribution as land is a matter that does not, in his experience, occur at the OPA stage but instead later in the development approval process; (ii) if the City is ultimately dissatisfied with the potential for parkland dedication within an area of open space as portrayed in the CRAFT OPA or the Concept Plan or as revised at later stages, then at later stages of planning approval, alternative parkland designs can be discussed; (iii) the proposed Mixed-Use Areas designation permits a public park and Northern Linear Park is an example of a public park within a Mixed-Use area (and constructed) that was not designated as Parks until the Prior Decision permitted OPA 395 to redesignate it to Parks; and (iv) since the proposed Mixed-Use Areas designation permits a public park, the CRAFT OPA would not prohibit the City from accepting dedication of a portion of the CRAFT Site for that purpose - and if the City should ever decide to acquire portions of the CRAFT Site for parkland (by negotiated agreement or by expropriation), then it can redesignate those portions at that time as it sees fit;

f. *Mr. Goldberg describes the approvals process for the development on the north side of Front Street West opposite the site known as the Well. He notes that the approvals process for the Well included the approval of an OPA in advance of the approval of the zoning amendment. We note that the Zoning By-law and Official Plan Amendment application for the Well were submitted concurrently and that the Zoning By-law and Official Plan amendment application for the Well included details about all of the development proposed.*

[178] The Tribunal finds that the above statement seems to insinuate that it is improper to submit an OPA for a large development without simultaneously seeking a zoning by-law amendment. Although such circumstances may not be the norm, the Tribunal does not agree with this apparent contention – and notes that the City did not call evidence or make any legal argument to support it.

g. *Mr. Goldberg describes a development application at 315 - 325 Front Street West on properties east of the subject site. This site is also within the Railway Lands Central Secondary Plan area. We note that this application includes both an Official Plan and Zoning By-law amendment together with the details of all of the development proposed as well as the open space/parkland proposed on the site and over the railway corridor.*

[179] The Panel repeats its views as set out following paragraph [178] g. above.

h. *Mr. Goldberg notes that the proposal envisions the use of the northern portion of the subject site for the construction of buildings and the southern portion for open space uses that could include public parkland. Further he notes that if the Tribunal approves the OPA the nature and tenure of the proposed open space can be determined as part of subsequent Zoning By-law amendment approval processes, and opines that that would be the usual and customary manner to implement the open space components. <u>We note that in master planned developments and large sites such as this one, the City determines and designates the public and private open space as part of the initial application whether it be an official plan amendment and/or rezoning</u>.* [emphasis added]

[180] The Tribunal views the above conclusion in the same vein as the suggestion that somehow an OPA must be accompanied by other concurrent amending applications. Again, no specific authority for this proposition was provided by the City's legal team and the CRAFT OPA contains master planning policy language, as pointed out by Mr. Goldberg. In addition, both Ms. McAlpine and Ms. Macdonald admitted on cross-examination that they have approved other OPA's submitted "on their own" by other applicants in the past. The practice of the City as stated in subparagraph h. – even if it is a preferable practice - is not part of the test for granting an OPA nor did counsel for the City attempt to argue that. The Panel prefers the evidence of Mr. Goldberg as to the determination of parks and open space elements during the subsequent development processes.

i. *Mr. Goldberg notes that the City owns the air rights above PDL Bridge and the bridge is proposed to remain in place. He also notes that the City considers the bridge to constitute public art. Mr. Goldberg fails to note that the May 31, 2020 Concept Plan proposes to extend the development including the retail mall over the Puente de Luz bridge, within the air rights above the bridge owned by the City as illustrated in architectural and landscaping drawings. As well, as outlined in the letter from Karen Mills, of Mills + Mills Consulting Services, and who is the Public Art Consultant and Member of the Puente de Luz artwork team, the PDL bridge is an artwork and Ms. Mills outlines her concerns about the impact of the development on the Puente de Luz bridge.*

[181] The Tribunal notes that even if the Safdie/PWP Concept Plan proposed the impact on the PDL bridge claimed above – which it does not according to the evidence of Mr. Sweeny and Mr. Safdie which is accepted by the Panel – this would be immaterial as the Concept Plan is exemplary only and solely the CRAFT OPA is before the Tribunal for approval. The statements concerning the negative impacts of the

Concept Plan on the PDL Bridge from an artistic standpoint were also raised by Ms. Bogdanowich in her WS where she stated: "The proposed changes have been put forward without any consultation with the artist and the City of Toronto Public Art Commission as is required under City of Toronto Public Art Policy and the arrangements agreed to with the artist. This must be rectified as the obligations for consultation are embedded in the artist design agreement and in City policy". This same issue also then arose during the cross-examination of Ms. Bogdanowicz by CRAFT's counsel. Unfortunately, this testimony once again illustrated an all-too-familar combative approach which negatively influenced the Tribunal's view of the evidence. It was admitted by Ms. Bogdanowicz that she had in fact directly solicited the "'unfavourable views'" of the PDL Bridge artist, as also relied upon by Ms. McAlpine and Ms. Macdonald. In the Tribunal's view, this is undesirable conduct for a professional expert witness to engage in. It led to the following passage in the oral evidence which has been edited to reduce its length:

> THE CHAIR: So, what the panel would prefer first is, Ms. Bogdanowicz, just to explain how she came to receive or possess the letter just as a first step…So we will take it in sequence.
>
> MS. BOGDANOWICZ: Sure. So, as I understand, the Safdie [Plan] came in as a public application. It is on the City's portal, it is a public document. And so anyone who was interested in the fate of the CRAFT site could go there and download the documents…As we were preparing for our visual evidence and for our testimony, we reached out to Ms. Mills to find out information...technical information about the bridge…And so we reached out to Ms. Mills for that technical information and she was aware of the [Safdie] drawings and without, you know, us having to show her the drawings she was aware of the impacts. And she knew, of course, in the first application that the bridge was simply removed. So she is aware, obviously, of what is going on and what is at stake with the bridge because she…cares very much for this piece of public artwork.
>
> THE CHAIR: Okay. So, Mr. Kagan, I think you wanted an opportunity once you had that answer to possibly make additional representations.
>
> MR. KAGAN: Yes, I have a question for Ms. Bogdanowicz and then I am going to finish my submissions. My question for Ms. Bogdanowicz is at any time, Ms. Bogdanowicz, did you ask or encourage Karen Mills to write a letter on this point?
>
> MS. BOGDANOWICZ: We asked Karen if she had any opinions on the CRAFT proposal and if she did, if she would be interested in putting that in writing so that we could bring that as evidence to the tribunal.
>
> MR. KAGAN: When you say "we asked", is it you who asked or is it somebody else who asked?

> MS. BOGDANOWICZ: I asked on behalf of the urban design section.
>
> MR. KAGAN: Okay. Thank you. So, Mr. Chairman, I now have additional submissions. Firstly, I believe that Ms. Bogdanowicz has now crossed the line from independent consultant trying to assist the Tribunal to an advocate. It is absolutely not appropriate for an independent witness to go out and try to get opinions from other people to put in their witness statement. That is the job of the City solicitor, not the job of an independent witness. So, in addition to me believing and submitting that this letter is inappropriate for that reason alone, I will have other submissions to make in my closing statement about what weight to put on the evidence of Ms. Bogdanowicz in general…The CRAFT witness statements were referring to the Safdie concept plan and the CRAFT OPA. Those documents were in existence from May 2020. Everybody knew that the Puente de Luz Bridge was being retained, if that was the City's wish, and they all knew as early as May 2020 what the relationship would be between that bridge and the CRAFT deck and the buildings that are on the CRAFT deck….This is a classic example of splitting your case. They know that the bridge...the Puente de Luz Bridge is going to be at a lower elevation than the CRAFT deck as demonstrated in the Safdie concept plan. They put that on the issues list. My client is required to respond to matters on the issues list and it does so. It explains why that is going to be the way it is. It explains the height of the deck vis-a-vis the air rights…And it also went on to explain, for example, that...and this is in the witness statements...that the City only purchased the air rights for the Puente de Luz Bridge and not, for example, five or ten metres on either side if it wanted breathing room…That would have been the time to then deal with it in a witness statement…They did it instead in a reply witness statement. That in and of itself disqualifies this letter. But if they had put this particular letter in their witness statement, I would have asked Ms. Bogdanowicz the very questions I asked her a few moments ago and the answers she gave would have disqualified the letter from being in the witness statement. Lastly, sir, I cannot cross-examine Ms. Mills. She is not a witness in this hearing. The City didn't choose to put her on the witness list. The City knew for a long time that this was an issue for them and if they thought it was important to hear from her, they would have done it properly, sir, which was to call her as a witness and we could have cross-examined her. For all those reasons, I believe this letter should not be admitted into evidence… [emphasis added]

[182] After hearing vigorous contrary submissions from Mr. O'Callaghan on behalf of the City, the Panel decided against receiving the Mills letter into evidence, and expressed its ruling as follows:

> The Panel is of the view that a letter such as this really is of marginal relevance if any…All of the panel members have numerous examples in their own experience of where passionate views are possessed by members of the public or otherwise …and they can seek participant status and, of course, they can make written submissions…[to be] …considered by the Tribunal…[The Panel] would say… we are not here to debate the value of public art…The Panel is not prepared to declare

> Ms. Bogdanowicz as partial or partisan here. We understand the policy positions that particularly City witnesses acquire during the course of their employment can be very passionately felt and held and we would underline the need to exercise some caution in a circumstance where testimony is being offered to the Panel…So the Panel has decided that it will decline to receive this letter or any testimony about it in evidence in these proceedings. [emphasis added]

[183] Unfortunately, as has been pointed out above, this was just one of several examples of a regrettable tenor that too often permeated the evidence provided by many City witnesses in this proceeding. The additional relevance here of the passages described above is that the evidence of Ms. Macdonald and Ms. McAlpine is tainted by their decision to include an assertion related to the Mill's letter about the PDL Bridge – even though they did not apparently seek that evidence.

[184] The Tribunal must reaffirm that it has not found that there was conduct in this proceeding which reached a level that would justify the disqualification of any City witness or that there has been a breach of any witness's duty owed to the LPAT. However, as already noted on several occasions in this Decision, over the course of several weeks of testimony during the City's case commencing in January 2021, the pattern of conduct demonstrated by the City's witnesses during cross-examination negatively influenced the Panel's view of their evidence. It also contributed in part to the determination that, on balance, after taking into account the overall demeanour of the City's witnesses and the CRAFT witnesses, and the totality of their written evidence and oral testimony, the Tribunal found the written statements and testimony of CRAFT's witnesses to be more thoroughly detailed, analytical, objective, less argumentative and ultimately more useful to the Panel – and simply more reliable on all major points of disagreement with the City's experts on the material issues relating to the Panel's consideration of the CRAFT OPA. In the Tribunal's view, this is something every professional witness who intends to testify in a LPAT hearing ought to carefully consider. In fact, this is reflected in the Acknowledgement of Expert's Duty that all witnesses must execute.

[185] As a final note, the Tribunal finds it necessary to at least briefly deal with a number of pervasive themes set out in the final written and oral arguments of the City's lawyers:

1. The density of 4.2 FSI set out in the CRAFT OPA at section 10.1. The City's counsel argued that:

> The loose nature of the OPA gives CRAFT absolute discretion"…[and]…"This permissiveness in the OPA gives CRAFT alone the discretion to locate and how to mass all of the buildings on the site and provides for no guidance or restrictions on how all of the density is to be deployed… given the looseness and lack of direction regarding tower size, height and location, in the proposed OPA, CRAFT has the completed (sic) discretion to build the density in any manner it chooses…

Counsel for the City went on to contend:

> If the OPA is approved by the Tribunal in its current form, with the density of 3500 residential units and 140 km2 of retail/commercial space included then the Tribunal is giving CRAFT the discretion to decide where to put the towers" and still further stated: "Because of this requirement by CRAFT for all of the density to be identified and provided for in the OPA, the OPA before the Tribunal provides CRAFT alone with the discretion to determine how and where the density will be deployed.

2. CRAFT's counsel points out that the density of 4.2 FSI set out in the CRAFT OPA is far less than is permitted under the OPAs for neighbouring sites: e.g. less than half of what was approved at The Well and less than a third of what was approved for 400 Front Street West, both across the street from the CRAFT Site. He also noted that the CRAFT OPA proposes a range of 2,500 to 3,500 dwelling units which is almost identical to the total number of units approved for both of The Well and 400 Front Street West together - although the CRAFT Site is approximately 50% larger than those two sites combined. Moreover, the Tribunal notes that the City's own witnesses – in addition to Mr. Goldberg – agree that the 4.2 FSI density is a cap, not a mandatory allocation. For example, Ms. Bogdanowicz, when asked on cross-examination "It is a maximum, which

means anything below is allowed, nothing above is allowed" answered "Yes, that's correct" although she later insisted that developers always demand the maximum density allowed in the OPA.

3. The cross-examination on the meaning and effect of having 4.2 FSI density in the CRAFT OPA referred to in paragraph [185] 2. above turned into yet another adversarial struggle as the City's witness refused at one point to answer a simple permissible question for reasons that seemed to arise from her desire to keep common cause with the "no modifications" position demonstrated by all other City witnesses. This was again another example of witness conduct that the Tribunal found unhelpful and, at times, a little exhausting. Again, to reduce its length, editing was required:

> A. I mean, we're recommending that it [the CRAFT OPA] be refused.
>
> Q. I really don't want you to use the word "we", because on the record, I have no idea who that is. I'm assuming that all the words that come out of your mouth are your opinion…
>
> A. I am recommending refusal of the OPA for a number of reasons, and one of them is it because it contains a number, a density number.
>
> Q. Okay, you have to answer this question, otherwise I'm going to continue to ask it, and eventually, I will ask for the Tribunal member's assistance, and he will choose whether to ask it of you or not. And heaven help you if you don't answer his question directly. So, I'm going to ask again. Would you be happier if the 4.2 maximum [FSI] was removed from this document?
>
> A. I'm afraid that I can't answer that question, because that's modification… Am I missing something? I mean, you're asking me to make a modification, and we've been clear to you that we're not here to make modifications. Am I missing something, Mr. Kagan?
>
> MR. KAGAN: I think I now have to ask Mr. Chairman for assistance. Mr. Chairman, I can continue to ask this question and battle with this witness if necessary, but I don't want to waste your time, and I'm wondering if you can direct her to answer the question with a yes-or-no answer, and then explain.

> THE CHAIR: Ms. Bogdanowicz, your concern about making a recommendation is understood, but this question is different, and you ought not to interpret it as being an admission that you're making a modification. It's a factual question as to your opinion as to whether it would be an improvement if the density number is removed from the OPA. I think it's a relevant question, and you should answer just that question.
>
> WITNESS: Okay, thank you, Mr. Chair. And in that case, if it's considered not to be a modification, in that case, yes, I think the OPA would be better if it did not contain a density number. And I think that my testimony is clear that that is a major issue of ours. If the OPA contains a density number and doesn't contain urban design detail, then that's an issue.

4. In any event, the Tribunal agrees with CRAFT's counsel that the presence of a density number in the CRAFT OPA does not give CRAFT "carte blanche" to then propose and build whatever assortment of buildings it wants, wherever it wants to locate them on the CRAFT Site. There is still a zoning by-law stage and a site plan approval stage as well as building permits to be submitted for approval by the City. Many policies of the City's OP, including various guidelines, will be applicable, along with the relevant provisions of the PA, the PPS 2020 and the Growth Plan – and of course, principles of good land use planning must be evident throughout those stages of the development process. None of these are exempted by the CRAFT OPA.

## 4. CONCLUSIONS: DECISION AND ORDER OF THE TRIBUNAL

[186] The Tribunal is of the view that the CRAFT OPA became the focal point for an unusual approach taken by the City with respect to development over the Rail Corridor. This was typified by how the City's legal team put forward their case in both the WS's and Reply WS's and during the examination-in-chief of the City witnesses. Moreover, it is the Panel's opinion that the direct evidence of the City's witnesses was repeatedly and successfully challenged on cross-examination on almost all substantive points.

[187] While the Tribunal has referred to – and in some cases quoted from - many of the arguments raised by the legal teams for the City and CRAFT, it has not yet referred to the positions taken by the GCA in final submissions. Mr. Allen, the representative for the GCA, and his constituents live in the area around the Rail Corridor and in many ways will be more directly and personally affected by its development than perhaps any other Toronto residents. Notably then, the GCA supports the CRAFT OPA.

[188] Mr. Allen, as was the case during the hearing, was both eloquent and amusing in his final written arguments for the GCA. As only he could, he managed to include quotes from: the Holy Roman Emperor Frederick I, William Shakespeare, Karl Marx, Vladimir Lenin, Stéphane Mallarmé, Margaret Wolfe Hungerford, Jesus Christ (quoted in Matthew 7:12), The Canadian Urban Institute and The Honourable Mr. Justice David Corbett in a recent Ontario judicial decision. Some of his observations, however, mirrored those reached by the Panel as expressed in this Decision.

[189] In an especially relevant passage in his final argument for the GCA, Mr. Allen stated:

> The 167 pages of the Goldberg witness statement for CRAFT and the 392 paragraphs (91 pages) of the Macdonald/McAlpine joint witness statement for the City hardly share a word of agreement – about how the various policy and by-law requirements apply to the rail corridor proposal(s), or about the adherence by the CRAFT proposal to general principles of good planning. Another way to look at this is to notice that the City's Issues List (dated April 30, 2019) enumerated 218 contentious issues.

[190] He also included some excerpts from testimony of the City's senior planning witness, Ms. Macdonald that echo the themes concerning the City's stubborn approach to the CRAFT OPA described above in Part 3 by the Tribunal:

> …We didn't feel it was appropriate to submit modifications because each modification would have a series of repercussions or a domino effect…It was not the City's job to hire its own consultant team to redesign the CRAFT application to address all of the City's concerns and then to come back with a competing plan saying, "Here's a plan that we have developed with a separate consultant team which now demonstrates how the City's issues can be met". I do not believe that that is the job of the City…

[191] Mr. Allen attended almost every day of the LPAT hearing to listen to the testimony of the City's and CRAFT's witnesses - and (without the assistance of counsel) cross-examined several witnesses. In his view:

> The City and its witnesses did not, anywhere in the public record, list the aspects of the CRAFT proposal that were admirable and that they agreed with. In the opinion of the City planning witnesses it was not their job – indeed not their professional responsibility – to mention any worthy aspect of the CRAFT proposal. If there was something they agreed with, they said, they simply didn't mention it. They came to bury the CRAFT proposal, not to praise it. [emphasis added]

[192] There are many possible ways to describe and characterize how the City responded to and dealt with the CRAFT OPA from its inception and throughout this case. The Tribunal also recalls and accepts the views expressed by Mr. Goldberg in his lengthy testimony. As noted, Mr. Goldberg is the author of the most current CRAFT OPA and a professional planner with deep experience in dealing with Downtown Toronto development applications for more than three decades – including many of the developments that have been built or are now being constructed in the areas directly adjacent or very near to the CRAFT Site. Mr. Goldberg gave frank and candid evidence that relates to some of the themes mentioned by the Tribunal in its Introduction in Part 1 above. Near the end of his direct examination on November 24, 2020, he stated:

> This is an OPA that sets this OPA application as but the first step in the process. And like The Well or OPA 395, or possibly even a number of other applications within the railway lands central and west secondary plans, there remains many subsequent implementing steps should this OPA be approved to address the many details that have been raised in the context of this hearing. All City OPA issues are addressed now, in my opinion. The others, the details that others have expressed to you that are capable of being addressed later, will be or are capable of being addressed at the right time. [emphasis added]

[193] Mr. Goldberg went on to remark:

> If Rail Deck Park didn't exist, would we have gone through a normal planning process, would we have had a preliminary report instead of a refusal report, would we have gone through maybe a few years of collaboration before we got to the point with the City in agreeing to how this development site would, in fact, be developed, how the policy framework for the development would be established? But in the

> presence of this alternative universe, the City takes a very extreme position of moving very quickly to a refusal report which basically forces an appeal of that private application...And in the face of attempts to discuss with the City, there was no take-up of that discussion. So where does this extreme position that the City is taking, and that's my characterization, this extreme position that the City is taking on this appeal moving summarily to a refusal report, raising issues that relate to other authorities having jurisdiction, such as the rail companies, such as the school boards, raising prematurity issues relating the issues that may be even OPA 395 didn't even address at the OPA stage, issues that The Well didn't even address at the OPA stage, raising the need for public parkland, but not being terribly helpful to this tribunal of not even identifying where that parkland could potentially be, and then writing very extensive witness statements criticizing the OPA, but not providing any suggestions on how the OPA is to be approved. And I say that because apparently the City is treating this as a development site, but I don't think it really is. That's my own professional opinion. So with all that said, I have reviewed this application, members of the panel, in what I will call a conventional planning analysis. Now, this site is anything but conventional, there's no doubt about that, and that's why the future development area policies are structured the way they are, but there's no doubt. Since 1994, there is an anticipation of a real possibility that an amendment to the Official Plan could take place which shows a mix of uses, and possibly a new neighbourhood being established overtop the rail corridor while maintaining the active rail corridor beneath it. There's a range of studies that have to be provided, there is an extensive range of expertise that needs to come to the table. The City actually stated pursuant to the future development policies what study requirements were required, and that application had been deemed complete. We provided an Official Plan amendment, then we provided an Amended Official Plan amendment. And the Amended Official Plan amendment on March 23rd was quite remarkably different than the original one. In my opinion, it sets out the future for this future development area. It sets out the framework for how development of this development site can responsibly, and in the public interest, unfold. In my opinion, all the detail that has been thrown at this application [by the City] through the witness statements is as if there is zero recognition of the framework that had been set up, not only in the Railway Lands West and Central Secondary Plan that is remaining the governing documents of this piece of turf, but also in the new plan which implementation section is almost a mirror image of OPA 395. [emphasis added]

[194] Mr. Goldberg then summed up his opinion supporting the CRAFT OPA as follows:

> …this is an application to ask for this site to be designated mixed-use area. As a development site, that is the only logical land use designation in the downtown that should be applied…The framework [in the OPA]…is comprehensive, it sets out steps, additional study steps, and additional guideline documents to be prepared, and bylaws to be prepared. And things have to be done before those things get approved. Those things in full do not need to be done to apply a mixed-use area designation on this piece of land…I conclude that this is a very good application. It's an application, as the Official Plan says, for next generation. It's a long-term

> plan. It repatriates what is basically a pit within the full arterial to arterial block right now in the urban fabric and reurbanizes it by providing connections, by providing land uses, by animating a street which today doesn't even have a side walk on it and turns it into a vibrant city street, and provides for an abundance of open space, well beyond what the parkland dedication requirement would be if that's all that was provided. In my opinion…this represents good planning. It is in the public interest to approve this Official Plan, and it is appropriate to bring closure to this process. That too is in the public interest because all the levels of inquiry that the City want, or expressing through their witness statement will be done. I think it's a red herring to say that this Official Plan should not be done because of all those levels of detail that have been thrown at us. [emphasis added]

[195] The Tribunal agrees with and entirely accepts the opinions and conclusions of Mr. Goldberg as stated in Part 3 and as reproduced above in paragraphs [193] and [194]. The Panel also agrees with the general sentiments expressed by the GCA in paragraphs [189] to [191].

## DECISION AND ORDER OF THE TRIBUNAL

[196] Pursuant to the Applicable OPA Tests described in Part 2 above, the Tribunal is satisfied, based on the evidence, discussions, findings and reasons described above in Part 1, Part 2 and Part 3 above of this Decision, as follows:

1. Based on the Tribunal's express acceptance of the totality of the evidence provided by the expert witnesses of CRAFT, as described in Part 3 above, the CRAFT OPA properly and appropriately addresses all relevant matters of provincial interest as set out in section 2 of the *Planning Act*, R.S.O 1990, c. P13, and conforms with all relevant matters of policy as required under Section 3 of that Act.;

2. The CRAFT OPA conforms with all relevant matters of policy contained in the provisions of the Provincial Policy Statement (2020), based on the Tribunal's express acceptance of the totality of the evidence provided by the expert witnesses of CRAFT, as discussed in Part 3 above;

3. The CRAFT OPA conforms with all relevant aspects set out in the provisions of the Growth Plan for the Greater Golden Horseshoe (2019), based on the Tribunal's express acceptance of the totality of the evidence provided by the expert witnesses of CRAFT, as referenced in Part 3 above;

4. Based on the Tribunal's express acceptance of the totality of the evidence provided by the expert witnesses of CRAFT, as set out in Part 3 above, the CRAFT OPA conforms with all relevant and applicable provisions of the City of Toronto Official Plan, including all applicable provisions of the Railway Lands West Secondary Plan and of the Railway Lands Central Secondary Plan, and including all other applicable policies, guidelines and design guidelines duly promulgated under that Official Plan;

5. The CRAFT OPA represents and respects good planning principles; sets out a land use designation of Mixed-Use Areas that is appropriate for the CRAFT Site and proposes a development that is feasible from the perspective of (i) transportation and transit matters; (ii) water, stormwater and sewage servicing; (iii) structural engineering and construction; (iv) architecture, urban design and landscape architecture; and (v) land use planning, community services and amenities, based upon the Tribunal's express acceptance of the totality of the evidence provided by the expert witnesses of CRAFT, as summarized in Part 3 above; and

6. In reaching this Decision, the Tribunal has given careful and due regard for the decision of the City of Toronto Council on January 31 and February 1, 2018 to deny the CRAFT OPA.

[197] Mr. Allen, for the GCA, requested the Tribunal to consider a "compromise" along the following lines:

> By approving some version of the CRAFT proposal now before it, and saying that both visions are "legal," – and desirable in their respective ways – the Tribunal could open the door to an amalgamated vision. The Tribunal would in essence be urging both proponents to move through an open door…Instead of declaring a winner in the contest, the Tribunal could leave the outcome and its management in the hands of others where in our opinion it ideally belongs….In addition to serving planning and urban design ends, the CRAFT OPA amendment with respect to parking allows a fundamental, and in our view altogether desirable, redesign of the decking structure…What previously had seemed the main intractable disagreements between CRAFT and the City have now melted into air. If in addition to reconsidering the configuration of the decking structure the Tribunal were to impose a Phasing requirement that would reduce the risk and increase the benefits for both the main Parties, the major sticking points between them seem within an inch of being resolved.

[198] Although the Tribunal does have broad powers to amend the CRAFT OPA, it declines to do so here. An OPA is not intended to provide more than policy guidance and much detailed work and analysis will be required on the part of the City and CRAFT as they proceed (and hopefully collaborate) through the next steps of the development process to address the array of issues that will arise in respect of this significant development on a challenging and unique site now designated Mixed-Use. This Tribunal is not as well-situated as is CRAFT and the City to cooperatively consider the range of possible solutions to address all relevant issues, nor is it able to somehow prescribe in an OPA a fail-safe formula or mechanism to solve all problems that could arise. The zoning by-law amendment, site plan approval and building permit processes together comprise the better venue to deal with those. While the Tribunal hopes that the City and CRAFT will resolve any issues to their mutual satisfaction and advantage, both Parties certainly will continue to have access to the Tribunal's procedures in the event that this does not occur.

**ORDERS**

[199] Based on the evidence, discussions, findings and reasons described above in Part 1, Part 2, Part 3 above of this Decision, and summarized in paragraph [196], and after due consideration for all of the arguments set forth in the opening statements and

final written and oral submissions of counsel for the Parties, the Tribunal Orders as follows:

1. The appeals of the Applicants and Appellants CRAFT Acquisitions Corporation and P.I.T.S. Developments Inc. are allowed; and

2. The application by the Applicants/Appellants for an amendment of the City of Toronto Official Plan in accordance with the form and content set out in Addendum A attached hereto is hereby granted.

[200] In the event that the Parties experience any difficulties in implementing the Orders made above with respect to the OPA application of CRAFT, they may contact the Tribunal for assistance.

"*William R. Middleton*"

WILLIAM R. MIDDLETON
MEMBER

"*T. Prevedel*"

T. PREVEDEL
MEMBER

"*C. Tucci*"

C. TUCCI
MEMBER

# ADDENDUM A

**Draft February 26, 2021**

**CITY OF TORONTO**

**Bill No. ~**

**BY-LAW No. ~ -20~**

**To adopt an amendment to the Official Plan**

**for the City of Toronto**

**with respect to the lands bounded by Front Street West, Bathurst Street, Northern Linear Park, Blue Jays Way and the Rail Corridor (municipally known in the year 2020, as Utility Corridors and the Future Development Area of the Railway Lands West Secondary Plan and Utility Corridor "A" of the Railway Lands Central Secondary Plan).**

WHEREAS authority is given to Council under the *Planning Act*, R.S.O. 1990, c.P. 13, as amended, to pass this By-law;

WHEREAS Council of the City of Toronto has provided adequate information to the public and has held at least one public meeting in accordance with the *Planning Act*;

The Council of the City of Toronto HEREBY ENACTS as follows:

1, The attached Amendment No. ~~~ to the Official Plan is hereby adopted pursuant to the *Planning Act*, as amended.

ENACTED AND PASSED this ~ day of ~, A.D. 20 ~.

JOHN TORY
Mayor

ULLI S. WATKISS
City Clerk

(Corporate Seal)

**AMENDMENT NO. ~~~ TO THE OFFICIAL PLAN**

**LANDS MUNICIPALLY KNOWN IN THE YEAR 2020 AS**

**Utility Corridors and the Future Development Area of the Railway Lands West Secondary Plan and Utility Corridor "A" of the Railway Lands Central Secondary Plan.**

The Official Plan of the City of Toronto is amended as follows:

1. Map 18, Land Use Plan, is amended by redesignating the lands south of Front Street West between Bathurst Street and Blue Jays Way from 'Utility Corridor Areas' to '*Mixed Use Areas'*, as shown on Schedule 1, attached;

2. Map 18, Land Use Plan, is further amended by adding the following public roads, as shown on Schedule 1, attached:

   a. Fort York Boulevard;

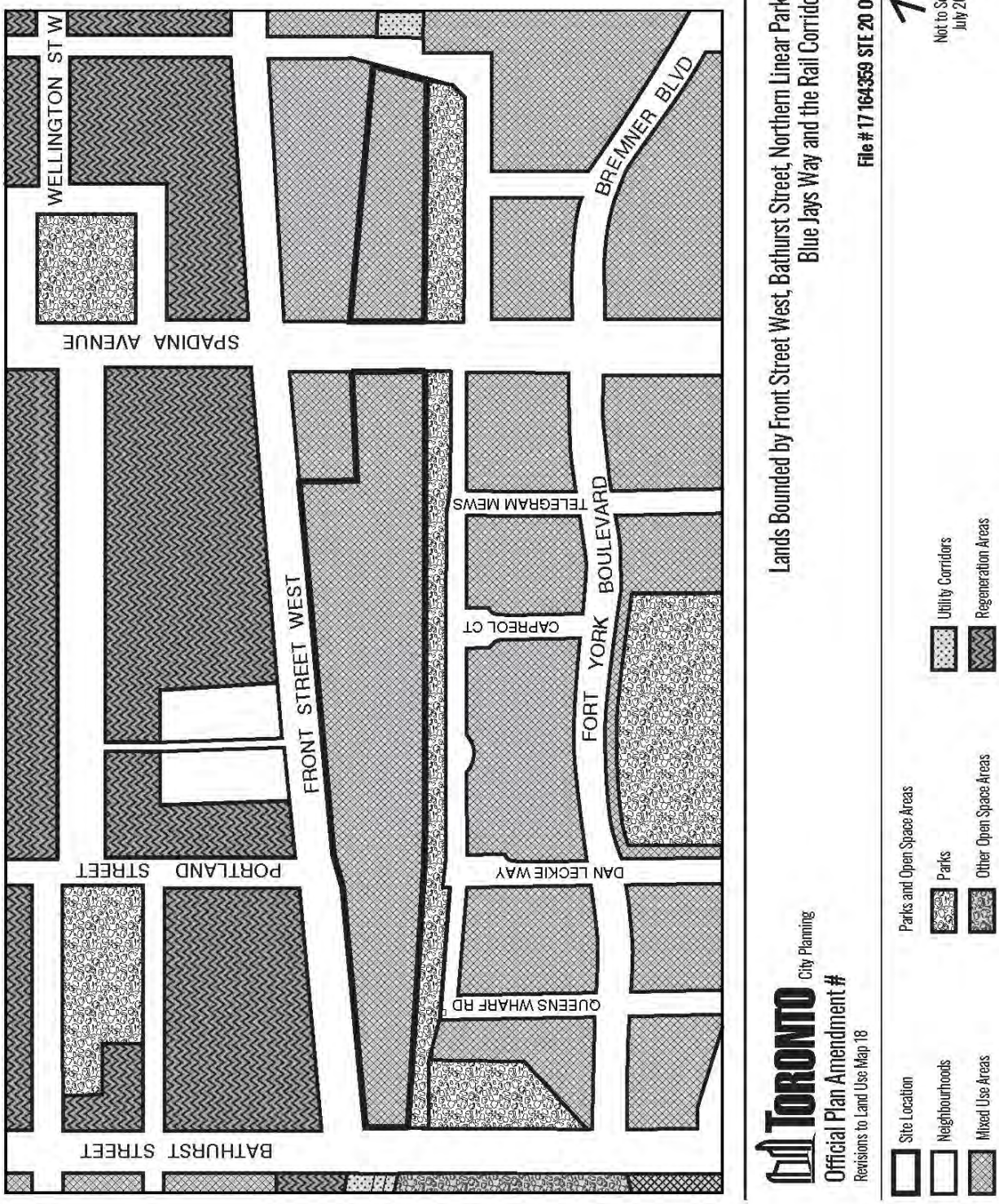
   b. Queens Warf Road;

   c. Dan Leckie Way; and

   d. Brunel Court.

3. Section 17 - Railway Lands East Secondary Plan, Section 18 - Railway Lands Central Secondary Plan, and Section 19 - Railway Lands West Secondary Plan is amended in accordance with Schedule 3 to this By-law, to reflect the vision and major objectives of Site and Area Specific Policy XX, and to amend relevant policies to ensure coordinated and cohesive development across the Railway Lands.

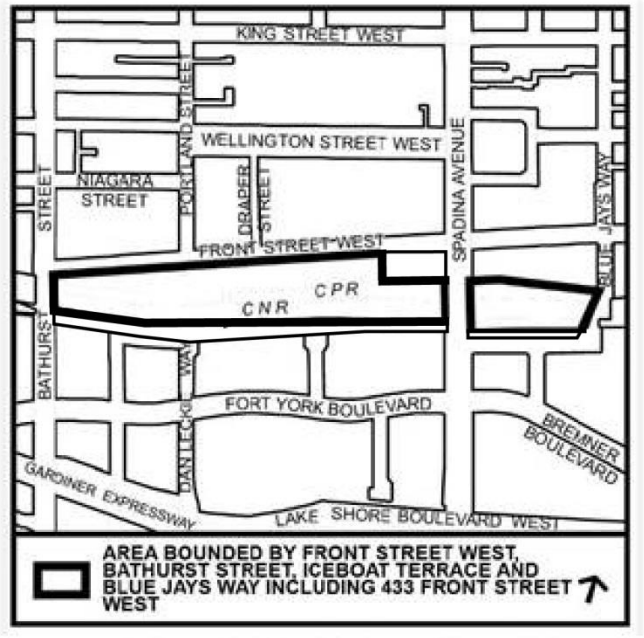
## Schedule 1


WELLINGTON ST W
SPADINA AVENUE
BREMNER BLVD
FRONT STREET WEST
TELEGRAM MEWS
CAPREOL CT
FORT YORK BOULEVARD
PORTLAND STREET
DAN LECKIE WAY
QUEENS WHARF RD
BATHURST STREET
Lands Bounded by Front Street West, Bathurst Street, Northern Linear Park, Blue Jays Way and the Rail Corridor
File # 17 164359 STE 20 OZ
TORONTO City Planning
Official Plan Amendment #
Revisions to Land Use Map 18
Not to Scale
July 2020
Site Location
Neighbourhoods
Mixed Use Areas
Parks and Open Space Areas
Parks
Other Open Space Areas
Utility Corridors
Regeneration Areas

## Schedule 2

1. Section 18 – Railway Lands Central Secondary Plan is amended by adding immediately following Section 12, a new Section 13 – Site and Area Specific Policy XX, and Section 19 – Railway Lands West Secondary Plan is amended by adding immediately following Section 13, a new Section 14 – Site and Area Specific Policy XX. SASP XX is as follows:

**"XX LANDS LOCATED WITHIN THE RAIL CORRIDOR FROM BATHURST STREET TO BLUE JAYS WAY AND FROM FRONT STREET WEST TO NORTHERN LINEAR PARK**




**INTRODUCTION**

1.1 The Railway Lands Central and West Secondary Plans, in force since 1994, have from the beginning envisioned and encouraged the overbuilding or "decking" of the *rail corridor* between Bathurst Street and Blue Jays Way for Future Development. To that end, both the Secondary Plans contain policies that require plan amendments be made detailing the nature of proposed development, specifically within those segments of the *rail corridor* identified as a "Future Development Area", and supported by a range of studies and analyses demonstrating technical feasibility appropriate for the Official Plan stage, that such development is consistent with the land use and design objectives of

each Secondary Plan, including that development will not adversely impact safe and efficient railway operations.

1.2 The existing Secondary Plans require that any application to amend the Secondary Plan to permit development in the *rail corridor* and *"*Future Development Area" will consider, among other things, a range of uses, including residential, commercial, institutional, industrial uses, parks and opens space uses. Policies of the Secondary Plans direct that the development will be implemented according to the Implementation policies set out in Section 11 of each Secondary Plan, which set out steps that need to be taken at each planning stage before development commences, including undertaking comprehensive study of a wide range of topic areas aimed at ensuring that the objectives of the Official Plan and the Secondary Plans are sufficiently addressed.

1.3 Since amalgamation and the incorporation of the existing Railway Lands West and Central Secondary Plans into the City of Toronto Official Plan, the Province of Ontario has approved three Provincial Policy Statements (PPS) (2005, 2014 and 2020) and three Growth Plans (2006, 2017 and 2019). This Official Plan Amendment implements the policy direction of the current PPS (2020) and Growth Plan (2019). This includes, among other things, making the most efficient use of these valuable downtown lands within a Provincial Urban Growth Centre, optimizing the land and infrastructure, including the existing and planned public transit serving the area, which includes the planned Go Station, at the southwest corner of Front Street West and Spadina Avenue (*Spadina-Front GO RER Station)*, and creating complete communities.

1.4 Also since amalgamation, the City, and in particular, the downtown area surrounding the site, has considerably evolved and continues to evolve into a high density area of tall mixed use residential and non-residential buildings, containing residential units, entertainment and tourist facilities, dining establishments, employment uses, and open spaces in the form of public parkland and private areas. This is reflected in part, by developments such as The Well, City Place, generally the extensive development in the King-Spadina Secondary Plan Area, the Mirvish-Gehry redevelopment and Fort York neighbourhood. Complementary to this new development surrounding the site, this amendment plans to remove the existing and significant urban barrier caused by the expanse of the existing *rail corridor*, by enabling the decking of the *rail corridor*, and by facilitating the comprehensive reurbanization and reintegration of this large site into the urban fabric of this evolving and maturing area of the downtown.

1.5 This amendment amends the site to the '*Mixed Use Areas*' land use designation, a first implementation step toward enabling the reurbanization and reintegration of this large site into the downtown. It is planned to include a range of mixed use buildings and spaces containing residential, employment/non-residential, retail and services, community facilities, and considerable opportunity for parkland and open space providing respite, active recreational opportunities, and connections and linkages to the adjacent neighbourhoods and open space networks. The proposed range of residential and non-residential uses, combined with the significant amount of on-site open space linked to

adjacent areas, advances the place-making objectives of the Official Plan, and supports the Growth Plan objective of creating complete communities.

**INTERPRETATION**

2.1 This Site and Area Specific Policy (SASP) should be read in conjunction with the Railway Lands Central Secondary Plan and the Railway Lands West Secondary Plan to understand the comprehensive and integrative intent as a policy framework for the amendment lands.

2.2 In the case of a conflict between this SASP and the policies in any of the Railway Lands Secondary Plans or the City of Toronto Official Plan, the policies of this SASP will prevail.

2.3 The boundaries of this SASP are shown on Schedule "1" attached are approximate. Where the general intent of this SASP is maintained, minor adjustments to such boundaries will not require amendment to this SASP, the Railway Lands Central Secondary Plan or the Railway Lands West Secondary Plan.

**VISION AND MAJOR OBJECTIVES**

3.1 This SASP enables the removal of a significant physical barrier in the existing urban fabric created by the wide expanse and large land area of the *rail corridor*. The development will create universally accessible linkages and visual connection from surrounding neighbourhoods, including connecting the area south of Front Street West to the neighbourhoods south of the *rail corridor* in City Place.

3.2 That part of the SASP along Front Street West and Spadina Avenue will transform these streets into significant urban streets, comprised of inviting and well landscaped sidewalks and public realm, bordered by retail store fronts at grade, and entry points into the development and open spaces, which entrances will be designed to be inviting and universally accessible.

3.3 The building(s), streetscape, public realm, and entrance locations to the development along all sides of the site will be designed to complement the existing and planned context along all streets.

3.4 The buildings along the frontage of the east side of Spadina Avenue will be restricted to non-residential uses only..

3.5 Parking for the combination of uses may be located above and/or beneath the surface of the *decking structure*, provided that any parking above the surface of the *decking structure* will be enclosed and such that vehicles will not visible from the public realm, enabling the surface of the *decking structure* to be optimized with non-residential and mixed residential\non-residential buildings and large contiguous areas of open space and public realm. Transit supportive parking rates will be established in the zoning by-law to reflect the downtown location with employment, shopping, entertainment, dining facilities, and rapid transit in very close proximity. The location of the site will intrinsically

promote the use of public transit and active transportation options. This combined with the lower parking rates supports the downtown and '*Mixed Use Areas*' policy direction of the Official Plan of reducing automobile dependency.

3.6 The development includes the opportunity for significant open space in the form of City parkland, Publicly Accessible Private Open Spaces (POPS), and other private open space areas, accessed by a combination of paths, pedestrian ramps, stairways, escalators and elevators. These open space areas will be universally accessible. The significant area devoted to open space opportunities will enable future programming for multiple functions, provides pedestrian and visual linkages through the site to adjacent neighbourhoods, and contributes to connecting this part of the City with the City's network of open space beyond the site.

3.7 Consistent with this direction, the policies of this SASP implement the planning vision and policy direction for those segments of the *rail corridor* designated "Future Development Area" within the Railway Lands West and Central Secondary Plans, having completed the required land use, conceptual design and technical studies, demonstrating that the decking of the *rail corridor* to facilitate mixed-use development and open space is appropriate and technically feasible.

**PARKS, OPEN SPACE, AND PUBLICLY ACCESSIBLE PRIVATE OPEN SPACE (POPS)**

4.1 Development applications in "*Mixed Use Areas*" will identify opportunities to provide a linked system of parks, open spaces, and POPS, or a combination thereof. This linked open space system is to be designed to improve and expand equitable access to quality public spaces for recreation, passive use, and active transportation for workers, residents, and visitors and contribute to this area being planned as a complete community.

4.2 Public parks are permitted by the *Mixed Use Areas* designation and may be acquired through parkland dedication under the Planning Act, other Planning Act tools, land exchanges, purchase, and any other available mechanism.

4.3 A substantial portion of the total site area will be maintained as POPS and/or parkland. Subject to appropriate arrangements and agreements with the City, these lands will be open to the public and easements will be granted to the City at appropriate locations to ensure the POPS are open to the public.

4.4 Provide for a minimum of 0.30 hectares (0.74 acres) of public parkland east of Spadina Avenue and a minimum of 1.28 hectares (3.16 acres) of public parkland west of Spadina Avenue in the "*Mixed Use Areas"* if all of Northern Linear Park is effectively removed to permit decking.

**PUBLIC REALM**

5.1 High-quality east-west and north-south publicly accessible connections will be provided, connecting Bathurst Street and Spadina Avenue with Blue Jays Way and Front Street West with Ice Boat Terrace and Blue Jays Way.

5.2 A well-designed, high quality public realm will be provided along all public street frontages including Front Street West, Spadina Avenue, Ice Boat Terrace and Blue Jays Way.

**HOUSING**

6.1 At least 40 per cent of the total number of dwelling units will be provided as two bedroom units or greater, of which, a minimum of 10 per cent shall be three bedroom units in order to provide housing suitable for families with children.

6.2 A mix of residential tenure and units sizes is encouraged, including rental and ownership housing.

6.3 At least 20 per cent of the total number of dwelling units will be developed as affordable purpose-built rental housing units.

**RANGE OF RETAIL UNIT SIZES**

7.1 A range of retail unit sizes are encouraged, with consideration for smaller retail units at-grade adjacent the open space areas and street frontages to create an urban main street retail experience.

**NON-RESIDENTIAL COMPONENT**

8.1 Non-residential buildings, shall be located fronting on the east side of Spadina Avenue.

**SHADOWS**

9.1 Development of new buildings shall be designed to adequately limit new shadows on Clarence Square Park and Victoria Memorial Square from March 21st to September 21st from 10:18 am – 4:18 pm.

**DENSITY**

10.1 The maximum total density of these lands shall be 4.2 FSI, and a range of residential units may be 2,500 – 3,500.

**TALL BUILDINGS**

11.1 Zoning By-law standards and Design Guidelines shall be developed to address built form matters such as size of tower floorplates, stepback and setbacks that consider the unique size of the site and area context.

11.2 Due to the unique size of the site and area context, mixed use residential and non-residential building(s) to the east and west of Spadina Avenue, are permitted to have tower floorplates greater than the maximum recommended under the City's Tall Building Design Guidelines, provided that towers floorplates which exceed 750 square metres meet or exceed the minimum of 30 metre distance between towers. This will contribute to enhanced light, views and privacy between larger tower floorplates.

**URBAN DESIGN GUIDELINES**

12.1 Urban Design Guidelines will be developed to the satisfaction of the Chief Planner and Executive Director, City Planning Division, and adopted by City Council in order to guide the design of the buildings and open space elements of the project. Urban Design Guidelines will guide development to implement the Official Plan and this SASP and assist staff in evaluating applications for Zoning By-law Amendment and Site Plan Approval. The Urban Design Guidelines shall include the following elements and reflect the following matters:

a) A Public Realm Master Plan for the site to implement the Vision and Major Objectives of this SASP, including the identification of all public and private open spaces, how the pedestrian network connects to and complements the public realm around the site, and how a coordinated, cohesive and connected public open space system is ensured.

b) Designs and materials should enhance sustainability.

c) Phasing, including plans for interim treatments where required.

d) A lighting plan which will complement the design and enhance security.

e) A signage strategy.

f) Consider input provided by the City's Design Review Panel.

**TRANSPORTATION**

13.1 Comprehensive decking and development of the site will be planned and designed to encourage walking, cycling, transit use and car sharing as a means to reduce the use of private automobiles. Through Zoning By-law Amendment and Site Plan Control applications, robust Traffic Demand Management measures will be proposed and implemented.

13.2 Bicycle parking facilities will be provided on site to encourage bicycle use in the area, and the number of bicycle facilities required at grade level shall adhere to the Tier 1 Toronto Green Standard requirements.

13.3 Auto share facilities and built-in charging stations for electric vehicles are encouraged on site to further reduce auto demands to the development and to encourage a more sustainable source of energy.

13.4 Where feasible, transit stops and/or signage providing direction to the nearest transit stop shall be provided on-site.

13.5 The underground portions of non-residential buildings with frontage on Spadina Avenue will be designed to include knock-out panels to facilitate potential connections to the future *Spadina-Front GO RER Station*. Owners are also encouraged to connect these buildings to the PATH system, where feasible.

13.6 Vehicular parking and loading may be located above and/or beneath the surface of the *decking structure*, provided that any parking above the surface of the *decking structure* will be enclosed such that parked vehicles will not be visible from the public realm, and is encouraged to be shared between residential and non-residential uses on the site.

13.7 The *rail corridor* will continue to function as a corridor with rail uses located below the *decking structure* including active rail lines and uses associated with the rail operations such as train storage, and train maintenance. The continued, effective, safe, and efficient provision of inter-regional passenger rail and freight rail services will not, in any way, be compromised by the existence of the *decking structure* and the development of the site.

13.8 As part of subsequent implementation processes and the development of all or part of the site, the continued effective, safe, and efficient provision of inter-regional passenger rail and freight rail services will be ensured and supported through technical studies identified in the Implementation Section of this SASP.

13.9 Development adjacent to or above the *rail corridor* will respect its physical configurations and its current and future operation, including approaches, access, track electrification, easements, and emergency access during and after development of the site.

**ENVIRONMENT**

14.1 The comprehensive decking of the *rail corridor* and the development of the site represents an opportunity to expand and enhance the public realm and open space networks in the City. This Section contains policy direction to achieve the Vision and Major Objectives of this SASP. The design, development, and maintenance of the site, will support environment stewardship, connectivity and sustainability, through:

a) Including, where appropriate, a range of active recreational areas and passive areas within the open space system;

b) Provide connected planted areas that potentially support wildlife habitat;

c) Ensuring adequate soil volumes to support health and mature landscaping and tree canopies;

d) Reducing the urban heat island effect and increasing carbon capture through a diversity of planting and landscape design treatment;

e) Planting a range of native species to support biodiversity and reduce the need for intensive maintenance; and

f) Incorporating innovative approaches to irrigation, ventilation, and stormwater management systems.

**SERVICING AND INFRASTRUCTURE**

15.1 Development of the site will be supported by necessary improvements and/or modifications to existing municipal infrastructure. This will be secured as part of the Zoning By-law Amendment and Site Plan Control applications.

15.2 Development of the *decking structure* and associated community amenities within the site will incorporate stormwater management on site and have regard for, the objectives of the City's Wet Weather Flow Management Guidelines, as may be amended.

**COMMUNITY BENEFITS**

16.1 To the extent permitted by the Planning Act or other applicable legislation, community benefits will be secured in the implementing planning instruments, such as but not limited to Zoning By-law(s). Community benefits may include on-site Community Services and Facilities such as a licensed day care facility; improvements to public right of ways bordering the site beyond streetscape improvements which are typically delivered through the Site Plan Control process; contributions to affordable housing; contributions to public art; and other matter consistent with the Official Plan. Public Art provided on site will contribute to the character of the neighbourhood by enhancing the quality of public spaces that are publicly accessible and visible. In prominent locations, the art themes should express community heritage, including that formed by the Indigenous peoples and the rail operations.

**IMPLEMENTATION**

17.1 The development of the site will be planned comprehensively, but it is recognized that construction and development is expected to be phased and occur incrementally. The timing and phasing of necessary infrastructure and other improvements and works will depend on a number of factors, including the nature and scale of municipal infrastructure ultimately proposed as part of the development of the site.

17.2 A phasing strategy will be prepared that considers at least the following:

a) Existing rail infrastructure and functions;

b) Coordination with ongoing and future rail planning initiatives;

c) Rail safety mitigation measures;

d) Preparatory work related to reroute utilities and other heavy civil and structural works;

e) *Decking structure* construction including major mechanical and electrical systems;

f) Development of the site on and within the *decking structure*; and

g) Construction of urban design, planning, and transportation improvements as identified by various studies.

17.3 Construction of the site will generally include a number of preparatory works in and around the *rail corridor* to prepare the project for civil and structural works, *decking structure* construction, and further development of the site. Future timing of development will be coordinated with other related projects, where possible, such as track electrification, the *Spadina-Front GO RER Station,* among other infrastructure projects, requirements, or studies.

17.4 An acquisition and/or leasing strategy will be prepared by the City in conjunction with the applicant(s)/owners of development, to outline the goals, objectives and a framework, among other matters, for acquiring and/or leasing open space areas and potentially other indoor space, that align with the objectives of this SASP.

17.5 In order to ensure orderly and coordinated development of the site, the owners/applicants will ensure that the necessary requirements and studies are completed and approved by Council and any other applicable approval authority, before permitting the construction of the *decking structure* or the development of the site, including the following:

a) A detailed Public Realm Master Plan as describe in this SASP will be prepared, which will include specific technical, development, and design details, and will inform the development of the site.

b) Comprehensive studies that detail how the following environmental and technical matters and considerations will be satisfactorily addressed and how requirements will be secured, including:

i) The noise, odour, and vibration impact of the railway to ensure compatibility with rail operations, including mitigation and attenuation measures by, among other things, the provisions of buffers, including acoustical structures and landscaping features adjacent to noise, odour, vibration sources as appropriate for the development of the site, including the open space areas.

ii) Satisfactory air quality and climatic condition, including wind conditions, including a consideration of potential impact of snow and ice on rail service;

iii) Minimize impact on existing soil and ground water conditions as a result of the *decking structure* and the development above it, including if required, soil remediation or disposal plans for contaminated soil and remediation measures for any noxious substances;

iv) Servicing and stormwater management studies which confirm the sufficiency of municipal infrastructure, including sewer, water, stormwater, as well as capacity for managing snow and ice accumulation;

v) Minimizing, to the extent possible, risk of injury or damage from accidents on the *rail corridor*;

vi) Ensuring that the practices and procedures followed during construction, development, operation and maintenance of the *decking structure* and the site development are environmentally sound;

vii) Energy efficiency, conservation, waste reduction, and recycling as development of the site proceeds.

viii) A *rail corridor* study, in conjunction with the appropriate authorities, which demonstrates that:

- Existing and future capacity and safety of rail operations in the *rail corridor* will not be impaired;
- The effective, safe and efficient provision of rail transportation services of the *rail corridor* and Union Station will not be compromised; and
- The flexibility for future expansion of rail operations, including the implementation of the *Spadina-Front GO RER station*, and modifications and improvements to the track and signal system will not be reduced or impacted.

ix) An emergency management plan to outline how the City and new building and facility owners and tenants will respond to and mitigate the impact of a possible emergency within the *rail corridor* in coordination with rail operators;

x) A transportation monitoring program and a traffic management mitigation plan (TMMP) to address traffic infiltration issues and other traffic impacts in the neighbourhoods immediately surrounding the site. The TMMP may include strategies to support transit integration and active transportation, and accommodate potential vehicular lay-bys, drop off areas and parking zones, without negatively impacting the existing transportation network, among other matters; and

xi) A construction management plan (including a construction mitigation strategy addressing impact on adjacent buildings, to be implemented during the course of construction.

**Schedule 3**

**AMENDMENTS TO RAILWAY LANDS CENTRAL SECONDARY PLAN**

1. Chapter 6, Section 18, Railway Land Central Secondary Plan is amended by:

Amendments to Maps

That Map 18-3 of the Railway Lands Central Secondary Plan be amended as shown on attached Attachment 1, by redesignating *Utility Corridor* "A" to *Mixed Use Areas* "J".

That Map 18-6 of the Railway Lands Central Secondary Plan be amended as shown on Attachment 2, extending the "Significant Street Edge" along Spadina Avenue, and by creating a new "Significant City Waterfront Views and Vistas" symbol.

2. Chapter 6, Section 18, Railway Lands Central Secondary Plan is further amended as follows:

**1. INTERPRETATION**

Policy 1.2 be deleted and replaced with:

"1.2 The boundaries of the Railway Lands Central and the areas designated *Mixed Use Areas* "A", "B", "C", "D", "E", "F", "G", "H", "I" and "J", *Utility Corridors*, and *Parks and Open Space Areas* are as shown on Map 18-3 and are approximate. Where the general intent of this Secondary Plan is maintained, minor adjustments to such boundaries will not require amendment to this Plan."

Policy 1.3 be deleted and replaced with:

"1.3 This Secondary Plan is comprised of Sections 1 through 13 and Maps 18-1 through 18-6."

Policy 1.4 be added as follows:

"1.4 The Railway Lands Central Secondary Plan should be read in conjunction with Section 13 - SASP XX. Where provisions of the Railway Lands Central Secondary Plan conflict with the provisions of SASP XX, the provisions of SASP XX shall prevail."

**2. MAJOR OBJECTIVES FOR THE RAILWAY LANDS CENTRAL**

Policy 2.6 be added as follows:

“2.6 Policies in Section 10.6 of the Railway Lands Central Secondary Plan previously identified an area as Future Development Area/ *Utility Corridor* ‘A’. These policies encouraged future decking over the rail corridor. The purpose of this designation, according to Policy 10.6 of the Secondary Plan, is to provide for a comprehensive study or studies to evaluate various land uses and decking considerations to be included with future applications to amend this Plan. The decking creates the platform over which all forms of urban development (residential, commercial, office, institutional, public parks, and open space) occur. Section 13 - SASP XX amends these former policies in Section 10.6 of this Plan by providing area specific policies, based on the comprehensive studies filed in support of the Official Plan Amendment for this SASP area.”

Policy 2.7 be added as follows:

“2.7 Development on the *decking structure* over the *rail corridor* in *Mixed Use Area* “J” will be designed in accordance with the policies of Section 13 - SASP XX.

## 3. STRUCTURE, FORM AND PHYSICAL AMENITY

Policy 3.1 (c) be amended by deleting the word “and” at the end of the policy, and replacing it at the end of policy 3.1 (d), and that policy 3.1 (e) be added as follows:

“3.1 (e) a *decking structure* to be created over the existing and continuing active *rail corridor.* ”

Policy 3.6 be amended by adding Policy 3.6(a), following Policy 3.6:

“a) All parking provided in association with development in *Mixed Use Areas “J”* on the *decking structure,* may be located above and/or below the surface of the *decking structure,* provided that any parking above the surface of the *decking structure* will be enclosed such that parked vehicles will not be visible from the public realm, and will be located in a manner which minimizes its impact on streets, public parks, open spaces, pedestrian walkways and other land uses. Surface commercial parking lots will not be permitted and other surface parking will be minimized.”

## 4. HOUSING GOALS

Policy 4.4 be added as follows:

“4.4 Housing in the *Mixed Use Areas ”J”* will be provided in accordance with Section 13 – SASP XX.

## 5. SCHOOLS AND COMMUNITY SERVICES AND FACILITIES

No amendments proposed.

## 6. PARKS, OPEN SPACE, AND PEDESTRIAN SYSTEMS

Policy 6.1 is amended by adding the following sentence:

"6.1 …The linked system of parks and publicly accessible open space for the SASP XX area will be determined in accordance with the policies of SASP XX.

## 7. HERITAGE AND PUBLIC ART

No amendments proposed.

## 8. TRANSPORTATION AND CIRCULATION

Policy 8.2.5 (c) be amended by adding the following:

"8.2.5 (c) …, including a new east-west pedestrian connection between lands in *Mixed Use Areas "*J*"* and lands in the Railway Lands West Secondary Plan Area."

Policy 8.4.1 (a) be deleted and replaced with:

"8.4.1(a) Regional Metrolinx commuter services will continue to be incorporated in the *rail corridor*, and a new GO station has been identified by Metrolinx as the *Spadina-Front GO RER Station* in *Mixed Use Areas "A" of the Railway Lands Central Secondary Plan,* in the vicinity of the Front Street West and Spadina Road intersection."

The title of Policy 8.5 be deleted and replaced with:

"8.5 Railway Uses in the *Utility Corridors* and *Mixed Uses Areas* "J""

Policy 8.5.1 be deleted and replaced with:

"8.5.1 The *rail corridor* should remain in its present location and will continue to operate below the *decking structure* in *Mixed Use Areas* "J". Union Station will continue to function as a major regional transportation terminal, and all rail facilities, including the High Line freight bypass, should continue to operate within the width of the *rail corridor* and below the *decking structure* in *Mixed Use Areas* "J"."

Policy 8.5.3 be deleted and replaced with:

"8.5.3 Development adjacent to and on the *decking structure* as identified on Map 18-3 will respect the physical configuration of the *rail corridor* and its current and future operation, including minimum clearance height, approaches, access, easements and emergency access both during and subsequent to development and construction. Development on the *decking structure* in *Mixed Use Areas* "J" shall be subject to the policies of Section 13 - SASP XX."

## 9. ENVIRONMENT

Policy 9.2 be deleted and replaced with:

"9.2 The Environmental Report referred to in Section 9.1 will be prepared by the proponents in consultation with the City, the Local Board of Health, and the Ministry of the Environment and Climate Change. In the case of *Mixed Use Areas* "A", "B" and "J", the proponent will also consult with Metrolinx, CN Railway Company, or their successors

and assigns. The safeguards and measures set out in the Environmental Report will be secured through an Environmental Agreement submitted pursuant to Section 11.1(c) or 11.2 of this Secondary Plan.

For the purposes of this Secondary Plan, an Environmental Agreement means an agreement containing provisions sufficient to ensure that the safeguards and measures set out in the Environmental Report are adequately secured and in addition, will specify that the landowner will provide appropriate warning clauses to prospective purchasers and lessees of each dwelling unit in *Mixed Use Areas* "A", "B" and "J" regarding possible noise, vibration and/or air quality impacts associated with existing and future freight and passenger rail and regional rail and public transit uses in the *rail corridor*, *Utility Corridors*, or below the *decking structure* in *Mixed Use Areas* "J"."

Policies 9.1, 9.3 and 9.4 be amended as follows:

Replace "Ministry of the Environment and Energy" with "Ministry of the Environment and Climate Change".

Policy 9.4 is further amended as follows:

Replace "GO Transit and CN Railway Company" with "Metrolinx and CN Railway Company".

## 10. LAND USE DISTRICTS AND DENSITY

Policy 10.1 be deleted and replaced with:

"10.1 The Railway Lands Central will be developed with a wide range of uses including commercial, residential, institutional, cultural, recreational, public parks, open space, retail and an urban stadium and multi-purpose facility. The area south of and fronting onto Front Street West from John Street to Spadina Avenue is an extension of the commercial, institutional and industrial area to the north of Front Street West. The area around the Stadium is a mixed use area with primarily commercial, retail, hotel, and stadium related uses. The east side of Spadina Avenue is a predominantly commercial/residential street to be developed at relatively high densities. In *Mixed Use Areas* "J", the frontage along the east side of Spadina Avenue will be limited to non-residential building(s) with at grade retail uses, and the lands to the east of this building may be used for residential and mixed residential/commercial buildings, parks and open space. Parking is permitted below the surface of the *decking structure*.

Notwithstanding the foregoing, *Mixed Use Areas* "A", "B" and "J" will be regarded as an extension of the *Mixed Use Areas* "D" and "G", and residential will be regarded as an appropriate use therein.

It is the City's objective that the intersection of Spadina Avenue and Bremner Boulevard become a focus for the Railway Lands Central, and that its development provide for the integration of proposed transit lines with high standards of urban design and pedestrian amenity."

Delete Policy 10.4.2 (c).

Delete Policy 10.4.3 in its entirety.

Policy 10.5 be amended by deleting the last sentence, which currently reads as follows: "By-laws may be passed permitting only transportation and related ancillary uses in *Utility Corridor* 'A' portion of the Rail Corridor."

The title of Policy 10.6 be deleted and replaced with:

"10.6 *Mixed Use Areas* "J""

Policy 10.6 be deleted and replaced with:

"10.6 Comprehensive decking of the *rail corridor* between Spadina Avenue and Blue Jays Way in the Railway Lands Central is encouraged, in accordance with Section 13 – SASP XX. The *decking structure* may be phased provided the comprehensive decking within the Railway Lands Central and the Railway Lands West Secondary Plans is not compromised.

To assist in achieving Council's objectives in *Mixed Use Areas "J"* with respect to the comprehensive decking of the r*ail corridor*, the *decking structure* will cover the *rail corridor,* between Spadina Avenue and Blue Jays Way."

Policy 10.6.1 be deleted and replaced with:

"10.6.1 *Mixed Use Areas* "J" is permitted to be used for residential, commercial, retail uses, parks and open space. Parking within the *decking structure* in *Mixed Use Areas "J"* is permitted.

Policy 10.6.2 is deleted.

Policy 10.6.3 is deleted and replaced with:

"10.6.3 The *decking structure* and development in *Mixed Use Areas* "J" will be implemented in accordance with the Section 13 - SASP XX."

## 11. IMPLEMENTATION

No amendments proposed.

## 12. DEFINITIONS

Policy 12.4 be added as follows:

"12.4 The *decking structure* means the structure developed over the *rail corridor* to support development of the site including all the necessary engineering and structure elements that may or may not extend below the grade level of the *rail corridor*."

Policy 12.5 be added as follows:

"12.5 *Rail corridor* means the area comprised of the Union Station Rail Corridor (URSC) and the Bathurst North Yard, generally bounded by Front Street West to the north, and the Southern limit of the URSC to the south."

Policy 12.5 be added as follows:

"12.6 *Spadina-Front GO RER* means the Metrolinx GO Regional Express Rail station serving the Barrie GO Corridor, planned for Spadina Avenue and Front Street West."

**AMENDMENTS TO RAILWAY LANDS WEST SECONDARY PLAN**

1. Chapter 6, Section 19, Railway Land West Secondary Plan be amended by:

Amendments to Maps

That Map 19-2 of the Railway Lands West Secondary Plan be amended as shown on Attachment 3, by removing the Pedestrian Rail Corridor Bridge symbol.

That Map 19-3 of the Railway Lands West Secondary Plan be amended as shown on Attachment 4, by redesignating *Utility Corridors* to *Mixed Use Areas* "K".

That Map 19-4 of the Railway Lands West Secondary Plan be amended as shown on Attachment 5, by removing the Pedestrian Corridor Bridge symbol, as shown on Attachment 10 and by adding the following street names:

Queens Wharf Road;

Capreol Court; and

Telegram Mews.

That Map 19-5 of the Railway Lands West Secondary Plan be amended as shown on Attachment 6, by replacing *Future Development Area* with SASP XX, and by adding the following street names:

Queens Wharf Road;

Capreol Court; and

Telegram Mews.

That the following policies in Section 19 be amended:

**1. INTERPRETATION**

Policy 1.2 be deleted and replaced with:

"1.2 The boundaries of the Railway Lands West and the areas designated *Mixed Use Areas* "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", and "K", and *Parks and Open Space Areas* are shown on Map 19-3 and are approximate. Where the general intent of this

Secondary Plan is maintained, minor adjustments to such boundaries will not require amendment to this Secondary Plan."

## 2. MAJOR OBJECTIVES FOR THE RAILWAY LANDS WEST

Policy 2.6 be added:

"2.6 Policies in Section 10.3.2 of the Railway Lands West Secondary Plan previously identified an area as Future Development Area. These policies encouraged future decking over the rail corridor. The purpose of this designation, according to Policy 10.3.2 of the Secondary Plan, is to provide for a comprehensive study or studies to evaluate various land uses and decking considerations to be included with future applications to amend this Plan. The decking creates the platform over which all forms of urban development (residential, commercial, office, institutional, public parkland, and open space) occur. Section 14 - SASP XX amends these former policies of Section 10.3.2 of this Plan by providing area specific policies based on the comprehensive studies filed in support of the Official Plan Amendment for this SASP area."

Policy 2.7 be added:

"2.7 Development on the *decking structure* over the *rail corridor* in *Mixed Use Areas* "K" will be designed in accordance with the policies of Section 14 - SASP XX.

## 3. STRUCTURE, FORM AND PHYSICAL AMENITY

Policy 3.1 (c) be amended by deleting the word "and" at the end of the policy and replacing it at the end of policy 3.1 (d), and that policy 3.1 (e) be added:

"3.1 (e) commercial, office, institutional, residential, public park and open space uses on the *decking structure* over the existing and continuing active *rail corridor* between Bathurst Street and Spadina Avenue."

Policy 3.3 (b) be deleted and replaced with:

"3.3 (b) Where the street pattern will not extend through the new development on the *decking structure* in *Mixed Use Area "K"*, the sidewalks are directly linked to pedestrian connections established in the development, including the parks and open space system over the *rail corridor*, and that these pedestrian connections are designed as extensions of the public sidewalks;"

Policy 3.6 be amended by adding Policy 3.6(a), following Policy 3.6:

"a) All parking and/or loading provided in association with development on the *decking structure* in *Mixed Use Areas "K"* may be located above and/or below the surface of the *decking structure,* provided that any parking above the *decking structure* will be enclosed such that parked vehicles will not be visible from the public realm and vehicular access to this parking and/or loading will be designed in a manner which minimizes its impact on streets, public parks, open spaces, pedestrian walkways and other land uses. Surface commercial parking lots will not be permitted."

## 4. HOUSING GOALS

Policy 4.6 be added as follows:

"4.6 *Within Mixed Use Areas "K"* housing will be implemented in accordance with Section 14 – SASP XX."

## 5. SCHOOLS AND COMMUNITY SERVICES AND FACILITIES

Policy 5.12 be added as follows:

"5.12 New development on the *decking structure* in *Mixed Use Areas* "K" will provide an appropriately sized and located licensed day care centre."

## 6. PARKS, OPEN SPACE, AND PEDESTRIAN SYSTEMS

Policy 6.1 be amended by adding Policies 6.1(a) following Policy 6.1, as follows:

"a) The linked system of parks and publicly accessible open space in *Mixed Use Areas "K",* will be determined in accordance with the policies of Section 14 - SASP XX."

Policy 6.7 (a) be added as the last sentence of Policy 6.7:

"In *Mixed Use Areas "*K*"*, the parks, open space and pedestrian systems will be determined in accordance with the policies of Section 14 - SASP XX."

## 7. HERITAGE AND PUBLIC ART

Policy 7.6 be added:

"7.6 The provision of Public Art in *Mixed Use Areas* "K" will be subject to the policies of Section 14 - SASP XX. The existing pedestrian rail corridor bridge, known as Puente de Luz, which is identified as public art, may be removed, relocated and reinstalled, subject to the approval of the City. All other existing public art that may be affected by the construction of the *decking structure* and/or the new development in *Mixed Use Areas "K",* shall be removed, relocated and reinstalled within the Railway Lands West Secondary Plan area, subject to the approval of the City."

## 8. TRANSPORTATION AND CIRCULATION

Policy 8.2.5 be deleted and replaced with:

"8.2.5 Dan Leckie Way will be extended for vehicle and pedestrian use through the Railway Lands West, as shown on Map 19-2, by intersecting fully with Lake Shore Boulevard West and terminating at a potential entrance of a new parking facility north of Ice Boat Terrace in *Mixed Use Areas "K"*. Additional potential vehicle parking facility and/or loading entrances north of Ice Boat Terrace will be provided opposite the terminus of Telegram Mews and Capreol Court, as shown on Map 19-4."

Policy 8.2.7 be added:

“8.2.7 A new vehicle servicing entrance for rail yard service purposes will be permitted in *Mixed Use Areas “K”* from Front Street West, between the intersections of Bathurst Street and Portland Street.”

Policy 8.3.1 be deleted and replaced with:

“8.3.1 The City will secure appropriate connections and pedestrian links as part of the development of *Mixed Use Areas* “K”, in accordance with Section 14 - SASP XX.

Policy 8.4.1 (a) be deleted and replaced with:

“8.4.1(a) Regional Metrolinx commuter services will continue to be incorporated in the *rail corridor*, and a new GO station has been identified by Metrolinx as the *Spadina-Front GO RER Station* in *Mixed Use Areas “A” of the Railway Lands Central Secondary Plan,* in the vicinity of the Front Street West and Spadina Road intersection.”

Policy 8.5 title be deleted and replaced with:

“8.5 Railway Uses in the *Mixed Uses Areas* “K””

Policy 8.5.1 be deleted and replaced with:

“8.5.1 The *rail corridor* is intended to remain in its present location and will continue to operate below the *decking structure* in *Mixed Use Areas* “K”. Union Station will continue to function as a major regional transportation terminal, and all rail facilities, including the High Line freight by-pass, should continue to operate within the width of the *rail corridor* and/or below the *decking structure* in *Mixed Use Areas* “K”.”

Policy 8.5.3 to be deleted and replaced with:

“8.5.3 Development adjacent to the *rail corridor* and on the *decking structure* in *Mixed Use Areas “K”* will respect the physical configuration of the *rail corridor* and its current and future operation, including minimum clearance height, approaches, access, easements and emergency access both during and subsequent to development and construction. The construction of the *decking structure* and development in *Mixed Use Areas* “K” shall be in accordance with the policies of Section 14 - SASP XX. ”

## 9. ENVIRONMENT

Policy 9.2 be deleted and replaced with:

“9.2 The Environmental Report referred to in Section 9.1 will be prepared by the proponents in consultation with the City, the Local Board of Health, and the Ministry of the Environment and Climate Change. In *Mixed Use Areas* “K”, the proponent will also consult with Metrolinx and CN Railway Company or their successors and assigns. The safeguards and measures set out in the Environmental Report will be secured through an Environmental Agreement submitted pursuant to Section 11.6 of this Secondary Plan.

For the purposes if this Secondary Plan, an Environmental Agreement means an agreement containing provisions sufficient to ensure that the safeguards and measures set out in the Environmental Report are adequately secured and in addition, will specify that the owner will provide appropriate warning clauses to prospective purchasers and lessees of each dwelling unit within 300 metres of the *rail corridor* in the Secondary Plan area, including *Mixed Use Areas* "K", regarding possible noise, vibration and/or air quality impacts associated with existing and future freight and passenger rail and regional rail and public transit uses in the *rail corridor*."

Policies 9.1, 9.3 and 9.4 are amended as follows:

Replace "Ministry of the Environment and Energy" with "Ministry of the Environment and Climate Change".

## 10. LAND USE DISTRICTS AND DENSITY

Policy 10.1 be deleted and replaced with:

"10.1 The Railway Lands West will be developed with a wide range of uses including commercial, retail, residential, institutional, cultural, recreational, parks, open spaces, and retail. The area fronting on Spadina Avenue is a predominantly commercial/residential area to be developed at relatively high densities. The area west of the Spadina Avenue blocks, and south of the *rail corridor* to Bathurst Street is a medium density residential area with parks.

*Mixed Use Areas* "K" shall be implemented in accordance with Section 14 - SASP XX.

The intersection of Spadina Avenue and Fort York Boulevard will become a focus for the Railway Lands West, and its development will provide for the integration of proposed transit lines with high standards of urban design and pedestrian amenity."

Policy 10.3 be deleted in its entirety and replace with:

"10.3 Precinct '6'

Comprehensive decking of the *rail corridor* in *Mixed Use Areas "K"*, between Spadina Avenue and Bathurst Street is necessary to enable the land uses permitted by this Secondary Plan to be implemented. The *decking structure* may be phased and will be part of a comprehensive decking project involving that part of the Railway Lands West and the Railway Lands Central Secondary Plans, in accordance with Section 14 - SASP XX."

The title of Policy 10.3.1 and policy 10.3.1 be deleted in its entirety and replaced with:

"10.3.1 *Mixed Use Areas* "K"

The construction of the *decking structure,* and development in, *Mixed Use Areas* "K", shall be in accordance with the policies of Section 14 – SASP XX."

Policy 10.3.2 be deleted in its entirety.

## 11. DEVELOPMENT REQUIREMENTS AND STRATEGY

No amendments proposed.

## 12. IMPLEMENTATION

No amendments proposed.

## 13. DEFINITIONS

Policy 13.11 is added as follows:

"13.11 The *decking structure* means the structure developed over the *rail corridor* to support development of the site including all the necessary engineering and structure elements that may or may not extend below the grade level of the *rail corridor*."

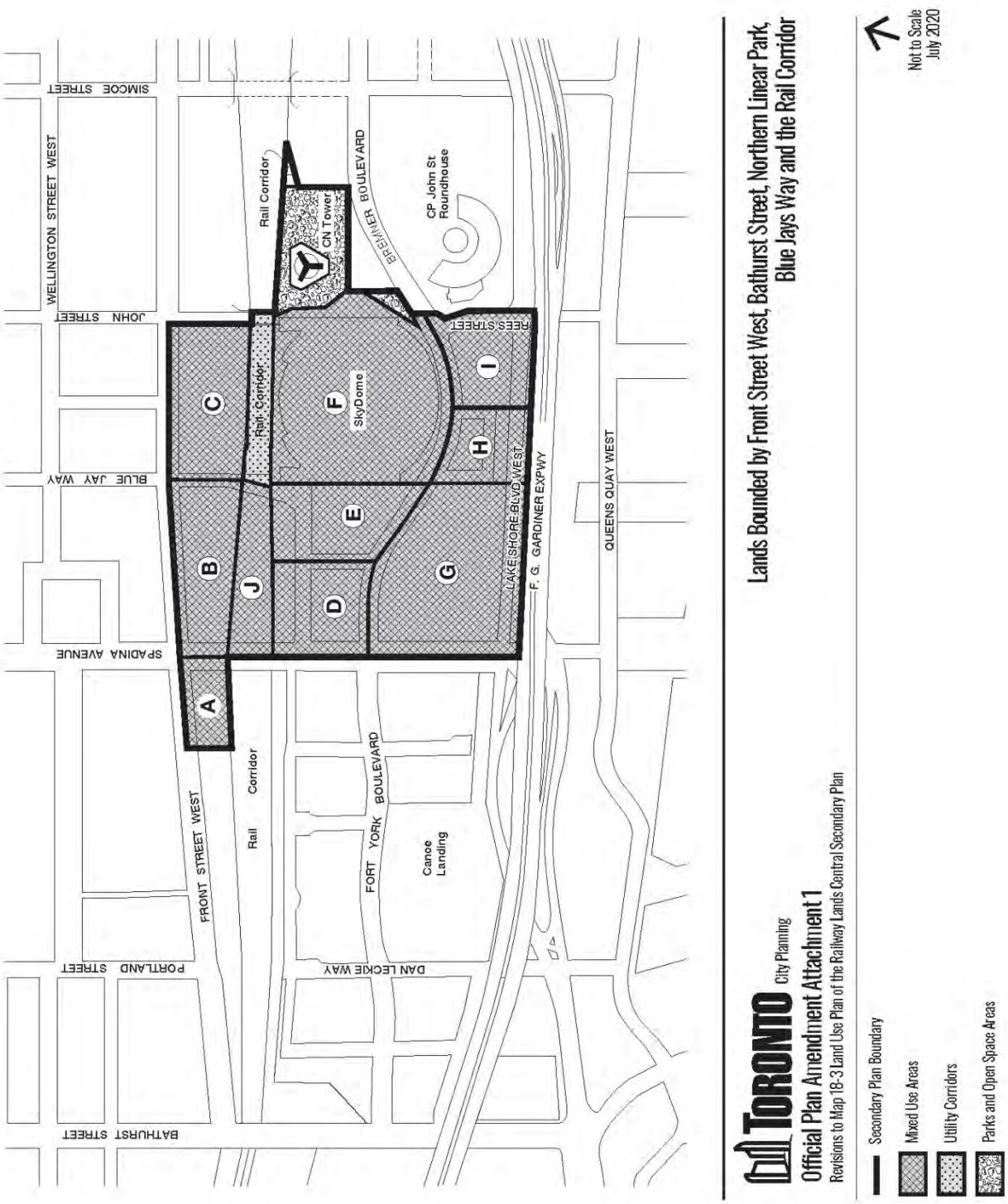
Policy 13.12 is added as follows:

"13.12 *Rail corridor* means the area comprised of the Union Station Rail Corridor (URSC) and the Bathurst North Yard, generally bounded by Front Street West to the north, and the Southern limit of the URSC to the south."

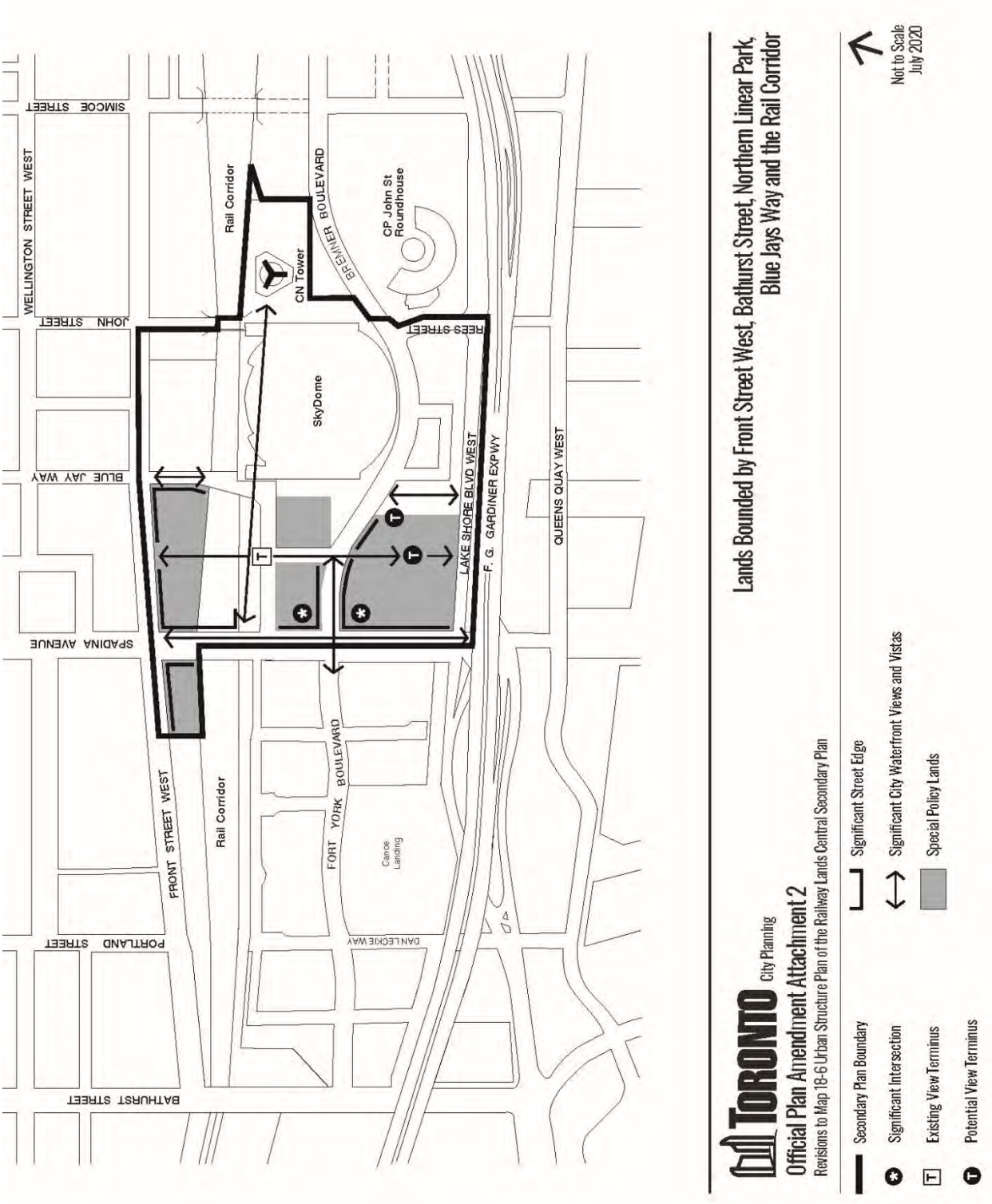
Policy 13.13 is added as follows:

*13.13 Spadina-Front GO RER* means the Metrolinx GO Regional Express Rail station serving the Barrie GO Corridor, planned for Spadina Avenue and Front Street West.

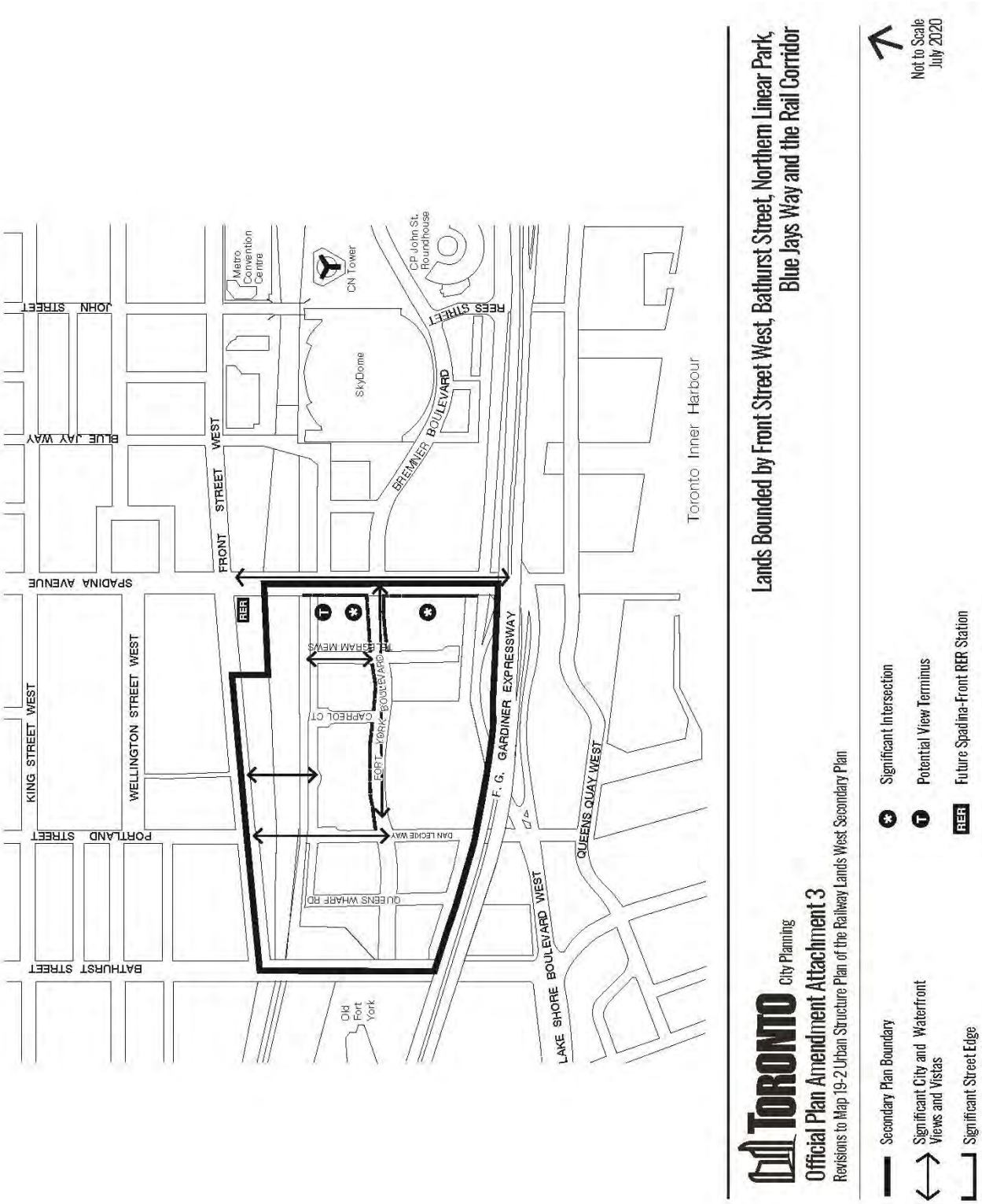
# Attachment 1



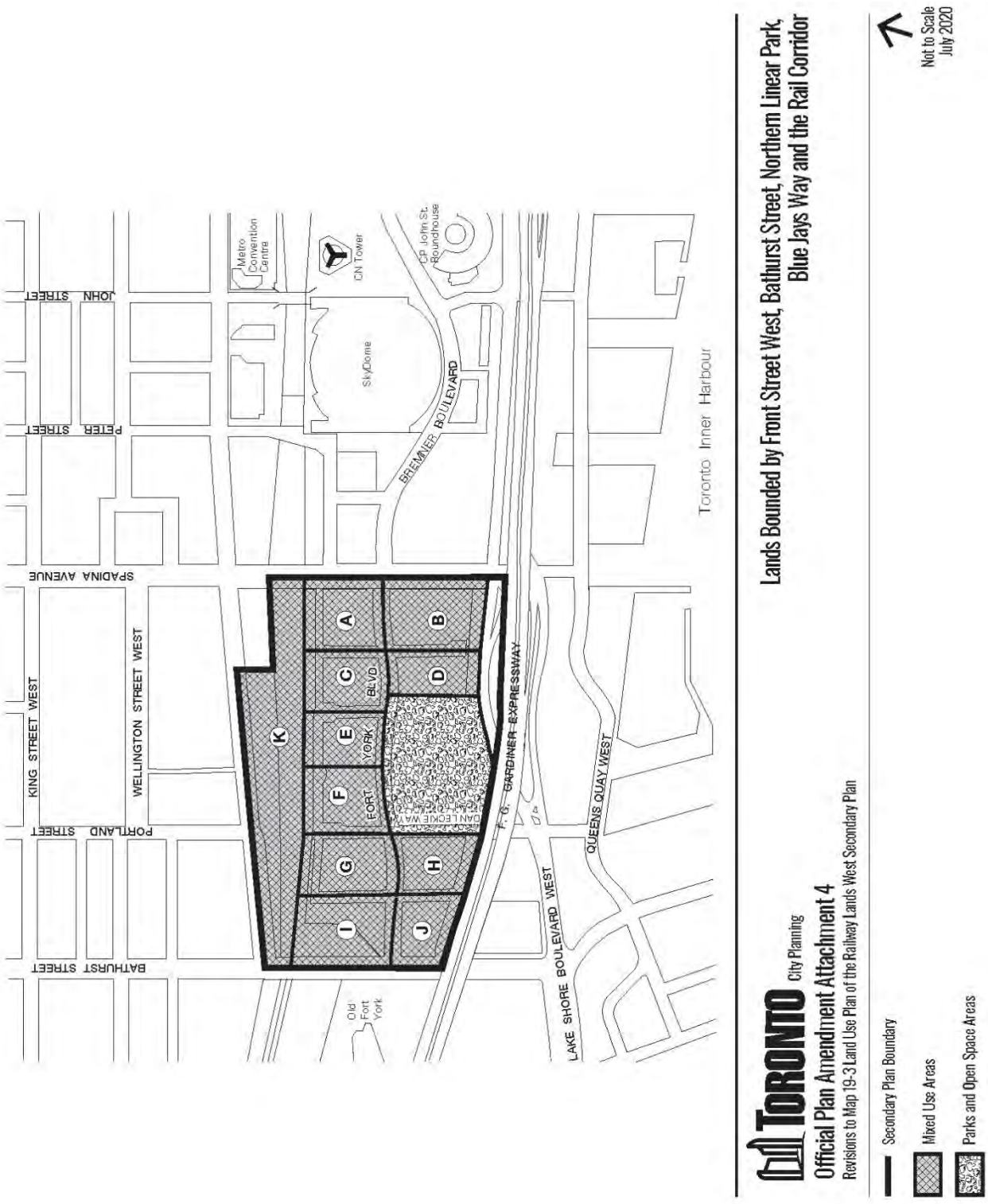
## Attachment 2



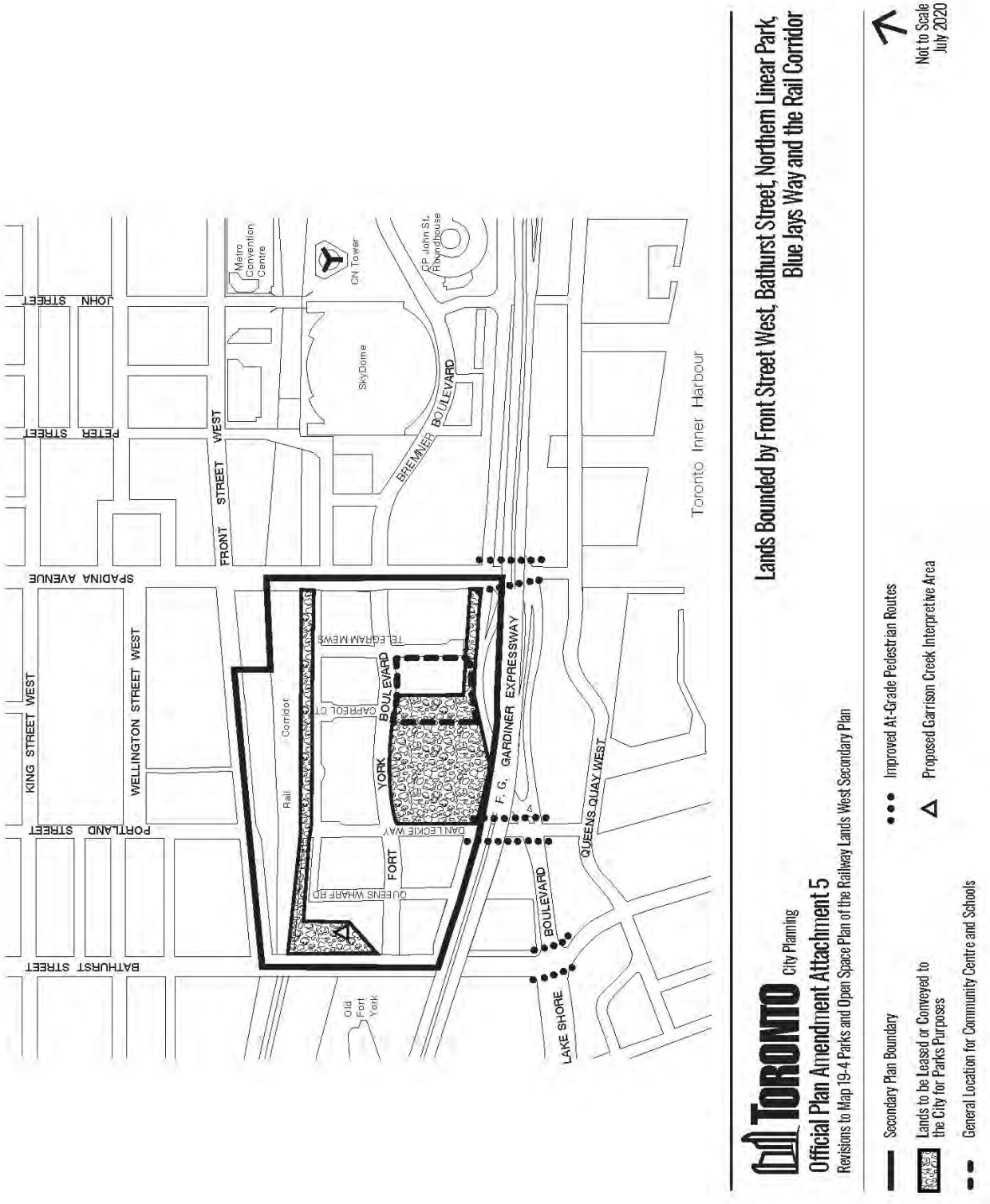
**Attachment 3**



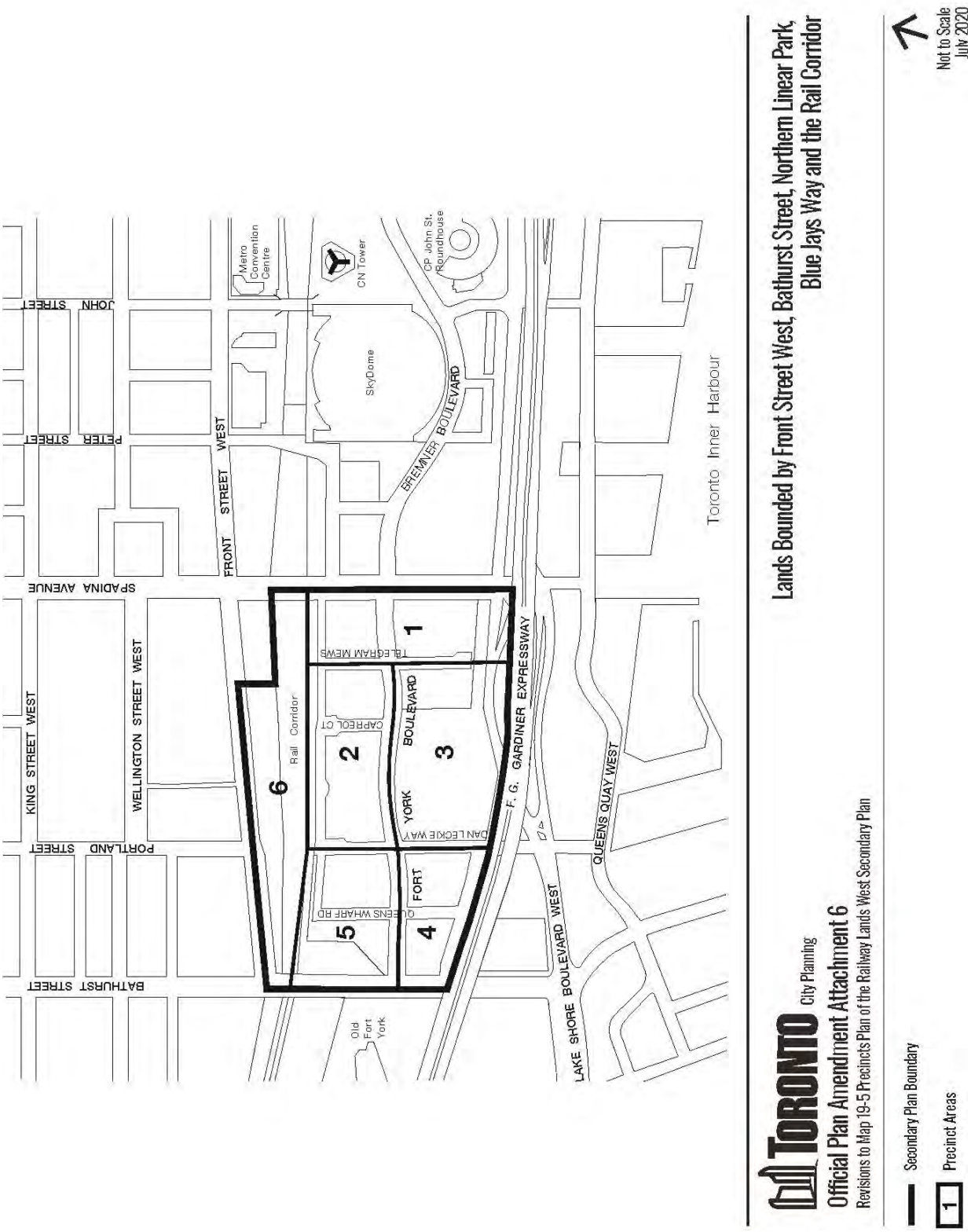
**Attachment 4**



**Attachment 5**



**Attachment 6**



# ADDENDUM B

## [SAFDIE / PWP CONCEPT PLAN EXCERPTS = separate PDF]

## ADDENDUM C

## INDEX TO JOINT DOCUMENT BOOK OF THE PARTIES

**PL180211**

# LOCAL PLANNING APPEAL TRIBUNAL

**Tribunal d'appel de l'aménagement local**

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

| | |
|---|---|
| Applicant and Appellant: | CRAFT Acquisitions Corporation and P.I.T.S. Developments Inc. |
| Subject: | Request to amend the City of Toronto Official Plan, Railway Lands West and Central Secondary Plans – Neglect or Refusal of request by the City of Toronto |
| Existing Designation: | Utility Corridors and Parks on Map 18 – Land Use Plan |
| Proposed Designated: | Site Specific (To be determined) |
| Purpose: | To permit a large-scale mixed-use development with a major park and open space component over the railway corridor |
| Property Address/Description: | Railway Lands between Bathurst Street and Blue Jays Way |
| Municipality: | City of Toronto |
| Approval Authority File No.: | 17 164359 STE 20 OZ |
| OMB Case No.: | PL180211 |
| OMB File No.: | PL180211 |
| OMB Case Name: | CRAFT Acquisitions Corporation v. Toronto (City) |

# Joint Document Book

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# TABLE OF CONTENTS


| VOLUME 1<br>LEGISLATION, POLICY DOCUMENTS, PLANS & BY-LAWS | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| | **LEGISLATION & RULES** | |
| 1. | *Planning Act* (1990) [Extracts] | 1 |
| 2. | *Local Planning Appeal Tribunal Act* (2017) | 17 |
| 3. | *LPAT Rules of Practice and Procedure* (February 25, 2020) | 29 |
| 4. | *Transport Canada Railway Safety Act* (1995) | 73 |
| | **PROVINCIAL POLICY DOCUMENTS** | |
| 5. | Provincial Policy Statement (2020) | 168 |
| 6. | Growth Plan for the Greater Golden Horseshoe (2019) | 225 |
| | **LOCAL POLICY DOCUMENTS & PLANS** | |
| 7. | City of Toronto Official Plan (2019 Office Consolidation) | 328 |
| 8. | City of Toronto Official Plan Amendment 406 (Downtown Secondary Plan)<br>A) Decision (June 5, 2019)<br>B) Official Plan Amendment 406 [with Minister modifications] | 502 |
| 9. | City of Toronto Official Plan Amendment 456 | 633 |
| 10. | Railway Lands West Secondary Plan | 671 |
| 11. | Railway Lands Central Secondary Plan | 698 |
| 12. | King-Spadina Secondary Plan | 727 |

| | | |
|---|---|---|
| 13. | Fort York Secondary Plan | 737 |
| 14. | Sustaining and Expanding the Urban Forest: Toronto Strategic Forest Management Plan [Adopted by City Council February 20, 2013] | 763 |
| 15. | Parks and Recreation Facilities Master Plan (2019-2038) [Adopted by City Council on November 9, 2017) | 846 |
| 16. | Downtown Parks and Public Realm Plan (2018) | 954 |
| 17. | Fort York Neighbourhood:<br>A) Public Realm Plan (2004)<br>B) Staff Report: Amendment to Fort York Neighbourhood Public Realm Plan adding Blocks 32 and 36 (February 28, 2008 [Adopted by City Council April 28/29, 2008]<br>C) Blocks 32 and 36 Public Realm Plan (2008) | 996 |
| **BY-LAWS** | | |
| 18. | Railway Lands West Zoning By-law 0805-1994 | 1090 |
| 19. | Railway Lands Central Zoning By-law 0806-1994 | 1245 |
| 20. | Railway Lands Block 32 and 36 By-law 1073-2006 | 1479 |
| 21. | Railway Lands West – Amendment By-law 1997-0614 | 1499 |

# VOLUME 2

# GUIDELINES & STANDARDS


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| | **GUIDELINES** | |
| 22. | Railway Lands West and Central Urban Design Guidelines | 1524 |
| 23. | Tall Building Design Guidelines (May 2013) | 1556 |
| 24. | Growing Up: Planning for Children in New Vertical Communities Urban Design Guidelines (2020) | 1647 |
| 25. | Pet Friendly Design Guidelines and Best Practices for New Multi-unit Buildings (December 2019) | 1704 |
| 26. | Urban Design Guidelines for Privately Owned Publicly Accessible Spaces<br>A) Draft Guidelines (June 2014)<br>B) Staff Report Re Protecting and Increasing Access to Privately Owned Publicly - Accessible Spaces (May 22, 2014)<br>C) Presentation on Protecting and Increasing Access to Privately Owned Publicly-Accessible Spaces (June 19, 2014)<br>D) Council Decision adopting Draft Guidelines (July 8, 2014) | 1784 |
| 27. | Guidelines for New Developments in Proximity to Railway Operations (2013) | 1924 |
| 28. | Metrolinx Adjacent Development Guidelines (2013) | 2039 |
| 29. | Metrolinx General Guidelines for Design of Railway Bridges and Structures (November 2018) | 2055 |
| 30. | Accessibility Design Guidelines (2020) | 2223 |
| 31. | King-Spadina Secondary Plan Urban Design Guidelines (June 2004) | 2353 |

| | | |
|---|---|---|
| 32. | RAC & FCM: Guidelines for New Development in Proximity to Railway Operations (May 2013) | 2361 |
| **STANDARDS** | | |
| 33. | Metrolinx Go Transit Standards Revision 01 (May 2018) | 2476 |
| 34. | CN Engineering Track Standards (January 2017) | 2922 |
| 35. | Transport Canada Standards Respecting Railway Clearances (May 1992) | 3091 |

| VOLUME 3<br>STRATEGIES & STUDIES<br>PART I | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 36. | City of Toronto Parkland Strategy (November 2019) | 3101 |
| 37. | Study of Parkland Dedication Policy Approaches and Acquisition Strategies (2017) | 3156 |
| 38. | Parks and Recreation Facilities Implementation Strategy [Adopted by City Council on October 29, 2019] | 3296 |
| 39. | Tree Canopy Study (2018) [Adopted by City Council January 29, 2020] | 3450 |
| 40. | TOcore Planning Toronto's Downtown: Phase I<br>A) Staff Report (October 23, 2015)<br>B) Council Decision (October 23, 2015) | 3721 |
| 41. | City of Toronto Land Use Study: Development in Proximity to Rail Corridors (March 2019) | 3778 |
| 42. | Lower Yonge Precinct:<br>A) Staff Report Re Transportation Master Plan (February 6, 2015)<br>B) Council Decision Re Transportation (March 31, 2015)<br>C) Final Staff Report (April 22, 2016)<br>D) Council Decision Re OPA (June 7, 2016)<br>E) Lower Precinct Plan (April 2016)<br>F) Request for Direction Staff Report (February 28, 2019)<br>G) Council Decision Re OPA (March 27, 2019) | 3871 |

| VOLUME 4<br>STRATEGIES & STUDIES<br>PART II | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 43. | East Bayfront Precinct:<br><br>A) Plan (November 2005)<br>B) Staff Report Re Plan and Class Environmental Assessment Master Plan (November 16, 2005)<br>C) Final Staff Report (September 27, 2006)<br>D) Central Waterfront Secondary Plan<br>E) By-law 1049-2006 (September 27, 2006) | 4187 |
| 44. | Golden Mile Secondary Plan:<br><br>A) Final Staff Report (June 25, 2020)<br>B) Supplementary Staff Report (September 29, 2020)<br>C) Council Decision (October 27, 2020)<br>D) Draft Official Plan Amendment 499 | 4438 |
| 45. | Bathurst Quay Neighbourhood Plan:<br><br>A) Final Staff Report (May 22, 2018)<br>B) Council Decision (June 26, 2018)<br>C) Official Plan Amendment 417 (By-law 781-2018) | 4610 |

| VOLUME 5 (ELECTRONIC ONLY*)<br>2017 APPLICATION MATERIAL | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 46. | Preapplication Checklist (January 20, 2017) | 4652 |
| **May 2017 Submission** | | |
| 47. | Cover Letter (May 23, 2017) | 4660 |
| 48. | Draft OPA (May 2017) | 4668 |
| 49. | Planning Rationale Report (May 23, 2017) | 4698 |
| 50. | Air Quality Assessment (May 5, 2017) | 4788 |
| 51. | Community Energy Strategy (May 5, 2017) | 4798 |
| 52. | Community Services & Energy Report (May 23, 2017) | 4826 |
| 53. | Environmental Noise Feasibility Study (May 5, 2017) | 4910 |
| 54. | Environmental Report (May 23, 2017) | 4989 |
| 55. | Functioning Servicing Report (May 31, 2017) | 5019 |
| 56. | Geotechnical Desk Study & Phase 1 ESA (May 15, 2017) | 5059 |
| 57. | Heritage Impact Assessment (May 8, 2017) | 5122 |
| 58. | Housing Issues Report (May 23, 2017) | 5187 |
| 59. | Life Safety & Fire Protection Concepts (May 5, 2017) | 5203 |
| 60. | Pedestrian Wind Study (May 5, 2017) | 5223 |
| 61. | Preliminary EMF Calculations (May 5, 2017) | 5267 |

* Hard copies of this Volume of the Joint Document Book will not be printed for the Tribunal Members unless requested to do so. An electronic copy of this Volume will be filed.

| | | |
|---|---|---|
| 62. | Preliminary Structural Design and Engineering Analysis of the Decking Structure (May 5, 2017) | 5284 |
| 63. | Public Engagement Plan (May 4, 2017) | 5294 |
| 64. | Toronto Green Standard Checklist (undated) | 5309 |
| 65. | Transportation Assessment Study (May 2017) | 5323 |
| 66. | Railway Vibration Study (May 5, 2017) | 5582 |
| 67. | Phase 1 Environmental Site Assessment/ Feasibility Assessment (January 2017) | 5639 |
| 68. | Topographical Survey (January 23, 2017) | 6289 |
| 69. | Boundary Plan of Survey (February 16, 2017) | 6290 |
| 70. | Stage 1 Archaeological Resource Assessment (February 28, 2017) | 6291 |
| 71. | Arborist Report (March 23, 2017) | 6330 |
| 72. | Architectural Drawings (March 31, 2017) | 6353 |
| 73. | Technical Rail and Decking Study (March 8, 2017) | 6375 |
| 74. | Landscape Plans (April 7, 2017) | 6399 |
| **August 2017 Submission** | | |
| 75. | Covering Letter (August 24, 2017) | 6402 |
| 76. | Community Energy Strategy (June 30, 2017) | 6404 |
| 77. | Preliminary Solar Reflection Analysis (June 29, 2017) | 6434 |
| 78. | Stormwater Management Report (August 17, 2017) | 6458 |

| VOLUME 6<br>2020 APPLICATION MATERIAL<br>[Re: Witnesses being called in Chief] | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 79. | Proposed Official Plan Amendment:<br>a) March 23, 2020<br>b) August 2, 2020 (Redlined)<br>c) August 2, 2020 (Clean) | 6484 |
| 80. | Planning Letter (May 31, 2020) | 6587 |
| 81. | Architectural Plans (May 29, 2020) | 6611 |
| 82. | Landscape Plans (May 29, 2020) | 6637 |
| 83. | Functional Servicing & Stormwater Management Report (May 29, 2020) | 6646 |
| 84. | Preliminary Structural Engineering Analysis and Design of Deck Towers (May 29, 2020) | 6792 |
| 85. | Technical Rail and Decking Study (May 29, 2020) | 6856 |
| 86. | Transportation Assessment Update (May 31, 2020) | 6911 |
| 87. | TTR/ CN Letter (January 15, 2018) | 7300 |

| VOLUME 7 (ELECTRONIC ONLY*)<br>2020 APPLICATION MATERIAL<br>[Re: Witnesses not being called in Chief] | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 88. | Above Deck Fire and Life Safety Report (May 29, 2020) | 7302 |
| 89. | Air Quality Report (May 29, 2020) | 7342 |
| 90. | Arborist Report (May 28, 2020) | 7370 |
| 91. | Arborist Tree Prevention Plans (May 28, 2020) | 7394 |
| 92. | Archeological Reliance Letter (May 11, 2020) | 7400 |
| 93. | Below Deck Fire and Life Safety Code Report (May 29, 2020) | 7402 |
| 94. | Below Deck Tunnel Ventilation System, Electrical & Fire Protection Concept Report (May 29, 2020) | 7502 |
| 95. | Community Energy Strategy (May 22, 2020) | 7558 |
| 96. | Community Services & Facilities Report (May 2020) | 7587 |
| 97. | EMF Calculations (May 28, 2020) | 7597 |
| 98. | Geotechnical Desk Study (May 27, 2020) | 7610 |
| 99. | Heritage Impact Assessment (May 29, 2020) | 7613 |
| 100. | Housing Issues Report (May 2020) | 7686 |
| 101. | Environmental Noise Feasibility Study (May 28, 2020) | 7696 |
| 102. | Pedestrian Level Wind and Snow Drift Study (May 29, 2020) | 7773 |
| 103. | Solar Glare Study (May 31, 2020) | 7845 |
| 104. | Toronto Green Standards Checklist (Undated) | 7866 |

* Hard copies of this Volume of the Joint Document Book will not be printed for the Tribunal Members unless requested to do so. An electronic copy of this Volume will be filed.

| | | |
|---|---|---|
| 105. | Railway Vibration Feasibility Study (May 28, 2020) | 7877 |

| VOLUME 8<br>STAFF REPORTS, CITY & AGENCY COMMENTS | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 106. | Toronto District School Board Comments (July 14, 2017) | 7913 |
| 107. | TELUS Comments (July 21, 2017) | 7915 |
| 108. | Toronto Transit Commission Comments (August 17, 2017) | 7916 |
| 109. | Enbridge (June 1, 2017 and September 11, 2017) | 7918 |
| 110. | Notice of Community Consultation Meeting (September 12, 2017) | 7920 |
| 111. | Environment & Energy Division (June 9, 2017 and September 19, 2017) | 7921 |
| 112. | Rogers (June 13, 2017 and September 18, 2017) | 7924 |
| 113. | Development Engineering Comments (July 18, 2017) | 7927 |
| 114. | Parks, Forestry and Recreation (July 19, 2017 and October 12, 2017) | 7933 |
| 115. | Joe Cressy Tweet (August 14, 2017) | 7944 |
| 116. | Joe Cressy Meeting Announcement (September 5, 2017) | 7946 |
| 117. | Toronto Hydro (September 13, 2017) | 7947 |
| 118. | Metrolinx Comments (October 3, 2017) | 7957 |
| 119. | Canadian Transportation Agency (October 6, 2017) | 7975 |
| 120. | Tree Protection & Plan Review (October 17, 2017) | 7976 |
| 121. | Waterfront Toronto Comments (October 18, 2017) | 7978 |
| 122. | Ministry of Municipal Affairs and Housing (November 17, 2017) | 7979 |
| 123. | Development Engineering Comments (November 23, 2017) | 7982 |

| | | |
|---|---|---|
| 124. | Toronto Public Health/ Environment and Energy Division (November 27, 2017) | 7996 |
| 125. | City Planning Comments (December 20, 2017) | 7997 |
| 126. | City of Toronto Staff Refusal Report (December 20, 2017) | 8003 |
| 127. | NAV Canada Comments (February 8, 2018) | 8105 |
| 128. | Children's Services Comments (undated) | 8106 |

| VOLUME 9<br>RAIL DECK PARK OPA 395 | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 129. | OPA 395 | 8110 |
| 130. | LPAT Decision approving OPA 395 (July 11, 2019) | 8142 |
| 131. | LPAT Hearing Transcript (May 27, 2019) | 8198 |
| 132. | CRAFT oral submissions to LPAT (May 27, 2019) | 8366 |
| 133. | City oral submissions to LPAT (May 27, 2019) | 8391 |
| 134. | CRAFT Case Synopsis [without case law] (July 12, 2018) | 8407 |
| 135. | CN/TTR Case Synopsis [without case law] (July 12, 2018) | 8445 |
| 136. | City Case Synopsis [without case law] (August 1, 2018) | 8467 |
| 137. | Extracts from CRAFT & CN Joint Appeal Record (July 12, 2018) | 8500 |
| 138. | Extracts from City Appeal Record (August 1, 2018) | 8554 |
| 139. | City Staff Reports, Publications & Presentations:<br>a) Backgrounder Rail Deck Park (August 3, 2016)<br>b) Backgrounder #2 Rail Deck Park (September 15, 2016)<br>c) City Staff Report Re: Work Plan (September 15, 2016)<br>d) City Staff Report to Executive Committee (September 22, 2016)<br>e) Preliminary City Staff Report (June 1, 2017)<br>f) Final City Staff Report (October 30, 2017)<br>g) City Staff Report Re: Results of Feasibility Analysis (November 20, 2017)<br>h) Rail Deck Park – Technical Briefing (November 21, 2017) | 8559 |
| 140. | Consulting Reports:<br>A) Urban Strategies Consulting Report [with Appendices] (October 2017)<br>B) Urban Strategies Executive Summary (October 2017) | 8827 |

| | | |
|---|---|---|
| | C) Build Toronto, WSP and McMillan Rail Deck Park Engineering & Costing Study (November 24, 2017) | |
| 141. | City Council Decisions & Notices of Adoption:<br><br>a) City Council Decision Re: Rail Deck Park Work Plan (October 5, 2016)<br>b) Toronto and East York Community Council Decision Re: Rail Corridor Preliminary Report (June 13, 2017)<br>c) Toronto and East York Community Council Decision Re: Rail Deck Park Final Report (November 14, 2017)<br>d) Executive Committee Decision Re: Rail Deck Park Feasibility Analysis and Next Steps (November 28, 2017)<br>e) City Council Decision Re: Rail Deck Park Feasibility Analysis & Next Steps (December 5, 2017)<br>f) City Council Decision Amending the Official Plan through OPA 395 (December 5, 2017)<br>g) Notice of Adoption of OPA 395 (February 15, 2018) | 9159 |
| 142. | Correspondence Re Leave to Appeal<br><br>A) Ira Kagan Letter (December 24, 2019)<br>B) Brendan O'Callaghan Letter (January 17, 2020) | 9187 |

# VOLUME 10

# OTHER DEVELOPMENTS

# PART I


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 143. | 440 Front Street West (The Well):<br><br>A) Staff Report Re OPA (May 28, 2015)<br>B) Staff Report Re ZBLA (November 4, 2016)<br>C) Official Plan Amendment (adopted July 7, 2015)<br>D) Zoning By-Law Amendment (By-law 124-2017)<br>E) Zoning By-Law Amendment (By-law 125-2017)<br>F) Shadow Studies (October 10, 2017)<br>G) Transportation Report (April 16, 2014)<br>H) Transportation Report (December 2016) | 9191 |
| 144. | 400 Front Street West:<br><br>A) Transportation Impact Study (March 23, 2014)<br>B) Staff Refusal Report (April 11, 2017)<br>C) Updated Transportation Impact Study (March 19, 2018)<br>D) Shadow Studies (May 10, 2018)<br>E) LPAT Decision (October 3, 2019)<br>F) Zoning By-law Amendment (version presented to LPAT – not yet Final) | 9910 |
| 145. | 315 and 325 Front Street West:<br><br>A) Staff Report for Action (October 22, 2019)<br>B) Planning Rationale & Urban Design Analysis (August 7, 2019) | 10,507 |
| 146. | 49 Spadina Avenue: LPAT Decision (October 3, 2019) | 10,710 |

# VOLUME 11

# OTHER DEVELOPMENTS

# PART II


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 147. | 45 and 141 Bay Street:<br><br>A) Urban Design Analysis and Planning Rationale [Phase I] (September 16, 2014)<br>B) Urban Design Analysis and Planning Rationale [Phase II] (August 10, 2015)<br>C) Preliminary Staff Report (October 22, 2015)<br>D) Final Staff Report (October 7, 2016)<br>E) Rendering of Project [extract from Urban Land] (Spring 2020)<br>F) Transportation Memo (May 12, 2016) | 10,723 |
| 148. | 495-517 Wellington Street West and 510-532 Front Street West:<br><br>A) Final Staff Report (June 14, 2018)<br>B) Zoning By-law Amendment (592-2019)<br>C) Zoning By-law Amendment (593-2019) | 11,226 |
| 149. | 500 Lake Shore Boulevard Traffic Review (April 27, 2015) | 11,296 |
| 150. | 2161 Lakeshore Boulevard West Traffic Impact Study (August 2014) | 11,368 |
| 151. | Railway Lands West:<br><br>A) Traffic Impact Study (November 2005)<br>B) Response to Comments (June 22, 2006) | 11,803 |
| 152. | 1245 Dupont Street et al. (Galleria Mall)<br><br>A) Final Staff Report (May 18, 2018)<br>B) Council Decision (June 26, 2018)<br>C) Official Plan Amendment 415 (1164-2019)<br>D) Zoning By-law Amendment 1165-2019 | 12,061 |

| | | |
|---|---|---|
| 153. | 571-597 Bloor Street West et al. (Honest Ed's/ Mirvish Village):<br><br>A) Final Staff Report (March 17, 2017)<br>B) Supplementary Staff Report (April 3, 2017)<br>C) Council Decision (April 26, 2017)<br>D) Official Plan Amendment 378 (1104-2017)<br>E) Zoning By-law Amendment 1105-2015<br>F) Zoning By-law Amendment 1270-2017 | 12,201 |
| 154. | 844 Don Mills Road et al. (Celestica)<br><br>A) Request for Direction Staff Report (May 29, 2018)<br>B) Council Decision (June 26, 2018)<br>C) Official Plan Amendment 434 (1213-2019)<br>D) Zoning By-law Amendment 1214-2019 | 12,367 |
| 155. | 1141 Bloor Street West et al. (Bloor/Dufferin)<br><br>A) Request for Direction Staff Report (November 25, 2019)<br>B) Council Decision (December 17, 2019)<br>C) Official Plan Amendment 489 (123-2020) | 12,661 |
| 156. | 315-325 Front Street West & Rail Corridor between Blue Jays Way and Rod Robbie Bridge (Union Park) Preliminary Staff Report (October 22, 2019) | 12,748 |
| 157. | 23 Spadina Avenue Zoning By-law 319-2020 | 12,768 |

| VOLUME 12<br><br>LPAT MATERIALS | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 158. | LPAT Decisions:<br><br>A) First Case Management Conference (June 4, 2019)<br>B) Second Case Management Conference (September 6, 2019)<br>C) Third Case Management Conference & Severance Appeal (October 16, 2020) [Corrected October 23, 2020]<br>D) Fourth Case Management Conference [with Issued Procedural Order] (October 27, 2020) | 12,788 |
| 159. | Issues List:<br><br>A) Original (April 2019 – August 2020)<br>B) City Revised (August 17, 2020)<br>C) Analysis Chart prepared for Adjournment Motion | 12,816 |

## VOLUME 13

## TRANSPORTATION REPORTS, PLANS & GUIDELINES


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 160. | Ministry of Transportation Transit Supportive Guidelines (2012) | 12,875 |
| 161. | Staff Report Re Future of King Street: Results of the Transit Pilot (April 2, 2019) | 13,093 |
| 162. | Staff Report #1 Re TransformTO Climate Action for a Healthy, Equitable and Prosperous Toronto (November 2, 2016) | 13,126 |
| 163. | Staff Report #2 TransformTO Climate Action for a Healthy, Equitable and Prosperous Toronto (April 20, 2017) | 13,146 |
| 164. | TransformTO Climate Action for a Healthy, Equitable and Prosperous Toronto (Implementation Update 2017 and 2018) | 13,183 |
| 165. | Staff Report Re Vision Zero 2.0 Road Safety Plan Update (June 13, 2019) | 13,267 |
| 166. | Vision Zero Toronto's Road Safety Plan (2017-2021) | 13,319 |
| 167. | Waterfront Transit "Reset" Phase 2 Study Public Information & Consultation Meetings (September 18 & 26, 2017) | 13,381 |
| 168. | Staff Report Re Waterfront Transit Network Plan (January 10, 2018) | 13,439 |
| 169. | Staff Report Re Cycling Network Plan Update (June 13, 2019) | 13,467 |
| 170. | TOCore Proposals Report (November 2016) | 13,499 |
| 171. | Toronto Ten Year Cycling Network Implementation Plan Final Report (April 17, 2017) | 13,665 |
| 172. | Metrolinx: Mobility Hub Guidelines for the Greater Toronto and Hamilton Area (February 18, 2011) | 13,693 |
| 173. | Metrolinx: The Big Move, Transforming Transportation in the Greater Toronto and Hamilton Area (November 2008) | 13,856 |

| | | |
|---|---|---|
| 174. | Metrolinx Volume 2 – Spadina-Front GO Station Design and Technical Studies, Appendix I [Transportation Brief] (November August 2018) | 13,969 |
| 175. | Parking Standards Review: Examination of Potential Options and Impacts of Car Share Programs on Parking Standards (March 2009) | 14,035 |
| 176. | Metrolinx and Infrastructure Ontario: Ontario Line Initial Business Case (July 2019) | 14,082 |
| 177. | Waterfront Transit Reset Phase I: Network Vision (October 2016) | 14,167 |
| 178. | Union Station – Queens Quay Transit Link Study Final Report (April 2019) | 14,452 |
| 179. | Staff Report Re Pedestrian Safety Review (October 13, 2015) | 14,492 |
| 180. | City of Toronto Guidelines for the Preparation of Transportation Impact Studies (2013) | 14,498 |
| 181. | City of Toronto Guidelines for using SYNCHRO 9 (March 18, 2016) | 14,527 |

# VOLUME 14

# SERVICING MANUALS, STANDARDS, PLANS, & GUIDELINES

# PART I


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 182. | Ontario Ministry of Environment Stormwater Management Planning and Design Manual (March 2003) | 14,606 |
| 183. | Toronto Waterfront Sanitary Servicing Master Plan (January 2018) | 14,981 |
| 184. | City of Toronto Wet Weather Flow Management Guidelines (November 2006) | 15,560 |
| 185. | City of Toronto Design Criteria for Sewers and Watermains 2nd Revision (June 2019) | 15,677 |
| 186. | Ministry of Environment Design Guidelines for Sewage Works (2008) | 15,880 |

# VOLUME 15

# SERVICING MANUALS, STANDARDS, PLANS, & GUIDELINES

# PART II


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 187. | New Jersey Storm Water Best Management Practices Manual (April 2004) | 16,356 |
| 188. | Ministry of Natural Resources Technical Guide Re River and Streams Systems: Flooding Hazard Limits (2002) | 16,789 |
| 189. | Ministry of Transportation Road and Bridge Deck Drainage Systems (November 1982) | 16,907 |
| 190. | US Environmental Protection Agency: Storm Water Management Model Manual 5.1 | 16,999 |
| 191. | Credit Valley Conservation Authority & Toronto Town Conservation Authority Low Impact Development Stormwater Management Manual (2008) | 17,352 |
| 192. | Greater Golden Horseshoe Area Conservation Authorities Erosion and Sedimentation Control Guidelines for Urban Construction (December 2006) | 17,652 |
| 193. | City of Toronto Infoworks CS Basement Flooding Model Studies Guideline, version 1.02 (October 2014) | 17,797 |
| 194. | Water supply for Public Fire Protection (1999) | 17,938 |
| 195. | Toronto Municipal Code Chapter 681, Sewers | 17,962 |
| 196. | F-5-5 Determination of Treatment Requirements for Municipal & Private Revision (June 2019) | 18,020 |

| VOLUME 16<br>MISCELLANEOUS | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 197. | ULI Urban Open Space Awards Finalist: Salesforce Park, San Francisco, California (August 17, 2020) | 18,028 |
| 198. | City of Toronto Retail Design Manual (December 2019) | 18,033 |
| 199. | City of Toronto Development Guide Terms of Reference: Pedestrian Level Wind Study | 18,089 |
| 200. | Toronto Green Standard Version 3 (2018) | 18,093 |
| 201. | CPTED, Toronto Police Brochure | 18,100 |
| **HERITAGE DOCUMENTS** | | |
| 202. | Victoria Square Historical Listing | 18,102 |
| 203. | King-Spadina Heritage Conservation District Plan (June 2017) | 18,104 |
| 204. | Union Station Heritage Conservation District Plan (2006) | 18,291 |
| 205. | Waterfront Culture and Heritage:<br>A) Plan (2001) [Adopted by City Council December 4-6, 2001)<br>B) Staff Report (September 28, 2001) [Adopted by City Council December 4-6, 2001) | 18,365 |
| 206. | Draper Street Heritage Conservation District:<br>A) Study (1998)<br>B) Designation By-law 26-1999 [Adopted by City Council February 4, 1999] | 18,440 |
| 207. | Fort York Heritage Conservation District:<br>A) Fort York Heritage Conservation District Study (1984)<br>B) HCD By-law 420-85<br>C) Expansion By-law 541-2004 | 18,506 |

| | | |
|---|---|---|
| | D) Fort York Commemorative Integrity Statement (March 2004) | |
| 208. | 25 Clarence Square:<br><br>A) Designation By-law 713-2017<br>B) Statement of Significance | 18,570 |
| 209. | 5 Eireann Quay – Canada Malting Complex Designation By-law 32-2011 | 18,579 |
| 210. | 495-517 Wellington Street West Designation<br><br>A) By-law 758-1979 [Passed by City Council September 17, 1979]<br>B) Amendment to By-law 758-1979: By-law 14-2019 [Adopted by City Council July 23-30, 2018] | 18,584 |

# ADDENDUM D

# EXHIBIT LIST [PL180211]

| No. | | Description | | Filed By | | Date |
|---|---|---|---|---|---|---|
| | | **FOR THE HEARING COMMENCING (November 2, 2020) – Phases II and III** | | | | |
| | | | | | | |
| **1.** | | Joint Document Book<br>a) Volume 1- Legislation, Policy Documents, Plans & By-Laws<br>b) Volume 2- Guidelines & Standards<br>c) Volume 3- Strategies & Studies (Part I)<br>d) Volume 4- Strategies & Studies (Part II)<br>e) Volume 5- 2017 Application Material- **Not printed**<br>f) Volume 6- 2020 Application Material (For witnesses being called in chief)<br>g) Volume 7- 2020 Application Material (For witnesses <u>not</u> being called in chief)- **Not Printed**<br>h) Volume 8- Staff Reports, City & Agent Comments<br>i) Volume 9- Rail Deck Park OPA 395<br>j) Volume 10- Other Developments (Part I)<br>k) Volume 11- Other Developments (Part II)<br>l) Volume 12- LPAT Materials<br>m) Volume 13- Transportation Reports, Plans & Guidelines<br>n) Volume 14- Servicing Manuals, Standards, Plans, & Guidelines (Part I)<br>o) Volume 15- Servicing Manuals, Standards, Plans, & Guidelines (Part II)<br>p) Volume 16- Miscellaneous | | CRAFT & CITY | | Nov. 2 2020 |

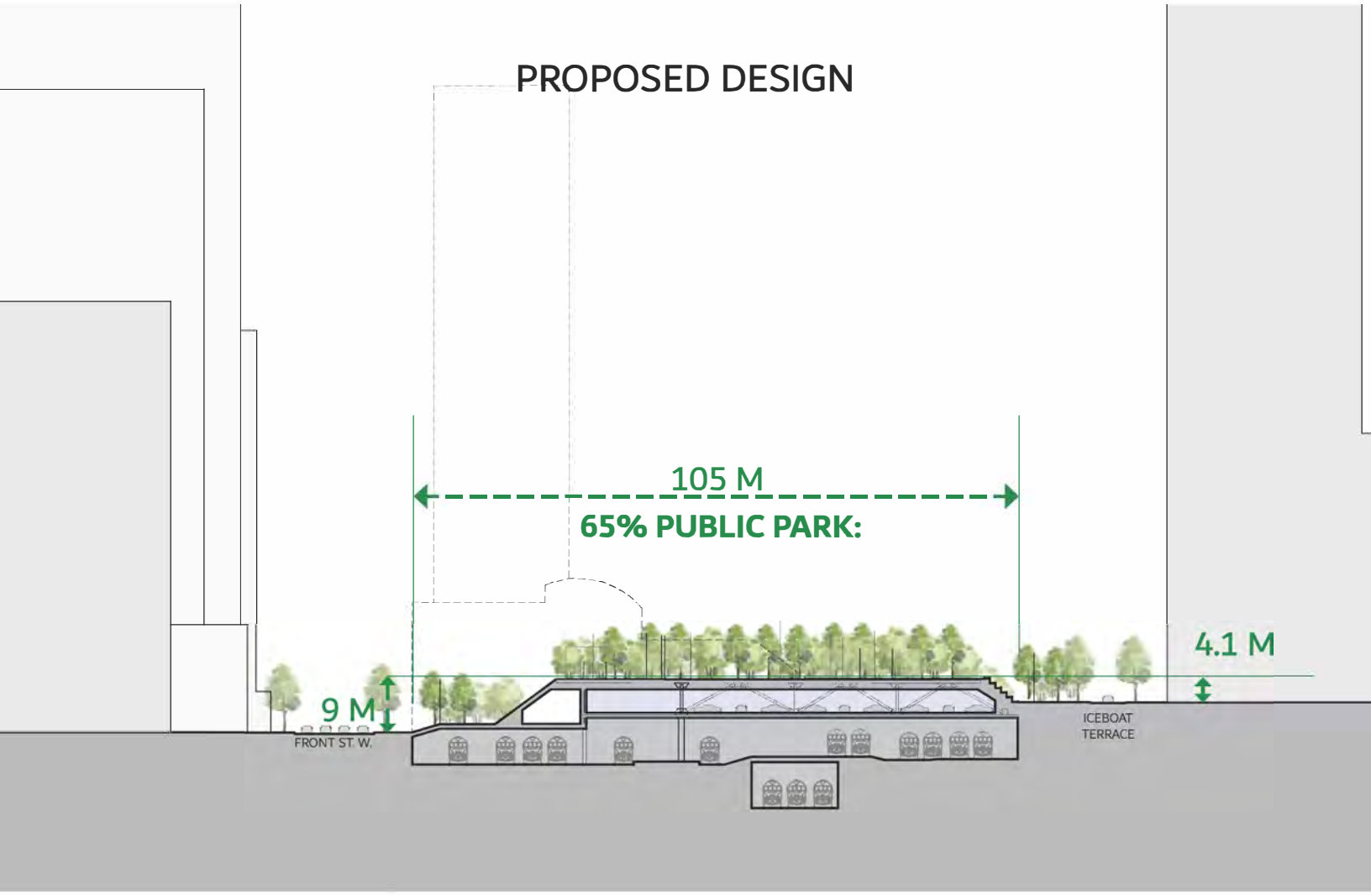
| | | | | | | |
|---|---|---|---|---|---|---|
| **2.** | | Compendium of CRAFT/ P.I.T.S Witness and Reply Witness Statements | | CRAFT | | Nov. 2 2020 |
| **3.** | | CRAFT Visual Evidence | | CRAFT | | Nov. 2 2020 |
| **4.** | | CRAFT Scale Model | | CRAFT | | Nov. 2 2020 |
| **5.** | | City Visual Evidence | | CITY | | Nov. 2 2020 |
| **6.** | | Compendium of City Witness and Reply Witness Statements | | CITY | | Nov. 2 2020 |
| **7.** | | Sweeney VE (November 9 2020) Shadow Study Angle Comparison | | CRAFT | | Nov. 9 2020 |
| **8.** | | Transportation Diagrams (Fig 2-15; 5-6; 7-8) | | CRAFT | | Nov. 13 2020 |
| **9.** | | OPA with Modifications | | CRAFT | | Nov. 24 2020 |
| **10.** | | Craft Submissions on Motion Re: City's Evidence | | CRAFT | | Jan. 19 2021 |
| **11.** | | City Submissions on Motion Re: City's Evidence | | CITY | | Jan. 19 2021 |
| **12.** | | John Gladki CV | | CITY | | Jan. 25 2021 |
| **13.** | | Map 18 to City's OP | | CITY | | Jan. 25 2021 |
| **14.** | | By-law 189-2005, Regent Park OPA | | CITY | | Jan. 25, 2021 |
| **15.** | | Gladki chart of updated population and employment forecasts for the three Railway Plans Secondary Plans. | | CITY | | Jan. 26, 2021 |
| **16.** | | Toronto Municipal Code<br>**Password for Bake #2**: **P2Up1T$A** | | CRAFT | | Jan. 27, 2021 |
| **17.** | | Toronto By-Law #1985-0612 (Railway Lands)<br>**Password for Bake #3: w*pLS&E1** | | CRAFT | | Jan. 27, 2021 |

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|---|---|---|---|---|---|---|
| **18.** | | Email from McAlpine to Bake et all Friday July 28 2017<br>**Password for Bake #4: H2=lsa#7** | | CRAFT | | Jan. 27, 2021 |
| **19.** | | Various images of City's Rail Deck Park<br>**Password for Bake #5: +-sPuVu5** | | CRAFT | | Jan. 27, 2021 |
| **20.** | | Toronto Star Article RE: Elevated Parks (July 7, 2019)<br>**Password for Bake #6: ??hLz93R** | | CRAFT | | Jan. 27, 2021 |
| **21.** | | Toronto OPA 476 (Don Mills and Sheppard)<br>**Password for Bake #0: Huy??xTG** | | CRAFT | | Jan. 27, 2021 |
| **22.** | | Andrea Bake comment (June 23, 2020) on May 2020 CRAFT OPA | | CRAFT | | Jan. 28, 2021 |
| **23.** | | McMillan response to Safdie contention regarding lowering of the decking structure by 1m | | CITY | | Jan. 29 2021 |
| **24.** | | Mende Transportation Impact Study (June 4, 2020)<br>**Password for Mende #1: B?rL+RE5** | | CRAFT | | Feb. 1 2021 |
| **25.** | | Toronto Star article (October 4, 2007) Quoting John Mende<br>**Password for Mende #2: KVe67!k4** | | CRAFT | | Feb. 1 2021 |
| **26.** | | "The car is no longer king!" prepared by John Mende 2008<br>**Password for Mende #3: YnVT??89** | | CRAFT | | Feb. 1 2021 |
| **27.** | | Transportation Impact Study (7887 Weston Road, Vaughan) Prepared by John Mende (December 2019)<br>**Password for Mende #4: +nA42Bb+** | | CRAFT | | Feb. 2 2021 |
| **28.** | | Curriculum Vitae Of David Leinster | | CITY | | Feb. 2 2021 |
| **29.** | | Planning Partnership Website<br>**Password for Leinster #1: pHecr-z1** | | CRAFT | | Feb. 5 2021 |

| | | | | | | |
|---|---|---|---|---|---|---|
| **30.** | | Oxford Open Space Zoning- By Law<br>**Password for Leinster #2: @egoM79+** | | CRAFT | | Feb. 5, 2021 |
| **31.** | | The Guardian Article "Horror on the Hudson" (April 9 2019)<br>**Password for Bagley and Bogdanowicz 2: 8?tBs!6F** | | CRAFT | | Feb. 5, 2021 |
| **32.** | | Images of Mouth of the Creek Park<br>**Password for Bagley and Bogdanowicz 7: +?tBe675** | | CRAFT | | Feb. 8, 2021 |
| **33.** | | Images of 81 Bay St. Sky Park<br>**Password for Bagley and Bogdanowicz 8: JiX4?s79** | | CRAFT | | Feb. 8, 2021 |
| **34.** | | (a) City's Witness List served August 4th 2020<br>(b) City's Witness List served August 10th 2020 | | CRAFT | | Feb. 8, 2021 |
| **35.** | | Devine Park Letter to LPAT Parties July 23rd 2020 | | CRAFT | | Feb. 8, 2021 |
| **36.** | | Photo of Canada Malting Plant<br>**Password for Bagley and Bogdanowicz 9: H@n7F?4f** | | CRAFT | | Feb. 8, 2021 |
| **37.** | | Curriculum Vitae Of David Moyle | | CRAFT | | Feb. 9, 2021 |
| **38.** | | Water Service Schematic for Park Amenities (January 2020)<br>**Password for Moyle #4: 7@MoFV?4** | | CRAFT | | Feb. 9, 2021 |
| **39.** | | Oden Detech Email Exchange with David Moyle (September 16, 2020)<br>**Password for Moyle #8: ?K59GetV** | | CRAFT | | Feb. 9, 2021 |
| **40.** | | Globe and Mail Article "New Toronto Blue Jays Stadium likely to win political support, create more public space" (November 27, 2020)<br>**Password for Moyle #2: CeUn55@B** | | CRAFT | | Feb. 9, 2021 |

| | | | | | | |
|---|---|---|---|---|---|---|
| **41.** | | Email exchange between John Krpan and David Moyle (November 2020)<br>**Password for Moyle #3: 8Ft2?6JG** | | CRAFT | | Feb. 9, 2021 |
| **42.** | | Toronto Waterfront Sanitary Servicing Master Plan 2017 Update Report<br>**Password for Moyle #1: M8?3g6eT** | | CRAFT | | Feb. 9, 2021 |
| **43.** | | Email from Heather Oliver cc'd to Susan McAlpine and Lynda MacDonald (August 4th 2017)<br>**Password for McAlpine and MacDonald #3: PIb6l-$C** | | CRAFT | | Feb. 11, 2021 |
| **44.** | | Email from Heather Oliver to Susan McAlpine and Lynda MacDonald (September 11, 2017)<br>**Password McAlpine and MacDonald #4: qup3ab+B** | | CRAFT | | Feb. 11, 2021 |
| **45.** | | Email from Heather Oliver cc'd to Susan McAlpine (July 28, 2017)<br>**Password McAlpine and MacDonald #6: S4u$opHL** | | CRAFT | | Feb. 11, 2021 |
| **46.** | | Email between Ian Graham and Gregg Lintern (June 1st 2020 & June 4th 2020)<br>**Password McAlpine and MacDonald #2: phI6L8$i** | | CRAFT | | Feb. 12, 2021 |
| **47.** | | Email string between Susan McAlpine and other City staff (April 24th, 2017)<br>**Password McAlpine and MacDonald #1: =rL?hI2A** | | CRAFT | | Feb. 12, 2021 |
| **48.** | | 680News Video (August 2017) RE: CRAFT OPA and Rail Deck Park | | CRAFT | | Feb. 12, 2021 |
| **49.** | | (A) CRAFT OPA (Feb 26, 2021) Clean version<br>(B) CRAFT OPA (Feb. 26, 2021) Redline version | | CRAFT | | March 3, 2021 |

# ADDENDUM B


PROPOSED DESIGN
105 M
65% PUBLIC PARK:
4.1 M
9 M
FRONT ST. W.
ICEBOAT
TERRACE


OVERALL SITE PLAN
100M
50M
10M
PORTLAND ST
DRAPER ST
FRONT ST. W.
BATHURST STREET
PUENTE DE LUZ
Landscaped Open Space
65%
SPADINA AVE.
QUEEN'S WHARF RD
DAN LECKIE WAY
ICEBOAT TERRACE
CAPREOL CT
TELEGRAM MEWS
BLUE JAYS WAY
NAVY WHARF CT


PARK FROM ICEBOAT TERRACE


OVERALL SITE PLAN
100M
50M
10M
PORTLAND ST
DRAPER ST
FRONT ST. W.
BATHURST STREET
PUENTE DE LUZ
QUEEN'S WHARF RD
DAN LECKIE WAY
ICEBOAT TERRACE
CAPREOL CT
TELEGRAM MEWS
SPADINA AVE.
BLUE JAYS WAY
NAVY WHARF CT







**ADDENDUM C**

**PL180211**

# LOCAL PLANNING APPEAL TRIBUNAL

**Tribunal d'appel de l'aménagement local**

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

| | |
|---|---|
| Applicant and Appellant: | CRAFT Acquisitions Corporation and P.I.T.S. Developments Inc. |
| Subject: | Request to amend the City of Toronto Official Plan, Railway Lands West and Central Secondary Plans –Neglect or Refusal of request by the City of Toronto |
| Existing Land Use Designations: | Utility Corridors, Parks and Mixed-Use Areas on Map 18-Land Use Plan (Comment: The application proposes to amend the RWL Central and West Secondary Plans Land Use Maps not Map 18) |
| Proposed Land Use Designations: | Site Specific (To be determined) (Comments: The application proposes to change the land use designations in the RWL Central and West Secondary Plans to Mixed Use Areas and Open Space Areas) |
| Purpose: | To permit a large-scale mixed-use development with residential, office, retail, and open space uses over the railway corridor |
| Property Address/ Description: | Railway Lands Between Bathurst Street and Blue Jays Way |
| Municipality: | City of Toronto |
| Municipality File No.: | 17 164359 STE 20 OZ |
| LPAT Case No.: | PL180211 |
| LPAT File No.: | PL180211 |
| LPAT Case Name: | CRAFT Acquisitions Corporation v. Toronto (City) |

# Joint Document Book

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# TABLE OF CONTENTS


| VOLUME 1<br>LEGISLATION, POLICY DOCUMENTS, PLANS & BY-LAWS | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| | **LEGISLATION & RULES** | |
| 1. | *Planning Act* (1990) [Extracts] | 1 |
| 2. | *Local Planning Appeal Tribunal Act* (2017) | 17 |
| 3. | *LPAT Rules of Practice and Procedure* (February 25, 2020) | 29 |
| 4. | *Transport Canada Railway Safety Act* (1995) | 73 |
| | **PROVINCIAL POLICY DOCUMENTS** | |
| 5. | Provincial Policy Statement (2020) | 168 |
| 6. | Growth Plan for the Greater Golden Horseshoe (2019) | 225 |
| | **LOCAL POLICY DOCUMENTS & PLANS** | |
| 7. | City of Toronto Official Plan (2019 Office Consolidation) | 328 |
| 8. | City of Toronto Official Plan Amendment 406 (Downtown Secondary Plan)<br>A) Decision (June 5, 2019)<br>B) Official Plan Amendment 406 [with Minister modifications] | 502 |
| 9. | City of Toronto Official Plan Amendment 456 | 633 |
| 10. | Railway Lands West Secondary Plan | 671 |
| 11. | Railway Lands Central Secondary Plan | 698 |

| | | |
|---|---|---|
| 12. | King-Spadina Secondary Plan | 727 |
| 13. | Fort York Secondary Plan | 737 |
| 14. | Sustaining and Expanding the Urban Forest: Toronto Strategic Forest Management Plan [Adopted by City Council February 20, 2013] | 763 |
| 15. | Parks and Recreation Facilities Master Plan (2019-2038) [Adopted by City Council on November 9, 2017) | 846 |
| 16. | Downtown Parks and Public Realm Plan (2018) | 954 |
| 17. | Fort York Neighbourhood:<br>A) Public Realm Plan (2004)<br>B) Staff Report: Amendment to Fort York Neighbourhood Public Realm Plan adding Blocks 32 and 36 (February 28, 2008 [Adopted by City Council April 28/29, 2008]<br>C) Blocks 32 and 36 Public Realm Plan (2008) | 996 |
| **BY-LAWS** | | |
| 18. | Railway Lands West Zoning By-law 0805-1994 | 1090 |
| 19. | Railway Lands Central Zoning By-law 0806-1994 | 1245 |
| 20. | Railway Lands Block 32 and 36 By-law 1073-2006 | 1479 |
| 21. | Railway Lands West – Amendment By-law 1997-0614 | 1499 |

# VOLUME 2

# GUIDELINES & STANDARDS


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| | **GUIDELINES** | |
| 22. | Railway Lands West and Central Urban Design Guidelines | 1524 |
| 23. | Tall Building Design Guidelines (May 2013) | 1556 |
| 24. | Growing Up: Planning for Children in New Vertical Communities Urban Design Guidelines (2020) | 1647 |
| 25. | Pet Friendly Design Guidelines and Best Practices for New Multi-unit Buildings (December 2019) | 1704 |
| 26. | Urban Design Guidelines for Privately Owned Publicly Accessible Spaces<br>A) Draft Guidelines (June 2014)<br>B) Staff Report Re Protecting and Increasing Access to Privately Owned Publicly - Accessible Spaces (May 22, 2014)<br>C) Presentation on Protecting and Increasing Access to Privately Owned Publicly-Accessible Spaces (June 19, 2014)<br>D) Council Decision adopting Draft Guidelines (July 8, 2014) | 1784 |
| 27. | Guidelines for New Developments in Proximity to Railway Operations (2013) | 1924 |
| 28. | Metrolinx Adjacent Development Guidelines (2013) | 2039 |
| 29. | Metrolinx General Guidelines for Design of Railway Bridges and Structures (November 2018) | 2055 |
| 30. | Accessibility Design Guidelines (2020) | 2223 |

| | | |
|---|---|---|
| 31. | King-Spadina Secondary Plan Urban Design Guidelines (June 2004) | 2353 |
| 32. | RAC & FCM: Guidelines for New Development in Proximity to Railway Operations (May 2013) | 2361 |
| **STANDARDS** | | |
| 33. | Metrolinx Go Transit Standards Revision 01 (May 2018) | 2476 |
| 34. | CN Engineering Track Standards (January 2017) | 2922 |
| 35. | Transport Canada Standards Respecting Railway Clearances (May 1992) | 3091 |

# VOLUME 3

# STRATEGIES & STUDIES

# PART I


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 36. | City of Toronto Parkland Strategy (November 2019) | 3101 |
| 37. | Study of Parkland Dedication Policy Approaches and Acquisition Strategies (2017) | 3156 |
| 38. | Parks and Recreation Facilities Implementation Strategy [Adopted by City Council on October 29, 2019] | 3296 |
| 39. | Tree Canopy Study (2018) [Adopted by City Council January 29, 2020] | 3450 |
| 40. | TOcore Planning Toronto's Downtown: Phase I<br>A) Staff Report (October 23, 2015)<br>B) Council Decision (October 23, 2015) | 3721 |
| 41. | City of Toronto Land Use Study: Development in Proximity to Rail Corridors (March 2019) | 3778 |
| 42. | Lower Yonge Precinct:<br>A) Staff Report Re Transportation Master Plan (February 6, 2015)<br>B) Council Decision Re Transportation (March 31, 2015)<br>C) Final Staff Report (April 22, 2016)<br>D) Council Decision Re OPA (June 7, 2016)<br>E) Lower Precinct Plan (April 2016)<br>F) Request for Direction Staff Report (February 28, 2019)<br>G) Council Decision Re OPA (March 27, 2019) | 3871 |

# VOLUME 4

# STRATEGIES & STUDIES

# PART II


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 43. | East Bayfront Precinct:<br><br>A) Plan (November 2005)<br>B) Staff Report Re Plan and Class Environmental Assessment Master Plan (November 16, 2005)<br>C) Final Staff Report (September 27, 2006)<br>D) Central Waterfront Secondary Plan<br>E) By-law 1049-2006 (September 27, 2006) | 4187 |
| 44. | Golden Mile Secondary Plan:<br><br>A) Final Staff Report (June 25, 2020)<br>B) Supplementary Staff Report (September 29, 2020)<br>C) Council Decision (October 27, 2020)<br>D) Draft Official Plan Amendment 499 | 4438 |
| 45. | Bathurst Quay Neighbourhood Plan:<br><br>A) Final Staff Report (May 22, 2018)<br>B) Council Decision (June 26, 2018)<br>C) Official Plan Amendment 417 (By-law 781-2018) | 4610 |

| VOLUME 5 (ELECTRONIC ONLY*)<br>2017 APPLICATION MATERIAL | | |
|---|---|---|
| **TAB** | **DOCUMENT DESCRIPTION** | **PAGE** |
| 46. | Preapplication Checklist (January 20, 2017) | 4652 |
| **May 2017 Submission** | | |
| 47. | Cover Letter (May 23, 2017) | 4660 |
| 48. | Draft OPA (May 2017) | 4668 |
| 49. | Planning Rationale Report (May 23, 2017) | 4698 |
| 50. | Air Quality Assessment (May 5, 2017) | 4788 |
| 51. | Community Energy Strategy (May 5, 2017) | 4798 |
| 52. | Community Services & Energy Report (May 23, 2017) | 4826 |
| 53. | Environmental Noise Feasibility Study (May 5, 2017) | 4910 |
| 54. | Environmental Report (May 23, 2017) | 4989 |
| 55. | Functioning Servicing Report (May 31, 2017) | 5019 |
| 56. | Geotechnical Desk Study & Phase 1 ESA (May 15, 2017) | 5059 |
| 57. | Heritage Impact Assessment (May 8, 2017) | 5122 |
| 58. | Housing Issues Report (May 23, 2017) | 5187 |
| 59. | Life Safety & Fire Protection Concepts (May 5, 2017) | 5203 |
| 60. | Pedestrian Wind Study (May 5, 2017) | 5223 |
| 61. | Preliminary EMF Calculations (May 5, 2017) | 5267 |

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| | | |
|---|---|---|
| 62. | Preliminary Structural Design and Engineering Analysis of the Decking Structure (May 5, 2017) | 5284 |
| 63. | Public Engagement Plan (May 4, 2017) | 5294 |
| 64. | Toronto Green Standard Checklist (undated) | 5309 |
| 65. | Transportation Assessment Study (May 2017) | 5323 |
| 66. | Railway Vibration Study (May 5, 2017) | 5582 |
| 67. | Phase 1 Environmental Site Assessment/ Feasibility Assessment (January 2017) | 5639 |
| 68. | Topographical Survey (January 23, 2017) | 6289 |
| 69. | Boundary Plan of Survey (February 16, 2017) | 6290 |
| 70. | Stage 1 Archaeological Resource Assessment (February 28, 2017) | 6291 |
| 71. | Arborist Report (March 23, 2017) | 6330 |
| 72. | Architectural Drawings (March 31, 2017) | 6353 |
| 73. | Technical Rail and Decking Study (March 8, 2017) | 6375 |
| 74. | Landscape Plans (April 7, 2017) | 6399 |
| **August 2017 Submission** | | |
| 75. | Covering Letter (August 24, 2017) | 6402 |
| 76. | Community Energy Strategy (June 30, 2017) | 6404 |
| 77. | Preliminary Solar Reflection Analysis (June 29, 2017) | 6434 |
| 78. | Stormwater Management Report (August 17, 2017) | 6458 |

# VOLUME 6

# 2020 APPLICATION MATERIAL

**[Re: Witnesses being called in Chief]**


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 79. | Proposed Official Plan Amendment:<br>a) March 23, 2020<br>b) August 2, 2020 (Redlined)<br>c) August 2, 2020 (Clean) | 6484 |
| 80. | Planning Letter (May 31, 2020) | 6587 |
| 81. | Architectural Plans (May 29, 2020) | 6611 |
| 82. | Landscape Plans (May 29, 2020) | 6637 |
| 83. | Functional Servicing & Stormwater Management Report (May 29, 2020) | 6646 |
| 84. | Preliminary Structural Engineering Analysis and Design of Deck Towers (May 29, 2020) | 6792 |
| 85. | Technical Rail and Decking Study (May 29, 2020) | 6856 |
| 86. | Transportation Assessment Update (May 31, 2020) | 6911 |
| 87. | TTR/ CN Letter (January 15, 2018) | 7300 |

# VOLUME 7 (ELECTRONIC ONLY*)

## 2020 APPLICATION MATERIAL

**[Re: Witnesses not being called in Chief]**


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 88. | Above Deck Fire and Life Safety Report (May 29, 2020) | 7302 |
| 89. | Air Quality Report (May 29, 2020) | 7342 |
| 90. | Arborist Report (May 28, 2020) | 7370 |
| 91. | Arborist Tree Prevention Plans (May 28, 2020) | 7394 |
| 92. | Archeological Reliance Letter (May 11, 2020) | 7400 |
| 93. | Below Deck Fire and Life Safety Code Report (May 29, 2020) | 7402 |
| 94. | Below Deck Tunnel Ventilation System, Electrical & Fire Protection Concept Report (May 29, 2020) | 7502 |
| 95. | Community Energy Strategy (May 22, 2020) | 7558 |
| 96. | Community Services & Facilities Report (May 2020) | 7587 |
| 97. | EMF Calculations (May 28, 2020) | 7597 |
| 98. | Geotechnical Desk Study (May 27, 2020) | 7610 |
| 99. | Heritage Impact Assessment (May 29, 2020) | 7613 |
| 100. | Housing Issues Report (May 2020) | 7686 |
| 101. | Environmental Noise Feasibility Study (May 28, 2020) | 7696 |
| 102. | Pedestrian Level Wind and Snow Drift Study (May 29, 2020) | 7773 |
| 103. | Solar Glare Study (May 31, 2020) | 7845 |
| 104. | Toronto Green Standards Checklist (Undated) | 7866 |


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| | | |
|---|---|---|
| 105. | Railway Vibration Feasibility Study (May 28, 2020) | 7877 |

## VOLUME 8

## STAFF REPORTS, CITY & AGENCY COMMENTS


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 106. | Toronto District School Board Comments (July 14, 2017) | 7913 |
| 107. | TELUS Comments (July 21, 2017) | 7915 |
| 108. | Toronto Transit Commission Comments (August 17, 2017) | 7916 |
| 109. | Enbridge (June 1, 2017 and September 11, 2017) | 7918 |
| 110. | Notice of Community Consultation Meeting (September 12, 2017) | 7920 |
| 111. | Environment & Energy Division (June 9, 2017 and September 19, 2017) | 7921 |
| 112. | Rogers (June 13, 2017 and September 18, 2017) | 7924 |
| 113. | Development Engineering Comments (July 18, 2017) | 7927 |
| 114. | Parks, Forestry and Recreation (July 19, 2017 and October 12, 2017) | 7933 |
| 115. | Joe Cressy Tweet (August 14, 2017) | 7944 |
| 116. | Joe Cressy Meeting Announcement (September 5, 2017) | 7946 |
| 117. | Toronto Hydro (September 13, 2017) | 7947 |
| 118. | Metrolinx Comments (October 3, 2017) | 7957 |
| 119. | Canadian Transportation Agency (October 6, 2017) | 7975 |
| 120. | Tree Protection & Plan Review (October 17, 2017) | 7976 |
| 121. | Waterfront Toronto Comments (October 18, 2017) | 7978 |
| 122. | Ministry of Municipal Affairs and Housing (November 17, 2017) | 7979 |
| 123. | Development Engineering Comments (November 23, 2017) | 7982 |

| | | |
|---|---|---|
| 124. | Toronto Public Health/ Environment and Energy Division (November 27, 2017) | 7996 |
| 125. | City Planning Comments (December 20, 2017) | 7997 |
| 126. | City of Toronto Staff Refusal Report (December 20, 2017) | 8003 |
| 127. | NAV Canada Comments (February 8, 2018) | 8105 |
| 128. | Children's Services Comments (undated) | 8106 |

# VOLUME 9

# RAIL DECK PARK OPA 395


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 129. | OPA 395 | 8110 |
| 130. | LPAT Decision approving OPA 395 (July 11, 2019) | 8142 |
| 131. | LPAT Hearing Transcript (May 27, 2019) | 8198 |
| 132. | CRAFT oral submissions to LPAT (May 27, 2019) | 8366 |
| 133. | City oral submissions to LPAT (May 27, 2019) | 8391 |
| 134. | CRAFT Case Synopsis [without case law] (July 12, 2018) | 8407 |
| 135. | CN/TTR Case Synopsis [without case law] (July 12, 2018) | 8445 |
| 136. | City Case Synopsis [without case law] (August 1, 2018) | 8467 |
| 137. | Extracts from CRAFT & CN Joint Appeal Record (July 12, 2018) | 8500 |
| 138. | Extracts from City Appeal Record (August 1, 2018) | 8554 |
| 139. | City Staff Reports, Publications & Presentations:<br>a) Backgrounder Rail Deck Park (August 3, 2016)<br>b) Backgrounder #2 Rail Deck Park (September 15, 2016)<br>c) City Staff Report Re: Work Plan (September 15, 2016)<br>d) City Staff Report to Executive Committee (September 22, 2016)<br>e) Preliminary City Staff Report (June 1, 2017)<br>f) Final City Staff Report (October 30, 2017)<br>g) City Staff Report Re: Results of Feasibility Analysis (November 20, 2017)<br>h) Rail Deck Park – Technical Briefing (November 21, 2017) | 8559 |
| 140. | Consulting Reports:<br>A) Urban Strategies Consulting Report [with Appendices] (October 2017) | 8827 |

| | | |
|---|---|---|
| | B) Urban Strategies Executive Summary (October 2017)<br>C) Build Toronto, WSP and McMillan Rail Deck Park Engineering & Costing Study (November 24, 2017) | |
| 141. | City Council Decisions & Notices of Adoption:<br><br>a) City Council Decision Re: Rail Deck Park Work Plan (October 5, 2016)<br>b) Toronto and East York Community Council Decision Re: Rail Corridor Preliminary Report (June 13, 2017)<br>c) Toronto and East York Community Council Decision Re: Rail Deck Park Final Report (November 14, 2017)<br>d) Executive Committee Decision Re: Rail Deck Park Feasibility Analysis and Next Steps (November 28, 2017)<br>e) City Council Decision Re: Rail Deck Park Feasibility Analysis & Next Steps (December 5, 2017)<br>f) City Council Decision Amending the Official Plan through OPA 395 (December 5, 2017)<br>g) Notice of Adoption of OPA 395 (February 15, 2018) | 9159 |
| 142. | Correspondence Re Leave to Appeal<br><br>A) Ira Kagan Letter (December 24, 2019)<br>B) Brendan O'Callaghan Letter (January 17, 2020) | 9187 |

# VOLUME 10

# OTHER DEVELOPMENTS

# PART I


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 143. | 440 Front Street West (The Well):<br><br>A) Staff Report Re OPA (May 28, 2015)<br>B) Staff Report Re ZBLA (November 4, 2016)<br>C) Official Plan Amendment (adopted July 7, 2015)<br>D) Zoning By-Law Amendment (By-law 124-2017)<br>E) Zoning By-Law Amendment (By-law 125-2017)<br>F) Shadow Studies (October 10, 2017)<br>G) Transportation Report (April 16, 2014)<br>H) Transportation Report (December 2016) | 9191 |
| 144. | 400 Front Street West:<br><br>A) Transportation Impact Study (March 23, 2014)<br>B) Staff Refusal Report (April 11, 2017)<br>C) Updated Transportation Impact Study (March 19, 2018)<br>D) Shadow Studies (May 10, 2018)<br>E) LPAT Decision (October 3, 2019)<br>F) Zoning By-law Amendment (version presented to LPAT – not yet Final) | 9910 |
| 145. | 315 and 325 Front Street West:<br><br>A) Staff Report for Action (October 22, 2019)<br>B) Planning Rationale & Urban Design Analysis (August 7, 2019) | 10,507 |
| 146. | 49 Spadina Avenue: LPAT Decision (October 3, 2019) | 10,710 |

# VOLUME 11

# OTHER DEVELOPMENTS

# PART II


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 147. | 45 and 141 Bay Street:<br>A) Urban Design Analysis and Planning Rationale [Phase I] (September 16, 2014)<br>B) Urban Design Analysis and Planning Rationale [Phase II](August 10, 2015)<br>C) Preliminary Staff Report (October 22, 2015)<br>D) Final Staff Report (October 7, 2016)<br>E) Rendering of Project [extract from Urban Land] (Spring 2020)<br>F) Transportation Memo (May 12, 2016 | 10,723 |
| 148. | 495-517 Wellington Street West and 510-532 Front Street West:<br>A) Final Staff Report (June 14, 2018)<br>B) Zoning By-law Amendment (592-2019)<br>C) Zoning By-law Amendment (593-2019) | 11,226 |
| 149. | 500 Lake Shore Boulevard Traffic Review (April 27, 2015) | 11,296 |
| 150. | 2161 Lakeshore Boulevard West Traffic Impact Study (August 2014) | 11,368 |
| 151. | Railway Lands West:<br>A) Traffic Impact Study (November 2005)<br>B) Response to Comments (June 22, 2006) | 11,803 |
| 152. | 1245 Dupont Street et al. (Galleria Mall)<br>A) Final Staff Report (May 18, 2018)<br>B) Council Decision (June 26, 2018) | 12,061 |

| | | |
|---|---|---|
| | C) Official Plan Amendment 415 (1164-2019)<br>D) Zoning By-law Amendment 1165-2019 | |
| 153. | 571-597 Bloor Street West et al. (Honest Ed's/ Mirvish Village):<br><br>A) Final Staff Report (March 17, 2017)<br>B) Supplementary Staff Report (April 3, 2017)<br>C) Council Decision (April 26, 2017)<br>D) Official Plan Amendment 378 (1104-2017)<br>E) Zoning By-law Amendment 1105-2015<br>F) Zoning By-law Amendment 1270-2017 | 12,201 |
| 154. | 844 Don Mills Road et al. (Celestica)<br><br>A) Request for Direction Staff Report (May 29, 2018)<br>B) Council Decision (June 26, 2018)<br>C) Official Plan Amendment 434 (1213-2019)<br>D) Zoning By-law Amendment 1214-2019 | 12,367 |
| 155. | 1141 Bloor Street West et al. (Bloor/Dufferin)<br><br>A) Request for Direction Staff Report (November 25, 2019)<br>B) Council Decision (December 17, 2019)<br>C) Official Plan Amendment 489 (123-2020) | 12,661 |
| 156. | 315-325 Front Street West & Rail Corridor between Blue Jays Way and Rod Robbie Bridge (Union Park) Preliminary Staff Report (October 22, 2019) | 12,748 |
| 157. | 23 Spadina Avenue Zoning By-law 319-2020 | 12,768 |

# VOLUME 12

# LPAT MATERIALS


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 158. | LPAT Decisions:<br><br>A) First Case Management Conference (June 4, 2019)<br>B) Second Case Management Conference (September 6, 2019)<br>C) Third Case Management Conference & Severance Appeal (October 16, 2020) [Corrected October 23, 2020]<br>D) Fourth Case Management Conference [with Issued Procedural Order] (October 27, 2020) | 12,788 |
| 159. | Issues List:<br><br>A) Original (April 2019 – August 2020)<br>B) City Revised (August 17, 2020)<br>C) Analysis Chart prepared for Adjournment Motion | 12,816 |

# VOLUME 13

# TRANSPORTATION REPORTS, PLANS & GUIDELINES


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 160. | Ministry of Transportation Transit Supportive Guidelines (2012) | 12,875 |
| 161. | Staff Report Re Future of King Street: Results of the Transit Pilot (April 2, 2019) | 13,093 |
| 162. | Staff Report #1 Re TransformTO Climate Action for a Healthy, Equitable and Prosperous Toronto (November 2, 2016) | 13,126 |
| 163. | Staff Report #2 TransformTO Climate Action for a Healthy, Equitable and Prosperous Toronto (April 20, 2017) | 13,146 |
| 164. | TransformTO Climate Action for a Healthy, Equitable and Prosperous Toronto (Implementation Update 2017 and 2018) | 13,183 |
| 165. | Staff Report Re Vision Zero 2.0 Road Safety Plan Update (June 13, 2019) | 13,267 |
| 166. | Vision Zero Toronto's Road Safety Plan (2017-2021) | 13,319 |
| 167. | Waterfront Transit "Reset" Phase 2 Study Public Information & Consultation Meetings (September 18 & 26, 2017) | 13,381 |
| 168. | Staff Report Re Waterfront Transit Network Plan (January 10, 2018) | 13,439 |
| 169. | Staff Report Re Cycling Network Plan Update (June 13, 2019) | 13,467 |
| 170. | TOCore Proposals Report (November 2016) | 13,499 |
| 171. | Toronto Ten Year Cycling Network Implementation Plan Final Report (April 17, 2017) | 13,665 |
| 172. | Metrolinx: Mobility Hub Guidelines for the Greater Toronto and Hamilton Area (February 18, 2011) | 13,693 |
| 173. | Metrolinx: The Big Move, Transforming Transportation in the Greater Toronto and Hamilton Area (November 2008) | 13,856 |

| | | |
|---|---|---|
| 174. | Metrolinx Volume 2 – Spadina-Front GO Station Design and Technical Studies, Appendix I [Transportation Brief] (November August 2018) | 13,969 |
| 175. | Parking Standards Review: Examination of Potential Options and Impacts of Car Share Programs on Parking Standards (March 2009) | 14,035 |
| 176. | Metrolinx and Infrastructure Ontario: Ontario Line Initial Business Case (July 2019) | 14,082 |
| 177. | Waterfront Transit Reset Phase I: Network Vision (October 2016) | 14,167 |
| 178. | Union Station – Queens Quay Transit Link Study Final Report (April 2019) | 14,452 |
| 179. | Staff Report Re Pedestrian Safety Review (October 13, 2015) | 14,492 |
| 180. | City of Toronto Guidelines for the Preparation of Transportation Impact Studies (2013) | 14,498 |
| 181. | City of Toronto Guidelines for using SYNCHRO 9 (March 18, 2016) | 14,527 |

# VOLUME 14

# SERVICING MANUALS, STANDARDS, PLANS, & GUIDELINES

# PART I


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 182. | Ontario Ministry of Environment Stormwater Management Planning and Design Manual (March 2003) | 14,606 |
| 183. | Toronto Waterfront Sanitary Servicing Master Plan (January 2018) | 14,981 |
| 184. | City of Toronto Wet Weather Flow Management Guidelines (November 2006) | 15,560 |
| 185. | City of Toronto Design Criteria for Sewers and Watermains 2nd Revision (June 2019) | 15,677 |
| 186. | Ministry of Environment Design Guidelines for Sewage Works (2008) | 15,880 |

# VOLUME 15

# SERVICING MANUALS, STANDARDS, PLANS, & GUIDELINES

# PART II


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 187. | New Jersey Storm Water Best Management Practices Manual (April 2004) | 16,356 |
| 188. | Ministry of Natural Resources Technical Guide Re River and Streams Systems: Flooding Hazard Limits (2002) | 16,789 |
| 189. | Ministry of Transportation Road and Bridge Deck Drainage Systems (November 1982) | 16,907 |
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| 191. | Credit Valley Conservation Authority & Toronto Town Conservation Authority Low Impact Development Stormwater Management Manual (2008) | 17,352 |
| 192. | Greater Golden Horseshoe Area Conservation Authorities Erosion and Sedimentation Control Guidelines for Urban Construction (December 2006) | 17,652 |
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| 195. | Toronto Municipal Code Chapter 681, Sewers | 17,962 |
| 196. | F-5-5 Determination of Treatment Requirements for Municipal & Private Revision (June 2019) | 18,020 |

# VOLUME 16

# MISCELLANEOUS


| TAB | DOCUMENT DESCRIPTION | PAGE |
|---|---|---|
| 197. | ULI Urban Open Space Awards Finalist: Salesforce Park, San Francisco, California (August 17, 2020) | 18,028 |
| 198. | City of Toronto Retail Design Manual (December 2019) | 18,033 |
| 199. | City of Toronto Development Guide Terms of Reference: Pedestrian Level Wind Study | 18,089 |
| 200. | Toronto Green Standard Version 3 (2018) | 18,093 |
| 201. | CPTED, Toronto Police Brochure | 18,100 |
| | **HERITAGE DOCUMENTS** | |
| 202. | Victoria Square Historical Listing | 18,102 |
| 203. | King-Spadina Heritage Conservation District Plan (June 2017) | 18,104 |
| 204. | Union Station Heritage Conservation District Plan (2006) | 18,291 |
| 205. | Waterfront Culture and Heritage:<br>A) Plan (2001) [Adopted by City Council December 4-6, 2001)<br>B) Staff Report (September 28, 2001) [Adopted by City Council December 4-6, 2001) | 18,365 |
| 206. | Draper Street Heritage Conservation District:<br>A) Study (1998)<br>B) Designation By-law 26-1999 [Adopted by City Council February 4, 1999] | 18,440 |
| 207. | Fort York Heritage Conservation District:<br>A) Fort York Heritage Conservation District Study (1984)<br>B) HCD By-law 420-85<br>C) Expansion By-law 541-2004 | 18,506 |

| | | |
|---|---|---|
| | D) Fort York Commemorative Integrity Statement (March 2004) | |
| 208. | 25 Clarence Square:<br><br>A) Designation By-law 713-2017<br>B) Statement of Significance | 18,570 |
| 209. | 5 Eireann Quay – Canada Malting Complex Designation By-law 32-2011 | 18,579 |
| 210. | 495-517 Wellington Street West Designation<br><br>A) By-law 758-1979 [Passed by City Council September 17, 1979]<br>B) Amendment to By-law 758-1979: By-law 14-2019 [Adopted by City Council July 23-30, 2018] | 18,584 |

# ADDENDUM D

## EXHIBIT LIST [PL180211]

| No. | | Description | | Filed By | | Date |
|---|---|---|---|---|---|---|
| | | **FOR THE HEARING COMMENCING (November 2, 2020)** | | | | |
| | | | | | | |
| **1.** | | Joint Document Book<br><br>a) Volume 1- Legislation, Policy Documents, Plans & By-Laws<br>b) Volume 2- Guidelines & Standards<br>c) Volume 3- Strategies & Studies (Part I)<br>d) Volume 4- Strategies & Studies (Part II)<br>e) Volume 5- 2017 Application Material- **Not printed**<br>f) Volume 6- 2020 Application Material (For witnesses being called in chief)<br>g) Volume 7- 2020 Application Material (For witnesses not being called in chief)- **Not Printed**<br>h) Volume 8- Staff Reports, City & Agent Comments<br>i) Volume 9- Rail Deck Park OPA 395<br>j) Volume 10- Other Developments (Part I)<br>k) Volume 11- Other Developments (Part II)<br>l) Volume 12- LPAT Materials<br>m) Volume 13- Transportation Reports, Plans & Guidelines<br>n) Volume 14- Servicing Manuals, Standards, Plans, & Guidelines (Part I)<br>o) Volume 15- Servicing Manuals, Standards, Plans, & Guidelines (Part II) | | CRAFT & CITY | | Nov. 2 2020 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | p) Volume 16- Miscellaneous | | | | |
| **2.** | | Compendium of CRAFT/ P.I.T.S Witness and Reply Witness Statements | | CRAFT | | Nov. 2 2020 |
| **3.** | | CRAFT Visual Evidence | | CRAFT | | Nov. 2 2020 |
| **4.** | | CRAFT Scale Model | | CRAFT | | Nov. 2 2020 |
| **5.** | | City Visual Evidence | | CITY | | Nov. 2 2020 |
| **6.** | | Compendium of City Witness and Reply Witness Statements | | CITY | | Nov. 2 2020 |
| **7.** | | Sweeney VE (November 9 2020) Shadow Study Angle Comparison | | CRAFT | | Nov. 9 2020 |
| **8.** | | Transportation Diagrams (Fig 2-15; 5-6; 7-8) | | CRAFT | | Nov. 13 2020 |
| **9.** | | OPA with Modifications | | CRAFT | | Nov. 24 2020 |
| **10.** | | Craft Submissions on Motion Re: City's Evidence | | CRAFT | | Jan. 19 2021 |
| **11.** | | City Submissions on Motion Re: City's Evidence | | CITY | | Jan. 19 2021 |
| **12.** | | John Gladki CV | | CITY | | Jan. 25 2021 |
| **13.** | | Map 18 to City's OP | | CITY | | Jan. 25 2021 |
| **14.** | | By-law 189-2005, Regent Park OPA | | CITY | | Jan. 25, 2021 |
| **15.** | | Gladki chart of updated population and employment forecasts for the three Railway Plans Secondary Plans. | | CITY | | Jan. 26, 2021 |
| **16.** | | Toronto Municipal Code<br>**Password for Bake #2**: **P2Up1T$A** | | CRAFT | | Jan. 27, 2021 |
| **17.** | | Toronto By-Law #1985-0612 (Railway Lands)<br>**Password for Bake #3: w*pLS&E1** | | CRAFT | | Jan. 27, 2021 |

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|---|---|---|---|---|---|---|
| **18.** | | Email from McAlpine to Bake et all Friday July 28 2017<br>**Password for Bake #4: H2=lsa#7** | | CRAFT | | Jan. 27, 2021 |
| **19.** | | Various images of City's Rail Deck Park<br>**Password for Bake #5: +-sPuVu5** | | CRAFT | | Jan. 27, 2021 |
| **20.** | | Toronto Star Article RE: Elevated Parks (July 7, 2019)<br>**Password for Bake #6: ??hLz93R** | | CRAFT | | Jan. 27, 2021 |
| **21.** | | Toronto OPA 476 (Don Mills and Sheppard)<br>**Password for Bake #0: Huy??xTG** | | CRAFT | | Jan. 27, 2021 |
| **22.** | | Andrea Bake comment (June 23, 2020) on May 2020 CRAFT OPA | | CRAFT | | Jan. 28, 2021 |
| **23.** | | McMillan response to Safdie contention regarding lowering of the decking structure by 1m | | CITY | | Jan. 29 2021 |
| **24.** | | Mende Transportation Impact Study (June 4, 2020)<br>**Password for Mende #1: B?rL+RE5** | | CRAFT | | Feb. 1 2021 |
| **25.** | | Toronto Star article (October 4, 2007) Quoting John Mende<br>**Password for Mende #2: KVe67!k4** | | CRAFT | | Feb. 1 2021 |
| **26.** | | "The car is no longer king!" prepared by John Mende 2008<br>**Password for Mende #3: YnVT??89** | | CRAFT | | Feb. 1 2021 |
| **27.** | | Transportation Impact Study (7887 Weston Road, Vaughan) Prepared by John Mende (December 2019)<br>**Password for Mende #4: +nA42Bb+** | | CRAFT | | Feb. 2 2021 |
| **28.** | | Curriculum Vitae Of David Leinster | | CITY | | Feb. 2 2021 |

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|---|---|---|---|---|---|---|
| **29.** | | Planning Partnership Website<br>**Password for Leinster #1**: **pHecr-z1** | | CRAFT | | Feb. 5 2021 |
| **30.** | | Oxford Open Space Zoning- By Law<br>**Password for Leinster #2: @egoM79+** | | CRAFT | | Feb. 5, 2021 |
| **31.** | | The Guardian Article "Horror on the Hudson" (April 9 2019)<br>**Password for Bagley and Bogdanowicz 2: 8?tBs!6F** | | CRAFT | | Feb. 5, 2021 |
| **32.** | | Images of Mouth of the Creek Park<br>**Password for Bagley and Bogdanowicz 7: +?tBe675** | | CRAFT | | Feb. 8, 2021 |
| **33.** | | Images of 81 Bay St. Sky Park<br>**Password for Bagley and Bogdanowicz 8: JiX4?s79** | | CRAFT | | Feb. 8, 2021 |
| **34.** | | (a) City's Witness List served August 4th 2020<br>(b) City's Witness List served August 10th 2020 | | CRAFT | | Feb. 8, 2021 |
| **35.** | | Devine Park Letter to LPAT Parties July 23rd 2020 | | CRAFT | | Feb. 8, 2021 |
| **36.** | | Photo of Canada Malting Plant<br>**Password for Bagley and Bogdanowicz 9: H@n7F?4f** | | CRAFT | | Feb. 8, 2021 |
| **37.** | | Curriculum Vitae Of David Moyle | | CRAFT | | Feb. 9, 2021 |
| **38.** | | Water Service Schematic for Park Amenities (January 2020)<br>**Password for Moyle #4: 7@MoFV?4** | | CRAFT | | Feb. 9, 2021 |
| **39.** | | Oden Detech Email Exchange with David Moyle (September 16, 2020)<br>**Password for Moyle #8: ?K59GetV** | | CRAFT | | Feb. 9, 2021 |

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|---|---|---|---|---|---|---|
| **40.** | | Globe and Mail Article "New Toronto Blue Jays Stadium likely to win political support, create more public space" (November 27, 2020)<br>**Password for Moyle #2: CeUn55@B** | | CRAFT | | Feb. 9, 2021 |
| **41.** | | Email exchange between John Krpan and David Moyle (November 2020)<br>**Password for Moyle #3: 8Ft2?6JG** | | CRAFT | | Feb. 9, 2021 |
| **42.** | | Toronto Waterfront Sanitary Servicing Master Plan 2017 Update Report<br>**Password for Moyle #1: M8?3g6eT** | | CRAFT | | Feb. 9, 2021 |
| **43.** | | Email from Heather Oliver cc'd to Susan McAlpine and Lynda MacDonald (August 4th 2017)<br>**Password for McAlpine and MacDonald #3: PIb6l-$C** | | CRAFT | | Feb. 11, 2021 |
| **44.** | | Email from Heather Oliver to Susan McAlpine and Lynda MacDonald (September 11, 2017)<br>**Password McAlpine and MacDonald #4: qup3ab+B** | | CRAFT | | Feb. 11, 2021 |
| **45.** | | Email from Heather Oliver cc'd to Susan McAlpine (July 28, 2017)<br>**Password McAlpine and MacDonald #6: S4u$opHL** | | CRAFT | | Feb. 11, 2021 |

SUBMITTED BY John Steil RPP, FCIP




SOURCE: *iStock*

# When Planning, Politics, Public Interest and Ethics Collide

The Government of Saskatchewan removed the Reeve of the Rural Municipality (RM) of Sherwood . The Reeve's conduct in advancing a development from which he might receive millions of dollars was found to be highly unethical, did not withstand public scrutiny, and violated the public trust. While it takes place in the RM—a rural community of less than 1,000 residents surrounding the City of Regina—it has a multi-disciplinary cast including planners from every province west of Quebec. The case involves the collision of planning, politics, public interest and ethics (or the lack thereof).

## The Proposal and Council's Consideration

Wascana Village, a 736-acre urban development (of which a majority was owned by the Reeve or his relatives) was proposed despite objections from the City of Regina and other stakeholders. An Ontario developer had a purchase agreement, conditional upon favourable rezoning.

The Inquiry Report (Barclay 2014) commented on the proposal's unanimous approval with:

> *The RM had never in its history considered a proposal for a high density residential development of this magnitude but, in a matter of hours, without any study or professional reports from their staff, they were behind the proposal…the elapsed time between the motion being tabled and then voted on was roughly one minute.*

The province rejected the concept plan because it was deficient in many ways—no confirmed water source or sewage treatment, environmental impacts such as burrowing owl nesting, etc.

## The Inspection and Inquiry

Pursuant to *The Municipalities Act*, in June 2014, the Minister of Government Relations appointed Judge Barclay to conduct an "inspection," covering what led to Council's approval and the appropriateness of actions of any employee, agent of the municipality, or member of Council relating to Wascana Village. Judge Barclay discovered the Reeve, while having made a declaration

of pecuniary interest, had inappropriate involvement. Subsequently, the Minister escalated the matter to a broader "inquiry."

Hearings included 14 witnesses over 18 days with 377 exhibits. Witnesses included the Province's Executive Director of Community Planning (who was examined and cross-examined over four days), former and current RM CAOs, Reeve and members of Council, RM staff, and the developer, with the findings published by the Government of Saskatchewan in the "Final Report of the Inspection and Inquiry into the R.M. of Sherwood No. 159" (Barclay 2014).

## Conflict of Interest

The Judge quotes relevant jurisprudence: an oft-quoted moral principle that *no man can serve two masters*. The report discusses the nuances of pecuniary interest, extent of influence, official oath, disclosure, code of ethics, and intricacies of common law relative to legislated requirements. Mascarin (2015) notes common law obligations are far broader and much less permissive than provincial statutes.

The Inquiry found the Reeve owned a significant part of the proposed development land, was to be compensated on profits from the overall development, was going to be paid more per acre than other owners, and would accrue benefits to other land owned by the Reeve.

While the Judge noted the Reeve had declared a pecuniary interest to Council and recused himself from voting on Council decisions, good conscience required something more. There was evidence the Reeve may have had other inappropriate involvement—"I am left to wonder what part the Reeve played with other Councillors during this period of time" (Barclay 2014).

Potential conflicts of interest often arise in planning. The planner's role is as an independent advisor to client, employers, or tribunals. Planners must avoid conflicts of interest that make their judgment appear unreliable when it is this reliability that is specifically needed. Therefore, improper behaviour is a threat to the good that the profession seeks to achieve and to the profession's reputation.

## The Public Interest

The RM, in the Judge's words, "… has never taken the basic step of determining whether the proposed development will ultimately be economically beneficially to the citizens of the RM" (Barclay 2014). Council failed to "recognize that Community Planning and the Ministry had an obligation to protect the public by ensuring all proper conditions were met before approval was given."

The Judge reported Council's decision to submit what was conceded as a clearly deficient plan demonstrated a failure to consider the public interest. Further, "Council's assimilation with the developer's intention to make the matter political was a luxury not afforded to the RM by virtue of its wider mandate. Unlike the developer, the Council owes a duty to keep the best interest of the RM in mind" (Barclay 2014).

## Relationship with Planners

First, it's clear Council viewed the process as political and didn't seek guidance from staff planners or consultants. The Judge reported "certain allegations by former employees of poor treatment that they received while in the employ of the RM which related in one way or another to Wascana Village"—concluding there was demanding work, was understaffing, but positions on Wascana Village were a contributing factor. The former CAO's states:

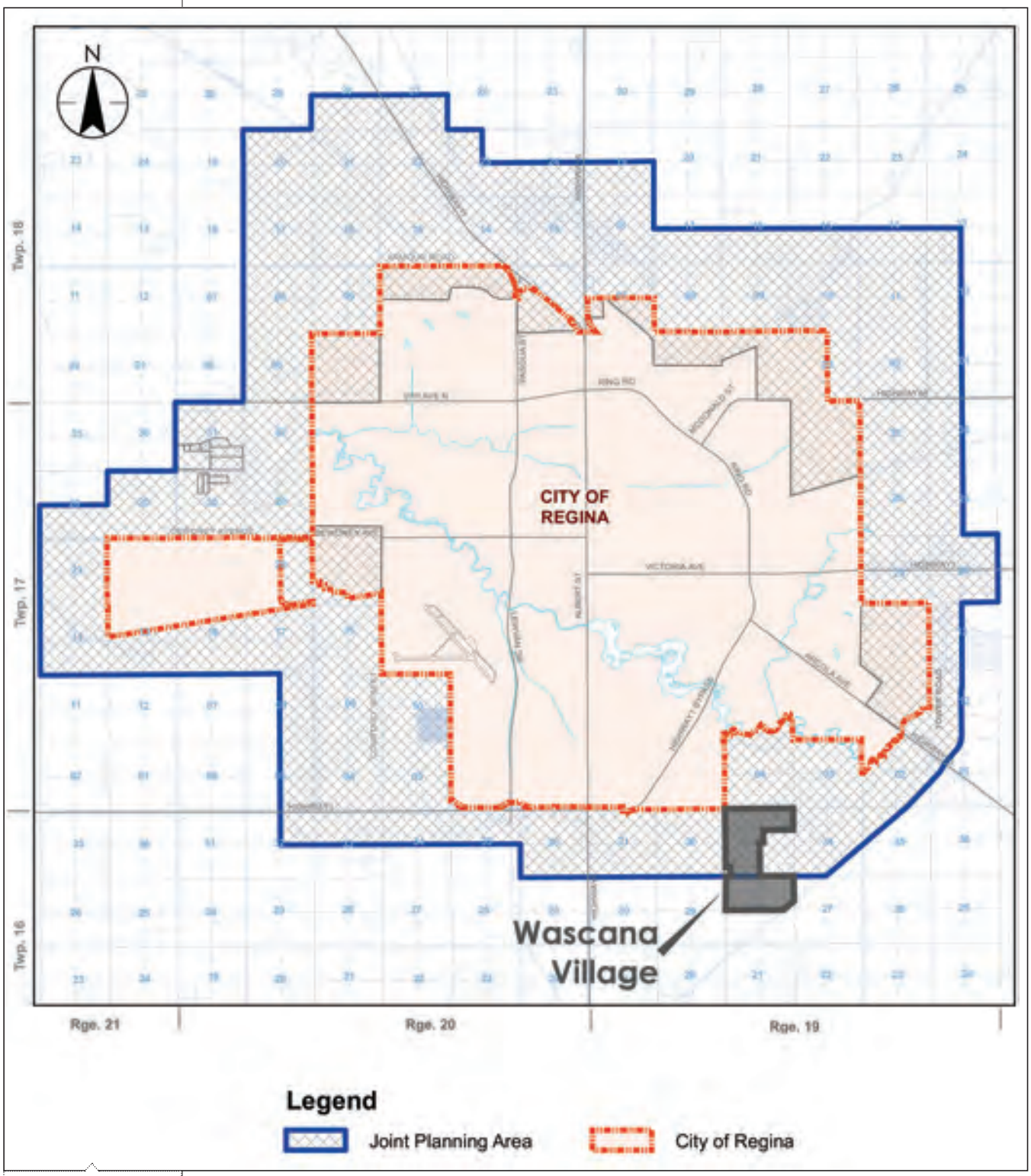
> *When told that staff may write a report that recommends not approving the Concept Plan Bylaw but that it would be Council's decision to make a political decision and go against the recommendations and accept the Concept Plan, the Reeve completely lost it. I was told that all reports from staff are to be positive and are to recommend approving the concept plan* (Barclay 2014).

There are precedents in some provinces that conflict of interest is not only defined by statute, but also broader common law provisions apply. The Reeve's lawyer provided an opinion:

> *The result is that you ought not to vote or otherwise participate as a member of Council in discussing your lands* nor direct planners *or other administrative personnel in relation to your lands* [Emphasis added](Barclay 2014).

As the CAO stated, "I constantly had direction from him to facilitate the rezoning, so, you know, find him water, find him sewer, talk about access from highways, that kind of direction" (Barclay 2014). The Judge stated that the Reeve's "conduct in this respect was inappropriate and took advantage of the trust reposed in him by the RM staff" (Barclay 2014). The CAO testified that the Reeve gave her instruction to destroy documents, including emails, which made reference to his involvement. Minutes were amended to remove the Reeve from the list of attendees—"… a decision to alter minutes was a deceptive act and is consistent with Ms. Kunz's assertion that Reeve Eberle wanted no documented record of his involvement in Wascana Village" (Barclay 2014).

 continued from page 11




Map showing the City of Regina and surrounding lands including the location of the proposed Wascana Village

SOURCE: *Stantec, 2015*

Second, the Judge found that the Councillors "… wrongly chose to personify and target their frustration …" (Barclay 2014) on the provincial planner providing oversight. The Judge characterized their position of one to "demonize" the provincial planner, whom he described as protecting the public interest.

## Outcomes

The Reeve was removed from office. The Province adopted new legislation to tighten conflict of interest regulations. Analysis determined continuing deficiencies in the concept plan. The developer didn't pursue a revised concept plan, so the Province's conditional approval lapsed. The RM has a new draft official community plan that includes a collaborative planning area with the City and new development is to be evaluated based on a life-cycle assessment and cost benefit analysis.

## Lessons for Planners

First, planners must always be cognizant of their obligation to be independent professionals providing objective comprehensive analysis.

Second, be aware of issues arising from conflicts of interest–regardless of where they arise.

Third, planners are often confronted with situations where they are pulled in several directions, but there is a requirement to protect the public interest even in the face of broader administrative or political pressure. This occurs more than planners are generally comfortable acknowledging. In this case, the administrators and planners were under significant pressure from political masters.

I'm a Case Officer for PIBC's Professional Practice Review Committee. I've been asked to advise planners instructed by planning directors, CAOs, or politicians to "change their reports" from what their professional opinion directs them. Of course, every situation is unique, but my advice has centered on considering alternatives.

One option is to do as directed–clearly in conflict with the notion of professionalism and potentially challengeable as misconduct. There are gray areas but, as Karen Smith (2012) writes, "It is not enough to just close your eyes and say 'my employer told me to do it.' One's obligation to the public and the profession supersedes." Another choice is to resign–a tough choice. I'm aware of another situation where the planner wrote the report as directed, but refused to sign it–other administrators did.

*There is a requirement to protect the public interest even in the face of broader administrative or political pressure.*

Planners under unreasonable pressure to author professional recommendations should be supported when confronted with this challenge. In a discussion of the "my boss told me to do it" scenario, the American Institute of Certified Planners (2012) states that "'Following orders" is not an acceptable rationalization if the orders violate the Code of Professional Ethics. When one feels orders are at difference with the standards of our Code, the first step is to advise the supervisor of the conflict and discuss the consequences of such an action. In a non-threatening manner, discuss alternatives and resources available at APA/AICP, with both the supervisor and other professionals."

Support can come from a knowledgeable peer or leader in the profession. Or, I suggest contacting a Fellow. The College of Fellows have a network that 'has seen it all.' Advice can be about 'navigating the system' or, in extreme cases, the College of Fellows could take a public stance in defence of planners threatened with intimidation. Since the profession puts the burden on the individual planner to protect the profession, the profession should, likewise, protect the planner. I'd like to see a structure support to planners that are confronting the "my boss told me to do it" scenario. ■

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About the Author

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# Professional ethics, lobbying and post-employment conduct

Bill Buholzer and John Steil



**In light of the BC government's announced plans to restrict lobbying by ex-MLAs and very senior staff for a period after they leave office, some west coast Fellows have recently been musing about the parts of the PIBC Code of Ethics that potentially touch on post-employment conduct.** For example, the Code says that a planner will not "engage in dishonourable or questionable conduct that may cast doubt on their professional competence or integrity or that may reflect adversely on the integrity of the profession." BC's government seems to think, probably quite rightly, that members of the public take a dim view of ex-MLAs lobbying their former colleagues in government on behalf of private clients, at least immediately after their term of office ends. It seem wrong that they should be able to profit from information they obtained and contacts they made while in public service; they were fully remunerated for their work while in office. What about planners?

Through the magic of modern telecommunications technology, we were able to eavesdrop on some conversations at city hall. Our first observation was at the front counter of the planning department, where development applicants are required to 'take a number' from one of those annoying red number-dispensing machines and wait for their turn. Then we stopped in at the planning department's coffee room. The conversations raise some challenging issues around ethics and public perception of our profession.

The first conversation at the counter involves the recently-retired (and fully-pensioned) planning director and a new junior planner, whose job is to receive permit applications for major developments. The ex-planning director has opened a consulting practice and has been engaged by a local developer he met on the job. He knew enough to arrive at City Hall well before the opening of business, in order to get a low number from the machine.

*Good morning, you seem to be first in line this morning.*

*Uh-huh. You probably don't recognize me. I used to have the corner office here. I'm representing Acme Builders on that parking lot site at the corner of First and Juniper. I've been over these plans myself and I can tell you that they exceed your development guidelines for the site. In fact, you could use them as examples in your*

*next bylaw. My client needs to pick up the permits and begin construction right away.*

*I see. I did think you looked familiar from some photos I've seen in the paper. Our turnaround time for projects of this scale is about four months, or maybe a little less if the plans don't need many revisions. Sir.*

*That's not going to work for us. Look, when I was here, the average turnaround time was 10 weeks. And many of those plans, I'm in a good position to know, were total crap. So four months aren't going to be necessary. Four weeks aren't going to be necessary. Four days will be ample.*

*Well, sir, I'll note your comment on the application. As you know, you can track progress on your application online. Anything else?*

*Let me have your business card, so I can make sure that you get an invitation to my client's golf tournament later this month.*

A conversation at the other end of the counter is between a planning consultant, who recently completed a maternity leave gig in the planning department and has returned to private practice, and the staff planner who he temporarily replaced. This planner's job is to receive applications for smaller developments, like two-lot splits and renovations; the consultant's client has plans to raise an older bungalow and install a basement suite.

*Hey, Harland, good to see you. Back at the consulting game?*

*Yep, have to keep my hand in and there's the mortgage to pay. This will be an easy one for you – no variances, nice simple design, neighbours are all on board, another rental housing unit for the city. Win-win-win!*

*It's SO nice to see a proper application from someone who knows their way around here. You saw the rubbish applications that we have to deal with here. Why do every small-time developer and their know-nothing agents insist on picking fights over every picayune detail in an application? You'd think they were building the Burj Khalifa.*

*Yeah, totally. So you should be able to turn this one around by the end of the week? That would be awesome.*

*Well, no promises, but it does look pretty clean. By the way, I have to thank you for what you did here when I was away. You really opened some eyes. We have a much better idea of where builders are going to be looking for development sites and how far we can push them on off-site works and amenity contributions. None of us learned that in planning school!*

The third conversation is between applicants in the waiting area who hold numbers 46 and 47 from the machine and have been observing what has been described above.

*Sorry, I just noticed that you have the number just before mine. How long do you think we'll be waiting here?*

*No idea. I've only done this once before, when we did a renovation eight years ago. Funny thing, that guy with the Harry Potter glasses was in charge here when I came in to get my permit.*

*You're kidding. And now he's on this side of the counter?*

*Yeah. Fired or retired, I guess. Anyway, with that big roll of plans, he's not here for a garden shed permit. He was first in line when I got here. Consulting, I would think. Probably on a full city pension, too!*

*They can do that? And we have to sit here and figure out for ourselves what counts for floor area ratio calculations and where's the average finished grade? That doesn't seem right. The city should be treating us all the same way. That young guy at the counter looked totally intimidated.*

The fourth conversation takes place in the planning department coffee room a bit later, while the new planning director and the long-range planner wait for the water to drip through their individual grown-in-the-shade coffee servings.

*I just saw your predecessor at the counter, chatting up our new planner about the development guidelines. He was never there in all the years he worked here – avoided dealing with the public. But I figured this would happen – his retirement plan.*

*I've never met the guy. How do you think that will go over, him changing roles? Doesn't he have inside information about how the development guidelines are applied? Haven't people in this department heard about a 'cooling-off' period?'*

*We've never discussed it, and senior management here has never mentioned it. Now that you point it out, though, I'm thinking it probably makes us look less than professional. But where's the line?*

There's not been very much discussion within CIP about how professional ethics come into play in the "post-employment" scenario, as planners change jobs, potentially raising ethical issues, particularly when they move from the public to private sectors. But, if it's something that the community thinks is important for politicians and very senior civil servants—requiring a cooling-off period—shouldn't planners be thinking seriously about that in the context of professional conduct standards – not just at the senior levels, but across the board?

Clearly, planners must have professional integrity. This means having a keen sense of responsibility to their profession and employers and to the public, and not engaging in dishonourable or questionable conduct that may cast doubt on their professional integrity, or that may reflect adversely on the integrity of the profession. Are the planners on both sides of the counter in these conversations conducting themselves ethically? How should a self-regulating profession deal with post-employment relationships? ■

Chapter 9

# Avoiding Wrong

*Virtue beckons quietly,*
*asking to speak.*

Because planning practice links knowledge to action in the public domain, as discussed in Chapter 1, it generates complex ethical questions. Dealing with these questions can be stressful, but if properly addressed they develop character. After all, professional life might be boring if it was just straightforward application of technique to problems. If my planning practice means something, I accept that there will be tough choices. Developing an ability for ethical reasoning in the planner's professional life also supports good choices in the personal realm. Perhaps there is no greater satisfaction than to look back at the end of a career and feel peace with the choices made.

This chapter makes a simple point: planners should allow an inner moral compass to exist in their practice. This can help them avoid wrong and respond appropriately *if* they've done wrong. This is the path of virtue.

## Planners' Ethics

A planner can avoid ethical mistakes by listening for the voice of an inner conscience, thinking clearly, and taking planning professional ethics seriously.

Although avoiding missteps should be the planner's first priority, the chapter also addresses what to do *after* making one. Although we all seek to avoid mistakes, they are an occupational hazard in change-oriented professions like planning. In fact, planners who deny the possibility of misstep are often the ones who get into trouble.

Case studies help planners consider ethical obligations and generate useful dialogues with other planners. They are regularly presented at conferences and offered in planning ethics books (Barrett, 2001; Weitz, 2013). These cases provide scenarios and interpretations of rules. This chapter takes a different direction. Surely, most of us will decide to do the right thing when nothing is on the line. Yet, ethical standards that we readily endorse may be ignored in times of stress. Ethics becomes most necessary when planners are at their worst, not their best—when they've been betrayed, when they've made a humiliating error, when they've sought personal benefit, or when their house is about to be foreclosed.

Ethics play a modest but important role early in a planner's career because managers define work tasks, parameters, and make the critical judgments. Even so, entry-level planning work presents ethical choices, and it is advisable to establishing a pattern of ethical thinking and action early on. As planners move up the ladder, more ethical choices await—in interacting with politicians and the community, pursuing work as a consultant, and seeking funding as a nonprofit organization.

The chapter suggests a three-part process for avoiding missteps and dealing with missteps that may occur: (1) sensing a pang of conscience, either before or after an action; (2) thinking rationally about that pang of conscience; and (3) avoiding the mistake or making amends if it has already occurred.

## About Ethics

Allowing a pang of conscience is easier to say than to do. It takes self-esteem to anticipate or admit a mistake. Feeling a pang of conscience is a signal that something is amiss, but it's only a signal. Thinking rationally requires consideration of that pang in terms of ethical principles, context and situations, and culpability. With that, the idealist can avoid or discern wrong. This is the work of virtue, used here to mean a willingness to feel a pang of conscience and a commitment to use that feeling to stimulate rational thought about how to correct the action.

The chapter uses *ethics* to mean a system of principles to guide behavior. An example of ethics is Emanuel Kant's concept of a duty to respect other rational

beings (Honderich, 1995, p. 438). All ethical systems are built on concepts of morality, ultimate rightness or wrongness. As discussed in Chapter 8, accepting this idea means ascribing to moral realism—the existence of right and wrong beyond individual opinion. Most planners are moral realists, but this is not universal. Of course, moral realists will disagree on what constitutes rightness or wrongness, in abstract terms and specific situations.

Philosophers have argued about ethical systems and morality over millennia. Some ethical systems are based on virtue—a quality such as fortitude or self-restraint that serves a larger purpose. Other systems refer to rules of behavior or *process*, such as an admonition to tell the truth. These systems are called deontological. Following state law in environmental review procedures is an example of this. Other systems refer to the *outcome* of behavior and are termed consequentialist or utilitarian. In that case, environmental ethics is about avoiding damage to the environment. Of course, there are different views about outcomes in consequentialist ethics—is the best plan the one that provides the most aggregate utility for all or the one that serves those with the least agency and choice?

All professionals face ethical and moral questions, but planning's idealistic and political nature produces situations that challenge simple definition or resolution. The first distinction needed is between appropriate professional behavior and broader moral questions about the rightness of plans, programs, or their outcomes (Wachs, 2013). As with most professions, planning has an ethical code for professional behavior that guides planners in making good choices and avoiding mistakes with clients, supervisors, and elected officials (AICP, 2016). This is difficult enough, but now consider the impact of plans—is there such a thing as a plan that was developed with proper process that produces harm? Of course there is. And to add further complication, a plan may produce both harm and good at the same time—in different realms, to different groups of people.

Planning "wrong" can occur for many reasons, ranging from a technical error, to inappropriate professional behavior, to participating in a plan that produces harm. Planners may be confused about standards of professional conduct, or think they are doing right when in fact they are doing wrong. These are mistakes of knowledge or logical thought. Wrong can also occur if planners have weak moral character—they know what is right but transgress anyway. This may stem from greed, excessive deference to authority, or lack of courage. Obviously, planners do wrong if they corruptly pursue personal gain or personal agenda over process, rules, and professional standards as might the

hedonist described in Chapter 7. This may occur when planners' internal ethical compass is disabled or their view of the public interest(s) is idiosyncratic.

Considering whether a plan creates harm or good is a complex undertaking. Planning "ends" may be in conflict, such as tension between short-term job creation and long-term greenhouse gas reduction. Of course, planners want to find the sweet spot where tradeoffs are lessened, but that isn't always possible. There are also tensions between ends and the *means* used to achieve them. For example, reporting on a climate model that produced anomalous results compared to the majority of models gives those opposed to climate change responses fodder to claim scientific disagreement, and therefore resist action. Should ethical planners withhold those results?

Do good goals (ends) ever justify otherwise inappropriate means? If so, what warrants such an action? How does that line up with the obligation of a professional to be honest? This question raises the virtue/deontological/consequentialist split in ethical systems. Here is a practical example: Is it permissible to selectively present data or modeling results favorable to a land use reform agenda, in order to resist powerful forces motivated by narrow self-interest?

Nihilists reject the idea of a moral law and the notion of an internal moral compass. They may make decisions from self-interest, destructive impulses, or follow rules of society out of prudence so as to avoid punishment. My view is that there *is* moral (natural) law (Honderich, 1995, p. 586). Some things are right and others wrong, universally. Although this may be discredited in contemporary philosophical circles, most planners act as if moral or natural law exists. Of course, people (and philosophers) will differ on what that natural law is. Values commonly ascribed to natural law that relate to urban planning include social life, rational conduct, justice and fairness, knowledge of truth, physical and mental health, the natural world, and experience of beauty. Idealist planners can gain clarity on their compass directions if they reflect on which of these aspects motivate their work.

## The Planner's Internal Compass

Values guide thoughts, feelings, speech, and behavior. The latter two are the primary subjects of professional interest. My view is that planners should seek to cultivate and follow an internal moral compass, as it is a guide when complex ethical questions arise. I see this as the aspect of a person that produces good decisions. I cannot prove that a moral compass exists, but I know there's one in me. I seek to make myself open to it when I stand at

a critical decision. My moral compass helps me make good decisions and avoid mistakes. But when I fail, it also helps me own up to mistakes after I have made them.

The idea that certain values are an authority may be held by both an atheist secular humanist and a religious person. The humanist may refer to human dignity as an ultimate value, whereas the religious person may refer to values based on religious texts. In contrast, a relativist conception suggests that values are not universal but exist only in relation to culture, subculture, personal experience, and context.

Engaging these issues has provoked many philosophical debates and is certainly beyond the scope of this chapter. The simplest way planners can resolve the question of values for professional practice is to develop a rough distinction between values that are universal and those that are relative. For me, issues of urban design are primarily matters of taste and culture, and therefore relative. I don't expect my point of view on urban design to win the day universally. On the other hand, values related to human rights, social justice, and environmental sustainability are universal to me. I seek to realize those values in my work and convince others of their validity. Of course, reasonable people will differ on how we move from a value to action in the public domain, so this doesn't mean I avoid compromise or conflict.

## The Planning Profession's Compass

If planners receive American Institute of Certified Planners (AICP) certification, they agree to live by the values espoused in the AICP Code of Ethics (AICP, 2016). Even if they don't have AICP certification, the Code is a useful external reference point on ethical behavior. Having a code of ethics is part of what makes planning a profession—a set of expectations that the public can count on for the planner's behavior. Furthermore, the planner's code is a product of the deliberations of planners as to their conduct, and so differs from those for architects, landscape architects, city managers, and engineers. It is our profession's unique statement.

The Code's narrative examines both process-oriented and outcome-based ethics and provides guidance for making tough decisions. It includes the following:

- Aspirational principles—ideals to which AICP planners strive. Failure to achieve these principles is not a violation of the Code.
- Rules of conduct—rules to which AICP members are held accountable.
- Procedural provisions—what to do if there is a violation.

Key aspirational principles regarding the public include respecting the rights of others, considering long-range consequences, and providing accurate information. The Code indicates that planners have a commitment to public participation, social justice, and fair process. Lastly, it stipulates aspirational values regarding design excellence and environment.

With regard to clients and employers, the Code exhorts planners to exercise independent professional judgment. The code advises planners to accept employer decisions *unless* they are illegal or inconsistent with public interest; it requires that planners avoid conflict of interest or appearance of conflict of interest. Regarding the profession and colleagues, planners have an obligation to respect the profession, think, reflect, and train.

The Code also includes 26 rules that define good professional behavior. These concern issues such as providing clarity, refusing assignments that are illegal or violate rules, not using information or power for personal advantage, disclosure, avoiding perceived or real conflict of interest, transparency, avoiding misrepresentation and plagiarism, and other provisions. Violation of these rules can lead to a charge against an AICP-certified planner, which is a rare but serious occurrence. The Code does most of its work in shaping planners' day-to-day activities and decisions.

Planning's professional rules are not straightforward nor can they be. First, as Weitz (2013) suggests, rules of conduct provide little context, so a narrow interpretation of them could lead to an ethical violation when the full context is considered. He suggests that planners consider the intent of the rule when applying it to a particular situation.

Another interpretation issue is that a planner's work serves the public interest, which is a contested idea. The Code, therefore, requires judgment between differing "goods" involved in planning. For example, loyalty to an employer (a process-oriented ethical mandate) can be set against loyalty to the public interest (an outcome-based ethical mandate). Rather than artificially resolving this, the Code leaves responsibility to the individual planner to reason through these dilemmas, hence the previous suggestion that the planner cultivate a personal ethical compass. Here's how this issue is addressed in the Code:

> As the basic values of society can come into competition with each other, so can the aspirational principles we espouse under this Code. An ethical judgment often requires a conscientious balancing, based on the facts and context of a particular situation and on the precepts of the entire Code.
>
> (AICP, 2016)

## Finding an Inner Guide

Planners need an inner guide to help them make ethical judgments. Situations require it. For example, because zoning changes affect land value, interests seeking to influence zoning for private gain. They will seek to draw planners into their scheme. These are cases of clear-cut wrong. More complicated situations are those in which there are competing values to which the planner ascribes. These situations require ethical reasoning that helps the planner assess the situation. A strong inner guide supports good decisions and the planner's integrity.

Despite efforts to do the right thing, planners make missteps from time to time. It is better to not be in denial about that possibility. If the planner's inner guide fails or is ignored, the planner may feel shame. Shame has a bad connotation for many, evoking a parent shaming a child for a minor transgression. Some people are held back by shame that they don't deserve to feel. I'm also not talking about it in the sense of one person shaming another to control them. Rather, I mean an internal experience of distress caused by an awareness of the potential for wrong behavior or wrong behavior itself. Instead of avoiding it, ethical planners allow an internal sense of shame to operate.

Biographies of planners and other public officials who go off-track suggest that some blocked their feelings of shame. Once blocked, self-justification and distraction rushes in—a planner makes one mistake and then compounds it with further ones. I certainly know how hard it is to admit when I am wrong. I sense my desire to self-justify—my need for self-esteem wants to make the feeling go away. Because society values self-worth, it is hard to admit mistakes, flaws, or brokenness.

When we err, it is difficult to accept the damage we do. It's natural to run from shame, avoid it, go to sleep, repress it, or go on the attack. It is an uncomfortable feeling, but it can be metabolized in a healthy way to serve as a catalyst for positive change. Shame is a challenge to self-worth, but in fact, a healthy respect for shame is key in following an ethical path.

## Ways of Being Wrong

A planner's inner guide may be experienced as a vague feeling that something is not right as he or she faces a decision or considers something already done. As long as that feeling stays vague, there is nothing to be done about it. Precision is vital for clear ethical reasoning. The planner should connect the vague feeling to a specific issue. To illustrate that, the examples that follow show how varied the types of issues may be.

### *Technical Errors*

A simple case of being wrong is making a technical mistake. This could be transposing numbers in a spreadsheet or incorrectly citing the facts on a staff report. This is an affront to the planning value of providing technically valid information for decision-making, so planners shouldn't underestimate the seriousness of technical mistakes. Making a traffic impact analysis error in an environmental review document may lead to its rejection under court challenge, costing money or halting a project. A financial projection error could lead to the termination of an otherwise valuable program. Attention to detail is the starting point for professional work.

We all make technical mistakes, despite our best efforts. This is not the territory of complex ethical questions. What to do when that happens? The temptation to hide the mistake is strong—perhaps no one will notice and the planner will avoid embarrassment. If it is noticed, and if the planner hasn't brought it to his or her supervisor's attention, he or she has done a disservice to that supervisor, the organization, and the planning profession. It is not for a staff planner to decide what to do about a mistake—it is up to the responsible manager. By hiding a mistake, the planner denies the manager the opportunity to determine what to do about it and harms the client's or public's interest.

### *Professional Behavior*

Mistakes in professional behavior are common, running the gamut from seemingly inconsequential to job-threatening. It may seem a minor point, but being chronically late is poor professional behavior. In effect, the planner adds a concern and a task to his or her supervisor's already busy schedule, who must now pay attention to punctuality rather than the substantive elements of work. Missing a meeting because a planner entered an incorrect date on the calendar may result in the company losing a consulting client. More serious, and usually grounds for dismissal, is exaggerating qualifications. This could occur if a planner put a Master's degree in planning on a resume when the terminal thesis was not filed, misstated the order of authorship on a multi-author research publication, or fraudulently wrote a letter of recommendation posing as the recommender.

In the interpersonal realm, let's say a planner has a frustrating co-worker who doesn't follow through on work assignments. This casts a negative light on the entire team. The best course of action is to directly address the issue with the person, and if that doesn't work, bring the matter to the attention of a direct

supervisor. Less appropriate is gossiping about the person while socializing with other co-workers. That person, in turn, could tell the co-worker, resulting in a negative work environment.

More seriously, there are professional behavior situations where a planner personally benefits, financially or otherwise, from insider planning knowledge or powers to approve a request. This is a direct ethical contravention. It can ruin the planner's career and it undermines public trust in planning institutions, which affects all planners. Even if money isn't involved, it is unethical to use insider planner knowledge to have power or undue influence over others.

When it comes to policy choices, planners can make the mistake of exaggerating the benefits of a proposal or catastrophizing about what will happen if a policy is not adopted, thinking that the greater "end" of getting a policy adopted justifies the "means" of suggesting outcomes beyond what the evidence suggests. Mistakes can also be those of omission. For example, a planner might not speak up at the staff meeting when a planning analysis is misinterpreted. Because the planner did not speak up, decision-makers may approve a course of action that creates harm. More subtly, the decision-makers may be confused over the evidence and analysis, but the planner doesn't correct them because they are about to select the planner's preferred policy.

Lastly, professional behavior includes conflict of interest. The AICP Code of Ethics says, "We shall avoid a conflict of interest or even the appearance of a conflict of interest in accepting assignments from clients or employers" (AICP, 2016, 2c). Direct conflict involves accepting a golf club membership in return for approving a development proposal that otherwise would have been denied. Appearance of conflict of interest is being seen on the golf course playing a round with that developer, even though there is no quid pro quo. The planner's actions create a reasonable suspicion that there may be one.

Those who violate conflict of interest rules may be intentionally corrupt, but for those who intend to honor them, the slippery slope of self-justification can interfere. "I deserve this holiday gift from XYZ developer because . . . I'm underpaid . . . worked so many uncompensated overtime hours . . . am unappreciated by my manager . . . could have made a lot more money in consulting . . . take a lot of crap at the zoning counter every day . . . have gone out of my way to help the community but my efforts have not been recognized." The list of possible justifications is long. In these instances, a *version* of justice (reward for effort) is used to justify unethical behavior. The human power of imagination can propel us into actions that aren't grounded in the real world.

Box 9.1 provides an example that illustrates potential conflict of interest and perceived conflict of interest concerning my role on an advisory committee.

### Box 9.1 Conflict of Interest

My job involves teaching, research, and community service for a state university. I also do independent consulting on transit-oriented development (TOD) for public and private sector clients. One of my clients proposed a TOD at a bus terminal in Southern California. I worked for the developer on an hourly basis and did not have an equity position in the project.

In 2006, California voters approved Proposition 1C, an affordable housing fund that included $300 million for mixed-income housing in TODs. State officials were developing criteria to allocate these funds to TODs across the state on a competitive basis. They hired a northern California based consultant to develop criteria based on factors such as density, type of transit service (rail versus bus), impacts on transit ridership, private/public partnerships, walkability, etc. As with any allocation system, the factors, measurement, and weighting system can explicitly or inadvertently include bias.

State officials created an advisory body of academics and public agency officials to advise state officials in developing the criteria. I was appointed to the advisory body and participated in a four-hour meeting by telephone. I was not paid for the work; my comments were provided as community service advice to the state agency. Unlike other planning roles, such city council and some consulting situations, financial disclosure statements were not required. During the introductions at the meeting, participants did not disclose their consulting relationships.

My view was that the first draft of the criteria was biased. Although the law prescribed a split in funding allocations between northern and southern California, the criteria reflected a northern California perspective, favoring rail systems over locations with advanced bus-on-freeway programs. The state officials and their consultant team were based in northern California. I successfully argued for some changes in the criteria system to recognize bus-on-freeway situations, but even with the revisions, my view was that they still did not fairly reflect TOD opportunities in southern California.

In separate meetings with my developer client, I indicated my view that the draft criteria were biased. I also provided strategic advice to the developer on preparing a funding application. The developer contacted state politicians representing southern California to complain about this bias, and they in turn pressured state agencies to revise the criteria. I participated in this meeting.

State officials later called me to complain about my involvement in a private development project that was intending to apply for funds. Even though I had sound technical reasons for my position, the lack of disclosure was a problem. There was the appearance of conflict of interest. My actions lacked transparency. I believed that my position had technical justification, but the event undermined my reputation with state agencies. I should have disclosed my consulting relationships. I learned from the experience and vowed to go out of my way to disclose early on in those relationships in the future and to step down when the appearance of conflict of interest is present. Disclosure is critically important, even if it seems awkward in the moment.

## *Content of Plans*

Understanding ethical missteps in the content of plans requires clear thinking, as debates over plans relate to axioms, values, and facts. Axioms are taken to be self-evident and cannot necessarily be proven—for example, an axiom might be compassion. A planner may view compassion as a starting point for considering right and wrong. A plan that treats homeless people harshly would then be said to be mistaken. If an axiom is clear, then a person with a different axiom, like personal responsibility, can understand how the other person's thinking starts from a different place.

A more specific expression of axioms is values. Plans can be examined in terms of the values they serve. There will be differences of opinion about these values, but as with professional behavior, the AICP Code of Professional Conduct outlines aspirational principles that can be considered along with the planner's own values. Lastly, a plan might be faulted on a factual or analytical basis. Does it ignore long-term environmental consequences? Are the projections of travel demand flawed? Assessing a plan's "rightness" or "wrongness," therefore, can be achieved by considering axioms, values, and facts and the distinctions between them. Sometimes when we say we are arguing about facts, for example, we are really arguing about values.

In plan development, let's say the city engineer asks a planning consultant to remove all alternatives from a commissioned report that (a) aren't feasible right this moment or (b) aren't in agreement with what the engineer is willing to do. The reason is to prevent anything from appearing in a document that a member of the community can use to pressure the engineer to implement a disliked option. It is understandable that the engineer does not want to build up expectations for an infeasible idea, but if the consultant edits the report to the engineer's preference, then the product may not be the consultant's best professional opinion. Rather, the document is the engineer's report masquerading as an independent consultant report. The education role of planning is lost as alternatives are truncated and eliminated. Figuring out how to respond to this type of situation is a common challenge for planning consultants.

## *Implementation of Plans*

Well-designed plans may go "wrong" in implementation. The benefits of a policy choice could be counteracted by a single aspect of implementation. For example, a streetcar system whose forecast ridership and resulting financial

feasibility are based on its travel time may fail because the assumed traffic signal prioritization is not implemented. This slows service, reduces ridership and fare revenue, and places the project in a financial bind. Or, a plan or policy intervention may produce an unanticipated consequence. For example, setting high value-capture taxes around streetcar stops may produce an undesirable consequence of shifting development to sprawling locations away from transit access. Box 7.2 provides an example of a poison pill that was included in a policy that made it impossible to efficiently implement.

## After a Mistake

As discussed above, there are many ways of being "wrong" as a planner. They range from personal examples, such as gossip, to complex situations in which the planner is part of a team that collectively misjudges outcomes, such as the streetcar implementation example above. Planners seek to avoid mistakes, but try as hard as we might, they are inevitable. What should planners do when they have made a mistake, personally, or in plans and their implementation? I suggest allowing the feeling or anxiety to occur rather than rationalize it away. An error doesn't mean that a planner is a bad person, just that he or she made a mistake. In fact, a sign of virtue is to own mistakes and make amends.

My first suggestion is to diagnose the pang of conscience. For some, a knot in their stomach is a physical indication that something is off. For others, a heavy feeling or sense of gloom occurs when attention is drawn to the wrong that occurred. Still others may feel jittery, annoyed, and ready to pick a fight. Regardless of which feeling is an indicator, it should stimulate rational thinking.

Ethical planners use a methodical process to understand what happened—naming it—and then assessing how to respond. First, what was the nature of the "wrong" or error? As noted above, it could be technical or related to professional behavior, the content of plans, or the effect of plans. Then, the details of the error should be enumerated—developing a factual understanding of what happened without emotional interpretation. Was the error one of commission (something the planner did) or omission (something the planner didn't do but should have)? Was the wrong committed by the planner individually or as part of a group? Is the issue about process, outcome, or both? Then the planner can assess who was harmed and how. It may be that multiple parties were harmed. Lastly, the planner can consider possible remedies and ways to prevent such occurrences in the future.

I battle my tendency to self-justify by seeking objectivity and withholding feelings so that I can get the facts. This might be called the "police report" version. Although there are certainly bad police reports, either incomplete or biased, the best version of the police report is just the facts, who said what, to whom, when, and who did what. This avoids the possible distortions of feelings.

Table 9.1 illustrates two examples of situations that have "gone wrong" relating to a planner's personal behavior. Using this table format can help planners be precise about what happened. This counteracts a tendency to be too general, when a planner deals with error by saying, "I'm a bad person." The more specific, the better. In this reflection, the planner seeks a reasonable conclusion about his or her role and culpability in the error. Then the planner can consider what to do about it—how to disclose it, make amends, and to take steps to prevent it from reoccurring.

If "wrongs" or errors occur in team or group efforts, identifying culpability is more complex. There are difficult tradeoffs between personal conceptions of the good, organizational goals, norms, and loyalty to the team and/or organization. Table 9.2 provides examples of these dilemmas, in situations concerning the content of plans and the effects of plans through implementation. Similar to Table 9.1, a step-by-step process can shed light on the best course of action.

*Table 9.1* Diagnosing a pang of conscience for an individual wrong

| *Type of wrong* | *What happened?* | *Details* | *Who is harmed? How?* | *Remedy* |
|---|---|---|---|---|
| Technical error (modeling example) | Used the wrong data set in specifying a travel mode model, which led to selection of a suboptimal transit mode. | An error of commission (accidental). An outcome concern. | Transit users and taxpayers, through an inefficient project. | Disclose, reissue study. Institute quality control procedures for data or data use procedures. |
| Professional behavior (advisory board example) | Participated on an advisory board without disclosing that a client was affected by the grant program being deliberated (see Box 9.1). | An error of omission. A process concern. | Other advisory board members and the public, through lack of transparency. | Disclose. Recuse oneself from those deliberations. Make a habit of identifying conflict of interest, or appearance of conflict of interest, and disclose. |

*Table 9.2* Diagnosing a pang of conscience for a team wrong

| *Type of wrong* | *What happened?* | *Details* | *Who is harmed? How?* | *Remedy* |
|---|---|---|---|---|
| Content of plans (consulting example) | Developed transit-oriented development plans that had the effect of distracting attention from the poor ridership performance of rail transit projects. | An error of commission. A process concern. | Transit users and taxpayers, through an inefficient project. | Educate client on ridership issues. Deliberate with team and management. Consider opportunities to improve outcomes. |
| Effects of plans (public planning example) | Negotiated agreements with developers that compel vehicle trip reductions, used these reductions in traffic impact calculations, with the knowledge that enforcement mechanisms do not exist and compliance is unlikely. | An error of omission. An outcome concern. | Public stakeholders affected by higher trip generation levels the predicted. | Disclose implementation concerns to managers. Seek ways of strengthening agreements and agency enforcement commitments. |

If a planner concludes that he or she has erred, the best response is to seek a remedy with a contrite spirit. A contrite spirit may be hard for idealists who feel strongly justified by the rightness of their cause. They might feel that they deserve an exemption from normal ethical standards because of the importance of the issue at hand. Idealist planners can be working for the good and also be unethical.

Experienced managers tell me that what happens *after* the mistake can be the most important thing. Hiding mistakes or blaming others is tempting, but it makes things worse. The planner should acknowledge the problem and allow other parties (managers, clients, elected officials) to be upset. Apologies, should they be in order, should be heartfelt—it is frustrating for managers to hear "I apologize" and then the word "but . . ." soon follows. Planners shouldn't rationalize or blame others after they apologize. They should accept the consequences—but not go overboard by deciding the consequences for themselves—and make amends to a reasonable level. When idealists own up to mistakes, they are perceived as planners of good character.

The idea of broken-heartedness may seem quaint, but it is an appropriate response to doing wrong. It is appropriate to sit with sadness associated with a mistake. Planners shouldn't grovel or ask the outside world for something to ease the pain. We should learn how to suffer properly, mourn losses, and move on. Then we can renew a commitment to allowing the self-correcting mechanism of shame to function. Let's be honest: planners have multiple motivations—lofty commitments to the public interest, but also getting their needs met by looking good, career advancement, or exercising power. Here's a new take on an old expression: "I will not sully my purpose by getting my needs met." That places purpose first, where I think it should be.

## And Now to You: Your Deeds Define You

Planning is replete with ethical choices. Sometimes all interests line up with good planning. Sometimes your challenge is to determine *whether* to resist what you perceive as a wrong, and then determine *how* to resist it. You may experience consequences to resisting client or decision-maker directions that go against planning's values. As I write this, federal government employees have been told not to communicate with the public as they have in the past, and scientists have been told their research will be reviewed for compliance with the views of the government. These employees face a dilemma between following directions and serving their conceptions of the public good.

The consequences of resisting bad plans or owning an error could include job termination, missed promotions, or being sidelined in the organization. You may think the world will end if you get fired from a job or are pushed out, but life goes on. The sun comes up in the morning. If your internal compass fails in the heat of the moment, you may make a poor choice that goes against professional ethics or your own personal commitments. Ethical behavior in that case is to own the choice and make amends. You are more likely to do that if you have made a habit of virtue.

Ultimately, your deeds and professional reputation define you. They are worth investing in. You deserve a stellar ethical reputation. Making good ethical decisions creates confidence and empowerment. A commitment to improve your moral character elevates you, sustains you through tough times, and is treasured throughout your career. Having the respect of your professional colleagues is one of the great satisfactions in life.

## Discussion/Reflection Questions for Chapter 9

1. Reflect for a moment and write down the top five elements of your moral value system (e.g., truthfulness, compassion, justice, etc.). How do you want to be known? What do you want people to say about you at the end of your career?
2. In your understanding of the world, are morals (right or wrong) culturally determined or universal? What is the implication of your position for planning ethics?
3. The AICP Code of Ethics does not define the public interest. Should it? What is your conception of it?
4. Reflect on a moment in your personal or professional life when you felt a pang of conscience. How did you move from that initial feeling to determining what to do about it?

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# STARTING WITH HUMILITY CREATING MEANINGFUL PUBLIC ENGAGEMENT

by **Jennifer Fix** MCIP, RPP

The planning profession has come a long way since the days of Robert Moses, the mid-century New York City official who imposed freeway projects on and through established neighbourhoods. When asked about the displacement of several thousand residents without obtaining their input, he declared that "[y]ou can't make an omelet without breaking a few eggs".

Canadian cities were not immune to this style of top-down planning, void of engaging affected residents, from the urban renewal in Vancouver's Strathcona that saw the displacement of 860 residents, to similar "slum clearance" schemes in cities across Canada.

Municipalities and planners have a different relationship with communities now. Not only are there legislative requirements for public consultation, but municipalities are increasingly adopting public engagement policies and frameworks to standardize and improve public participation. The Canadian Institute of Planners' Code of Professional Conduct requires that we provide opportunities for "meaningful participation and education in the planning process to all interested parties". Increasingly, communities are also expecting and demanding that they be engaged meaningfully.

But what constitutes *meaningful* engagement? Engagement practitioners often speak of the importance of transparency, clarity, inclusivity, accessibility, and genuine use of participant input in the decision-making process. At the same time, different communities and different groups can have different perspectives on what types of engagement qualify as meaningful in their own contexts.

As a planner whose work includes a strong engagement focus, I have learned that meaningful engagement also demands that practitioners bring certain mindsets and self-awareness to the table.

## ACKNOWLEDGING WISDOM IN COMMUNITIES

As professionals, we are called upon for our expertise. This is particularly the case for consultants, who are often hired for their ability to provide answers and solutions. While technical expertise is no doubt a vital aspect of planning processes – as is evidence-based design and knowledge of best practices – there is a tremendous amount of wisdom that resides within communities. This wisdom must be embraced for a plan to be successful. As the people living in the places that plans are ultimately shaping, residents are best suited to articulate their own aspirations and participate in problem solving.

I learned this lesson when I was engaged along with my team at DIALOG to develop a vitalization plan for Tofino's waterfront Main Street. When I arrived for the initial site visit, I was struck by the lack of pedestrian infrastructure and overabundance of surface parking along the street, as well as the harsh exposure to the coastal storms that were so common during the winter season. In the back of my mind, I felt I already knew what some of the basic design solutions should be: first, expansive sidewalks should replace much of the parking; second, street trees and other interventions should be introduced to provide weather protection; and third, much of the parking should be removed.

After the initial site visit, we began the planning process with an engagement exercise. Using film, we captured the stories about Main Street's history and aspirations for its future directly from residents. We spoke with long time Tofino residents, business owners, and members of indigenous communities who live in nearby island communities and who use Main Street to access groceries and other services.

From this exercise, we learned that my pre-conceived notions of appropriate design solutions were well off the mark. First, we learned that residents value the small-town, eclectic nature of their community. While pedestrian facilities were important, they did not want the expansive urban sidewalks I imagined. Second, I learned that residents found the idea of street trees as laughable. Why would we foolishly plant trees or any form of visual obstruction along the street with the best views to the surrounding old growth forests? Third, I learned from the neighbouring indigenous communities that parking on Main Street was non-negotiable, as they lived in boat-access-only communities and needed to easily access their parked vehicles on Main Street. I was told that those communities had been "parking their canoes there for thousands of years", and they would continue to do the same with their cars.

As such, we ultimately designed a plan that didn't reduce the number of parking spaces, but rather reconfigured them to improve safety and comfort for pedestrians. We also provided design ideas for playful and




**DIALOG'S MATTHEW THOMPSON** facilitates a participatory design process with the Town of Ladysmith and Stz'uminus First Nation.

unique pedestrian spaces, including DIY elements, and replaced the idea of street trees with weather protected seating areas where residents could take in the view. We finished the plan less than three years ago, and nearly all of it has now been implemented.

## ACCESSING AND INCLUDING COMMUNITY WISDOM

Until we live in a society in which all people – including all genders, ages, ethnicities, physical abilities, and classes – are fairly represented around decision-making tables, it benefits planners to specifically engage under-represented groups in the planning process. Traditional engagement conjures up images of participants interacting with open house boards or filling out an online survey. In reality, however, many under-represented groups don't have the time, experience, cultural context, or literacy to engage this way.

By taking the engagement out to the community, rather than expecting the community to come to us, planners have better success at hosting processes that are truly inclusive and meaningful. In my work, this has involved visiting reserves (when we've been invited), schools, service-providers to vulnerable groups, and homes of people with significant disabilities.

It has also involved partnering with groups who can lead engagement in their own communities, ranging from Chief and Councils to representatives of community organizations and cultural groups. For the City of Abbotsford's Official Community Plan process, a steering committee was struck that matched the City's demographic profile in terms of age, gender, country-of-origin, and newcomer status. Participants on the committee worked with the City and our consulting team on the engagement process, which was essential in reaching the large Sikh community, many of whom did not speak English.

Acknowledging and accessing wisdom within communities requires that planners – as "outsiders" – reflect on our own assumptions and pre-conceived notions about what constitutes a good planning process, and what constitutes a good plan. It demands that we reflect on our own privilege and the cultural power we carry as individuals and professionals. It demands that we approach projects and communities with awareness of the inherent expertise that resides in all communities, and of the limits of our own expertise. And it invites us to approach communities and planning processes with humility and curiosity. ■

*Jennifer Fix is an Associate and Senior Urban Planner with DIALOG, based in both Vancouver and Saskatchewan.*

**Public engagement is premised on the belief that everyone has the right to be involved in decisions that will affect their life.** Hearing from people with diverse lived experiences leads to more innovative ideas, better decisions, greater public support of outcomes and stronger democracies. Further, moving beyond inclusion and towards a practice of equity involves sharing power so that communities and leaders may collaborate throughout the planning, implementation and follow-up of an engagement in order to genuinely co-create solutions.

**The following eight principles are designed to inform choices and guide action when planning and implementing public engagement in order to maximize the meaningful and equitable inclusion of diverse voices to inform decisions in governments, organizations or institutions across sectors.**

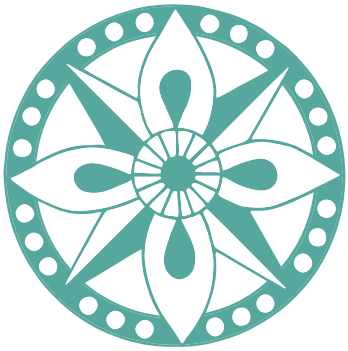
Following a principles-based approach can help practitioners adapt and respond creatively to emerging needs and diverse contexts, while upholding core values. Read on to learn more about these principles alongside specific strategies that can support their implementation.





## 1 Invite participation within an authentic and accountable engagement process

Authentic public engagement does not have pre-determined conclusions or expected outcomes. Decision-makers are genuinely interested in the public's input and responsive to what they hear. Set realistic expectations by clarifying the scope and the degree of influence participants can have on the final decision. Follow through with commitments and communicate outcomes transparently to foster trust in engagement processes.



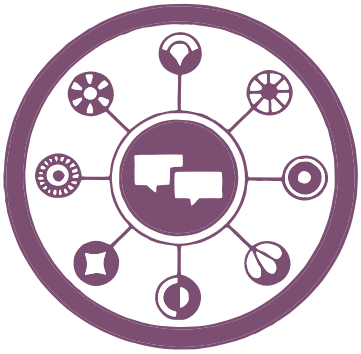
## 2 Plan early and proactively

Design the entire engagement plan with the aim of maximizing inclusion and equity, including budgets, timelines, scoping and framing, outreach and communication, process design, evaluation and follow-up. Anticipate and address inequities or potential barriers to participation before community members are discouraged from participating or are forced to advocate for themselves.



## 3 Establish respectful relationships with Indigenous Peoples

In recognition of Indigenous Peoples' ancestral ties to the land and their inherent rights, work in a spirit of reconciliation both when specifically engaging Indigenous Peoples, or when engaging other communities on ancestral Indigenous Territories. Acknowledge and equitably address the impacts of past and present-day colonialism, honour and centre Indigenous knowledge and worldviews and foster trusting, reciprocal and collaborative relationships with Indigenous Peoples.



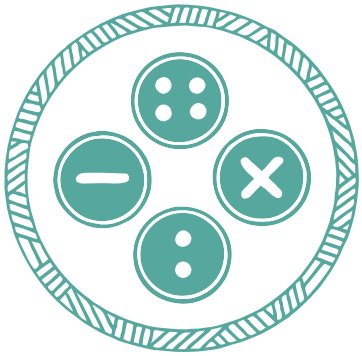
## 4 Engage the internal diversity of a community

Community members who share one aspect of their identity or experience may hold very different perspectives on an issue and may face different barriers to participation. Apply an intersectional approach to engagement to hear from diverse members of the communities who may be impacted by a decision.



## 5 Work in reciprocal relationship with communities

Equitable public engagement is founded on trusting, respectful, collaborative and reciprocal relationships with communities. Dedicate time and resources to relationship building and share power to co-create mutually beneficial and accessible engagement processes.



## 6 Tailor engagement plans to the context

In consultation with partners and participants, tailor engagement plans to suit the particular topic, objectives, location, available resources, key audiences and individual participant needs. Distribute resources equitably in order to meet the needs of those who face the greatest barriers to participation.



## 7 Commit to ongoing learning and improvement

After establishing a baseline understanding of inclusive, equitable and accessible engagement practices, develop capacity over time by engaging in reflection, evaluation, and ongoing professional development.



## 8 Advance systemic equity

Power inequities, colonialism and systems of discrimination or oppression (such as racism, sexism, ableism, classism, ageism, heterosexism, etc.) fundamentally limit participation in democracies and impact interactions within engagement processes, institutions and communities. Question long-standing norms, structures and power relationships, and work to advance diversity and equity in systems and leadership.

"The foundation for meaningful engagement is authenticity, accountability and trust."

**— Anonymous participant**



Section 4

# Emerging Issues

## EMERGING ISSUES

The following additional readings in this theme, Emerging Issues, will help you further develop your understanding of what it means to meaningfully consider and address:

- Interests and rights of Indigenous communities, through truth and reconciliation
- Social equity, including the experiences and perspectives of racialized communities
- Deepening and broadening consultation and engagement
- Climate change and environmental justice
- Human rights in the built environment

### Readings

1. Maloney (2016) "First Nations are not Municipalities" *Plan Canada*
2. Barry and McNeil/Cassidy (2019) "Indigenous rights and planning: From recognition to meaningful coexistence?" *Plan Canada*
3. Koch and Barry (2016) "Treaty Principles and Planning Principles" *Plan Canada*
4. Longboat (2016) "Beyond Consultation: lessons from joint stewardship" *Plan Canada*
5. Bridge (2021) "Indigenzing Planning" *Planning West*
6. Bouvier and Walker (2018) "Indigenous planning and municipal governance: Lessons from the transformative frontier" *Canadian Public Administration*. 61(1)
7. Patterson (2019) "A Brief Overview of the Duty to Consult". *Planning West*
8. CIP Policy on Planning Practice and Reconciliation
9. Clyde River v. Petroleum Geo-Services Inc., Supreme Court of Canada decision (2017 SCC 40) Re. Treaty Rights
10. Tsilhqot'in Nation v. British Columbia, Supreme Court of Canada decision (2014 SCC 44, [2014] 2 S.C.R. 256) Re. Duty to Consult
11. Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550, 2004 SCC 74
12. Barr (2019) "Through an Equity Lens: Planning for Healthy and Equitable Communities" *Planning West*
13. Syvixay and Peter (2021) "Challenging from within: To bring equity forward, we must challenge our profession from within" *Plan Canada*
14. Ma (2018) "Community Engagement with Cultural Communities" *Planning West*
15. APA "Introduction" *Planning with Diverse Communities* PAS Report 593
16. Loh and Kim (2021) "Are We Planning for Equity?" *Journal of the American Planning Association* 87(2)

17. Boron, Levett and Pope (2021) "Racial inequities in rural, remote, and northern Canadian planning" *Plan Canada*
18. Kurdi and Abdullah (2021) "Disability justice in the city" *Plan Canada*
19. Agrawal (2021) " Viewpoint. Human Rights and the City: A View From Canada" *Journal of the American Planning Association* 87(1)
20. CIP-ICU Policy on Climate Change Planning
21. CIP-ICU Climate Change Glossary of Terms
22. CIP-ICU "Introduction" and "Layer 1" from *Model Standard of Practice for Climate Change Planning*
23. Kyriazis and Callihoo (2018) "Legal Implications of Climate Change" *Plan Canada*
24. Meerow and Woodruff (2021) " Viewpoint. Seven Principles of Strong Climate Change Planning" *Journal of the American Planning Association* 87(1)

PATRICIA MALONEY RPP, FCIP

# FIRST NATIONS ARE NOT MUNICIPALITIES

Often we think that once we have completed our degrees and started work, we are finished with learning. Oh, we might meet our learning credits, but we generally believe we have the tools to complete our duties as a professional planner. Well, I was proven wrong about 25 years ago when I had my first opportunity to work with a First Nation. I was asked to prepare a "town plan" for the Siksika Nation as an add-on to a highway upgrade plan. My great fortune was to meet Allan Wolf Leg, my mentor and long-time friend, who had the grace to guide me through working with a First Nation. Now, years later, I have worked with over 24 First Nations. I have taught Land Management at the Banff School of Management Aboriginal Studies and the Centre for Indigenous Environmental Resources; prepared and taught courses for INAC (Indigenous and Northern Affairs Canada) and spoken at First Nation Land Managers Conferences.

Among the first things I learned was that Indigenous peoples do not perceive land the way non-Indigenous peoples do. Land is generally considered communal and housing is often considered a liability rather than an asset. The legacy of residential schools and the colonization of the First Nations has damaged generations. Social issues abound. And, in its fiduciary role, the federal government continues to treat First Nations people as incapable, rather than training them to self-govern.

First Nations vary across the country in terms of their independence, level of self-governance, and economic development abilities. When I started working with First Nations, the main thrust of the work was completing physical development plans that identified the infrastructure required. These plans were led by INAC with minimal community engagement. Over the last 25 years, we have seen significant changes in the scope and sophistication of the plans and studies completed by First Nations. While knowledge was historically passed on verbally through stories, First Nations are now mapping their traditional knowledge and writing their goals, objectives and policies. They are adopting comprehensive community plans that provide direction for their growth and formulating economic development strategies that incorporate education and training for their members. While First Nations' land has been traditionally held communally and not thought of as a commodity that is bought and sold, many First Nations are turning to land development both on and off reserve for economic development, to create employment and generate income. Several First Nations have demonstrated their progressive economic development with major land development projects such as West Bank in Kelowna, B.C. (West Bank First Nation), Grey Eagle Casino and Resort (Tsuut'ina First Nation in Calgary, Alberta), Great Blue Heron Casino (Port Perry, Ontario) and Tsawwassen Mills (Tsawwassen First Nation in Delta, B.C.).

For those planners who have never worked with a First Nation before,

CONTINUED ON PAGE 72

While knowledge was historically passed on verbally through stories, First Nations are now mapping their traditional knowledge and writing their goals, objectives and policies.

*CONTINUED FROM PAGE 70*

here are a few tips to help make your collaborations successful:

1. **Respect** – Respect the culture, respect the process and respect the people. Do not interrupt an Elder. If you don't know something, ask. Some First Nations are more traditional than others, but just as municipalities all have slightly unique processes, so do First Nations.
2. **Legislation** – While most of the legislation and funding comes through the federal government, each province and region has slightly different rules, treaties and initiatives. For example, while the Treaty structure is very formal and has been in existence for 140 years in Alberta, First Nations in British Columbia are negotiating treaties now.
3. **Partner** – You are there to listen to the Nation chief, council, and members and to understand their concerns and issues. You are not there to impose municipal rules and regulations, but to partner with the Nation to develop a solution for them. Earn trust as an advisor.
4. **Patience** – While you might work in the fast-paced corporate world, First Nations have different perspectives on time and different priorities. Remember that many First Nations are small, and can be affected by a small event. They do not have the same pressure for approving development. There is no subdivision of land.
5. **Gratitude** – If you have the opportunity to work with a First Nation, be grateful for the chance to learn and to expand your knowledge and understanding.

Understand the politics of the First Nation. Remember that most First Nations communities are large families or clans. First Nation elected terms range from two to four years. Often the politics shift with an election. The new Chief and Council may want to make significant changes. Even if you have a history of working with the Nation, the new Council may decide to make broad changes to the consultants working with them.

Our Indigenous people are our fastest growing populations and make significant contributions to our cities, our rural areas and our economy. First Nations are *not* municipalities. They are sovereign nations that must be treated as such. Development on reserves will increase. First Nations will become more involved in development on non-reserve lands. This is an exciting time for anyone with the opportunity to work with our First Nations in some capacity, and planners can be at the leading edge. ■

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*SUITE DE LA PAGE 71*

sont tous légèrement différents, il en va de même pour les processus des Premières Nations.

2. **Loi** – Bien que la majorité des lois et du financement proviennent du gouvernement fédéral, chaque province et chaque région comporte des règlements, des initiatives et des traités légèrement différents. Par exemple, la structure des traités étant très formelle et en vigueur depuis 140 ans en Alberta, les Premières Nations de la Colombie-Britannique négocient actuellement les traités.
3. **Partneraire** – Votre rôle consiste à écouter le chef, le conseil et les membres de la Nation pour comprendre leurs préoccupations et les enjeux auxquels ils font face. Vous n'est pas là pour imposer des lois et règlements municipaux, mais pour établir un partenariat avec la Nation afin d'élaborer des solutions. Gagnez leur confiance en tant que conseiller.
4. **Patience** – Même si vous travaillez probablement dans un monde des affaires en rapide évolution, les Premières Nations ont des perspectives différentes quant au temps ainsi que d'autres priorités. Souvenez-vous que plusieurs collectivités des Premières Nations sont petites et peuvent être affectées par un événement de faible envergure. Ils ne subissent pas les mêmes pressions en ce qui concerne les approbations des projets de développement. Il n'y a aucun morcellement des terres.
5. **Reconnaissance** – Si vous avez l'occasion de travailler avec un peuple de la Première Nation, soyez reconnaissant de pouvoir apprendre et approfondir vos connaissances et votre compréhension.

Assurez-vous de comprendre les politiques de la Première Nation. Souvenez-vous que les collectivités sont en majeure partie composées de grandes familles ou de clans. Le mandat de la Première Nation est passé de deux à quatre ans. Les politiques changent souvent avec l'élection. Le nouveau Chef/Conseil peut vouloir entreprendre des changements importants. Même si vous avez déjà travaillé avec la Première Nation, le nouveau Conseil peut décider d'apporter des changements d'envergure.

Nos peuples autochtones représentent les segments de la population dont la croissance est la plus rapide. Par conséquent, ils apportent une contribution importante à nos villes, nos régions rurales et à notre économie. Les Premières Nations *ne sont pas* des municipalités. Elles sont des nations souveraines qui doivent être considérées en tant que tel. Le développement dans les réserves augmentera. Les Premières Nations participeront davantage au développement des terres situées en dehors des réserves. C'est une période stimulante pour ceux qui auront la chance de travailler avec nos Premières Nations d'une façon ou d'une autre, et les urbanistes sont à la pointe des avancées. ■

**PAT MALONEY UPC, FICU,** urbaniste principale et associée de la firme Dillon Consulting Limited, travaille dans le bureau de Calgary. On lui a attribué le nom Pieds-Noirs de « Spitake » (prononcé spit-ahh-kay), qui signifie « Grande sœur ».

# Indigenous rights and planning:

## From recognition to meaningful coexistence?

By Janice Barry and Joelle McNeil/Cassidy

# Les droits des Autochtones et l'urbanisme :

## De la reconnaissance à une coexistence significative?

Par Janice Barry et Joelle McNeil/Cassidy



Planners' collective effort to shape the relationships between the Indigenous and non-Indigenous peoples of lands now known as Canada is arguably as old as the profession itself – and an effort with rather troubling beginnings. Although planning did not formally exist as a profession until 1919, many

L'effort collectif des urbanistes qui vise à façonner les relations entre les peuples autochtones et les populations non autochtones des territoires maintenant connus comme le Canada est sans doute aussi ancien que la profession elle-même. Et cet effort présente des débuts assez troublants. Bien que l'ubanisme n'existaient pas formellement comme profession avant 1919, nombre des outils et des pratiques réunis sous ce vocable (la cartographie, la catégorisation et l'arpentage) ont été inextricablement liés à la colonisation de ces territoires[1,2].

La première soixantaine d'années de l'urbanisme professionnel au Canada a été légèrement meilleure et pourrait être décrite comme une époque d'indifférence professionnelle ponctuée, à l'occasion, de moments où les urbanistes ont été directement impliqués dans la dépossession des terres autochtones et des pouvoirs de gouvernance. Plutôt que de retracer toute cette histoire, le présent article se concentre sur l'évolution de la relation au cours de la quarantaine d'années depuis l'arrêt *Calder* de la Cour suprême du Canada en 1973 et sa conclusion que les droits et le titre autochtones n'avaient pas été juridiquement éteints. Le jugement a entraîné une modification de la constitution canadienne pour reconnaître et confirmer les droits ancestraux et a eu une incidence importante sur divers aspects des politiques publiques, y compris l'urbanisme.

Le présent article met en évidence quelques tentatives de reconnaître les droits des Autochtones par l'urbanisme et demande si nous, en tant que profession, sommes sur la bonne voie. (Lorsque nous parlons de la « profession d'urbaniste » de cette façon, nous faisons presque exclusivement référence à un groupe de praticiens non autochtones. L'ICU n'a que récemment commencé à recueillir des données sur la diversité de ses membres. Cependant, des conversations avec des urbanistes autochtones de diverses régions du pays laissent entendre qu'ils représentent une très petite proportion des membres de l'Institut, peut-être moins de 1 p. 100.)



CLICK TO RETURN TO TABLE OF CONTENTS

of the tools and practices we now call 'planning' (mapping, categorizing, and surveying land) were inextricably linked to colonialization.[1,2]

The first 60 or so years of the Canadian planning profession were little better and might be described as an era of professional indifference, punctuated by occasional moments when planners were directly involved in the dispossession of Indigenous lands and governance authorities. Rather than trace this entire history, this article focusses on how the relationship has changed over the 40-plus years since the Supreme Court of Canada's 1973 Calder decision and its finding that Indigenous rights and title had not been lawfully extinguished. The ruling catalyzed a change to the Canadian Constitution to recognize and affirm Aboriginal rights and significantly affected various aspects of public policy, including planning.

This article highlights a few attempts to recognize Indigenous rights through planning and questions whether we, as a profession, are on the right path. (When we speak about the 'planning profession' in this manner, we are almost exclusively referring to a group of non-Indigenous practitioners. CIP has only recently started to collect data on the diversity of its members; however, conversations with Indigenous planners from various part of the country suggests that they represent a very small portion of the Institute, perhaps less than 1%.)

## LESSONS FROM NATURAL RESOURCE PLANNING

The Calder decision's most direct impact on planning was arguably the land-claim agreements that were negotiated over the next 25 years (and that continue to be negotiated today). These agreements led to a new era of "claims-based co-management," with increased opportunities for Indigenous groups to share the responsibility for creation of land use plans. Collaborative approaches to land use planning began with the James Bay and Northern Quebec Agreement and have now been included in "nearly every comprehensive land claims agreement since 1975."[3] Each agreement establishes a new governance body with varying levels of authority, ranging from actual decision-making power to a more advisory role. This approach is particularly prevalent in the North, where there are numerous collaborative planning regions and several completed plans in Yukon Territory, the Northwest Territories and Nunavut.[3] Nunatsiavut (Labrador) also has a co-management board that was tasked with creating a land use plan.

Claims-based co-management is not the only attempt to recognize Indigenous rights through natural resource planning. The 1997 *Delgamuukw* decision, with its assertion that "[t]here is always a duty of consultation," signaled the need for additional models. However, it was not until the 2004 *Haida* and *Taku* decisions that substantial steps were taken to ensure that Indigenous peoples were consulted on planning decisions. These Supreme Court of Canada rulings asserted that the duty to consult arises out of the Crown's responsibility to act *honourably* toward Indigenous peoples, rather than out of the signing of a treaty or a formal Indigenous claim. The honour of the Crown is at stake in all dealings with Aboriginal peoples, giving rise to different duties in different circumstances. With respect to consultation, honourable conduct entails a duty to consult Aboriginal communities where the Crown has knowledge of potential Aboriginal rights or title and when there are potential adverse impacts of the Crowns actions on that right.

There is also a duty to accommodate Indigenous concerns, with habitat restoration, agreements for hiring, and profit sharing as just

## LEÇONS TIRÉES DE L'AMÉNAGEMENT DES RESSOURCES NATURELLES

L'incidence directe la plus directe de l'arrêt *Calder* sur l'urbanisme est sans doute les accords de revendications territoriales qui ont été négociés au cours des 25 années suivantes (et qui font toujours l'objet de pourparlers aujourd'hui). Ces accords ont donné lieu à une nouvelle ère de « cogestion fondée sur les revendications », grâce à laquelle les groupes autochtones ont bénéficié de plus de possibilités de partager la responsabilité de la création de plans d'utilisation des terres. Les approches collaboratives de l'aménagement du territoire ont débuté avec la *Convention de la Baie-James et du Nord québécois*. Elles ont maintenant été incluses dans « presque toutes les ententes sur les revendications territoriales globales depuis 1975[3] ». Chaque entente établit un organe de gouvernance avec des niveaux décisionnels variés, allant d'un pouvoir de décision réel à un rôle plus consultatif. Cette approche est particulièrement répandue dans le Nord : de nombreuses régions pratiquent l'aménagement collaboratif et des plans ont été achevés au Yukon, dans les Territoires du Nord-Ouest et au Nunavut[3] . Le Nunatsiavut (le Labrador) possède, pour sa part, un conseil de cogestion qui a été chargé de la création d'un plan d'aménagement du territoire.

La cogestion fondée sur les revendications ne constitue pas la seule tentative de reconnaissance des droits des Autochtones par l'aménagement des ressources naturelles. L'arrêt *Delgamuukw* de 1997, qui affirme «[i]l y a toujours devoir de consultation », a signalé la nécessité de modèles supplémentaires. Cependant, il a fallu attendre les arrêts *Haïda* et *Taku* de 2004 pour que des mesures substantielles soient prises afin de voir à ce que les peuples autochtones soient consultés à propos de décisions d'aménagement. Ces jugements de la Cour suprême du Canada affirment que le devoir de consultation découle de la responsabilité qu'à la Couronne d'agir *honorablement* envers les peuples autochtones, plutôt que de la signature d'un traité ou d'une revendication autochtone officielle. L'honneur de la Couronne est en jeu dans toutes ses relations avec les peuples autochtones, ce qui donne lieu à différentes obligations selon les circonstances. Relativement aux consultations, la conduite honorable comporte un devoir de consulter les communautés autochtones là où la Couronne a connaissance d'un titre ou de droits autochtones potentiels et lorsque ses interventions risquent d'avoir une incidence défavorable sur ces droits.

Il y a aussi un devoir d'accomoder des préoccupations autochtones, la restauration de l'habitat, la conclusion d'ententes d'embauche et la participation aux bénéfices ne constituant que quelques-unes des mesures d'adaptation possibles. L'arrêt *Haïda* constitue l'une des seules affaires de droit autochtone à faire directement référence à l'aménagement du territoire. Il attire une attention particulière sur l'importance de consulter à propos des plans à long terme, étant donné que ces documents établissent les paramètres généraux de toutes les autres activités d'aménagement et de gestion des ressources.

En Colombie-Britannique, l'incidence de cet arrêt a été presque immédiate. La province a dû élaborer de nouvelles méthodes d'échange avec les peuples autochtones au sujet de l'aménagement stratégique des ressources naturelles. Sinon, ses plans risqueraient de continuer à être contestés devant un tribunal. Tous les plans conçus depuis l'arrêt *Haïda* ont fait l'objet de discussions de gouvernement à gouvernement entre les Premières Nations concernées et la province.

some potential accommodation measures. The *Haida* decision is one of the few Aboriginal law cases to make direct reference to land use planning. It drew specific attention to the importance of consulting on long-range plans, since these documents establish the general parameters for all other resource planning and management activities.

In BC, the impact of this decision was almost immediate; it had to develop new methods for engaging Indigenous peoples in strategic natural resource planning or the plans might continue to be challenged in a court of law. All of the plans completed since the Haida decision have been subject to government-to-government discussions between affected First Nations and the province.

The Central Coast Land and Resource Management Plan was one of the earliest and most complex plans to adopt this new method of involving First Nations. Its government-to-government approach included several types of bilateral forums between affected First Nations and the provincial government that were tasked with addressing both the technical and political/jurisdictional aspects of the planning relationship. The language of a government-to-government planning relationship has also been used in Ontario, where it was evoked by the former Grand Chief of Nishnawbe Aski Nation (NAN) when advocating for significant changes to Ontario's 2010 *Far North Act*. The Act is the legislative foundation for land use planning in the Far North. It supports community-based land use planning that sets out a joint planning process between First Nations and the province, supports the province's land use planning objectives, and recognizes Aboriginal and treaty rights.

While claims-based co-management and government-to-government planning can be effective avenues for addressing Indigenous interests and protecting sensitive cultural values, they can also be deeply exclusionary. As Indigenous scholar and political commentator Hayden King observes, "their design, structure, and implementation are so steeped in the technical language and procedure of bureaucracy that Indigenous peoples have immense difficulty accessing or participating in them in earnest."[3] Without deep structural changes and a sustained commitment from government officials to meaningfully engage with the values and expertise Indigenous peoples are bringing to the table, these processes may end up doing little more that creating an "illusion of the inclusion of [Indigenous] knowledge systems."[3]

Experiences are also rather mixed on the related, but distinct issue of establishing planning processes that represent a genuine sharing of power. Here, NAN's experience with the *Far North Act* is particularly instructive. Although the Act established joint planning processes in the form of community land use plans, NAN argues that First Nations were not adequately consulted in the creation of the Act itself. Community land use plans remain under the ultimate authority of the Minister and must adhere to the planning objectives set out in the Act.

## THE EMERGING URBAN STORY

The duty to consult, as well as the broader process for recognizing and settling Indigenous land claims, has had far less of an impact on the planning of our built environment. Some observers have commented that urban planning remains largely silent on issues of Indigenous rights and title. [1,2,4] These silences are potentially a result of a current lack of legal clarity on whether or not the duty to consult

Le Central Coast Land and Resource Management Plan constitue l'un des documents les plus anciens et les plus complexes à adopter la nouvelle méthode de participation des Premières Nations. À titre de volet de son approche de gouvernement à gouvernement, on trouve plusieurs types d'instances bilatérales qui réunissaient les Premières Nations concernées et le gouvernement provincial et qui étaient chargées de s'occuper à la fois des aspects techniques et des aspects liés à la politique et aux compétences de la relation de planification. Le concept de relation de gouvernement à gouvernement en matière de planification a également été employé en Ontario, où il a été invoqué par l'ancien grand chef de la Nation Nishnawbe-Aski (NNA) lorsqu'il a préconisé l'apport de modifications importantes à la Loi de 2010 sur le Grand Nord de l'Ontario. Celle-ci représente la base législative sur laquelle repose l'aménagement du territoire dans le Grand Nord. Il soutient un aménagement communautaire du territoire qui établit un processus mixte de planification entre les Premières Nations et la province, soutient les objectifs provinciaux de l'aménagement du territoire et reconnaît les droits ancestraux et issus de traités.

La cogestion fondée sur les revendications et la planification de gouvernement à gouvernement peuvent constituer des moyens efficaces de tenir compte des intérêts autochtones et de protéger des valeurs culturelles sensibles, mais ils sont aussi susceptibles de représenter une source profonde d'exclusion. Comme l'observe Hayden King, érudit et commentateur politique autochtone, « leur conception, leur structure et leur mise en œuvre sont tellement imprégnées d'un langage technique et de bureaucratie, que les peuples autochtones éprouvent une immense difficulté à y avoir accès ou à y participer sérieusement[3]. » Sans l'apport de changements structurels majeurs et un engagement soutenu des fonctionnaires à s'intéresser d'une manière significative aux valeurs et à l'expertise contribuées par les peuples autochtones, ces processus risquent de n'engendrer guère plus qu'une "illusion de l'inclusion des systèmes de connaissances [autochtones]"[3]. »

En outre, les expériences sont plutôt mitigées relativement à la question connexe mais distincte de l'établissement de processus d'aménagement qui représentent un véritable partage du pouvoir. Dans ce contexte, l'expérience de la NNA avec la *Loi de 2010 sur le Grand Nord* est particulièrement instructive. Bien que la Loi ait établi des processus mixtes d'aménagement sous la forme de plans communautaires d'aménagement du territoire, la NNA soutient que les Premières Nations n'ont pas été adéquatement consultées lors de sa création. Les plans communautaires d'aménagement du territoire demeurent sous l'autorité ultime du ministre et doivent respecter les objectifs d'aménagement énoncés dans la *Loi*.

## LE RÉCIT URBAIN ÉMERGENT

Le devoir de consultation, ainsi que le processus plus large de reconnaissance et de règlement des revendications territoriales autochtones, ont eu une incidence beaucoup moins grande sur l'aménagement de notre environnement bâti. Certains observateurs ont commenté que, dans une large mesure, l'urbanisme ne s'exprime pas sur les questions de droits et de titre autochtones[1,2,4] . Ces silences découlent peut-être de l'absence actuelle de clarté juridique sur l'application aux municipalités du devoir de consulter les peuples autochtones. Bien que la Couronne soit l'unique responsable du devoir de consultation, « [e]lle peut déléguer certains aspects



CLICK TO RETURN TO TABLE OF CONTENTS

Indigenous peoples applies to municipalities. While the Crown alone is legally responsible for the duty to consult, "the Crown may delegate procedural aspects of consultation." The Crown's delegation may be express or implied and is contextual and case-specific. With respect to municipalities, there exists a grey area in part due to a lack of clear pronouncements on behalf of the courts about the municipal role in consultation. However, recent trends in Indigenous-municipal planning relationships suggest that the issues may run deeper.

Processes of colonization physically and conceptually separated Indigenous peoples from urban spaces.[5] However, this colonial separation is challenged by increasing numbers of Indigenous peoples living in urban centres. These increases have resulted in a range of efforts to provide better services to Indigenous peoples in the urban environment, with many of Canada's 22 Big Cities now framing their efforts as part of a broader commitment to the Truth and Reconciliation Commission's Calls to Action. Efforts are also being made to both the collaborative relationship with Indigenous peoples and the cultural and historical representation of Indigeneity in the built environment. Yet as one study found, not all cities have strategies in place to achieve their expressed commitments and many have not sufficiently grappled with the complexity of recognizing Indigenous claims to sovereignty and self-determination.

"The Canadian planning profession's relationships with Indigenous peoples have undoubtedly changed in the 40-plus years since the 1973 Calder decision and, more recently, through the duty to consult."

Municipal ambiguity as to whether Indigenous peoples are engaged in urban planning processes as stakeholders or as holders of an inherent right to self-determination can manifest itself in different ways. In metropolitan Vancouver, for example, concerns have been raised about whether the government of an adjacent First Nation reserve should be engaged in Official Community Planning in much the same way as a neighbouring municipality or as representatives of Indigenous peoples who hold unextinguished rights. Different, but related issues are arising out the establishment of Urban Reserves in Manitoba, where the approach to negotiating municipal services and potential land use compatibility issues does not sufficiently recognize First Nations as self-determining governments and is often built around an expectation that First Nations will just follow pre-existing bylaws and zoning decisions.

## REFLECTING ON OUR PAST AND CHARTING A PATH FOR THE FUTURE

The Canadian planning profession's relationships with Indigenous peoples have undoubtedly changed in the 40-plus years since the 1973 Calder decision and, more recently, through the duty to consult. Yet, as we have also seen, a considerable amount of work still needs to be done. The bureaucratic and technical language of many planning processes needs to be challenged, and more work needs to be done in terms of carefully and cooperatively carving out space for a deeper and more meaningful expression of Indigenous knowledge and governance systems.

procéduraux de la consultation ». La délégation par la Couronne peut être explicite ou implicite et est contextuelle et propre à chaque cas. Pour ce qui est des municipalités, il existe une zone d'incertitude, en partie à cause de l'absence de décisions claires des tribunaux au sujet de leur rôle dans la consultation. Cependant, les récentes tendances en matière de relations entre les Autochtones et les municipalités en matière d'aménagement laissent entendre que les problèmes sont peut-être plus épineux.

Les processus de colonisation ont physiquement et conceptuellement séparés les peuples autochtones des espaces urbains[5]. Toutefois, cette séparation coloniale est contestée par un nombre croissant d'Autochtones vivant dans des centres urbains. Cette hausse a donné lieu à un éventail d'efforts visant à fournir de meilleurs services aux Autochtones en milieu urbain. Bon nombre des 22 grandes villes du Canada encadrent maintenant leurs initiatives comme volet d'un engagement plus large envers les appels à l'action de la Commission de vérité et réconciliation. Des efforts sont également consentis à la fois sur le plan de la relation de collaboration avec les peuples autochtones et sur celui de la représentation culturelle et historique de l'indigénéité dans l'environnement bâti. Pourtant, comme l'a constaté une étude, les villes ne disposent pas toutes de stratégies pour respecter les engagements qu'elles ont exprimés, et beaucoup n'ont pas suffisamment fait face à la complexité de la reconnaissance des revendications autochtones en matière de souveraineté et d'autodétermination.

Lorsqu'il s'agit de déterminer si les peuples autochtones participent aux processus d'urbanisme à titre de parties prenantes ou de détenteurs d'un droit inhérent à l'autodétermination, l'ambiguïté des municipalités peut se manifester de diverses façons. Par exemple, dans la région métropolitaine de Vancouver, on s'est demandé si le gouvernement de la réserve adjacente d'une Première Nation devait participer à l'aménagement communautaire officiel de la même manière qu'une municipalité voisine ou à titre de représentants de peuples autochtones qui détiennent des droits non éteints. Des problèmes différents, mais connexes, découlent de l'établissement de réserves urbaines au Manitoba. Ici, l'approche de la négociation des services municipaux et des problèmes possibles de compatibilité des utilisations du sol ne reconnaît pas assez les Premières Nations comme gouvernements autonomes et s'articule souvent autour d'une attente que les Premières Nations se contenteront de respecter les règlements et les décisions de zonage existants.

## RÉFLÉCHIR SUR NOTRE PASSÉ ET DÉFINIR UNE VOIE À SUIVRE

Les relations de l'urbanisme professionnel canadien avec les peuples autochtones ont indubitablement changé au cours de la quarantaine d'années depuis l'arrêt *Calder* de 1973 et, plus récemment, par le devoir de consultation. Pourtant, comme nous l'avons aussi vu, il reste encore beaucoup de travail à accomplir. Le langage technique et bureaucratique de beaucoup de processus d'aménagement doit être contesté et il faut faire davantage pour créer avec soin et en collaboration un espace permettant une expression plus profonde et plus significative des systèmes de connaissance et de gouvernance autochtones.

Ces problèmes sont particulièrement répandus dans les régions urbaines, où les urbanistes ne font que commencer à faire face à la signification et aux conséquences de l'autodétermination autochtone. La profession est mise au défi d'examiner comment la prochaine

These challenges are particularly prevalent in urban areas, where planners are only just beginning to contend with the meaning and implications of Indigenous self-determination. Moving forward, the planning profession is challenged to explore how the next era of planning can promote a deeper form of coexistence. Rather than broadening existing planning paradigms to include Indigenous peoples, will Indigenous knowledge and governance be allowed to sit alongside and be given just as much standing as more familiar modes of planning? This, we argue, represents a significant and exciting challenge for the next 100 years of planning.

**Janice Barry**, PhD, MCIP, RPP, is an Assistant Professor in University of Waterloo's School of Planning. Her research focuses on questions of Indigenous recognition and reconciliation in and through planning, with a particular interest in how land claims and other treaty settlement agreements shape planners' relationships with Indigenous peoples.

**Joelle McNeil/Cassidy**, MPl, MA, is a PhD student at the University of Waterloo's School of Planning. Her research interests include the intercultural planning relationships between planning consultants and Indigenous communities.

## ENDNOTES

1 Libby Porter, *Unlearning the Colonial Cultures of Planning* (Aldershot: Ashgate, 2010).

2 Libby Porter and Janice Barry, *Planning for Coexistence? Recognizing Indigenous Rights through Land-Use Planning* (Abingdon: Routledge, 2016). References to much of the literature that supports this article can be found in this book.

3 Hayden King, "Give It Up: Land and Resource Management in the *Canadian North: Illusions of Indigenous Power and Inclusions*," in Canada's North: What's the Plan? eds. Thomas Berger, Steven A Kennett, and Hayden King (Ottawa: The Conference Board of Canada, 2010), 75-108.

4 Ryan Walker, Ted Jojola, and David Natcher, eds, *Reclaiming Indigenous Planning* (Montreal: McGill-Queen University Press, 2013), especially Andrea Procter and Keith Chaulk, "Our Beautiful Land: The Challenge of Nunatsiavut Land-Use Planning," 436–53; and Libby Porter, "Coexistence in Cities: The Challenge of Indigenous Urban Planning in the Twenty-First Century," 183–310.

5 Richie Howitt and Gaim James Lunkapis, "Coexistence: Planning and the Challenge of Indigenous Rights," in *The Ashgate Research Companion to Planning Theory*, eds. Jean Hillier and Patsy Healey (Farnham: Ashgate, 2010), 109-134. ■

ère de l'aménagement peut promouvoir une forme plus poussée de coexistence. Plutôt que d'élargir les paradigmes actuels de l'urbanisme pour inclure les peuples autochtones, pourra-t-on tenir aussi compte de leurs connaissances et de leur gouvernance et leur accorder autant d'importance que les modes d'aménagement plus familiers? À notre avis, il s'agit là d'un défi majeur et excitant pour les 100 prochaines années de l'urbanisme.

**Janice Barry**, PhD, MICU, UPC, est professeure adjointe à l'École d'urbanisme de l'Université de Waterloo. Ses recherches se concentrent sur les questions de la reconnaissance des Autochtones et de la réconciliation avec eux dans le domaine de l'urbanisme et par l'entremise de celui-ci, avec un intérêt particulier sur la façon dont les revendications territoriales et d'autres accords de règlement de revendications issues de traités influencent les relations des urbanistes avec les peuples autochtones.

**Joelle McNeil/Cassidy**, MIP, MA, est doctorante à l'École d'urbanisme de l'Université de Waterloo. Elle s'intéresse notamment aux relations interculturelles en matière d'urbanisme entre les experts-conseils de ce domaine et les communautés autochtones.

## NOTES

1 Libby Porter, *Unlearning the Colonial Cultures of Planning* (Aldershot: Ashgate, 2010).

2 Libby Porter and Janice Barry, *Planning for Coexistence? Recognizing Indigenous Rights through Land-Use Planning* (Abingdon: Routledge, 2016). On peut trouver dans ce livre des références à une bonne partie de la littérature à l'appui du présent article.

3 Hayden King, « Give It Up: Land and Resource Management in the Canadian North: Illusions of Indigenous Power and Inclusions » , in *Canada's North: What's the Plan?* eds. Thomas Berger, Steven A Kennett, et Hayden King (Ottawa: The Conference Board of Canada, 2010), 75-108.

4 Ryan Walker, Ted Jojola, and David Natcher, eds, *Reclaiming Indigenous Planning* (Montreal: McGill-Queen University Press, 2013), en particulier Andrea Procter et Keith Chaulk, « Our Beautiful Land: The Challenge of Nunatsiavut Land-Use Planning », 436–53; et Libby Porter, "Coexistence in Cities: The Challenge of Indigenous Urban Planning in the Twenty-First Century," 183–310.

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# TREATY PRINCIPLES ARE PLANNING PRINCIPLES

## Learning from the Experiences of Manitoban Planning Practitioners

BY MADELEINE KOCH MCP, MCIP CANDIDATE
AND JANICE BARRY PHD, MCIP CANDIDATE

**SUMMARY** *Drawing on the results of a recently completed Master's thesis, this paper examines how local government planners can support Indigenous reconciliation. It frames this work according to four Indigenous principles contained in many of the original treaties, and reinterpreted in more contemporary publications by the Truth and Reconciliation Commission of Canada and the Royal Commission on Aboriginal Peoples. Mutual recognition, mutual respect, sharing, and mutual responsibility are positioned as key principles for facilitating positive relationships with First Nations and for planners to contribute to our ongoing and collective responsibilities as "treaty people".*

**RÉSUMÉ** *Cet article, s'inspirant des résultats d'un mémoire de maîtrise récemment achevé, explore la façon dont les urbanistes des gouvernements locaux peuvent soutenir la réconciliation des collectivités autochtones. La présente tâche est fondée selon quatre principes autochtones que l'on retrouve dans de nombreux traités anciens et qui ont été réinterprétés dans des publications plus récentes par la Commission de vérité et de réconciliation du Canada et la Commission royale sur les peuples autochtones. Les principes clés adoptés pour entretenir des relations positives avec les Premières Nations sont : la reconnaissance réciproque, le respect mutuel, le partage et la responsabilité commune. Ces mêmes principes s'appliquent aux urbanistes afin qu'ils contribuent à nos responsabilités collectives et continues en tant « qu'autochtones visés par un traité ».*




The relationship between Indigenous and non-Indigenous peoples is at a turning point, so much so that the recent Truth and Reconciliation Commission (TRC) has published several "calls to action"[1] for governments and agencies with a role to play in repairing the relationship with Indigenous peoples of Canada. While much of the required reconciliation work will take place at the national and provincial levels, there are also implications for local government planners. They are often at the forefront of the relationships that arise as First Nations acquire lands adjacent to or within established local government jurisdictions and add them to their existing reserve lands. These "urban reserves" open up planning coordination challenges as well as opportunities for collaboration, which is not always straightforward work. The two parties may have limited experience and practical guidance on how to navigate their relationship. This article explores how the Indigenous principles contained in many of the original treaties, and reinterpreted in more contemporary publications by the Truth and Reconciliation Commission of Canada and the Royal Commission on Aboriginal Peoples,[2] can inform and enrich these relationships.

We draw on the results of a recently completed Master's thesis by co-author Koch[3] that used semi-structured interviews, often of one hour or more in length, to collect "practice stories"[4, 5] about Manitoban practitioners' experiences with the emerging planning relationships between municipalities and First Nations. As the prominent U.S. planning scholar John Forester explains, the goal of these interviews is not simply to relay facts; a "practice story" is intended to reveal the priorities, values, and the essence of the problems planning practitioners face.[6] The six interviewees in Koch's thesis[7] included First Nation representatives, as well as planning practitioners working at both the provincial and local government

scale. These two scales of analysis were necessary, as the Province of Manitoba provides planning support to many of Manitoba's small rural municipalities who lack an in-house professional planner, but who may be in close proximity to a First Nation. A private planning consultant was also interviewed as part of this research, though he was reflecting on his previous position as a planner for a large municipality.

In this article, we focus on a small portion of the study results and use the strategies and examples shared in these practice stories to illustrate how these planning relationships can be understood as enactments of our ongoing and collective responsibilities as "treaty people". In using this phrase, we acknowledge that not all Indigenous peoples in Canada were signatories to a treaty, and that there is a long and ongoing history of broken treaty promises. Notwithstanding these issues, the idea that "we are all treaty people"[8] reminds us that these agreements to share land and resources and to maintain respectful governance relations extend well beyond Indigenous peoples and the Crown.

## TREATY PRINCIPLES AS RELATIONSHIP PRINCIPLES

Although the Canadian Government tends to regard treaties as one-time land surrenders, Indigenous peoples often view these agreements as living "relationship documents"[9] intended to guide the two parties through an equal relationship based on principles of coexistence, sharing, respect and deep mutual responsibility. This latter perspective is grounded in Indigenous law, which can be conceived as the customs and conventions that guide Indigenous peoples' relationships to one another and to the natural world. Indigenous law was very much a part of the treaty-making process, in that the terms of the relationships were formalized through ceremonies and intended to be revisited and reaffirmed through further ceremony on an ongoing basis.[10,11,12] These relational aspects of treaties received limited popular attention; however, Indigenous legal scholarship suggests that such interpretations are just as legitimate as the Eurocentric legal interpretations that have dominated for so long.[13,14] As discussed below, more contemporary documents about facilitating renewed relationships with First Nations largely correspond with the early treaty principles based in Indigenous law.

The principles outlined in RCAP's 1996 document *Looking Forward Looking Back* and the "calls to action" associated with the TRC's 2015 Final Report each provide guidance for achieving the same goal: reconciliation between Indigenous peoples, non-Indigenous communities, and Canadian governments (*including* local governments). The RCAP document sets forth four overarching principles for a renewed relationship, and the TRC report echoes and endorses these. They are: Mutual Recognition, Mutual Respect, Sharing, and Mutual Responsibility. The principle of Mutual Recognition centres on recognition of equality, coexistence, and self-government[15] meaning the two parties are to operate alongside one another in a spirit of coexistence while still retaining their own culture, governance, and use of lands for specific purposes. Mutual Respect recognizes that people of all cultures warrant respect "simply by virtue of their humanity"[16] and requires that respect must extend not just to human beings, but to nature and land as well. The principle of Sharing was a major concept in treaties – it was intended that treaties were agreements for lands to be shared between settlers and First Nations (an intention that was not properly fulfilled). RCAP emphasizes that sharing must start from a basis of equality between parties, meaning that First Nations must regain access to a reasonable portion of their ancestral lands, and that sharing should increase their ability to form economic self-reliance. The principle of Mutual Responsibility requires parties to act in a spirit of intrinsic responsibly towards each other, and towards shared land.

## LAND USE PLANNING, LOCAL GOVERNMENTS AND FIRST NATIONS: RENEWING RELATIONSHIPS & ENACTING RESPONSIBILITIES?

Given the emphasis on land in each of these four principles, land use planners – and the organizations they work for – can play a significant role in renewing relationships with Indigenous peoples. While none of the Manitoban planners that took part in the study made explicit reference to the RCAP principles, their responses suggest that ideas of mutual recognition, mutual respect, sharing and mutual responsibility provide useful guidance for the emerging planning relationship between First Nations and local governments, particularly when there have been poor histories of working together. Their responses suggest that this relationship begins with a willingness to mutually recognize one another as a long-term governance partner, not as another "stakeholder" that needs to be accommodated. These planners' experiences also point to the importance of subtle, yet powerful, shifts in how planners conceive and enact their (treaty) responsibilities.

Several of the planners included in this study highlighted the importance of spending time to develop positive relationships in advance of a specific project proposal. Small interventions, like regular lunch meetings, were seen to develop mutual understanding and respect, making subsequent projects run more smoothly. Others spoke about the importance of avoiding an "expert attitude" and approaching this work with humility, honesty, and an interest in learning their partner First Nation's story (while also respecting that it may not always be appropriate for these stories to be shared). Early on in the relationship, it is particularly important for planners to use the soft skills of community engagement, adopting an open and iterative mode of communication. However, it was noted that some organizations undervalue these skills, which can impact planners' ability to start new relationships on the right foot.

As some of the planners included in the study found, mutual respect and recognition may necessitate unexpected alterations to project timelines to allow for culturally important events and practices. Rather than considering this a disruption, one planner considered their experience a "refreshing" moment of cross-cultural learning, in that some things in life should be more important than work. Building flexibility into mutually agreed upon work plans can accommodate unforeseen events, alleviate tension, and keep projects on track. One local government hired an Indigenous person to work on certain cultural projects, an initiative that may help to facilitate further cross-cultural understanding and learning between parties.

Although mutual respect and recognition are foundational elements of Indigenous reconciliation and positive intergovernmental planning relationships, there must also be willingness to share power and exercise mutual responsibilities. When applied to planning, these two remaining RCAP principles call for a shift in thinking. Urban reserves need to be seen not as a potential loss to municipal tax revenue or land use oversight (since new and existing reserve lands are federal lands that fall outside of a local government's jurisdiction), but as an opportunity to pursue mutually beneficial development projects. Although the creation of new arrangements to support the sharing of economic benefits and political responsibilities are usually outside of an individual planner's scope of influence, one of the practice stories included in the research illustrated how a politically savvy planner was able to harness the power they did have to change the course of events over a specific development project and to counteract systemic racism.

As the practice stories included in this research begin to suggest, planners can take personal responsibility for facilitating positive relationships with First Nations, and local governments can play a clear role in Indigenous reconciliation. These relationships can be, and in many cases are already being, productively framed and facilitated by planning theories, principles and practices that will already be quite familiar to any planning practitioner – from general collaborative planning principles to the simple human act of regularly getting together for lunch meetings. However, productive and respectful engagement in these more difficult and potentially contentious aspects of the emerging planning relationship between First Nations and municipalities may require additional guiding principles and ethical perspectives. We are certainly not alone in suggesting that more attention needs to be paid to these issues. Several organizations have published guides to assist with the development and navigation of relationships between local governments and First Nations.[17,18,19] But, as this research suggests, planners do not necessarily need new principles or guides to support this work; they need to learn more about treaties and the relationship principles that are expressed in them, and that are mirrored in more recent documents like RCAP and TRC.

As evidenced by the work of Manitoban planning practitioners, some of these principles are already being enacted in planning practice, to the benefit of intergovernmental relationships. We, therefore, challenge planning educators to explore ways to incorporate Indigenous histories, laws and relationship principles into their curriculum and suggest that this knowledge ought to be considered a core competency for planners, one that needs to be championed at the institutional level. We also ask professional planners to dedicate just a small portion of their Continuing Professional Learning (CPL) to reading the RCAP and TRC reports and exploring the ethical and practical meaning of mutual recognition, mutual respect, sharing and mutual responsibility. As a profession, we need to develop greater awareness of how treaty principles are, indeed, planning principles. ■

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# BEYOND CONSULTATION:

## Lessons from Joint Stewardship

Figure 1: Red Hill Parkway, Hamilton, Ontario

BY SHERI LONGBOAT PHD

**SUMMARY** *The role of Indigenous consultation and engagement in land use planning and development continues to evolve in response to a changing legal and policy landscape. While formal processes that trigger consultation continue to develop and expand, an alternative approach involves exploring collaborative relationships on projects where there are shared interests between municipalities and Indigenous communities. Lessons from the Red Hill Valley Joint Stewardship Board in Hamilton illustrate informal collaboration can support positive benefits and situate each community in a better positon to adapt to change.*

**RÉSUMÉ** *Le rôle de la consultation et de l'engagement des collectivités autochtones dans l'aménagement et la mise en valeur du territoire continue d'évoluer en réponse aux changements observés dans les paysages juridique et politique. Bien que des procédures formelles visant à déclencher des procédures de consultation sont toujours élaborées et encouragées, une approche alternative est également préconisée, soit l'adoption de relations de collaboration au sein de projets présentant des intérêts communs pour les municipalités et les collectivités autochtones. Le conseil de gouvernance commune de Red Hill Valley à Hamilton a démontré qu'une collaboration informelle peut avoir des répercussions positives et favoriser l'adaptation aux changements des collectivités.*

A new approach to working with Indigenous communities in land use planning and development is reshaping conventional practices for consultation and engagement. Under Ontario law, Indigenous consultation is generally triggered by the *Environmental Assessment Act (1990)*, the *Heritage Act (1990)* and the *Ontario Planning Act (2005)*. The *Far North Act (2010)* requires a higher level of First Nations engagement through the joint development of land use plans for traditional territories; although the First Nations affected initially opposed the legislation because of its unilateral development. Signifying a shift towards a more comprehensive and collaborative model to land use planning across Ontario is the 2014 Provincial Policy Statement that explicitly "recognizes the importance of consulting with Indigenous communities on planning matters that may affect their rights and interests."

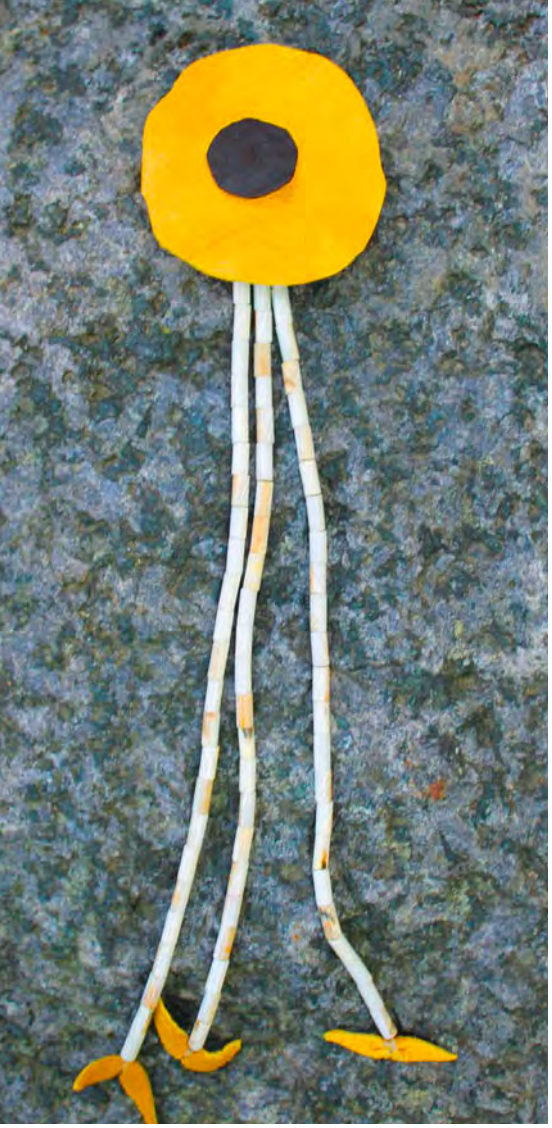


Figure 2: Fire of the Valley Wampum

Arguably, the impetus for this new approach emanates from the courts where judicial decisions (for example, *Haida Nation v. British Columbia; Taku River Tlingit First Nation v. British Columbia; Mikisew Cree First Nation v. Canada;* and, more recently, *Tsilhqot'in Nation v. British Columbia)* have affirmed and defined the Crown's duty to consult and accommodate Indigenous communities on activities that may impact both asserted and proven Indigenous and treaty rights. At the heart of the legal disputes are issues of land ownership, land use and development, and access, use and control over natural resources within traditional territories or ancestral lands. These activities are interconnected with planning, and often complicated by overlapping jurisdictions and policies between multiple levels of government and their respective ministries and departments.

Canada's 2016 full endorsement and commitment by Prime Minister Trudeau to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) further signifies a shift toward a new relationship between Indigenous communities and government. Most relevant for planning is UNDRIP Article 18 that affirms Indigenous peoples' "right to participate in decision-making in matters which would affect their rights", and Article 19 requires that states "obtain free, prior and informed consent" before adopting measures that affect Indigenous peoples. Moreover, given the full scope of the 46 Articles contained in UNDRIP, its implementation will undoubtedly require a concerted effort and involve all levels of government committed to collaborating with Indigenous communities.

Likewise, Indigenous communities are proactively responding to the changing environment in their own ways. Communities are developing consultation and accommodation protocols grounded in ancestral knowledge and Indigenous law. Some are using the courts to challenge government infringement on rights and interests including lack of adequate consultation on development activities, while other communities are leveraging their strengths and working directly with private sector partners to create short and long-term economic opportunities. The result is a complex and transformative landscape that can pose a significant challenge to conventional planning and development, particularly as the full implications of high-level government obligations and community response have yet to be fully realized.

On the other hand, one can look at the current state of change as an opportunity - an opportunity to reset the relationship and establish, where necessary, new multi-level and inter-governmental approaches, which include Indigenous governments, to collaboratively address a myriad of complex issues that involve land, resources and environment. From an Indigenous perspective, this can be seen as rekindling the historic relationship (between Indigenous people and settlers) long established by our ancestors who held firm to the original instructions and set forth the guiding principles for our relationships, our coexistence with one another and with all of creation. Among some Indigenous nations are traditional teachings that foretell of a time when critical decisions will be required that ultimately determine our future path and existence. Some believe that time is upon us right now.

Given this context of change, uncertainly, and complexity, the question that all levels of government and Indigenous communities inevitably share is, how do we move forward to fulfill responsibilities within our respective needs and constraints, without compromising our rights, autonomy and accountabilities? Or more practically, how do municipal and Indigenous governments build relationships and transform shared objectives into outcomes that produce mutual benefits on land of common interests?

The following section offers brief insight into an approach by the City of Hamilton and the Haudenosaunee Confederacy Chiefs Council (traditional government of the Six Nations) for joint stewardship in the Red Hill Valley, Hamilton, Ontario. The aim is to illustrate that a collaborative relationship need not only be triggered by formal mandate; it can emerge and flourish at the grass-roots by those who have a direct and vested interest in the outcomes of a shared commitment. Once established, these relationships have an added benefit of transitioning into a more formal structure and process to address emerging needs as required.

## LESSONS FROM JOINT STEWARDSHIP

The Joint Stewardship Board (JSB) was created through the Joint

Stewardship Agreement (2003) between the City of Hamilton and the Haudenosaunee Confederacy Chiefs Council (HCCC) in response to conflict over opposing views on construction of the Red Hill Valley Parkway in east Hamilton (Figure 1). The agreement is one of a series negotiated to address a number of shared concerns and interests between the City, and the Haudenosaunee people who assert pre-confederation treaty rights within what is now southern Ontario (Table 1).

Through parkway construction and restoration, the JSB jointly undertook a number of projects involving knowledge integration and coordination between Hamilton and the Six Nations community, namely environmental monitoring, ecological restoration, species-at-risk assessment, human and natural heritage protection, and traditional medicine plant recovery. Now, five years after the final restoration plans were completed, the JSB is focused on monitoring and planning for the future, and continuing developments for construction of an environmental interpretive centre. It is beyond the space available here to detail all of the JSB accomplishments. More information including the JSB vision, objectives and activities is found on the website at www.jointstewardshipboard.com. What follows below are four key lessons for how the JSB progressed from conflict to collaboration and shared benefits. It should be noted, the following is a reflective piece and represents the author's views and experiences.

**1 Find common ground upon which to build.** Opposing views to who holds the rights and jurisdiction to the Red Hill Valley were overcome by a conscious decision to focus on shared responsibilities. Rather than debate if the Haudenosaunee had proven Indigenous and treaty rights under the 1701 Nanfan Treaty, or if the City maintains sole jurisdiction as Crown entities under the *Municipal Act*, both communities agreed each have a responsibility for the

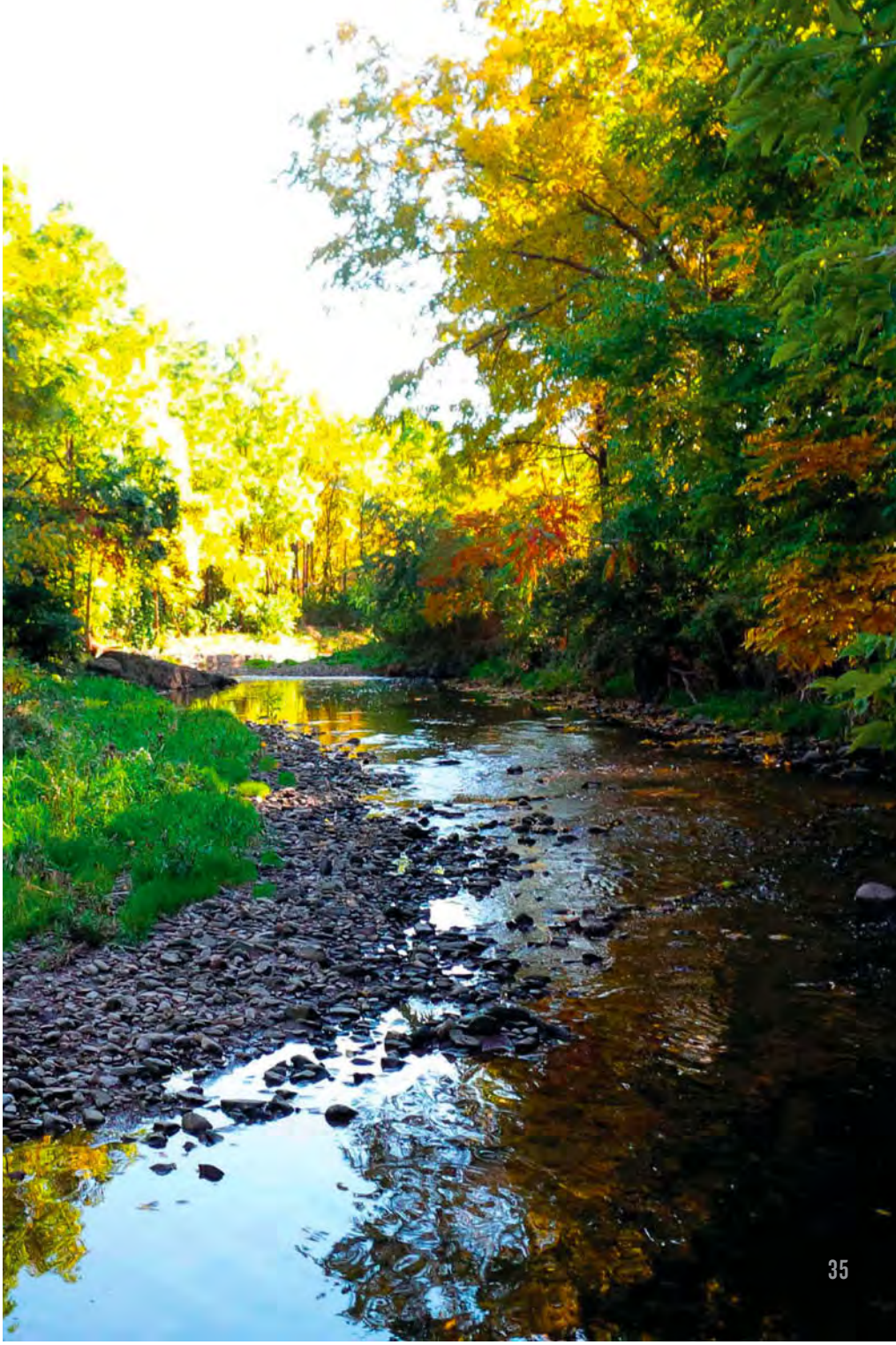
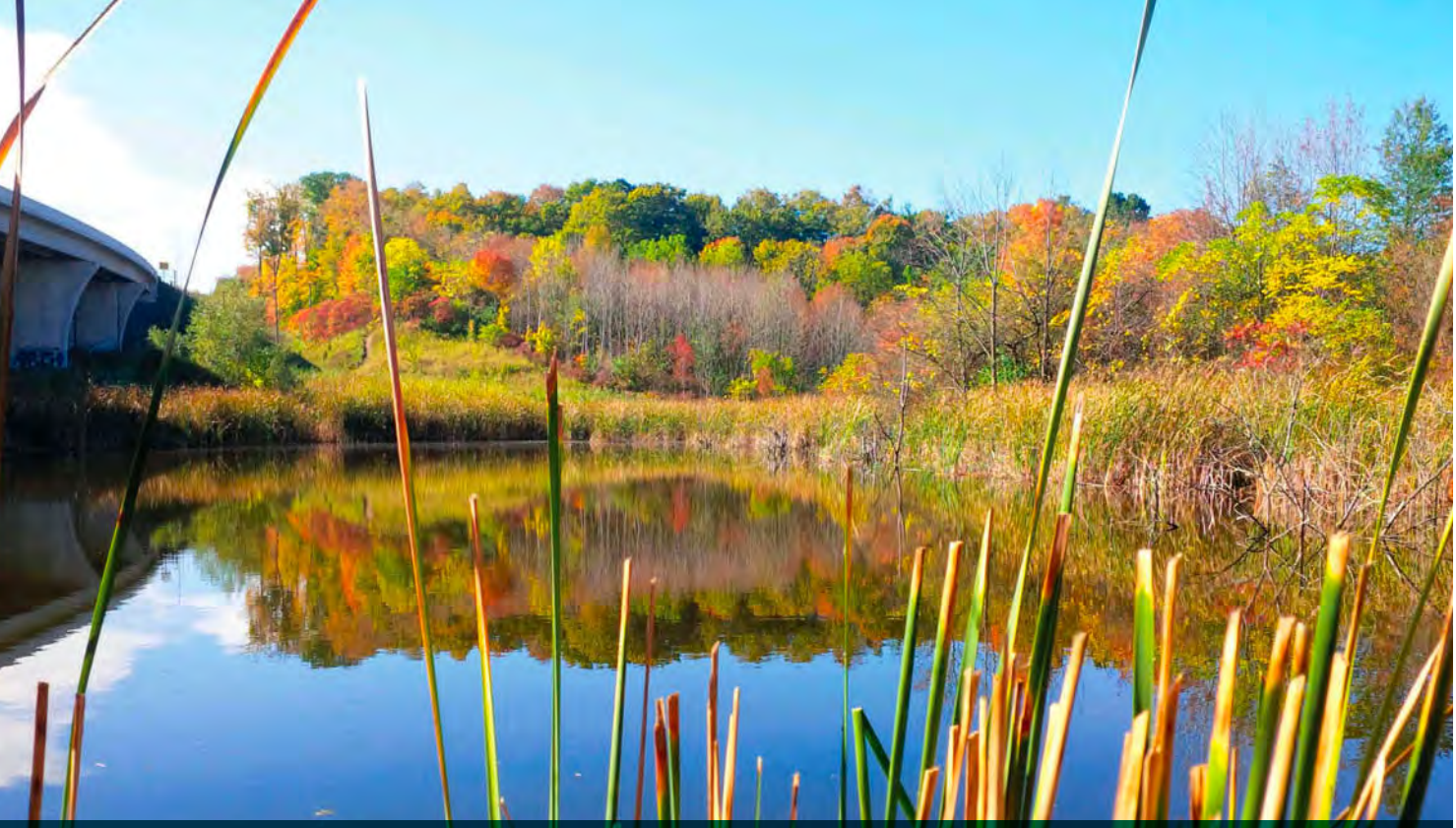




**TABLE 1: HAUDENOSAUNEE—HAMILTON RED HILL AGREEMENTS**

| |
|---|
| AGREEMENT ABOUT FACILITATED NEGOTIATIONS, SEPTEMBER 19, 2003 |
| AGREEMENT CONCERNING RESPECT FOR AND PROTECTION OF HUMAN BURIALS IN THE RED HILL CREEK VALLEY AND ASSURANCES CONCERNING ARCHEOLOGICAL WORK IN THE RED HILL CREEK VALLEY, OCTOBER 22, 2003 |
| GENERAL AGREEMENT, NOVEMBER 17, 2003 |
| AGREEMENT ABOUT HUNTING, FISHING, TRAPPING AND GATHERING, NOVEMBER 17, 2003 |
| AGREEMENT ON TOLLS, NOVEMBER 17, 2003 |
| JOINT STEWARDSHIP AGREEMENT, DECEMBER 18, 2003 |
| AGREEMENT ON MEDICINE PLANTS AND OTHER SIGNIFICANT PLANTS, DECEMBER 18, 2003 |
| AGREEMENT ON ECONOMIC OPPORTUNITIES IN THE RED HILL VALLEY, JANUARY 9, 2004 |
| AGREEMENT RESPECTING THE HUMAN HERITAGE OF THE RED HILL VALLEY, JANUARY 9, 2004 |



**THE GOAL WAS NOT TO REINVENT THE WHEEL BUT RATHER CAPITALIZE ON THE STRENGTHS OF EACH COMMUNITY.**

health and well-being of the Red Hill Valley, and that would form the basis of the relationship and vision moving forward.

**2** **Respect and incorporate Indigenous approaches.** It was important for the Haudenosaunee that the relationship defined by written agreements also be legitimized by Haudenosaunee tradition. The "Fire of the Valley" wampum which signifies principles of respect, trust and friendship, as represented by three strings of wampum beads (Figure 2), was presented to the Mayor of Hamilton to signify recognition of the commitment and responsibility to one another. The wampum is brought to all regular JSB meetings which are opened and closed by a Haudenosaunee Thanksgiving Address (Ohen:ton Karihwatehkwena), meaning the "Words Before All Else: Greetings to the Natural World."

**3** **Address capacity** issues that create barriers to participation for both communities. Lack of finances to carry out JSB activities was a limitation addressed through a financial commitment by the City. A dedicated budget supported JSB administration and a staff member who coordinated JSB activities and acted as a resource and link between the two communities. The financial commitment reaped shared benefits beyond the monetary investment. Completed and forthcoming projects attracted potential partners and funding opportunities, and local stewardship activities brought together communities.

**4** **Create structure and processes** to operationalize decisions into actions. While the agreements established a collaborative framework and created the JSB, also imperative was to carve out processes for moving forward the objectives with City staff and Six Nations. This was achieved through the co-development of Terms of Reference, routine monthly meetings (rotating between communities), a City staff liaison, and the adoption or adaptation of existing procedures proven effective in practice. The goal was not to reinvent the wheel but rather capitalize on the strengths of each community.

There are growing requirements for formal consultation with Indigenous communities in Canada. The JSB experience illustrates collaborative relationships can be formed outside of or in addition to mandated consultation, and yield shared benefits that jointly support municipal and Indigenous community goals. As an added benefit, both communities are now better positioned to work together on future challenges and opportunities as they emerge. ■

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undertake Truth and Reconciliation in the planning profession?

We are in the Truth stage of our work. The IPWG has unanimously agreed that our first step, acting as representatives of the BC and Yukon planning profession, is to hear from Indigenous people, their experience with planning and planning institutions. Our hope is to initiate decolonisation of the planning profession and that we can begin to co-create a new relationship with First Nations in BC and Yukon.

**Your consulting firm, Vesta Consultants, worked with Community Living BC to help house vulnerable people in the province. What do you think is the most valuable asset or skill planners can bring to that kind of crucial partnership?**

I started Vesta Consultants because I fundamentally believe that everyone needs to have a safe home. Today we work with non-profits and BC Housing throughout the province, delivering affordable and supportive housing for seniors, youths, families, women fleeing violence and residents with development disabilities, mental health and addictions. One portfolio of our work has been delivering homes for Community Living BC.

At the forefront of all our work is compassion and our commitment to provide each person with a safe home. The most valuable asset to bring is collaboration. We work with everyone on the team to provide the best and most inclusive housing we can. At the heart of our work is planning a community within each project.

**Is there one thing you are most looking forward to when the COVID-19 pandemic is behind us?**

Travelling! I had a wonderful trip booked last April to visit friends and to attend a wedding. I am very much looking forward to using that voucher! ■

# Indigenizing Planning

/ Gwen Bridge, Guest Editor





**Planning is evolving in British Columbia in response to the commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) through the Declaration on the Rights of Indigenous Peoples Act (DRIPA).** As we embark on this evolutionary journey, exploring what these commitments mean in terms of accepted planning practices and outcomes is the pressing challenge for planners and Indigenous people.

Understanding the different colonial and Indigenous approaches to planning is important for enabling equity in planning and for planning what a reconciled future could look like. In the Truth and Reconciliation (TRC) Commission of Canada report it states:

> Reconciliation between Aboriginal and non-Aboriginal Canadians, from an Aboriginal perspective, also requires reconciliation with the natural world. If human beings resolve problems between themselves but continue to destroy the natural world, then reconciliation remains incomplete. This is a perspective that we as Commissioners have repeatedly heard: that reconciliation will never occur unless we are also reconciled with the earth.[1]

Planning, and especially collective planning can support this process of reconciliation.



"To Indigenize planning, plans must acknowledge traditional and cultural Indigenous processes of knowledge acquisition and analysis."

Planning is a Western practice designed to anticipate future outcomes based on information and data, such as: population growth, water pollution permits, conservation priorities, and projected financial returns. In planning, determining the future state of systems, whether they be natural or human built, is viewed as possible, logical and desirable. Plans will determine the future: the structure of society; the equality of society (potentially); and the quality of the environment.

There is a long history of planning theory which relies upon the idea that the decisions we make will influence the outcomes. For example, planning to build a swimming pool may lead to an increase residents' health, property values, etc. This type of decision can influence the societal system of an area, i.e. the demographics. Or, if we plan for an industry to pollute water or we dam a river, we will influence the outcome of the water quality or quantity, i.e. the hydrologic system. Our operating assumption is that the decisions we make will influence systems, whether human systems or natural systems. This is implicitly accepted as a planning assumption. Planners and decision makers essentially have the authority to change the destiny of systems.

Indigenous concepts of planning can be quite different. Indigenous communities may need to address modern issues, such as economic development and food security, similar to non-Indigenous communities. There can be a lot of variation between Indigenous communities, obviously, with some choosing to fully embrace modern planning processes and others relying on traditional processes for planning.

Indigenous, more traditionally-based planning differs from modern, Western planning in that it is characterized by spirituality and observation-based methods of interpreting information from the earth, and applying that knowledge in decision making. To Indigenize planning, plans must acknowledge traditional and cultural Indigenous processes of knowledge acquisition and analysis. This presents challenges because typical planning, while it has been evolving, is very much rooted in a process of analysing future scenarios and making decisions on anticipated future outcomes based on human-focused interests.

In contrast, Indigenous decision making, in land and resource issues in particular, takes guidance from the natural systems in order to make decisions. For instance, when considering damming or polluting a water body, the water body itself will provide

a directive for what decision needs to be made. The water body says to people, "I need to be clear and clean," and subsequent decisions then reflect the requirement and no polluting is permitted.

The way that a system's requirements are communicated is often through ceremony, story and observation. People are part of systems and have relationships with those systems and, over time, generations understand those systems. This knowledge is then passed down from generation to generation. Indigenous stories



Images courtesy of the author

also contain decision making directions and information from the land and animals about how humans should interact with them. By acting in relationship with the system and honouring the needs of the system, decisions will be made based on what is good for all parties. The concept of honour is at the heart of most Indigenous cultures.

In many Indigenous cultures, decisions about how to proceed were and are the result of a spiritual process from which inputs were received from ancestors and the spiritual realm, even spiritual beings. This method of informing decisions is unfamiliar in planning processes today. In looking to Indigenize planning, we must understand that Indigenous planning is informed by ancient wisdom, stories and spiritual input. This will result in a different process and spectrum of options for how the planning process may unfold. We must be open to other ways of gathering, generating and communicating information. When people talk about reconciling ways of knowing, the concept of how to implement the components of Indigenous decision making is a key element.

Plans in British Columbia, whether urban, rural, focused on environment or economics, have typically looked forward to alternative scenarios in order to consider what will happen to our world, our systems as a result of decisions. For example, the socio-economic environmental assessment process is based on scenario analysis which employs quantitative or other scientific (social or environmental sciences) data.

If we include Indigenous ways of understanding effects and future outcomes, decisions about what to do come from options reached through spiritual and ceremonial practice, stories and intergenerational wisdom, and analytical approaches. Those conclusions should inform scenario development and be considered with the same seriousness as scientifically-based methods and conclusions. Part of the challenge for thinking in this new way is to accept that information gathered from Indigenous practices is credible and valid. It does not follow the scientific method of 'objective' observation but it is based on a relationship with the earth, its energies, and all things are made of energy.

Concepts for relationships with land are inherent in Indigenous language and are used in Indigenous decision making. Understanding words and concepts are critical to Indigenize planning. For example, in nsyilxn, the language of the Okanagan/smelqmix culture, there is concept of listening to the earth. This practice is conducted by a "suxʷkʻɬaʔcʻm (person-looks-underneath). This person is one who has knowledge to interpret what cannot be seen on the surface. They can accurately forecast short-term weather changes and seasonal anomalies as well as long-term climatic pattern shifts by feeling the land internally. Their knowledge includes a learned mind-focus technique based on a practice of heightened sensory perception in a type of meditative state, to synthesize the multi-layered immediate sensory information over the historical information they have accumulated.[2]

In addition to the processes of investigation, such as by suxʷkʻɬaʔcʻm , much of Indigenous knowledge is based on spirituality and ceremony, which is based on story and the rules transmitted through them. Stories contain rules and protocols for regulating behaviour and, in this way, have legal authority. When including Indigenous concepts and stories, it is important to acknowledge that they have legal authority, equivalent to any legislation, regulation, or policy of Canadian or British Columbia governments.

Indigenizing planning means allowing the process of planning and the content of the plans to be generated by Indigenous peoples based on cultural and traditional practices. It means allowing information from the spiritual realm to inform decisions. Planning has been evolving to be more inclusive of different priorities for land use, such as delineating ceremonial and cultural practice sites. To further Indigenize planning and advance reconciliation, planning processes need to include decisions based on a natural system's needs versus decisions that control the system. Reconciliation practices in planning will recognize decisions derived from spiritual practice, story, and intergenerational wisdom, an approach that should be considered by both Indigenous and non-Indigenous planners. ■

Gwen Bridge is an Indigenous management consultant and negotiator. Gwen is a member of the Saddle Lake Cree Nation and resides in Nelson, BC. She has spent the last 20 years working with Indigenous peoples to advance their interests and authority in natural resource management and decision making. Working in both the US and Canada, Gwen continues to support Indigenous people to ensure their laws, protocols and cultures are recognized and advanced through collaboration with governmental and non-governmental partners. Gwen has a Masters of Science in Renewable Resources from the University of Alberta.

Gwen was the guest editor for this issue of *Planning West*.

[1]https://trc.ca

[2]Armstrong, J. C. (2012)."Constructing Indigeneity: Syilx Okanagan Oraliture and tmixwcentrism" (Doctoral dissertation, Greifswald, Univ., Diss., 2010).

*Noelle Bouvier*
*Ryan Walker*

# Indigenous planning and municipal governance: Lessons from the transformative frontier

There is a noticeable comfort emerging within planning and municipal governance when it comes to acknowledging that our cities are on Indigenous lands, often referred to as Indigenous traditional territories or homelands. But beyond that basic recognition, municipalities still do a poor job overall of making space for Indigenous sovereignty, worldviews, processes, and protocols in the shared space of the city. With the goal of improving upon the present state of affairs, this article reviews six pieces of literature demonstrating ways in which municipalities are currently working with local Indigenous communities, including: land use planning, strategic planning initiatives, Indigenous relations offices and advisory committees, urban design, and new urban reserves. It also offers ideas to steer future research toward what are arguably among the greatest challenges faced by practitioners aiming to achieve more equitable municipal-Indigenous relations in the shared space of Canadian cities.

## Indigenous planning and coexisting sovereignty in the city

We begin with Matunga's (2013) compelling theorization of Indigenous planning, which while being reclaimed as an emergent paradigm of contemporary planning, has been practiced for hundreds, if not thousands, of years by Indigenous communities. Indigenous planning processes connect people, place, knowledge, values and worldview to decisions and practices that are directed at creating good lives and living environments for Indigenous communities over generations (Matunga 2013). Fundamentally he positions Indigenous planning as a theory and practice of internalized self-definition and externalized advocacy, responding to questions like:

> Whose future? Who decides what this future should or could look like? Who is doing the analysis and making the decisions? Who has the authority, the control, the final decision-making power? Whose values, ethics, concepts, and knowledge? Whose methods and approaches? What frameworks, institutions, and organizations are being used to guide the planning processes that most affect Indigenous peoples? Where are Indigenous peoples positioned in the construction of that future? (Matunga 2013: 4).

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CANADIAN PUBLIC ADMINISTRATION / ADMINISTRATION PUBLIQUE DU CANADA
VOLUME 61, NO. 1 (MARCH/MARS 2018), PP. 130–134
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The future-seeking focus of contemporary planning theory and practice needs also to work across the parallel traditions of colonial-derived mainstream and Indigenous planning, making space for and assisting in the restitution of Indigenous "materiality" (i.e., built environments and corporeal presence) and "memory" (i.e., recollection of presence) in the city (Matunga 2013: 8). Porter and Barry (2016) build on this understanding of parallel traditions by advancing the normative concept of coexistence in their book, *Planning for Coexistence*. Coexistence, as a framework for understanding the convergence and conflict between these parallel traditions, was used to examine land-use planning in the urban context of British Columbia, Canada and Victoria, Australia. Porter and Barry employ the "contact zone" as an analytic lens for exploring unequal power relations, and the contradictions of the continued reproduction of settler jurisdictions and spaces given the existence of nested and intersecting sovereignties. Based on their findings they put forward a number of intercultural competencies compelling planners and policy-makers to challenge settler norms, making space for diverse Indigenous identities and spatialities by positioning Indigenous communities as having distinctive rights and title beyond those of typical urban stakeholders. They point out that planners and policy-makers must also learn to productively navigate the conflict and uncomfortability accompanying transformative practice, rather than always trying to smooth over difference in order to arrive at an essentializing consensus. Matunga's (2013) perspective is congruent with Porter and Barry (2016) in this regard; he encourages planners to strive for resolution, if not consensus.

## Plan and policy co-production

While Porter and Barry (2016) examine the municipal–First Nation contact zone, Fawcett, Walker, and Greene (2015) apply the concepts of co-production and coexistence to a more broadly conceptualized and heterogeneous urban-based Indigenous community, comprised of various identities within and across political and community organizations. Both coexistence and co-production are predicated on the right of Indigenous self-determination, exercising sovereignty in urbanized traditional territory. However, co-production is particularly concerned with full partnership and shared control between Indigenous and non-Indigenous governance actors at every stage of the policymaking or planning process. Rather than land-use planning or Indigenous-specific policy formation, the article by Fawcett, Walker, and Greene (2015) examines the City of Saskatoon's engagement with Indigenous communities during the largest city-wide community dialogue and visioning exercise in the city's history, culminating in a community vision, a culture plan, and a strategic plan for the 2013–2023 time horizon. These scholars argue for institutionalized mechanisms to ensure policy and plan co-

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production with Indigenous organizations, leaders, and communities occurs in the production of urban space that is at once in a settler municipality, situated on Treaty Six territory, and within the homeland of the Métis nation.

## Institutional mechanisms

In her article, Heritz (2016) examines the presence of Aboriginal Relations Offices and Advisory Committees (ARACs) in four Canadian cities, providing an introduction to the diverse mandates and structures of these mechanisms within municipal governments. ARACs are seen as being relatively new in large Canadian cities, with those that Heritz examines coming into existence anywhere from four to 18 years ago, aimed at enhancing Indigenous representation at the municipal level. Toronto's Urban Aboriginal Peoples Advisory Committee, for example, actively recruited Indigenous people to volunteer on municipal agencies, boards and commissions. Future research on ARACs should, however, consider their representative legitimacy and the extent to which these mechanisms meaningfully contribute to broader processes of Indigenous urban governance. Is discursive space created for Indigenous planning through mechanisms like ARACs, for example, or is Indigeneity simply "grafted" onto settler planning and governance systems to satisfy goals of inclusivity (Matunga 2013: 31)?

## Creating Indigenous space in the city

Walker et al. (2017) examine original survey data from seven Prairie cities to understand what the non-Indigenous majority public think about increasing the influence of Indigenous communities in the procedural and material approaches to local urbanism. They focus on actions that would either bolster municipal–Indigenous governance or enhance Indigeneity in the public spaces of the city, finding that there is general support in both of these areas. Support for enhancing approaches to municipal–Indigenous governance is greater, however, than for infusing Indigeneity into the built environment and public space. Given the normative rationale for municipal governments to collaborate with Indigenous communities in order to enhance Indigenous materiality and memory (Matunga 2013), and the general empirical support among the non-Indigenous citizen majority surveyed, Walker et al. (2017: 11) contend that "[t]he public has left the door ajar, inviting civic leaders to open it wider with new institutional structures, progressive strategic policy, and initiative-taking in the built form of the city."

In her article, Tomiak (2017) critically interrogates the role that new urban reserves play in transforming the unequal power relations that characterize settler cities. Through an examination of the federal government's Additions to Reserve (ATR) policy and case studies from the Prairies, new

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urban reserves are seen to be bounded by settler state logics of economic development and neoliberalism which authorize weak forms of First Nation jurisdiction. By limiting urban reserves to narrow economic development objectives, settler state agendas serve to restrict Indigenous sovereignty and self-determination. Furthermore, the asymmetric extent of municipal government influence in urban ATR processes, with veto power should satisfactory servicing, bylaw, and land agreements not be reached, also serves to transform "nation-to-nation relationships into quasi-municipal relations as the very precondition for urban reserve creation," reinforcing settler spatial hegemony (Tomiak 2017: 7). Creating Indigenous space in the city is too often conditional upon the cooptation of settler-dominated planning and development practices in order to make modest incremental gains. Yet First Nations have been able to leverage the benefits of these processes to enable circumscribed self-determination, rendering visible to some degree a reclaimed Indigenous materiality and memory within cities. The risk, however, is that these processes leave "Crown sovereignty and the dynamics of Indigenous dispossession and marginalization intact" (Tomiak 2017: 7). Tomiak's analysis of the ATR process is distinctive in that it reveals the unequal power dynamics of settler colonial relations prescribed under the neoliberal paradigm of economic development and the role that the federal government plays in brokering this imbalance.

Taken together, the six research contributions discussed in this article highlight the urgency for theorists and practitioners to develop relational approaches to planning and governance with Indigenous communities based on values of mutualism, reciprocity, and sovereignty, and to practise reflexivity circling back to fundamental questions such as: On whose terms do these future-seeking processes occur? And whose vision for a better future do they serve? Future research should continue to explore the promising practices occurring across Canadian cities, limited though they may be. Most importantly, and to break through these limitations in practice, future research should move beyond simple inquiries into the types of practices occurring that marginally improve Indigenous inclusion in settler urbanism. Instead research must delve critically into how the rules of administrative logic are being set. Is Indigenous sovereignty being advanced in urban governance processes, with parallel traditions, worldviews, processes, and protocols? Or is Indigenous inclusion conditional upon strict adherence to colonial capitalism and settler (including municipal) regulatory authority?

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LEGAL UPDATE

> **Guy Patterson** MCIP, RPP

# A Brief Overview of the Duty to Consult



When I went to planning school, sustainability was all the rage. After attending the UBC Planning Students Symposium for the past few years it is apparent that reconciliation now tops the agenda. At least no one can accuse the profession of shying away from a challenge.

Like sustainability, reconciliation means many things. According to the Supreme Court of Canada's companion decisions in *Haida Nation v. British Columbia (Minister of Forests)*[1], and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*[2] one thing reconciliation means is the Crown has a duty to consult, and in some cases accommodate First Nations. Haida was a case of infringement on asserted but unproven title to land by the issuance and transfer of provincial logging rights; *Mikisew* dealt with an infringement of Treaty 8 rights to hunt, trap and fish, due to road construction.

In *Haida*, the Province argued against any duty to consult the Haida before their claim was "proven". The trial judge found a moral but not a legal duty, but the Supreme Court of Canada stated the duty to consult, even before rights or title claims have been formally proven, is a legal duty.

In *Mikisew*, the government tried and failed on three arguments: the road didn't infringe treaty rights; any duty to consult was discharged in 1899, when the Treaty was negotiated; if further consultation was required, Parks Canada's process was sufficient.

Consultation has been central to planning practice for decades, so it might come as a surprise to planners that the duty to consult First Nations is a relatively new development in Canadian law. Before a series of 1990s cases on aboriginal rights and title, courts scarcely mentioned it. There is now a rich and ever-expanding body of decisions on the subject.

This article provides a brief overview of the legal duty to consult First Nations, and considers how that duty might inform planners' reconciliation work. There is, of course, much more to reconciliation than consultation, and more to consultation than what courts require, but it's never a bad idea to go back to basics.

The duty to consult First Nations is entirely a product of what lawyers call "judge-made law." Unlike a local government's obligation to hold a public hearing before adopting certain kinds of bylaws, or the province's obligation to consult local governments before issuing a cannabis retail licence, there's no legislation codifying exactly when, or how the Crown must consult and accommodate First Nations before making a decision. The absence of clear rules might seem daunting, but it also creates exciting and meaningful opportunities for planners to exercise their professional judgment, and do their best work.

Under section 35(1) of Canada's constitution, "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Much of northeastern BC is covered by Treaty 8, but in the rest of the province aboriginal groups have been obliged to prove the existence and extent of the aboriginal rights that section 35(1) recognizes and affirms.[3]

The result today is that the Crown can't take actions or make decisions that might affect section 35 rights without first consulting, and in some cases accommodating, the First Nations whose rights stand to be affected.

In both *Haida* and *Mikisew* the Court emphasized the source of the Crown's duty to consult lies in the "honour of the Crown", which itself arises from the assertion of sovereignty over people who never acquiesced to that assertion. The Court in *Haida* explained:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so.
>
> The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues,

> the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

It's hard not to quote at length from former Chief Justice Mclachin, who penned the Court's unanimous judgment on the Haida claim:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests ... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

While *Haida* is the better-known case, for planners interested in consultation, *Mikisew* perhaps offers more to chew on. The decision opens with these words:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference, has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.

Again, Parks Canada, on behalf of the Crown, said it had consulted appropriately with the Miksew before deciding to go ahead with the winter access road through treaty territory. In support of this assertion, the government gave examples of the Mikisew being provided with essentially the same information and consultation opportunities as "the general public of interested stakeholders".

**While never amounting to a duty to agree, the duty to consult and accommodate cannot admit of the kind of "indifference" observed in *Mikisew*. It requires a process of balancing of interests, of give and take.**

The Mikisew were apparently advised of public open houses but declined to participate, explaining that open houses were not the forum for adequate consultation with them. Parks Canada, apparently after having decided to go ahead with the road, apologized in writing for the consultation process, and a few weeks later announced on its website the approval of the winter road without any reference to the Mikisew.

The way the alleged consultation had unfolded led the Court to observe that consultation is not simply an opportunity for those affected by a proposed decision to "blow off steam" before the decision maker goes ahead with what he or she intended all along. These choice words from Canada's highest court reinforced at least one critical proposition: because it is grounded in the honour of the Crown and part of the process of reconciliation, the duty to consult First Nations demands something deeper than mere "public" consultation.

Courts have repeatedly emphasized the scope or nature of consultation required where the honour of the Crown is at stake will vary depending on factors such as the potential impact of the decision on the rights in issue, and in the case of unproven rights, the strength of the claim. This approach creates a spectrum of consultation, but even where the required consultation falls at the lower end of the spectrum, it requires much more than giving notice, waiting for a response, and then moving right along. In all cases, at a minimum, the Crown must actively solicit and listen carefully to First Nations' concerns, take account of those concerns, and attempt to minimize adverse impacts on aboriginal or treaty rights.

Turning back to Haida, the point is that "the effect of good faith consultation may be to reveal a duty to accommodate." While never amounting to a duty to agree, the duty to consult and accommodate cannot admit of the kind of "indifference" observed in *Mikisew*. It requires a process of balancing of interests, of give and take.

This might all sound like everything planners already know about consultation: proper notice, meaningful engagement, careful listening, a balancing of interests, blah, blah, blah. But I'm not aware of any other requirements to consult, in Canadian law, that even come close to what courts demand when consultation is grounded in the honour of the Crown, and is part of the long process of reconciling aboriginal and non-aboriginal interests.

And I am aware of at least two cases decided in the last year in which courts have found the Crown failed to adequately consult with First Nations,[4] so either there aren't any planners working for the Crown, or we still have room for improvement. ■

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[1] 2004 SCC 73 [*"Haida"*].
[2] 2005 SCC 69 [*"Mikisew"*].
[3] It's far beyond the scope of this article to probe the question of why aboriginal people are required to prove the existence of rights that have been constitutionally "recognized and affirmed".
[4] In *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 the Federal Court of Appeal overturned the National Energy Board's approval of the Transmountain pipeline for inadequate consultation; in *Morton v Canada (Fisheries and Oceans)*, 2019 FC 143 the Federal Court concluded that the Department of Fisheries and Oceans failed to adequately consult with respect to a high level policy related to finfish aquaculture.

CANADIAN INSTITUTE OF PLANNERS
INSTITUT CANADIEN DES URBANISTES

# POLICY ON
# PLANNING PRACTICE AND RECONCILIATION



## POLICY CONTEXT

Across Canada, a national discussion is taking place concerning historic and current relationships between Canadians and the land's first peoples. Building relationships with Indigenous peoples that respect their values, ways, and cultures has been at the forefront of this discussion, often referred to as reconciliation.

CIP uses the term *reconciliation* to refer to the commitment to establish and maintain a mutually respectful relationship between Indigenous and non-Indigenous peoples. It is a long-term relationship-building, learning, and healing process, as opposed to a specific outcome to be achieved. Reconciliation in planning will look different in every context, as it is shaped by the unique needs, experiences, and priorities of the Indigenous partners involved.







The nature of planning casts the profession in a unique role in the reconciliation process. Good planning principles include trust, respect, engagement, transparency, and fairness; thus, discussions of how the land is managed, developed, and respected are a foundation upon which healthier relationships can grow. Furthermore, planning brings various perspectives in a community together to formulate a coherent vision and set of objectives. Finally, planners play a key role in educating the public and communicating innovative, mutually beneficial solutions, to decision-makers.

Planning has been happening in the land currently known as Canada since time immemorial. Effective land use and stewardship practices have allowed Indigenous peoples, their communities, and cultures to thrive in sustainable relationships with the land. Notwithstanding, Indigenous planning systems and practices have not historically been understood, honoured, or upheld by Canadian society. By respecting these practices, planners can show support for the rights of Indigenous peoples and greatly enhance their own profession, as they come to understand and value the depth of knowledge embodied in Indigenous stewardship and community planning traditions.

## INDIGENOUS PLANNING APPROACHES

While there is a breadth of Indigenous peoples and communities with diverse cultures and planning approaches across Canada, certain elements are relatively common. Indigenous planning approaches:

- are community-driven, inclusive, and representative of the diversity of community voices, e.g., youth and elders, women and men;
- empower community members to share reflections and concerns, and identify appropriate solutions using both individual and community strengths;
- provide time to hear and understand the experiences and emotions embodied in people's stories;
- use traditional knowledge to shape processes and inform decisions; and,
- prioritize land stewardship and strive for responsible development.[1]

1 This list is based on input from Indigenous people working in planning who were engaged during the development of the policy. It is consistent with insights from academic sources, such as Matunga, H. (2013). Theorizing Indigenous Planning. In R. Walker, T. Jojola, D. Natcher (Eds.), *Reclaiming Indigenous Planning* (pp.3-33). McGill-Queen's University Press.

The Truth and Reconciliation Commission (TRC) – which was initially set up to explore the history of residential schools in Canada – put forward 94 Calls to Action that are framing the national processes of reconciliation.[1] These do not explicitly address the planning profession, but they have implications for many aspects of planning in Canada including land, economy, culture, health, education, law, and governance. Many of the TRC Calls to Action address the various bodies that planners work for in Canada (e.g. governments, institutions, and businesses), and as such, planners have an opportunity to champion the TRC principles through their work in these organizations.

A specific, but far-reaching, TRC Call to Action is for all levels of government to fully adopt and implement the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which the Government of Canada endorsed in 2016. This document describes both the individual and collective rights of Indigenous peoples around the world. It offers guidance on cooperative relationships with Indigenous peoples based on the principles of equality, partnership, good faith, and mutual respect.[2]

1 Truth and Reconciliation Canada. (2015). *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada.* Winnipeg: Truth and Reconciliation Commission of Canada.

2 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples.* adopted by the General Assembly, 2 October 2007, A/RES/61/295.

Another important driver for reconciliation in planning practice is the growing recognition of the rights of Indigenous peoples and the implications of these rights for planning and development in Canada. While the planners working directly with Indigenous peoples and communities are most directly involved, all planning in Canada happens on land connected to Indigenous peoples through treaties, self-government agreements, and/or inherent rights. The legal landscapes are complex, regionally diverse, and rapidly evolving. Planners are striving to understand the implications for their own practices and adopt more collaborative planning approaches that honour recognized Indigenous rights. While the colonial systems that remain in place can preclude the recognition of rights, planners have a responsibility to critically examine this status quo and to pursue better planning outcomes for all.

The TRC's final report also identified the need for truth telling, as an essential element of justice and healing in reconciliation. Thus, it is critical that the planning profession in Canada acknowledges the detrimental impact that discriminatory planning practices have had, in order to build future respectful relationships with Indigenous peoples that are honest and constructive. Similarly, it is important for all Canadian planners to understand the history of First Nations, Inuit, and Métis peoples and their important contributions to Canada, in order to build for the future.

**LAW AND THE RIGHTS OF INDIGENOUS PEOPLES**

The rights that Indigenous peoples have (typically referred to as *Aboriginal rights,* as codified in the Canadian *Constitution Act, 1982*) flow from various sources. *Inherent rights* are the collective and inalienable rights that flow from continued use and occupation of certain areas. The right to *self-determination* flows from inherent rights. *Treaty rights* flow from specific treaties between Indigenous Nations and the Crown and/or Canada.

- *Aboriginal law* specifically refers to the body of Canadian law concerning the variety of issues related to Indigenous people in Canada. There are numerous sources for this law, including treaties, land claim agreements and Aboriginal rights defined by the courts that have sought to interpret section 35 of the Canadian *Constitution Act, 1982*.

- *Indigenous law* refers to the legal traditions and customs of Indigenous peoples. These practices play an important role in planning as they relate to decision-making and stewardship.

## POLICY GOAL

CIP envisions a future in which reconciliation is meaningfully embedded in planning practice in Canada and planners build relationships with Indigenous peoples based on mutual respect, trust, and dialogue.







## POLICY OBJECTIVES

In support of its policy goal, CIP endorses the following objectives:

- Planning is based on a respect for the well-being of all people and the natural environment that they are intricately linked to.
- Planners support the realization of TRC Calls to Action and the implementation of the principles of UNDRIP in their work.
- Planners understand the jurisdictional and legal context of planning, as it relates to treaties and the rights of Indigenous peoples.
- Planners advocate for and work to co-create meaningful planning processes among Indigenous communities and municipalities, regions, provinces, and territories.
- Planners recognize and uphold Indigenous planning approaches, law, and governance systems.
- Planners advocate for planning policy and legislation that ensure the rights, knowledge, protocols, and planning methods of Indigenous peoples are respected.
- Planners support enhanced opportunities for Indigenous people to enter the planning profession and celebrate the strengths, skills, and knowledge they bring to the profession.
- Planners respect the diversity of Indigenous peoples across Canada and their self-determined planning processes and goals.

## THE ROLE OF PLANNERS

Planners have a unique role to play in reconciliation, as their profession connects people, land, livelihoods, and governance. To fully realize this role, planners have a responsibility to embed reconciliation in their practice. Accordingly, planners should:

### ENHANCE THEIR PROFESSIONAL PRACTICE

- Demonstrate awareness and respect for Indigenous communities, cultural protocols and practices, local knowledge and decision-making systems, and self-determination.
- Identify challenges to and opportunities for relationship building and reconciliation in their planning practice and adapt their methods and tools accordingly.
- Understand the historical lack of Indigenous participation in public policy process and development, the legacy of residential schools, and the intergenerational impacts these have had on people and communities.
- Practice with cultural safety and cultural humility through active listening, learning, and understanding to confront and eliminate biases in their own practice and in the planning profession.
- Seek to understand the Indigenous context and history of the region they work in, including the communities, Nations, and cultures present.
- Understand their role in informing government's duty to consult through engagement;
- Understand federal and provincial legal rulings that could impact how the practice of planning is undertaken.
- Advocate for changes in planning policy and legislation to be more respectful of the rights and knowledge of Indigenous peoples.
- Understand the expectations arising from TRC and the principles contained in UNDRIP and integrate them into their professional practice.

## ENGAGE INDIGENOUS PEOPLES, COMMUNITIES, AND NATIONS

- Create and maintain respectful relationships with local Indigenous communities and seek sufficient staff time and resources from government to support these ongoing relationships.

- Adopt a "nothing about us without us" or "don't start without" approach, which entails that Indigenous communities should be engaged before any activity that affects them or their rights is undertaken.

- Work respectfully with existing governance systems in Indigenous communities, and understand differences between elected leadership and hereditary/traditional governance, where they exist.

- Take direction from Indigenous community leaders and partners on how and with whom engagement should be carried out.

- Offer their own knowledge of planning where it can complement Indigenous processes to meet the aspirations and objectives of the community in a culturally meaningful way.

- Respect that each community may have a different approach to Indigenous planning, some of which have been reaffirmed or affected through modern day treaty, land claim agreements, or court rulings.

- In urban areas, engage Indigenous groups, including the host community whose traditional territory the urban area rests upon, and work with those groups to develop planning processes that reflect their interests and circumstances.

- Understand that community-driven planning processes can play a role in community healing, but that at times, the healing process may require additional time.

- Work together with Indigenous partners to clearly identify the expected and intended outcomes of planning processes.

## PARTICIPATE IN MUTUAL CAPACITY BUILDING

- Understand that Indigenous communities can be administratively overburdened and under-resourced, which can restrict a community's ability to respond to requests for engagement in predetermined timeframes.

- Remain flexible to ensure that sufficient space and time is created for respectful planning relationships to be built.

- Approach capacity building as mutually beneficial, i.e., treat interactions with Indigenous communities not only as occasions to exercise knowledge, training, skill, and expertise, but as an opportunity to learn how one's own knowledge of good planning can be enhanced by traditional practices, which may represent millennia of community and ecological stewardship.

- Approach capacity-building from a perspective of self-determination, i.e., by working with the community to define its own planning processes and identifying where planning skills could supplement and reinforce community strengths.

**CALL TO ACTION**

CIP recognizes that reconciliation is more than a conversation; rather, it entails careful and sustained action toward relationship building, based on mutual respect, trust, and dialogue. CIP supports the principles put forward in the TRC Final Report and the UNDRIP, and recognizes the impact they have on planning. CIP will support and provide resources to individual planners, as they seek to understand the complex political and legal landscape around reconciliation and actively engage in the discussions and actions required. CIP respects the wisdom of Indigenous planning and sees the profession enhanced by these approaches.

## THE ROLE OF CIP

CIP strongly believes that it is essential to integrate reconciliation into its own work and the work of practicing planners, supporting Indigenous planning, and participating in the broader and long-term processes of reconciliation. To support implementation of the policy, CIP will undertake the following actions:

- Promote reconciliation in its communications, policy and advocacy, educational standards, professional development activities, and its work with other professions.
- Ensure that practicing planners have access to the resources, information, training, and other support they need to embed the principles of reconciliation in their practice.
- Build awareness of Indigenous history, rights, issues, and culture among practicing planners through the Institute's Continuous Professional Learning program.
- Support the integration of Indigenous history, rights, issues, and culture in the curricula of planning schools and as a core competency for the accreditation of professional planners.
- Support and encourage Indigenous people to consider a career in planning and explore other ways in which they can bring their knowledge to the profession.
- Advocate for international and federal policies and actions that contribute to reconciliation.
- Consider additional implementation priorities, based on an annual environmental scan and membership survey.

## ABOUT THIS POLICY

The Canadian Institute of Planners (CIP) is a professional body that works on behalf of over 7,000 members nationally and has served as the voice of Canada's planning community since 1919. CIP's policies guide the organization's daily work and special initiatives to advance best practices in Canadian professional planning.

The development of this policy was led by CIP's Indigenous Community Planning Committee, comprised of Indigenous and non-Indigenous practitioners, dedicated to building capacity for Indigenous planning and community development across Canada. The policy was developed through extensive engagement with Indigenous planning practitioners and community leaders, along with CIP members, over an eighteen-month period. Engagement was carried out through the use of individual interviews, focus groups, and surveys. The policy was ratified by the CIP Board of Directors in December of 2018.

## ADDITIONAL RESOURCES

For additional resources on produced by CIP, including past special Indigenous issues of *Plan Canada* magazine, bibliographies, links to model plans, and a range of case studies and resources, please see the CIP Indigenous Planning website.

## DEFINITIONS OF KEY TERMS

**Cultural Safety:** an outcome based on respectful engagement that recognizes and strives to address power differentials that can be present in planning systems, e.g., between decision-makers or experts and marginalized people. It means all people feel respected and safe when they participate in planning processes.

**Cultural Humility:** a practice of self-reflection to understand personal and systemic biases and to develop and maintain respectful processes and relationships based on mutual trust. Cultural humility involves humbly acknowledging oneself as a learner when it comes to understanding another's experience.

**Duty to Consult (or, the Duty to Consult and Accommodate with Aboriginal Peoples):** the Crown's duty to consult when it is considering actions that may adversely affect aboriginal or treaty rights guaranteed by section 35 of the *Constitution Act, 1982*. The duty to consult may not be delegated, but government's procedural aspects may be assigned to proponents. Outside of a formal assignment related to a specific activity, planners have an opportunity to inform government duty to consult process by engaging with Indigenous communities in the development of planning tools.

**Indigenous Peoples:** The term *Indigenous peoples* is used in this policy to refer to First Nations, Métis, and Inuit peoples. Different Indigenous peoples and Nations often use their own terms to self-identify, which planners should respect.

**Indigenous Planning:** a generic term to cover the diversity of planning at all scales undertake with or by Indigenous communities, Nations, and individuals.

PHOTO CREDIT

Cover: "Reflections on the River" by David Robinson, photo credit Sage MacGillivray.

Top Right: Perry Stein
Bottom Left: Nathan Roth

**Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization — Clyde River and Jerry Natanine** *Appellants*

*v.*

**Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-NOPEC Geophysical Company ASA (TGS) and Attorney General of Canada** *Respondents*

and

**Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunavut Wildlife Management Board, Inuvialuit Regional Corporation and Chiefs of Ontario** *Interveners*

**Hameau de Clyde River, Nammautaq Hunters & Trappers Organization — Clyde River et Jerry Natanine** *Appelants*

*c.*

**Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-NOPEC Geophysical Company ASA (TGS) et procureure générale du Canada** *Intimées*

et

**Procureur général de l'Ontario, procureur général de la Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Conseil de gestion des ressources fauniques du Nunavut, Inuvialuit Regional Corporation et Chiefs of Ontario** *Intervenants*

**Indexed as: Clyde River (Hamlet) *v.* Petroleum Geo-Services Inc.**

**2017 SCC 40**

File No.: 36692.

2016: November 30; 2017: July 26.[*]

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

**Répertorié : Clyde River (Hameau) *c.* Petroleum Geo-Services Inc.**

**2017 CSC 40**

N° du greffe : 36692.

2016 : 30 novembre; 2017 : 26 juillet[*].

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Constitutional law — Inuit — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact upon treaty rights — Offshore seismic testing for oil and gas resources potentially affecting Inuit treaty rights — National Energy Board authorizing project — Whether Board's approval process triggered Crown's duty to consult — Whether*

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Droit constitutionnel — Inuits — Droits issus de traités — Couronne — Obligation de consultation — Décision d'un organisme de réglementation fédéral indépendant qui pourrait avoir une incidence sur des droits issus de traités — Essais sismiques extracôtiers liés aux ressources pétrolières et gazières et susceptibles d'avoir une incidence sur des droits issus de traités des Inuits —*

[*] This judgment was amended on October 30, 2017, by adding the footnotes that now appear at paras. 31 and 47 of the English and French versions of the reasons.

[*] Ce jugement a été modifié le 30 octobre 2017, par adjonction des notes en bas de page qui figurent maintenant aux par. 31 et 47 des versions anglaise et française des motifs.

*Crown can rely on Board's process to fulfill its duty — Role of Board in considering Crown consultation before approval of project — Whether consultation was adequate in this case — Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 5(1)(b).*

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, is the final decision maker for issuing authorizations for activities such as exploration and drilling for the production of oil and gas in certain designated areas. The proponents applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The proposed testing could negatively affect the treaty rights of the Inuit of Clyde River, who opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process. The NEB also concluded that the testing was unlikely to cause significant adverse environmental effects. Clyde River applied for judicial review of the NEB's decision. The Federal Court of Appeal found that while the duty to consult had been triggered, the Crown was entitled to rely on the NEB to undertake such consultation, and the Crown's duty to consult had been satisfied in this case by the NEB's process.

*Held*: The appeal should be allowed and the NEB's authorization quashed.

The NEB's approval process, in this case, triggered the duty to consult. Crown conduct which would trigger the duty to consult is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The NEB is not, strictly speaking, "the Crown" or an agent of the Crown. However, it acts on behalf of the Crown when making a final decision on a project application. In this context, the NEB is the vehicle through which the Crown acts. It therefore does not matter whether the final decision maker is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult.

*Projet autorisé par l'Office national de l'énergie — Le processus d'approbation de l'Office a-t-il donné naissance à l'obligation de consulter de la Couronne? — La Couronne peut-elle s'en remettre au processus de l'Office pour satisfaire à son obligation? — Rôle de l'Office dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet — La consultation a-t-elle été adéquate en l'espèce? — Loi sur les opérations pétrolières au Canada, L.R.C. 1985, c. O-7, art. 5(1)b).*

L'Office national de l'énergie (ONÉ), tribunal administratif fédéral et organisme de réglementation, prend en dernier ressort la décision d'autoriser ou non des activités telles la recherche et l'exploitation des ressources pétrolières et gazières dans certains endroits désignés. Les promoteurs ont demandé à l'ONÉ l'autorisation de mener des essais sismiques extracôtiers liés aux ressources pétrolières et gazières au Nunavut. Les essais proposés pourraient avoir des incidences négatives sur les droits issus de traités des Inuits de Clyde River, qui se sont opposés aux essais sismiques, affirmant qu'il n'avait pas été satisfait à l'obligation de consultation en ce qui a trait à ces essais. L'ONÉ a accordé l'autorisation demandée. Il a conclu que les promoteurs avaient déployé suffisamment d'efforts pour consulter les groupes autochtones et que ces groupes avaient eu une possibilité adéquate de participer au processus d'évaluation environnementale de l'ONÉ. L'ONÉ a également conclu que les essais n'étaient pas susceptibles de causer des effets environnementaux négatifs et importants. Clyde River a demandé le contrôle judiciaire de la décision de l'ONÉ. La Cour d'appel fédérale a jugé que l'obligation de consulter avait pris naissance, mais que la Couronne pouvait s'en remettre à l'ONÉ pour que celui-ci procède à la consultation, et que le processus de l'ONÉ avait permis de satisfaire à l'obligation de consulter de la Couronne en l'espèce.

*Arrêt* : Le pourvoi est accueilli et l'autorisation de l'ONÉ est annulée.

Dans la présente affaire, le processus d'approbation de l'ONÉ a donné naissance à l'obligation de consulter. Les mesures de la Couronne susceptibles de donner naissance à l'obligation de consulter ne se limitent pas à l'exercice, par la Couronne ou en son nom, de la prérogative royale ou de pouvoirs conférés par la loi, et ne se limitent pas non plus aux décisions qui ont une incidence immédiate sur les terres et les ressources. L'ONÉ n'est pas, à proprement parler, « la Couronne » ou un mandataire de la Couronne. Cependant, il agit pour le compte de la Couronne lorsqu'il prend une décision définitive à l'égard d'une demande de projet. Dans ce contexte, l'ONÉ est le moyen par lequel la Couronne agit. Par conséquent, il importe

The substance of the duty does not change when a regulatory agency holds final decision-making authority.

It is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult. While the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on steps undertaken by a regulatory agency to fulfill its duty to consult. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures. Also, where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. The NEB has the procedural powers necessary to implement consultation, and the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

The NEB has broad powers to hear and determine all relevant matters of fact and law, and its decisions must conform to s. 35(1) the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty has been fulfilled. The public interest and the duty to consult do not operate in conflict here. The duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest. A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons. The degree of consideration that is appropriate will depend on the circumstances of each case. Above all, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project

peu que le décideur ultime soit le Cabinet ou l'ONÉ. Dans les deux cas, la décision constitue une mesure de la Couronne qui peut donner naissance à l'obligation de consulter. La substance de cette obligation ne change pas lorsqu'un organisme de réglementation détient le pouvoir de prendre la décision définitive.

Il est loisible aux législateurs d'habiliter des organismes de réglementation à contribuer à la réalisation de l'obligation de consulter de la Couronne. Bien que ce soit toujours à la Couronne qu'incombe la responsabilité ultime de veiller au caractère adéquat de la consultation, elle peut s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire à son obligation de consulter. Lorsque le processus réglementaire auquel s'en remet la Couronne ne lui permet pas de satisfaire adéquatement à son obligation de consulter ou d'accommoder, elle doit prendre des mesures supplémentaires pour ce faire. De plus, lorsque la Couronne s'en remet aux processus d'un organisme de réglementation pour satisfaire en tout ou en partie à son obligation, il doit être clairement indiqué aux groupes autochtones touchés que la Couronne s'en remet à un tel processus. L'ONÉ dispose des pouvoirs procéduraux nécessaires pour mener des consultations, ainsi que des pouvoirs de réparation lui permettant de prendre, au besoin, des mesures d'accommodement à l'égard des revendications autochtones ou des droits ancestraux ou issus de traités touchés. La Couronne peut donc s'en remettre au processus de l'ONÉ pour satisfaire, en tout ou en partie, à l'obligation de consulter qui lui incombe.

L'ONÉ dispose de vastes pouvoirs l'autorisant à entendre et à trancher toute question pertinente de droit et de fait, et ses décisions doivent respecter le par. 35(1) de la *Loi constitutionnelle de 1982*. Par conséquent, l'ONÉ peut décider s'il a été satisfait à l'obligation de consulter de la Couronne. L'intérêt public et l'obligation de consulter ne sont pas incompatibles en l'espèce. En tant qu'impératif constitutionnel, l'obligation de consulter fait naître un intérêt public spécial, qui l'emporte sur les autres préoccupations dont tiennent habituellement compte les tribunaux administratifs appelés à évaluer l'intérêt public. Lorsque l'autorisation accordée à l'égard d'un projet viole les droits constitutionnels des peuples autochtones, cette autorisation ne saurait servir l'intérêt public. Lorsque les groupes autochtones touchés soulèvent directement auprès de l'ONÉ des préoccupations concernant la consultation qui a été menée par la Couronne, l'ONÉ doit habituellement traiter de ces préoccupations dans des motifs. L'étendue de l'analyse qui conviendra variera selon les circonstances propres à chaque cas. Par-dessus tout, toute décision touchant des droits ancestraux ou issus

approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.

While the Crown may rely on the NEB's process to fulfill its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. First, the inquiry was misdirected. The consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. As well, the proponents eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked. There was no mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations. As well, the changes made to the project as a result of consultation were insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Therefore, the Crown breached its duty to consult in respect of the proposed testing.

**Cases Cited**

**Applied:** *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **distinguished:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; **referred to:** *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R.*

de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter. Lorsque la Couronne n'a pas satisfait à son obligation de consulter, l'ONÉ doit refuser d'approuver le projet. S'il l'approuve, sa décision devrait être annulée à l'issue d'un contrôle judiciaire.

Bien que la Couronne puisse s'en remettre au processus mené par l'ONÉ pour satisfaire à son obligation de consulter, les efforts de consultation et d'accommodement déployés dans le présent cas ont été inadéquats et lacunaires à plusieurs égards. Premièrement, la consultation était mal orientée. Le processus consultatif ne vise pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le droit lui-même. Dans son évaluation environnementale, l'ONÉ n'a pas pris en considération la source des droits issus de traités des Inuits, ni l'incidence des essais proposés sur ces droits. Deuxièmement, il n'a pas été indiqué clairement aux Inuits que la Couronne s'en remettait aux processus de l'ONÉ pour satisfaire à son obligation de consulter. Enfin, élément le plus important, le processus de l'ONÉ n'a pas permis de satisfaire à l'obligation de la Couronne de mener la consultation approfondie qui était requise dans la présente affaire. Très peu de possibilités de participation et de consultation ont étés offertes. Il n'y a pas eu d'audiences en l'espèce ni d'aide financière à l'intention des participants. Bien que ces garanties procédurales ne soient pas toujours nécessaires, leur absence dans la présente instance a réduit de façon importante la qualité de la consultation. De plus, les promoteurs ont finalement répondu aux questions soulevées durant le processus d'évaluation environnementale, mais au moyen d'un document pratiquement inaccessible, et ce, des mois après que les questions aient été posées. Il n'existait aucune compréhension mutuelle sur les points fondamentaux — à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements. En outre, les changements apportés au projet par suite de la consultation ne représentaient que des concessions négligeables au regard de l'atteinte potentielle aux droits issus de traités des Inuits. En conséquence, la Couronne a manqué à son obligation de consulter en ce qui concerne les essais proposés.

**Jurisprudence**

**Arrêt appliqué :** *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650; **distinction d'avec l'arrêt :** *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550; **arrêts mentionnés :** *Chippewas of the Thames First Nation c. Pipelines Enbridge inc.*, 2017 CSC 41, [2017] 1 R.C.S. 1099; *Nation haïda c. Colombie-Britannique (Ministre des*

*v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96; *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1; *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263.

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*Nader R. Hasan*, *Justin Safayeni* and *Pam Hrick*, for the appellants.

*Sandy Carpenter* and *Ian Breneman*, for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS).

*Mark R. Kindrachuk*, *Q.C.*, and *Peter Southey*, for the respondent the Attorney General of Canada.

*Manizeh Fancy* and *Richard Ogden*, for the intervener the Attorney General of Ontario.

*Richard James Fyfe*, for the intervener the Attorney General of Saskatchewan.

*Dominique Nouvet*, *Marie Belleau* and *Sonya Morgan*, for the intervener Nunavut Tunngavik Incorporated.

Written submissions only by *David Schulze* and *Nicholas Dodd*, for the intervener the Makivik Corporation.

*Marie-France Major* and *Thomas Slade*, for the intervener the Nunavut Wildlife Management Board.

*Kate Darling*, *Lorraine Land*, *Matt McPherson* and *Krista Nerland*, for the intervener the Inuvialuit Regional Corporation.

Isaac, Thomas, and Anthony Knox. « The Crown's Duty to Consult Aboriginal People » (2003), 41 *Alta. L. Rev.* 49.

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*Nader R. Hasan*, *Justin Safayeni* et *Pam Hrick*, pour les appelants.

*Sandy Carpenter* et *Ian Breneman*, pour les intimées Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) et TGS-NOPEC Geophysical Company ASA (TGS).

*Mark R. Kindrachuk*, *c.r.*, et *Peter Southey*, pour l'intimée la procureure générale du Canada.

*Manizeh Fancy* et *Richard Ogden*, pour l'intervenant le procureur général de l'Ontario.

*Richard James Fyfe*, pour l'intervenant le procureur général de la Saskatchewan.

*Dominique Nouvet*, *Marie Belleau* et *Sonya Morgan*, pour l'intervenante Nunavut Tunngavik Incorporated.

Argumentation écrite seulement par *David Schulze* et *Nicholas Dodd*, pour l'intervenante Makivik Corporation.

*Marie-France Major* et *Thomas Slade*, pour l'intervenant le Conseil de gestion des ressources fauniques du Nunavut.

*Kate Darling*, *Lorraine Land*, *Matt McPherson* et *Krista Nerland*, pour l'intervenante Inuvialuit Regional Corporation.

*Maxime Faille*, *Jaimie Lickers* and *Guy Régimbald*, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS AND BROWN JJ. —

I. Introduction

[1] This Court has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown. In this appeal, and its companion *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, we consider the Crown's duty to consult with Indigenous peoples before an independent regulatory agency authorizes a project which could impact upon their rights. The Court's jurisprudence shows that the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.

[2] The Hamlet of Clyde River lies on the northeast coast of Baffin Island, in Nunavut. The community is situated on a flood plain between Patricia Bay and the Arctic Cordillera. Most residents of Clyde River are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being. They have harvested marine mammals for generations. The bowhead whale, the narwhal, the ringed, bearded, and harp seals, and the polar bear are of particular importance to them. Under the *Nunavut Land Claims Agreement* (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

*Maxime Faille*, *Jaimie Lickers* et *Guy Régimbald*, pour l'intervenant Chiefs of Ontario.

Version française du jugement de la Cour rendu par

LES JUGES KARAKATSANIS ET BROWN —

I. Introduction

[1] À plusieurs reprises, la Cour a confirmé la place que tient l'obligation de consultation de la Couronne lorsqu'il s'agit de favoriser la réconciliation entre les peuples autochtones du Canada et la Couronne. Dans le présent pourvoi, ainsi que dans le pourvoi connexe *Chippewas of the Thames First Nation c. Pipelines Enbridge inc.*, 2017 SCC 41, [2017] 1 R.C.S. 1099, nous examinons l'obligation de la Couronne de consulter les peuples autochtones avant qu'un organisme de réglementation indépendant n'autorise un projet susceptible d'avoir des incidences sur leurs droits. Selon la jurisprudence de notre Cour, la substance de cette obligation ne change pas lorsqu'un organisme de réglementation détient le pouvoir de prendre la décision définitive à l'égard d'un projet. Bien que la Couronne soit toujours tenue de consulter, elle peut satisfaire partiellement ou totalement à cette obligation dans le cadre du processus de réglementation.

[2] Le hameau de Clyde River est situé sur la côte nord-est de l'île de Baffin, au Nunavut. La communauté se trouve dans une plaine inondable entre la Baie Patricia et la cordillère arctique. La plupart des résidents sont des Inuits et ils comptent sur les mammifères marins pour se nourrir et assurer leur bien-être économique, culturel et spirituel. Ils récoltent les mammifères marins depuis des générations. Ils accordent une importance particulière à la baleine boréale, au narval, au phoque annelé, au phoque barbu, au phoque du Groenland et à l'ours polaire. Aux termes de l'*Accord sur les revendications territoriales du Nunavut* (1993), les Inuits de Clyde River ont cédé l'ensemble de leurs revendications, droits, titres et intérêts ancestraux dans la région du Nunavut, qui comprend Clyde River, contre des droits définis par traité, notamment le droit de récolter des mammifères marins.

[3] In 2011, the respondents TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As and Petroleum Geo-Services Inc. (the proponents) applied to the National Energy Board (NEB) to conduct offshore seismic testing for oil and gas resources. It is undisputed that this testing could negatively affect the harvesting rights of the Inuit of Clyde River. After a period of consultation among the project proponents, the NEB, and affected Inuit communities, the NEB granted the requested authorization.

[4] While the Crown may rely on the NEB's process to fulfill its duty to consult, considering the importance of the established treaty rights at stake and the potential impact of the seismic testing on those rights, we agree with the appellants that the consultation and accommodation efforts in this case were inadequate. For the reasons set out below, we would therefore allow the appeal and quash the NEB's authorization.

## II. Background

### A. *Legislative Framework*

[5] The *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGOA*), aims, in part, to promote responsible exploration for and exploitation of oil and gas resources (s. 2.1). It applies to exploration and drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut (s. 3). Engaging in such activities is prohibited without an operating licence under s. 5(1)(a) or an authorization under s. 5(1)(b).

[6] The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of *COGOA*. The NEB has broad discretion to impose requirements for authorization under s. 5(4), and can ask parties to

[3] En 2011, les intimées TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As et Petroleum Geo-Services Inc. (les promoteurs) ont demandé à l'Office national de l'énergie (ONÉ) l'autorisation de mener des essais sismiques extracôtiers liés aux ressources pétrolières et gazières. Nul ne conteste que ces essais pourraient avoir des incidences négatives sur les droits de récolte des Inuits de Clyde River. Après une période de consultation entre les promoteurs du projet, l'ONÉ et les communautés inuites touchées, l'ONÉ a accordé l'autorisation demandée.

[4] Bien que la Couronne puisse s'en remettre au processus mené par l'ONÉ pour satisfaire à son obligation de consulter, vu l'importance des droits issus de traités reconnus en jeu et l'incidence que les essais sismiques pourraient avoir sur ces droits, à l'instar des appelants nous estimons que les efforts de consultation et d'accommodement en l'espèce ont été inadéquats. Pour les motifs qui suivent, nous sommes donc d'avis d'accueillir le pourvoi et d'annuler l'autorisation de l'ONÉ.

## II. Contexte

### A. *Cadre législatif*

[5] La *Loi sur les opérations pétrolières au Canada*, L.R.C. 1985, c. O-7 (*LOPC*), vise en partie à promouvoir la recherche et l'exploitation responsables des ressources pétrolières et gazières (art. 2.1). Elle s'applique à la recherche, notamment par forage, à la production, à la rationalisation de l'exploitation, à la transformation et au transport du pétrole et du gaz dans certains endroits désignés, notamment au Nunavut (art. 3). Il est interdit de se livrer à de telles activités sans avoir obtenu le permis de travaux prévu à l'al. 5(1)a) ou l'autorisation prévue à l'al. 5(1)b).

[6] L'ONÉ est un tribunal administratif fédéral et un organisme de réglementation établi par la *Loi sur l'Office national de l'énergie*, L.R.C. 1985, c. N-7 (*Loi sur l'ONÉ*). En l'espèce, c'est lui qui prend en dernier ressort la décision d'accorder ou non l'autorisation prévue à l'al. 5(1)b) de la *LOPC*. L'ONÉ est investi d'un large pouvoir discrétionnaire

provide any information it deems necessary to comply with its statutory mandate (s. 5.31).

B. *The Seismic Testing Authorization*

[7] In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship through a project area. These airguns produce underwater sound waves, which are intended to find and measure underwater geological resources such as petroleum. The testing was to run from July through November, for five successive years.

[8] The NEB launched an environmental assessment of the project.[1]

[9] Clyde River opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents responded to requests for further information from the NEB. They held meetings in communities that would be affected by the testing, including Clyde River.

[10] In April and May 2013, the NEB held meetings in Pond Inlet, Clyde River, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. Representatives of the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. For example, in

[1] This assessment was initially required under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Since its repeal and replacement by the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the NEB has continued to conduct environmental assessments in relation to proposed projects, taking the position that it is still empowered to do so under *COGOA*.

qui l'habilite à assortir de conditions, en vertu du par. 5(4), les autorisations qu'il délivre, et il peut demander aux parties tout renseignement qu'il juge nécessaire pour s'acquitter du mandat que lui confère la loi (art. 5.31).

B. *L'autorisation relative aux essais sismiques*

[7] En mai 2011, les promoteurs ont demandé à l'ONÉ, aux termes de l'al. 5(1)b) de la *LOPC*, l'autorisation d'effectuer des essais sismiques dans la baie de Baffin et le détroit de Davis, lieux adjacents à la région où les Inuits peuvent, conformément à des droits issus de traités, récolter des mammifères marins. Les essais proposés prévoyaient que des canons à air seraient remorqués par navire à travers une région visée par le projet. Ces canons produisent des ondes sonores sous-marines qui permettent de trouver et de mesurer les ressources géologiques sous-marines tel le pétrole. Les essais devaient avoir lieu de juillet à novembre, pendant cinq années consécutives.

[8] L'ONÉ a procédé à une évaluation environnementale du projet[1].

[9] Clyde River s'est opposé aux essais sismiques et a présenté à l'ONÉ une pétition à l'encontre de ces essais en mai 2011. En 2012, les promoteurs ont répondu à des demandes de renseignements supplémentaires de l'ONÉ. Ils ont tenu des assemblées dans des communautés qui seraient touchées par les essais, notamment à Clyde River.

[10] En avril et en mai 2013, l'ONÉ a tenu des assemblées dans les hameaux de Pond Inlet, Clyde River, Qikiqtarjuaq et Iqaluit afin de recueillir les commentaires des membres du public concernant le projet. Des représentants des promoteurs ont assisté à ces assemblées. Les membres des communautés ont posé des questions de base au sujet de l'effet des essais sur les mammifères marins de la région, mais

[1] Cette évaluation était initialement exigée par la *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, c. 37. Depuis l'abrogation de cette loi et son remplacement par la *Loi canadienne sur l'évaluation environnementale (2012)*, L.C. 2012, c. 19, art. 52, l'ONÉ continue de mener des évaluations environnementales relativement aux projets proposés, considérant qu'il possède toujours le pouvoir de le faire en vertu de la *LOPC*.

Pond Inlet, a community member asked the proponents which marine mammals would be affected by the survey. The proponents answered: "That's a very difficult question to answer because we're not the core experts" (A.R., vol. III, at p. 541). Similarly, in Clyde River, a community member asked how the testing would affect marine mammals. The proponents answered:

> . . . a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals.

(A.R., vol. III, at p. 651)

[11] These are but two examples of multiple instances of the proponents' failure to offer substantive answers to basic questions about the impacts of the proposed seismic testing. That failure led the NEB, in May 2013, to suspend its assessment. In August 2013, the proponents filed a 3,926-page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the hamlet offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

[12] Throughout the environmental assessment process, Clyde River and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

les promoteurs n'ont pas été en mesure de répondre à bon nombre de celles-ci. Par exemple, à Pond Inlet, un membre de la communauté a demandé aux promoteurs quels mammifères marins seraient touchés par les essais. Ceux-ci ont donné la réponse suivante : [TRADUCTION] « Il est très difficile de répondre à cette question parce que nous ne sommes pas des experts à ce sujet » (d.a., vol. III, p. 541). De même, à Clyde River, un membre de la communauté voulait savoir quel serait l'effet des essais sur les mammifères marins. Les promoteurs ont répondu ce qui suit :

> [TRADUCTION] . . . il y a eu beaucoup de travaux en matière d'essais sismiques à d'autres endroits, et une grande partie de cette information est utilisée dans la réalisation de l'évaluation environnementale, le document qui a été soumis à l'Office national de l'énergie par les entreprises pour les besoins du processus d'approbation. Il comporte une section sur, vous savez, les mammifères marins et les effets sur ceux-ci.

(d.a., vol. III, p. 651)

[11] Ce ne sont là que deux exemples des nombreux cas où les promoteurs n'ont pas su donner de réponses concrètes à des questions de base au sujet des répercussions des essais sismiques proposés. C'est ce qui a amené l'ONÉ à suspendre son évaluation en mai 2013. En août 2013, les promoteurs ont déposé auprès de l'ONÉ un document de 3 926 pages censé répondre à ces questions. Ce document a été affiché sur le site Web de l'ONÉ et envoyé aux bureaux des hameaux. La majeure partie de ce document n'a pas été traduite en inuktitut. Aucun effort additionnel n'a été déployé pour vérifier si les communautés avaient accès à ce document, et si elles avaient obtenu des réponses à leurs questions. Après le dépôt du document, l'ONÉ a repris son évaluation.

[12] Tout au long du processus d'évaluation environnementale, Clyde River et diverses organisations inuites ont déposé auprès de l'ONÉ des lettres de commentaires dans lesquelles ils affirmaient que la consultation était inadéquate et ils exprimaient leurs inquiétudes au sujet des essais.

[13] In April 2014, organizations representing the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. This could be remedied, they said, by completing a strategic environmental assessment[2] before authorizing any seismic testing. In May, the Nunavut Marine Council also wrote to the NEB, with a copy to the Minister, asking that any regulatory decisions affecting the Nunavut Settlement Area's marine environment be postponed until completion of the strategic environmental assessment. This assessment was necessary, in the Council's view, to understand the baseline conditions in the marine environment and to ensure that seismic tests are properly regulated.

[14] In June 2014, the Minister responded to both letters, "disagree[ing] with the view that seismic exploration of the region should be put on hold until the completion of a strategic environmental assessment" (A.R., vol. IV, at p. 967). A Geophysical Operations Authorization letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

[15] In its environmental assessment report, the NEB discussed consultation with, and the participation of, Aboriginal groups in the NEB process. It concluded that the proponents "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised" and that

[13] En avril 2014, des organisations représentant les appelants et des Inuits d'autres communautés ont écrit au ministre des Affaires autochtones et du Nord et à l'ONÉ, affirmant qu'à leur avis il n'avait pas été satisfait à l'obligation de consultation en ce qui a trait aux essais. Selon ces organisations, il était possible de remédier à cette situation en réalisant une évaluation environnementale stratégique[2] avant que des essais sismiques ne soient autorisés. En mai, le Conseil du milieu marin du Nunavut a lui aussi écrit à l'ONÉ, avec copie au ministre, et demandé que toute décision réglementaire touchant le milieu marin de la région du Nunavut soit reportée jusqu'à ce que l'évaluation environnementale stratégique soit terminée. De l'avis du Conseil, cette évaluation était nécessaire pour que l'on comprenne les conditions de référence du milieu marin et pour veiller à ce que les essais sismiques soient adéquatement réglementés.

[14] En juin 2014, le ministre a répondu à ces deux lettres, exprimant son [TRADUCTION] « désaccord avec l'idée de suspendre l'exploration sismique de la région jusqu'à ce que l'évaluation environnementale stratégique soit terminée » (d.a., vol. IV, p. 967). Peu de temps après, une lettre émanant de l'ONÉ qui accordait l'autorisation de mener des travaux géophysiques a suivi, indiquant que le rapport d'évaluation environnementale était terminé et que l'autorisation avait été accordée.

[15] Dans son rapport d'évaluation environnementale, l'ONÉ a traité de la consultation et de la participation des groupes autochtones dans le cadre de son processus. Il a conclu que les promoteurs [TRADUCTION] « ont déployé suffisamment d'efforts pour consulter les groupes autochtones susceptibles

[2] At the time, the Department of Aboriginal Affairs and Northern Development was preparing a strategic environmental assessment — specifically, the "Eastern Arctic Strategic Environmental Assessment" — for Baffin Bay and Davis Strait, meant to examine "all aspects of future oil and gas development." Once complete, it would "inform policy decisions around if, when, and where oil and gas companies may be invited to bid on parcels of land for exploration drilling rights in Baffin Bay/Davis Strait" (Letter to Cathy Towtongie et al. from the Honourable Bernard Valcourt, A.R., vol. IV, at pp. 966-67).

[2] À cette époque, le ministère des Affaires indiennes et du Nord canadien préparait une évaluation environnementale stratégique — plus précisément l'[TRADUCTION] « Évaluation environnementale stratégique dans l'Arctique de l'Est » — pour la baie de Baffin et le détroit de Davis, qui visait l'examen de « tous les aspects de l'exploitation pétrolière et gazière future ». Une fois terminée, cette évaluation « guiderait les décisions de politique générale concernant l'opportunité d'inviter les sociétés pétrolières et gazières à soumissionner à l'égard de parcelles de terre afin d'y obtenir des droits d'exploration par forage dans la baie de Baffin et le détroit de Davis, ainsi que le moment où cela pourrait se faire et les endroits qui seraient visés » (lettre de l'honorable Bernard Valcourt à Cathy Towtongie et autres, d.a., vol. IV, p. 966-967).

"Aboriginal groups had an adequate opportunity to participate in the NEB's [environmental assessment] process" (A.R., vol. I, at p. 24). It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as being of "Special Concern" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

C. *The Judicial Review Proceedings*

[16] Clyde River applied to the Federal Court of Appeal for judicial review of the NEB's decision to grant the authorization. Dawson J.A. (Nadon and Boivin JJ.A. concurring) found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister's approval (or waiver of the requirement for approval) of a benefits plan for the project, pursuant to s. 5.2(2) of *COGOA* (2015 FCA 179, [2016] 3 F.C.R. 167). The Federal Court of Appeal characterized the degree of consultation owed in the circumstances as deep, as that concept was discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 44, and found that the Crown was entitled to rely on the NEB to undertake such consultation.

[17] The Court of Appeal also concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The conditions upon which the authorization had been granted showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further development

d'être touchés et pour répondre aux préoccupations qu'ils ont soulevées », et que « les groupes autochtones ont eu une possibilité adéquate de participer au processus d'évaluation environnementale de l'ONÉ » (d.a., vol. I, p. 24). L'ONÉ a également conclu que les essais pouvaient modifier les routes migratoires des mammifères marins et augmenter le risque de mortalité chez ces animaux, situation qui influerait sur la récolte traditionnelle des mammifères marins, notamment les baleines boréales et les narvals, deux espèces qualifiées d'« espèces préoccupantes » par le Comité sur la situation des espèces en péril au Canada (COSEPAC). L'ONÉ a toutefois conclu que les essais n'étaient pas susceptibles de causer des effets environnementaux négatifs et importants compte tenu des mesures d'atténuation que les promoteurs mettraient en œuvre.

C. *La demande de contrôle judiciaire*

[16] Clyde River a demandé à la Cour d'appel fédérale le contrôle judiciaire de la décision de l'ONÉ accordant l'autorisation. La juge Dawson (avec l'appui des juges Nadon et Boivin) a conclu que l'obligation de consulter avait pris naissance, parce que l'ONÉ ne pouvait pas accorder l'autorisation tant que le ministre n'aurait pas approuvé (ou renoncer à l'obligation d'approuver) un plan de retombées économiques relativement au projet, conformément au par. 5.2(2) de la *LOPC* (2015 CAF 179, [2016] 3 R.C.F. 167). La Cour d'appel fédérale a considéré que les circonstances requéraient une consultation approfondie, suivant le sens donné à cette notion dans l'arrêt *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, par. 44, et elle a jugé que la Couronne pouvait s'en remettre à l'ONÉ pour que celui-ci procède à la consultation.

[17] La Cour d'appel a également conclu que, du fait de la nature et de l'étendue des processus de l'ONÉ, il avait été satisfait à l'obligation de consulter incombant à la Couronne. Les conditions auxquelles l'ONÉ avait accordé son autorisation montraient qu'il avait suffisamment pris en compte les intérêts des Inuits et qu'il était permis de s'attendre à ce que de nouvelles consultations soient

activities. In the circumstances, a strategic environmental assessment report was not required.

III. Analysis

[18] The following issues arise in this appeal:

1. Can an NEB approval process trigger the duty to consult?

2. Can the Crown rely on the NEB's process to fulfill the duty to consult?

3. What is the NEB's role in considering Crown consultation before approval?

4. Was the consultation adequate in this case?

A. *The Duty to Consult — General Principles*

[19] The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; *Carrier Sekani*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).

menées si les essais proposés étaient suivis d'autres activités de mise en valeur. Dans les circonstances, un rapport d'évaluation environnementale stratégique n'était pas nécessaire.

III. Analyse

[18] Le présent pourvoi soulève les questions suivantes :

1. Un processus d'approbation de l'ONÉ peut-il donner naissance à l'obligation de consulter?

2. La Couronne peut-elle s'en remettre au processus de l'ONÉ pour satisfaire à l'obligation de consulter?

3. Quel est le rôle de l'ONÉ dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet?

4. La consultation a-t-elle été adéquate en l'espèce?

A. *L'obligation de consulter — principes généraux*

[19] L'obligation de consulter vise la protection des droits ancestraux et issus de traités tout en favorisant la réconciliation entre les peuples autochtones et la Couronne (*Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650, par. 34). Elle revêt à la fois une dimension constitutionnelle et une dimension légale (*R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 6; *Carrier Sekani*, par. 34). Sa dimension constitutionnelle découle du principe de l'honneur de la Couronne (*Kapp*, par. 6). Ce principe est lui-même consacré au par. 35(1) de la *Loi constitutionnelle de 1982*, qui reconnaît et confirme les droits existants ancestraux et issus de traités (*Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550, par. 24). Et, en tant qu'obligation légale, elle découle de la proclamation de la souveraineté de la Couronne sur des terres et ressources autrefois détenues par les peuples autochtones (*Haïda*, par. 53).

[20] The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida*, at paras. 39 and 43-45).

[21] This Court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult (*Carrier Sekani*, at para. 56; *Haida*, at para. 51). The appellants argue that a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between "the Crown" and the affected Indigenous community is necessary.

[22] In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties

[20] Une fois que l'obligation a pris naissance, son contenu se situe sur un continuum qui va de la consultation limitée à la consultation approfondie, selon la solidité de la revendication autochtone et la gravité de l'impact potentiel sur le droit concerné. Il faut procéder au cas par cas et faire preuve de souplesse, car le caractère approfondi de la consultation nécessaire peut varier au fur et à mesure que se déroule le processus et que sont mis au jour de nouveaux renseignements (*Haïda*, par. 39 et 43-45).

[21] Notre Cour a affirmé qu'il est loisible aux législateurs d'habiliter des organismes de réglementation à contribuer à la réalisation de l'obligation de consulter de la Couronne (*Carrier Sekani*, par. 56; *Haïda*, par. 51). Les appelants plaident qu'un processus réglementaire ne peut à lui seul assurer le respect de l'obligation de consulter, parce qu'il faut au moins un certain dialogue direct entre « la Couronne » et la communauté autochtone touchée.

[22] À notre avis, bien que la Couronne puisse s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire, en tout ou en partie, à son obligation de consulter et, lorsque cela se justifie, à son obligation d'accommoder, c'est toujours à elle qu'incombe la responsabilité ultime de veiller au caractère adéquat de la consultation. Sur le plan pratique, cela ne signifie pas qu'un ministre doive dans chaque cas se demander explicitement s'il a été satisfait à l'obligation de consulter, ou qu'il doive participer directement au processus de consultation. Lorsque le processus réglementaire auquel s'en remet la Couronne ne lui permet pas de satisfaire adéquatement à son obligation de consulter ou d'accommoder, elle doit prendre des mesures supplémentaires pour ce faire. Elle pourrait devoir combler les lacunes soit au cas par cas, soit de manière plus systématique au moyen de modifications législatives ou réglementaires (voir, par ex., *Ross River Dena Council c. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Elle pourrait également exiger la présentation d'observations à l'organisme de réglementation, demander le réexamen de la décision ou solliciter le report de l'audience afin de mener d'autres consultations dans le cadre d'un processus distinct avant que la décision ne soit rendue. Par ailleurs, si un groupe autochtone

are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 12).

[23] Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

[24] Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal

touché est (comme les Inuits du Nunavut) partie à un traité moderne et juge que le processus est déficient, il devrait, comme ce fut le cas en l'espèce, demander une intervention directe de la Couronne en temps opportun (puisque les parties aux traités sont tenues d'agir de façon diligente pour faire valoir leurs intérêts respectifs) (*Beckman c. Première nation de Little Salmon/Carmacks*, 2010 CSC 53, [2010] 3 R.C.S. 103, par. 12).

[23] De plus, étant donné que l'honneur de la Couronne commande que celle-ci agisse de bonne foi et tienne une véritable consultation (*Haïda*, par. 41), lorsque la Couronne s'en remet aux processus d'un organisme de réglementation pour satisfaire en tout ou en partie à son obligation, il doit être clairement indiqué aux groupes autochtones touchés que la Couronne s'en remet à un tel processus. Les peuples autochtones doivent être avisés de la forme que prendra le processus de consultation, afin de savoir comment les consultations se dérouleront, de pouvoir y participer activement et, au besoin, d'être en mesure de soulever en temps opportun leurs préoccupations au sujet de la forme des consultations proposées.

[24] Par-dessus tout, et peu importe le processus de consultation entrepris, toute décision touchant des droits ancestraux ou issus de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter, laquelle est un impératif constitutionnel. En cas de contestation, la décision devrait être annulée à l'issue d'un contrôle judiciaire. Cela dit, le contrôle judiciaire ne saurait remplacer une consultation adéquate. On ne parvient que rarement, voire jamais, à une véritable réconciliation dans une salle d'audience. Un recours judiciaire peut tendre à corriger des atteintes passées à des droits ancestraux ou issus de traités, mais une consultation adéquate par la Couronne *avant* que le projet ne soit approuvé est toujours préférable à des remontrances judiciaires formulées après le fait, au terme d'une procédure contradictoire. Après tout, la consultation [TRADUCTION] « s'attache au maintien de relations constantes » (*Carrier Sekani*, par. 38, citant D. G. Newman, *The Duty to Consult : New Relationships with Aboriginal Peoples* (2009),

interests" (para. 14). No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.

### B. *Can an NEB Approval Process Trigger the Duty to Consult?*

[25] The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct (*Haida*, at para. 35; *Carrier Sekani*, at para. 31). Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible (*Carrier Sekani*, at paras. 45-46).

[26] In this appeal, all parties agreed that the Crown's duty to consult was triggered, although agreement on *just what* Crown conduct triggered the duty has proven elusive. The Federal Court of Appeal saw the trigger in *COGOA*'s requirement for ministerial approval (or waiver of the requirement for approval) of a benefits plan for the testing. In the companion appeal of *Chippewas of the Thames*, the majority of the Federal Court of Appeal concluded that it was not necessary to decide whether the duty to consult was triggered since the Crown was not a party before the NEB, but suggested the only Crown action involved might have been the 1959 enactment

p. 21). Comme notre Cour l'a souligné dans *Haïda*, « [m]ême si les revendications autochtones sont et peuvent être réglées dans le cadre de litiges, il est préférable de recourir à la négociation pour concilier les intérêts de la Couronne et ceux des Autochtones » (par. 14). Il n'est à l'avantage de personne — promoteurs du projet, peuples autochtones ou membres non autochtones des communautés touchées — qu'un projet soit approuvé prématurément mais fasse ensuite l'objet d'un litige.

### B. *Un processus d'approbation de l'ONÉ peut-il donner naissance à l'obligation de consulter?*

[25] L'obligation de consulter prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle d'une revendication autochtone ou de droits ancestraux ou issus de traités susceptibles de subir des effets préjudiciables en raison d'une mesure prise par la Couronne (*Haïda*, par. 35; *Carrier Sekani*, par. 31). Les mesures de la Couronne susceptibles de donner naissance à l'obligation de consulter ne se limitent pas à l'exercice, par la Couronne ou en son nom, de la prérogative royale ou de pouvoirs conférés par la loi, et ne se limitent pas non plus aux décisions qui ont une incidence immédiate sur les terres et les ressources. Il faut se demander si la mesure a des effets préjudiciables, quelle qu'en soit la cause, sur des droits ancestraux ou issus de traités. D'ailleurs, un des objectifs de la consultation consiste à cerner les effets préjudiciables, à les réduire au minimum et à y remédier si possible (*Carrier Sekani*, par. 45-46).

[26] Dans le présent pourvoi, toutes les parties ont reconnu que l'obligation de consulter de la Couronne avait pris naissance, mais elles ont été incapables de s'accorder sur la *nature exacte* de la mesure de la Couronne qui a donné naissance à cette obligation. La Cour d'appel fédérale a considéré que l'élément ayant fait naître l'obligation est l'exigence prévue par la *LOPC* qui requiert que le ministre approuve (ou renonce à l'obligation d'approuver) un plan de retombées économiques pour les essais. Dans l'affaire connexe *Chippewas of the Thames*, les juges majoritaires de la Cour d'appel fédérale ont conclu qu'il n'était pas nécessaire de

of the *NEB Act*[3] (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96). In short, the Federal Court of Appeal in both cases was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. And, before this Court in *Chippewas of the Thames*, the Attorney General of Canada argued that the duty was triggered by the NEB's approval of the pipeline project, because it was state action with the potential to affect Aboriginal or treaty rights.

[27] Contrary to the Federal Court of Appeal's conclusions on this point, we agree that the NEB's approval process, in this case, as in *Chippewas of the Thames*, triggered the duty to consult.

[28] It bears reiterating that the duty to consult is owed by the Crown. In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani*, at para. 44). For this reason, the term "Crown" is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359 (H.L.), at p. 397:

[3] *National Energy Board Act*, S.C. 1959, c. 46.

décider si l'obligation de consulter s'appliquait, puisque la Couronne n'était pas partie à l'instance devant l'ONÉ, mais ils ont évoqué l'idée que la seule mesure de la Couronne en cause pourrait être l'adoption en 1959 de la *Loi sur l'ONÉ*[3] (*Première Nation des Chippewas de la Thames c. Pipelines Enbridge Inc.*, 2015 CAF 222, [2016] 3 R.C.F. 96). Bref, dans les deux affaires la Cour d'appel fédérale était d'avis que seule une mesure prise par un ministre ou un ministère du gouvernement, ou une société d'État, peut constituer une mesure de la Couronne donnant naissance à l'obligation de consulter. Et devant notre Cour, dans le pourvoi *Chippewas of the Thames*, la procureure générale du Canada a plaidé que c'est l'approbation du projet de pipeline par l'ONÉ qui a donné naissance à l'obligation, puisqu'il s'agissait d'une mesure de l'État susceptible d'avoir une incidence sur des droits ancestraux ou issus de traités.

[27] Contrairement aux conclusions de la Cour d'appel fédérale sur ce point, nous sommes d'avis qu'en l'espèce, tout comme dans *Chippewas of the Thames*, c'est le processus d'approbation de l'ONÉ qui a donné naissance à l'obligation de consulter.

[28] Il importe de répéter que l'obligation de consulter incombe à la Couronne. En un sens, la « Couronne » s'entend de la personnification de Sa Majesté de l'État canadien dans l'exercice des prérogatives et des privilèges qui lui sont réservés. Cependant, la Couronne désigne aussi la souveraine dans l'exercice de son rôle législatif officiel (lorsqu'elle sanctionne les projets de loi, qu'elle refuse de les sanctionner ou qu'elle réserve sa décision), et en tant que chef du pouvoir exécutif (*McAteer c. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, par. 51; P. W. Hogg, P. J. Monahan et W. K. Wright, *Liability of the Crown* (4e éd. 2011), p. 11-12; mais voir *Carrier Sekani*, par. 44). Pour cette raison, le mot « Couronne » est couramment employé comme symbole du pouvoir exécutif et pour désigner ce pouvoir. C'est ce que lord Simon of Glaisdale a décrit dans *Town Investments Ltd. c. Department of the Environment*, [1978] A.C. 359 (H.L.), p. 397 :

[3] *Loi sur l'Office national de l'énergie*, S.C. 1959, c. 46.

The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king's peace but also against "his crown and dignity": *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term "the Crown" is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on "the Crown."

[29] By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown's ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final

[TRADUCTION] La couronne, en tant qu'objet, est une coiffure ornée de bijoux conservée sous garde à la tour de Londres. Mais elle symbolise les pouvoirs du gouvernement qui étaient auparavant exercés par la personne portant la couronne; c'est ainsi qu'au 13e siècle, les crimes étaient commis non seulement contre la paix du roi, mais aussi contre « sa couronne et sa dignité » : *Pollock and Maitland, History of English Law*, 2e éd. (1898), vol. I, p. 525. Par conséquent, on utilise l'expression « la Couronne » en droit constitutionnel pour désigner l'ensemble des pouvoirs de cette nature qui subsistent (la prérogative royale), ainsi que les autres pouvoirs que la loi confère expressément à « la Couronne ».

[29] Selon cette interprétation, l'ONÉ n'est pas, à proprement parler, « la Couronne ». Il n'est pas non plus, à proprement parler, un mandataire de la Couronne, étant donné que — comme l'ONÉ exerce ses activités de manière indépendante des ministres de la Couronne — il n'existe entre eux aucun lien de dépendance (Hogg, Monahan et Wright, p. 465). Cependant, en tant qu'organisme créé par la loi à qui incombe la responsabilité visée à l'al. 5(1)b) de la *LOPC*, l'ONÉ agit pour le compte de la Couronne lorsqu'il prend une décision définitive à l'égard d'une demande de projet. En termes simples, dès lors que l'on accepte qu'un organisme de réglementation existe pour exercer le pouvoir de nature exécutive que le législateur concerné l'autorise à exercer, toute distinction entre les mesures de cet organisme et celles de la Couronne disparaît rapidement. Dans ce contexte, l'ONÉ est le moyen par lequel la Couronne agit, d'où l'emploi interchangeable dans *Carrier Sekani* des expressions « mesure gouvernementale » et « mesure [. . .] de la Couronne » (par. 42-44). Par conséquent, il importe peu que le décideur ultime dans un projet soit le Cabinet ou l'ONÉ. Dans les deux cas, la décision constitue une mesure de la Couronne qui peut donner naissance à l'obligation de consulter. Comme l'a affirmé en dissidence le juge Rennie de la Cour d'appel fédérale dans *Chippewas of the Thames*, « [l]'obligation,

decisions respecting such testing as was proposed here, clearly constitutes Crown action.

C. *Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?*

[30] As we have said, while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani*, at paras. 55 and 60). In the NEB's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of Clyde River in respect of the proposed testing.

[31] We note that the NEB and *COGOA* each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (*Beckman*, at para. 39; *Taku River*, at para. 22). Under *COGOA*, the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of *COGOA* and the public interest (ss. 5.331, 5.31(1) and 5.32). It can also require

comme l'honneur de la Couronne, ne s'envole pas en fumée simplement parce qu'une décision sans appel a été rendue par un tribunal établi par le Parlement, plutôt que par le Cabinet » (par. 105). La mesure qu'a prise l'ONÉ dans l'exercice du pouvoir qu'il possède, en vertu de l'al. 5(1)b) de la *LOPC*, de prendre la décision ultime concernant des essais tels ceux proposés en l'espèce, constitue manifestement une mesure de la Couronne.

C. *La Couronne peut-elle s'en remettre au processus de l'ONÉ pour satisfaire à l'obligation de consulter?*

[30] Comme nous l'avons déjà dit, bien que la Couronne demeure ultimement responsable de veiller au caractère adéquat de la consultation, celle-ci peut s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire à l'obligation de consulter. Cependant, la question de savoir si la Couronne est en mesure de le faire, en tout ou en partie, dépend de la réponse à la question de savoir si les attributions que la loi confère à l'organisme habilitent ce dernier à faire ce que l'obligation exige dans les circonstances particulières (*Carrier Sekani*, par. 55 et 60). En conséquence, dans le cas de l'ONÉ, la question consiste à décider si celui-ci peut, dans la mesure où la Couronne s'en remet à lui, assurer un niveau de consultation adéquat et, au besoin, accorder aux Inuits de Clyde River des mesures d'accommodement à l'égard des essais proposés.

[31] Nous constatons que tant l'ONÉ que la *LOPC* sont antérieurs à la reconnaissance judiciaire de l'obligation de consulter. Toutefois, compte tenu du caractère souple de cette obligation, la Couronne peut s'en remettre à un processus qui a été initialement conçu pour une autre fin, tant que ce processus rend possible un niveau approprié de consultation du groupe autochtone touché (*Beckman*, par. 39; *Taku River*, par. 22). En vertu de la *LOPC*, l'ONÉ dispose d'un large éventail de pouvoirs qui permettent une consultation étendue. Il peut tenir des audiences, en plus de posséder un vaste pouvoir discrétionnaire l'habilitant à rendre des ordonnances ou obtenir

studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).[4]

[32] *COGOA* also grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary. The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (ss. 5(1)(b), 5(5) and 5.36(2)).

[33] The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

[34] In sum, the NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill

[4] While s. 5.002 (participant funding) and s. 5.331 (public hearings) of *COGOA* were not in force at the time the NEB considered and authorized the project at issue here, they were added later (see S.C. 2015, c. 4, ss. 7 and 13).

des renseignements pour l'application de la *LOPC* et dans l'intérêt public (art. 5.331, par. 5.31(1), art. 5.32). Il peut également exiger que des études soient entreprises et imposer des conditions préalables à l'approbation (par. 5(4)). Dans le cas de projets désignés, il peut aussi (comme c'est le cas en l'espèce) réaliser des évaluations environnementales et créer un programme d'aide financière pour faciliter la participation du public (art. 5.002)[4].

[32] La *LOPC* confère aussi à l'ONÉ de vastes pouvoirs d'accommodement afin de répondre, au besoin, aux préoccupations des groupes autochtones. L'ONÉ peut assortir l'autorisation qu'il accorde en vertu de l'al. 5(1)b) de toute condition qu'il juge appropriée, et peut faire dépendre la prise d'effet de cette autorisation de l'exécution de ces conditions (par. 5(4) et 5.36(1)). Plus important encore, l'ONÉ peut exiger que des accommodements soient apportés soit en exerçant son pouvoir discrétionnaire de refuser une autorisation, soit en réservant sa décision pendant le règlement d'autres questions (al. 5(1)b), et par. 5(5) et 5.36(2)).

[33] L'ONÉ a également acquis une importante expertise institutionnelle, tant en effectuant des consultations qu'en évaluant les effets environnementaux des projets proposés. Lorsque les effets d'un projet proposé sur un droit ancestral ou issu d'un traité chevauchent considérablement les répercussions environnementales potentielles du projet, l'ONÉ est bien placé pour superviser les consultations visant l'examen de ces effets, et pour utiliser son expertise technique afin d'évaluer les formes d'accommodement possibles.

[34] En somme, l'ONÉ dispose (1) des pouvoirs procéduraux nécessaires pour mener des consultations et (2) des pouvoirs de réparation lui permettant de prendre, au besoin, des mesures d'accommodement à l'égard des revendications autochtones ou des droits ancestraux ou issus de traités touchés. La

[4] Même si les art. 5.002 (aide financière) et 5.331 (audiences publiques) de la *LOPC* n'étaient pas en vigueur lorsque l'ONÉ a examiné et autorisé le projet litigieux en l'espèce, ils ont été ajoutés à la loi par la suite (voir L.C. 2015, c. 4, art. 7 et 13).

the Crown's duty to consult. Whether the NEB's process did so in this case, we consider below.

Couronne peut donc s'en remettre au processus de l'ONÉ pour satisfaire, en tout ou en partie, à l'obligation de consulter qui lui incombe. Nous allons examiner ci-après si le processus de l'ONÉ a permis de satisfaire à cette obligation en l'espèce.

### D. *What Is the NEB's Role in Considering Crown Consultation Before Approval?*

### D. *Quel est le rôle de l'ONÉ dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet?*

[35] The appellants argue that, as a tribunal empowered to decide questions of law, the NEB *must* exercise its decision-making authority in accordance with s. 35(1) of the *Constitution Act, 1982* by evaluating the adequacy of consultation before issuing an authorization for seismic testing. In contrast, the proponents submit that there is no basis in this Court's jurisprudence for imposing this obligation on the NEB. Although the Attorney General of Canada agrees with the appellants that the NEB has the legal capacity to decide constitutional questions when doing so is necessary to its decision-making powers, she argues that the NEB's environmental assessment decision in this case appropriately considered the adequacy of the proponents' consultation efforts.

[35] Les appelants soutiennent que, en tant que tribunal administratif habilité à trancher des questions de droit, l'ONÉ *doit* exercer son pouvoir décisionnel en conformité avec le par. 35(1) de la *Loi constitutionnelle de 1982*, et ce, en évaluant le caractère adéquat de la consultation avant d'accorder une autorisation pour des essais sismiques. À l'inverse, les promoteurs plaident que rien dans la jurisprudence de notre Cour ne permet d'imposer cette obligation à l'ONÉ. Bien que la procureure générale du Canada soit d'accord avec les appelants pour dire que l'ONÉ possède la capacité juridique de trancher des questions constitutionnelles lorsque cela est nécessaire dans l'exercice de ses pouvoirs décisionnels, elle soutient que, dans sa décision relative à l'évaluation environnementale en l'espèce, l'ONÉ a examiné de manière appropriée le caractère adéquat des efforts de consultation déployés par les promoteurs.

[36] Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power" (*Carrier Sekani*, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani*, at para. 72).

[36] En général, un tribunal administratif habilité à examiner des questions de droit doit décider si une consultation de ce genre était suffisante sur le plan constitutionnel dans le cas où cette question est régulièrement soulevée devant lui. Le pouvoir d'un tribunal administratif « de statuer en droit emporte celui de trancher une question constitutionnelle dont il est régulièrement saisi, sauf lorsqu'il est clairement établi que le législateur a voulu le priver d'un tel pouvoir » (*Carrier Sekani*, par. 69). Les organismes de réglementation investis du pouvoir de trancher des questions de droit ont le devoir et le pouvoir d'appliquer la Constitution, sauf si le pouvoir de statuer sur la question constitutionnelle a clairement été écarté (*R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765, par. 77). Il s'ensuit qu'ils doivent s'assurer que leurs décisions sont conformes à l'art. 35 de la *Loi constitutionnelle de 1982* (*Carrier Sekani*, par. 72).

[37] The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2)). No provision in either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.

[38] We note that the majority at the Federal Court of Appeal in *Chippewas of the Thames* considered that this issue was not properly before the NEB. It distinguished *Carrier Sekani* on the basis that the Crown was not a party to the NEB hearing in *Chippewas of the Thames*, while the Crown (in the form of BC Hydro, a Crown corporation) was a party in the utilities commission proceedings in *Carrier Sekani*. Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500, the majority of the Federal Court of Appeal in *Chippewas of the Thames* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.

[39] The difficulty with this view, however, is that — as we have explained — action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). If the Crown's duty to consult has been

[37] L'ONÉ dispose, tant en vertu de la *Loi sur l'ONÉ* que de la *LOPC*, de vastes pouvoirs l'autorisant à entendre et à trancher toute question pertinente de droit et de fait (*Loi sur l'ONÉ*, par. 12(2); *LOPC*, par. 5.31(2)). Aucune disposition de l'une ou l'autre de ces lois ne tend à indiquer que le législateur entendait priver l'ONÉ du pouvoir de statuer sur le caractère adéquat de la consultation. De plus, dans *Québec (Procureur général) c. Canada (Office national de l'énergie)*, [1994] 1 R.C.S. 159, notre Cour a conclu que les décisions de l'ONÉ doivent respecter le par. 35(1) de la *Loi constitutionnelle de 1982*. Par conséquent, l'ONÉ peut décider s'il a été satisfait à l'obligation de consulter de la Couronne.

[38] Nous constatons que, dans l'affaire *Chippewas of the Thames*, les juges majoritaires de la Cour d'appel fédérale ont considéré que l'ONÉ n'avait pas été régulièrement saisi de cette question. Ils ont distingué cette affaire de l'arrêt *Carrier Sekani* sur la base que, dans *Chippewas of the Thames*, la Couronne n'était pas partie à l'audience devant l'ONÉ, tandis que dans *Carrier Sekani* la Couronne (par l'entremise de BC Hydro, une société d'État) était partie à l'instance devant la commission des services d'utilité publique. Se fondant sur l'arrêt *Première nation dakota de Standing Buffalo c. Enbridge Pipelines Inc.*, 2009 CAF 308, [2010] 4 R.C.F. 500, les juges majoritaires de la Cour d'appel fédérale dans *Chippewas of the Thames* ont estimé que l'ONÉ n'est pas tenu de se demander si l'obligation de consulter incombant à la Couronne a pris naissance (ou s'il a été satisfait à cette obligation) avant d'autoriser un projet lié aux ressources, sauf dans le cas où la Couronne est une partie à l'instance devant l'ONÉ.

[39] Toutefois, la difficulté que soulève cette opinion est que — comme nous l'avons expliqué — les mesures prises par l'ONÉ en application de son pouvoir de rendre des décisions définitives en vertu de l'al. 5(1)b) de la *LOPC* sont *elles-mêmes* des mesures prises par la Couronne qui donnent naissance à l'obligation de consulter. Nous ne pouvons pas non plus, soit dit en tout respect, souscrire à l'opinion des juges majoritaires de la Cour d'appel fédérale dans l'affaire connexe *Chippewas of the Thames* selon laquelle une décision de l'ONÉ respecte le par. 35(1) de la *Loi constitutionnelle de 1982* dans

triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval (*Haida*, at para. 67). Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

la mesure où l'ONÉ s'assure que les promoteurs participent à des « discussions » avec les groupes autochtones susceptibles d'être touchés (par. 62). Si l'obligation de la Couronne de consulter a pris naissance, un décideur ne peut approuver un projet que si la consultation incombant à la Couronne est adéquate. Même si dans bien des cas la Couronne peut s'en remettre aux processus de l'ONÉ pour satisfaire à son obligation de consulter, étant donné que c'est l'ONÉ qui prend la décision définitive, la question fondamentale consiste à décider s'il a été satisfait à l'obligation avant l'approbation du projet (*Haïda*, par. 67). En conséquence, lorsque la Couronne n'a pas satisfait à son obligation de consulter les groupes autochtones touchés par un projet visé par la *LOPC*, l'ONÉ doit refuser d'approuver le projet. S'il l'approuve, sa décision devrait (comme nous l'avons dit précédemment) être annulée à l'issue d'un contrôle judiciaire, puisque l'obligation de consulter doit être respectée avant la prise de mesures susceptibles d'avoir des effets préjudiciables sur le droit en question (*Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257, par. 78).

[40] Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult (see R. Freedman and S. Hansen, "Aboriginal Rights vs. The Public Interest", prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*ibid.*).

[40] Certains auteurs affirment que, comme l'ONÉ a pour mission de trancher des questions dans l'intérêt public, il ne peut, de manière effective, tenir compte des droits ancestraux et issus de traités et apprécier l'obligation de consulter de la Couronne (voir R. Freedman et S. Hansen, « Aboriginal Rights vs. The Public Interest », préparé pour une conférence du Pacific Business & Law Institute, Vancouver, C.-B. (26-27 février 2009) (en ligne), p. 4 et 14). À notre avis, cependant, l'intérêt public et l'obligation de consulter ne sont pas incompatibles. Comme l'a expliqué la Cour dans *Carrier Sekani*, en tant qu'impératif constitutionnel, l'obligation de consulter fait naître un intérêt public spécial, qui l'emporte sur les autres préoccupations dont tiennent habituellement compte les tribunaux administratifs appelés à évaluer l'intérêt public (par. 70). Lorsque l'autorisation accordée à l'égard d'un projet viole les droits constitutionnels des peuples autochtones, cette autorisation ne saurait servir l'intérêt public (*ibid.*).

[41] This leaves the question of what a regulatory agency must do where the adequacy of Crown

[41] Il reste à déterminer ce qu'un organisme de réglementation doit faire dans les cas où se soulève

consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida*, at para. 44). Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39).

devant lui la question du caractère adéquat de la consultation incombant à la Couronne. Lorsque les groupes autochtones touchés soulèvent directement auprès de l'ONÉ des préoccupations concernant la consultation qui a été menée par la Couronne, l'ONÉ doit habituellement traiter de ces préoccupations dans des motifs, plus particulièrement s'il s'agit d'une demande d'approbation de projet requérant une consultation approfondie. Le fait que l'honneur de la Couronne soit en jeu ne permet pas de préjuger d'un résultat donné, mais favorise la réconciliation en imposant des obligations quant à l'approche et à la façon de faire du gouvernement (*Haïda*, par. 49 et 63). L'existence de motifs écrits favorise la réconciliation, parce que ces motifs montrent aux peuples autochtones touchés que leurs droits ont été considérés et comment on en a tenu compte (*Haïda*, par. 44). Des motifs constituent [TRADUCTION] « une marque de respect [qui] démontre la courtoisie dont doit faire preuve la Couronne en tant que souverain envers une nation qui occupait le territoire avant elle » (*Kainaiwa/Blood Tribe c. Alberta (Energy)*, 2017 ABQB 107, par. 117 (CanLII)). Les motifs écrits favorisent également une meilleure prise de décision (*Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 39).

[42] This does not mean, however, that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic "*Haida* analysis", as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case. But where deep consultation is required and the affected Indigenous peoples have made their concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.

[42] Cependant, cela ne signifie pas, contrairement à ce qu'affirment les appelants, que l'ONÉ est toujours tenu d'examiner le caractère adéquat de la consultation qui a été menée en appliquant mécaniquement l'« analyse requise par l'arrêt *Haïda* ». Des motifs explicites ne sont pas non plus requis dans tous les cas. L'étendue de l'analyse qui conviendra variera selon les circonstances propres à chaque cas. Mais dans les cas où une consultation approfondie est nécessaire et que les peuples autochtones touchés ont fait connaître leurs préoccupations, l'honneur de la Couronne obligera généralement l'ONÉ, lorsque son processus d'approbation donne naissance à l'obligation de consulter, à expliquer de quelle manière il a considéré ces préoccupations et il en a tenu compte.

### E. *Was the Consultation Adequate in This Case?*

### E. *La consultation a-t-elle été adéquate en l'espèce?*

[43] The Crown acknowledges that deep consultation was required in this case, and we agree. As

[43] La Couronne reconnaît qu'une consultation approfondie était requise dans le cas qui nous

this Court explained in *Haida*, deep consultation is required "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high" (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being (para. 2). Jerry Natanine, the former mayor of Clyde River, explained that hunting marine mammals "provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call 'country food'" (A.R., vol. II, at p. 197). The importance of these rights was also recently recognized by the Nunavut Court of Justice:

> The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the inability to harvest marine mammals would impact more than . . . just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.

(*Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, at para. 25)

occupe, et nous en convenons. Comme notre Cour l'a expliqué dans l'arrêt *Haïda*, une consultation approfondie est requise dans « les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé » (par. 44). En l'espèce, les appelants possèdent des *droits issus de traités établis* leur permettant de chasser et de récolter des mammifères marins. La Cour d'appel fédérale a reconnu que ces droits étaient extrêmement importants pour le bien-être économique, culturel et spirituel des appelants (par. 2). Jerry Natanine, l'ancien maire de Clyde River, a fourni les explications qui suivent à ce sujet : [TRADUCTION] « [la chasse aux mammifères marins] nous fournit des aliments nutritifs, en plus de nous permettre d'exercer des pratiques observées depuis des générations et d'entretenir d'étroites relations les uns avec les autres grâce au partage de ce que nous appelons les "aliments traditionnels" » (d.a., vol. II, p. 197). Récemment, la Cour de justice du Nunavut a également reconnu l'importance de ces droits :

> [TRADUCTION] Le droit inuit qui nous intéresse en l'espèce est le droit de récolter les mammifères marins. Le régime alimentaire de nombreux Inuits au Nunavut se compose en grande partie d'aliments traditionnels. Le coût des aliments est très élevé, et plusieurs habitants seraient dans l'incapacité d'acheter des aliments pour remplacer les aliments traditionnels si ceux-ci n'étaient plus disponibles. Il est reconnu que les aliments traditionnels ont une valeur nutritive plus élevée que les aliments achetés. Cependant, l'incapacité de récolter des mammifères marins n'aurait pas uniquement des répercussions sur le régime alimentaire des Inuits. La tradition culturelle qu'ont les Inuits de partager les aliments traditionnels entre eux dans la communauté serait perdue. La fabrication de vêtements traditionnels serait aussi touchée. Les Inuits perdraient la possibilité de participer à la chasse, une activité qui constitue un aspect fondamental de l'identité inuite. Le droit des Inuits qui est en jeu est d'une grande importance, d'où la nécessité d'une consultation approfondie et de mesures d'accommodement substantielles.

(*Qikiqtani Inuit Assn. c. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, par. 25)

[44] The risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.

[45] Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

[46] Furthermore, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.

[47] Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida*, at para. 44). Despite the NEB's broad powers under *COGOA* to afford those advantages, limited opportunities for participation and consultation were made available to the appellants.

[44] Les essais proposés comportent également des risques importants pour ces droits issus de traités. Selon l'évaluation environnementale de l'ONÉ, ce projet est susceptible d'accroître le risque de mortalité chez les mammifères marins, de causer des dommages permanents à leur ouïe et de modifier leurs routes migratoires, situation qui a en conséquence une incidence sur l'utilisation des ressources traditionnelles. En raison de l'importance du droit en jeu, de la portée des effets potentiels et du risque de préjudice non indemnisable, l'obligation qui s'impose dans la présente affaire se situe à l'extrémité supérieure du continuum.

[45] Dans cette optique, la consultation qui a eu lieu en l'espèce a été lacunaire à plusieurs égards. Premièrement, la consultation était mal orientée. Bien que l'ONÉ ait conclu que les essais proposés n'étaient pas susceptibles d'avoir des effets environnementaux négatifs importants, et que tout effet sur l'utilisation des ressources traditionnelles pourrait faire l'objet de mesures d'atténuation, le processus consultatif ne vise pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le *droit*. Dans son évaluation environnementale, l'ONÉ n'a pas pris en considération la source — un traité — des droits des appelants de récolter des mammifères marins, ni l'incidence des essais proposés sur ces droits.

[46] Deuxièmement, il n'a pas été indiqué clairement aux Inuits que la Couronne s'en remettait aux processus de l'ONÉ pour satisfaire à son obligation de consulter. L'importance du processus ne leur a pas été expliquée adéquatement.

[47] Enfin, élément le plus important, le processus de l'ONÉ n'a pas permis de satisfaire à l'obligation de la Couronne de mener une consultation approfondie. Une telle consultation « pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision » (*Haïda*, par. 44). Malgré les vastes pouvoirs que la *LOPC* confère à l'ONÉ pour offrir de telles mesures avantageuses, les appelants n'ont bénéficié

Unlike many NEB proceedings, including the proceedings in *Chippewas of the Thames*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument.[5] While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation (*Haida*, at para. 41) and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship (*Carrier Sekani*, at para. 38).

[48] The consultation in this case also stands in contrast to *Taku River* where, despite its entitlement to consultation falling only at the midrange of the spectrum (para. 32), the Taku River Tlingit First Nation, with financial assistance (para. 37), fully participated in the assessment process as a member of the project committee, which was "the primary engine driving the assessment process" (paras. 3, 8 and 40).

[49] While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including

[5] The NEB process in *Chippewas of the Thames* was undertaken pursuant to the *NEB Act*, not *COGOA*. Under the *NEB Act*, the NEB had at the relevant time, and still has today, explicit statutory powers to conduct public hearings (s. 24) and provide participant funding for such hearings (s. 16.3). As noted above, Parliament conferred similar powers upon the NEB under *COGOA* in 2015.

que de très peu de possibilités de participation et de consultation. Contrairement à de nombreuses autres instances de l'ONÉ, y compris celle dans l'affaire *Chippewas of the Thames*, il n'y a pas eu d'audiences en l'espèce. Bien que les appelants aient soumis des éléments de preuve scientifique à l'ONÉ, ils l'ont fait sans recevoir d'aide financière à l'intention des participants. Une autre situation qui contraste avec l'affaire *Chippewas of the Thames*, où le processus de consultation a été beaucoup plus robuste. Dans cette affaire, l'ONÉ a tenu des audiences, les appelants ont reçu des fonds pour y participer et ils ont eu l'occasion de présenter des éléments de preuve et des observations finales[5]. Quoique ces garanties procédurales constituent des caractéristiques d'un processus contradictoire, elles peuvent être nécessaires pour qu'une véritable consultation ait lieu (*Haïda*, par. 41) et elles ne transforment pas l'objectif sous-jacent de cette consultation, soit encourager la réconciliation tout en favorisant le maintien de relations constantes (*Carrier Sekani*, par. 38).

[48] La consultation qui s'est déroulée en l'espèce contraste également avec celle tenue dans l'affaire *Taku River* où, même si elle avait droit uniquement à un niveau de consultation se trouvant à mi-chemin du continuum (par. 32), la Première Nation Tlingit de Taku River a obtenu de l'aide financière (par. 37) et a participé pleinement au processus d'évaluation en tant que membre du comité responsable du projet, comité qui était le « principal moteur du processus d'évaluation » (par. 3, 8 et 40).

[49] Bien que ces garanties procédurales ne soient pas toujours nécessaires, leur absence en l'espèce a réduit de façon importante la qualité de la consultation. Même si les appelants ont eu la possibilité d'interroger les promoteurs au sujet du projet lors des rencontres organisées par l'ONÉ au printemps 2013, ces derniers ont été incapables de répondre à

[5] Le processus suivi par l'ONÉ dans l'affaire *Chippewas of the Thames* s'est déroulé conformément à la *Loi sur l'ONÉ*, et non à la *LOPC*. En vertu de la *Loi sur l'ONÉ*, l'ONÉ possédait au moment pertinent, et possède encore aujourd'hui, le pouvoir explicite de tenir des audiences publiques (art. 24) et de verser de l'aide financière en vue de faciliter la participation à de telles audiences (art. 16.3). Comme il a été indiqué précédemment, le Parlement a conféré à l'ONÉ des pouvoirs similaires dans la *LOPC* en 2015.

basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "'[C]onsultation' in its least technical definition is talking together for mutual understanding" (T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61). No mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations — could possibly have emerged from what occurred here.

[50] The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.

de nombreuses questions, y compris des questions de base sur les effets des essais proposés sur les mammifères marins. Les promoteurs ont finalement répondu à ces questions; cependant, ils l'ont fait dans un document de 3 926 pages, qu'ils ont soumis à l'ONÉ. Ce document a été affiché sur le site Web de l'ONÉ et remis aux bureaux des hameaux de Pond Inlet, Clyde River, Qikiqtajuak et Iqualuit. Toutefois, l'Internet est lent au Nunavut, et la bande passante est coûteuse. L'ancien maire de Clyde River a déclaré avoir été incapable de télécharger le document, puisque celui-ci était trop volumineux. De plus, une fraction seulement de cet énorme document a été traduite en inuktitut. Le moins que l'on puisse dire, c'est que le fait de répondre à des questions qui touchent à l'essence des droits issus de traités en cause au moyen d'un amas documentaire pratiquement inaccessible, et ce, des mois après que les questions aient été posées en personne ne constitue pas une véritable consultation. Selon des auteurs, le mot [TRADUCTION] « "consultation", dans son sens le moins technique, s'entend de l'action de se parler dans le but de se comprendre les uns les autres » (T. Isaac et A. Knox, « The Crown's Duty to Consult Aboriginal People » (2003), 41 *Alta. L. Rev.* 49, p. 61). Aucune compréhension mutuelle sur les points fondamentaux — à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements — n'aurait pu vraiment aboutir de ce qui s'est déroulé dans la présente affaire.

[50] Les fruits de la participation limitée des Inuits au processus d'évaluation en l'espèce ressortent clairement de l'examen des mesures d'accommodement consignées dans le rapport d'évaluation environnementale de l'ONÉ. Il y est fait état des changements apportés au projet par suite de la consultation, par exemple un engagement à poursuivre les consultations, l'affectation d'agents de liaison auprès de la communauté dans les communautés touchées et un projet d'étude sur les Inuit Qaujimajatuqangit (connaissances traditionnelles inuites). Les promoteurs se sont aussi engagés à doter le navire devant être utilisé pour les essais proposés d'appareils de surveillance acoustique passive afin d'éviter les collisions avec des mammifères marins.

[51] These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada" (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.

[52] The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

IV. Conclusion

[53] For the foregoing reasons, we conclude that the Crown breached its duty to consult the appellants in respect of the proposed testing. We would allow the appeal with costs to the appellants, and quash the NEB's authorization.

*Appeal allowed with costs.*

[51] Cependant, ces changements ne représentaient que des concessions négligeables au regard de l'atteinte potentielle aux droits issus de traités des Inuits. En outre, la surveillance acoustique passive ne constituait aucunement une concession, puisqu'elle est exigée par l'Énoncé des pratiques canadiennes d'atténuation des ondes sismiques en milieu marin, lequel énonce des « normes minimales, qui s'appliquent dans toutes les eaux marines du Canada libres de glace » (d.a., vol. I, p. 40), et qui figureraient virtuellement dans tous les projets d'essais sismiques. Aucune de ces soi-disant concessions, ni les motifs eux-mêmes exposés par l'ONÉ, n'ont donné aux Inuits une assurance raisonnable que leurs droits issus de traités protégés par la Constitution avaient été considérés en tant que *droits*, plutôt que comme un aspect accessoire de l'évaluation des préoccupations environnementales.

[52] Compte tenu des droits issus de traités établis que possèdent les Inuits et des risques que posent pour ces droits les essais proposés, le processus de consultation qui s'est déroulé en l'espèce a comporté d'importantes lacunes. Si les appelants avaient disposé des ressources nécessaires pour présenter leur propre preuve scientifique, et s'ils avaient eu l'occasion de vérifier la validité de la preuve des promoteurs, le résultat de l'évaluation environnementale aurait pu être bien différent. Les Inuits n'ont pas non plus reçu de réponses concrètes à leurs questions au sujet de l'effet des essais sur la vie marine. Bien que l'ONÉ ait examiné les répercussions potentielles du projet sur les mammifères marins et sur l'utilisation traditionnelle des ressources par les Inuits, son rapport ne reconnaît pas, ni même ne mentionne, l'existence des droits issus de traités des Inuits de récolter des ressources fauniques au Nunavut ou le fait qu'une consultation approfondie était nécessaire.

IV. Conclusion

[53] Pour ces motifs, nous concluons que la Couronne a manqué à son obligation de consulter les appelants au sujet des essais proposés. Nous sommes d'avis d'accueillir le pourvoi, avec dépens en faveur des appelants, et d'annuler l'autorisation de l'ONÉ.

*Pourvoi accueilli avec dépens.*

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*Solicitors for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS): Blake, Cassels & Graydon, Calgary.*

*Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.*

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*Solicitors for the intervener the Makivik Corporation: Dionne Schulze, Montréal.*

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CanLII

# Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 (CanLII), [2014] 2 SCR 257


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| Date: | 2014-06-26 |
| File number: | 34986 |
| Other citations: | [2014] 2 SCR 256 — 374 DLR (4th) 1 — [2014] 7 WWR 633 — [2014] SCJ No 44 (QL) |
| Citation: | Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 (CanLII), [2014] 2 SCR 257, <https://canlii.ca/t/g7mt9>, retrieved on 2021-09-12 |
| Most recent unfavourable mention: | What Changes did Grassy Narrows First Nation Make to Federalism and Other Doctrines?, 2017 CanLIIDocs 134 |


[…] replaced in Aboriginal law by a justified infringement analysis under section 35.100 **Despite the breadth of the wording in Tsilhqot ' in Nation** and Grassy Narrows, I will argue that a now-narrowed doctrine of interjurisdictional immunity continues to apply in relation to provincial impacts on Aboriginal peoples' rights. […]

**SUPREME COURT OF CANADA**

**C.TATION:** Tsilhqot'in Nation *v.* British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256 **DATE:** 20140626 **DOCKET:** 34986

**BETWEEN:**

**Roger William, on his own behalf, on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation**

Appellant

and

**Her Majesty The Queen in Right of the Province of British Columbia, Regional Manager of the Cariboo Forest Region and Attorney General of Canada**

Respondents

- and -

**Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, Hul'qumi'num Treaty Group, Council of the Haida Nation, Office of the Wet'suwet'en Chiefs, Indigenous Bar Association in Canada, First Nations Summit, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Coalition of Union of British Columbia Indian Chiefs, Okanagan Nation Alliance, Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, Amnesty International, Canadian Friends Service Committee, Gitxaala Nation, Chilko Resorts and Community Association and Council of Canadians**

Interveners

**CORAM:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

2013: November 7; 2014: June 26.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

. N APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Aboriginal law — Aboriginal title — Land claims — Elements of test for establishing Aboriginal title to land — Rights and limitations conferred by Aboriginal title — Duties owed by Crown before and after Aboriginal title to land established — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether test for Aboriginal title requiring proof of regular and exclusive occupation or evidence of intensive and site-specific occupation — Whether trial judge erred in finding Aboriginal title established — Whether Crown breached procedural duties to consult and accommodate before issuing logging licences — Whether Crown incursions on Aboriginal interest justified under s. 35 Constitution Act, 1982 framework — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.*

*Aboriginal law — Aboriginal title — Land claims — Provincial laws of general application — Constitutional constraints on provincial regulation of Aboriginal title land — Division of powers — Doctrine of interjurisdictional immunity — Infringement and justification framework under s. 35 Constitution Act, 1982 — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether provincial laws of general application apply to Aboriginal title land — Whether Forest Act on its face applies to Aboriginal title land — Whether application of Forest Act ousted by operation of Constitution — Whether doctrine of interjurisdictional immunity should be applied to lands held under Aboriginal title — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.*

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the Province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

*Held*: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35 framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the *Forest Act* applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 of the *Constitution Act, 1982* and the division of powers in the *Constitution Act, 1867*, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the *Forest Act* on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the *Forest Act* at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the *Forest Act*, is ousted by the s. 35 framework or by the limits on provincial power under the *Constitution Act, 1867*. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and no infringement will result. However, the issuance of

timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the *Forest Act* were inconsistent with its duties owed to the Tsilhqot'in people.

**Cases Cited**

**Applied:** *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **distinguished:** *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915; **referred to:** *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313; *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335; *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723; *Western Australia v. Ward* (2002), 213 C.L.R. 1; *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507; *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 11.

*Constitution Act, 1867*, ss. 91, 92, 109.

*Constitution Act, 1982*, Part I, Part II, s. 35.

*Forest Act*, R.S.B.C. 1996, c. 157, s. 1 "Crown land", "Crown timber", "private land".

*Royal Proclamation* (1763) (reprinted in R.S.C. 1985, App. II, No. 1).

**Authors Cited**

C. *Is the Forest Act Ousted by the Constitution?* 117

(1) Section 35 of the *Constitution Act, 1982* 118

(2) The Division of Powers 128

IX. Conclusion 153

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

## I. Introduction

[1] What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157, apply to land covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

[2] These reasons conclude:

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land.
- In this case, Aboriginal title is established over the area designated by the trial judge.
- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
- Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.
- Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.
- In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

## II. The Historic Backdrop

[3] For centuries, people of the Tsilhqot'in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

[4] Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

[5] The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xeni Gwet'in First Nations government (one of

the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging without the consent of the Xeni Gwet'in. Talks between the Ministry of Forests and the Xeni Gwet'in ensued, but reached an impasse over the Xeni Gwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

[6] The claim is confined to approximately five percent of what the Tsilhqot'in — a total of about 3,000 people — regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

[7] In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (2007 BCSC 1700, [2008] 1 C.N.L.R. 112).

[8] In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (2012 BCCA 285, 33 B.C.L.R. (5th) 260).

[9] The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the land unjustifiably infringed their rights under that title.

## III. The Jurisprudential Backdrop

[10] In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise: *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313. Although the majority in *Calder* divided on whether title had been extinguished, its affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties — mainly in British Columbia — resuming a policy that had been abandoned in the 1920s: P. W. Hogg, "The Constitutional Basis of Aboriginal Rights", in M. Morellato, ed., *Aboriginal Law Since Delgamuukw* (2009), 3.

[11] Almost a decade after *Calder*, the enactment of s. 35 of the *Constitution Act, 1982* "recognized and affirmed" existing Aboriginal rights, although it took some time for the meaning of this section to be fully fleshed out.

[12] In *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, this Court confirmed the potential for Aboriginal title in ancestral lands. The actual dispute concerned government conduct with respect to reserve lands. The Court held that the government had breached a fiduciary duty to the Musqueam Indian Band. In a concurring opinion, Justice Dickson (later Chief Justice) addressed the theory underlying Aboriginal title. He held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the "pre-existing legal right" of Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J. characterized this Aboriginal interest in the land as "an independent legal interest" (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.

[13] In 1990, this Court held that s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075. The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a "compelling and substantial" purpose and account for the "priority" of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (pp. 1113-19).

[14] The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010. This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.

[15] The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, "[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (para. 117). Negatively, the "protected uses must not be irreconcilable with the nature of the group's attachment to that land" (*ibid.*) — that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

[16] The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a "necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part" (at para. 161), quoting *R. v. Gladstone*, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723, at para. 73. While *Sparrow* had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, *Delgamuukw* articulated the "different" (at para. 168) approach of involvement of Aboriginal peoples — varying depending on the severity of the infringement — in decisions taken with respect to their lands.

[17] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the Court applied the *Delgamuukw* idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown's duty to consult and accommodate the asserted Aboriginal interest "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39). Thus, the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida*. The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

[18] The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

## IV. Pleadings in Aboriginal Land Claims Cases

[19] The Province, to its credit, no longer contends that the claim should be barred because of defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

[20] I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

[21] First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

[22] Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an "all or nothing" proposition (at para. 117):

> The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. . . . [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

[23] Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

## V. Is Aboriginal Title Established?

### A. *The Test for Aboriginal Title*

[24] How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

[25] As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

[26] The test was set out in *Delgamuukw*, *per* Lamer C.J., at para. 143:

> In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[27] The trial judge in this case held that "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

[28] The Court of Appeal disagreed and applied a narrower test for Aboriginal title — site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

[29] For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

[30] Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

[31] Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In *Western Australia v. Ward* (2002), 213 C.L.R. 1, the court stated as follows, at para 89:

> The expression "possession, occupation, use and enjoyment . . . to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

[32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

## 1. Sufficiency of Occupation

[33] The first requirement — and the one that lies at the heart of this appeal — is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

[34] The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507.

[35] The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

[36] The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

[37] Sufficiency of occupation is a context-specific inquiry. "[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

[38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

[39] In *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78, at paras. 135-38, Cromwell J.A. (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, *Common Law Aboriginal Title* (1989), at pp. 198-200:

> What, then, did one have to do to acquire a title by occupancy? . . . [I]t appears . . . that . . . a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider". There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation — it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone. . .
>
> Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used.
> [Emphasis added.]

[40] Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

> I would adopt, in general terms, Professor McNeil's analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would

> permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner. . . . Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly, . . . it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138]

[41] In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

[42] There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

[43] The Province argues that this Court in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there "appears to have rejected the territorial approach of the Court of Appeal" ("Aboriginal Title and the Supreme Court: What's Happening?" (2006), 69 *Sask. L. Rev.* 281, cited in British Columbia factum, para. 100). In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be "proof of sufficiently regular and exclusive use" of the land in question, a requirement established in *Delgamuukw*.

[44] The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While "[n]ot every nomadic passage or use will ground title to land", the Court confirmed that *Delgamuukw* contemplates that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used" (*ibid.*).

### 2. Continuity of Occupation

[45] Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises — continuity between present and pre-sovereignty occupation.

[46] The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

### 3. Exclusivity of Occupation

[47] The third requirement is *exclusive* occupation of the land at the time of sovereignty. The Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular

use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

[48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

[49] As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. The Court in *Delgamuukw* explained as follows, at para. 157:

> A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to [A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.

### 4. Summary

[50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

## B. *Was Aboriginal Title Established in This Case?*

[51] The trial judge applied a test of regular and exclusive use of the land. This is consistent with the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.

[52] Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

[53] I approach the question through the lenses of sufficiency, continuity and exclusivity discussed above.

[54] I will not repeat my earlier comments on what is required to establish sufficiency of occupation. Regular use of the territory suffices to establish sufficiency; the concept is not confined to

339 trial days spanning a five-year period. Much of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

[62] This said, I have accepted the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support a declaration of Aboriginal title. For ease of reference, I attach a map showing the various territories and how the trial judge treated them (Appendix; see Appellant's factum, "Appendix A"). The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence.

[63] The trial judge divided the claim area into six regions and then considered a host of individual sites within each region. He examined expert archeological evidence, historical evidence and oral evidence from Aboriginal elders referring to these specific sites. At some of these sites, although the evidence did suggest a Tsilhqot'in presence, he found it insufficient to establish regular and exclusive occupancy. At other sites, he held that the evidence did establish regular and exclusive occupancy. By examining a large number of individual sites, the trial judge was able to infer the boundaries within which the Tsilhqot'in regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.

[64] The Province also criticises the trial judge for offering his opinion on areas outside the claim area. This, the Province says, went beyond the mandate of a trial judge, who should pronounce only on pleaded matters.

[65] In my view, this criticism is misplaced. It is clear that no declaration of title could be made over areas outside those pleaded. The trial judge offered his comments on areas outside the claim area, not as binding rulings in the case, but to provide assistance in future land claims negotiations. Having canvassed the evidence and arrived at conclusions on it, it made economic and practical sense for the trial judge to give the parties the benefit of his views. Moreover, as I noted earlier in discussing the proper approach to pleadings in cases where Aboriginal title is at issue, these cases raise special considerations. Often, the ambit of a claim cannot be drawn with precision at the commencement of proceedings. The true state of affairs unfolds only gradually as the evidence emerges over what may be a lengthy period of time. If at the end of the process the boundaries of the initial claim and the boundaries suggested by the evidence are different, the trial judge should not be faulted for pointing that out.

[66] I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

## VI. What Rights Does Aboriginal Title Confer?

[67] As we have seen, *Delgamuukw* establishes that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (para. 117), including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

[68] I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

### A. *The Legal Characterization of Aboriginal Title*

[69] The starting point in characterizing the legal nature of Aboriginal title is Dickson J.'s concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in

Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

[70] The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act, 1867*; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land . . . for a variety of purposes", not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.

[71] What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements — a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act, 1982*.

[72] The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts".

B. *The Incidents of Aboriginal Title*

[73] Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

[74] Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

[75] The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

C. *Justification of Infringement*

[77] To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

[78] The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

[79] The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

[80] Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

[81] I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:

> . . . the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown. [Emphasis added.]

[82] As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

[83] What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para. 165.]

[84] If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people.

[85] The Crown's fiduciary duty in the context of justification merits further discussion. The Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group. This impacts the justification process in two ways.

[86] First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

[87] Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39).

[88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. *Remedies and Transition*

[89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.

[90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

[91] The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. *What Duties Were Owed by the Crown at the Time of the Government Action?*

[93] Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

[94] With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

## VII. Breach of the Duty to Consult

[95] The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

[96] The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

[97] I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

## VIII. Provincial Laws and Aboriginal Title

[98] As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

[99] However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

[100] The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how? (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title? and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. *Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?*

[101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

[102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

[103] Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act, 1982*. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

[104] This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone*:

> Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [para. 43]

[105] It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

[106] Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

### B. *Does the Forest Act on its Face Apply to Aboriginal Title Land?*

[107] Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title — the question at this point — is always a matter of statutory interpretation.

[108] The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

[109] Under the *Forest Act*, the Crown can only issue timber licences with respect to "Crown timber". "Crown timber" is defined as timber that is on "Crown land", and "Crown land" is defined as "land, whether or not it is covered by water, or an interest in land, vested in the Crown" (s. 1). The Crown is not empowered to issue timber licences on "private land", which is defined as anything that is not Crown land. The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is "Crown land"; (2) Aboriginal title land is "private land"; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

[110] If Aboriginal title land is "vested in the Crown", then it falls within the definition of "Crown land" and the timber on it is "Crown timber".

[111] What does it mean for a person or entity to be "vested" with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black's Law Dictionary* (9th ed. 2009), *sub verbo* "vested".

[112] Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown's underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

[113] The second consideration in statutory construction is more equivocal. Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida*. At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.

[114] It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain "Crown land" under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words "vested in the Crown" to cover at least lands to which Aboriginal title had not yet been confirmed.

[115] I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order.* To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are "vested" in the Aboriginal group and the lands are no longer Crown lands.

[116] Applied to this case, this means that as a matter of statutory construction, the lands in question were "Crown land" under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.

## C. *Is the Forest Act Ousted by the Constitution?*

[117] The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

### 1. Section 35 of the *Constitution Act, 1982*

[118] Section 35 of the *Constitution Act, 1982* represents "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights" (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

[119] Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. "[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights" (*Sparrow*, at p. 1109). Dickson C.J. and La Forest J. elaborated on this purpose as follows, at p. 1110:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s. 35(1).

[120] Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquiries are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

[121] A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, at para. 166).

[122] Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112).

[123] General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it. In such cases, no infringement will result.

[124] General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

[125] As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

[126] While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed

by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province — the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation — were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

[127] Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge's findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge's reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

## 2. The Division of Powers

[128] The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in "pith and substance" a provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

[129] "Indians, and Lands reserved for the Indians" falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both the provincial power over forestry in the province and the federal power over "Indians". Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative power creates no conflicts — federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

[130] First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament's power over "Indians", the latter would trump the former. No such inconsistency is alleged in this case.

[131] Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions. First, does the provincial legislation touch on a protected core of federal power? And second, would application of the provincial law significantly trammel or impair the federal power? (*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536).

[132] The trial judge held that interjurisdictional immunity rendered the provisions of the *Forest Act* inapplicable to land held under Aboriginal title because provisions authorizing management, acquisition, removal and sale of timber on such lands affect the core of the federal power over "Indians". He placed considerable reliance on *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, in which this Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of the federal power

[142] The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers.

[143] An analogy with *Charter* jurisprudence may illustrate the point. Parliament enjoys exclusive jurisdiction over criminal law. However, its criminal law power is circumscribed by s. 11 of the *Charter* which guarantees the right to a fair criminal process. Just as Aboriginal rights are fundamental to Aboriginal law, the right to a fair criminal process is fundamental to criminal law. But we do not say that the right to a fair criminal process under s. 11 falls at the core of Parliament's criminal law jurisdiction. Rather, it is a *limit* on Parliament's criminal law jurisdiction. If s. 11 rights were held to be at the core of Parliament's criminal law jurisdiction such that interjurisdictional immunity applied, the result would be absurd: provincial breaches of s. 11 rights would be judged on a different standard than federal breaches, with only the latter capable of being saved under s. 1 of the *Charter*. This same absurdity would result if interjurisdictional immunity were applied to Aboriginal rights.

[144] The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

[145] Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

[146] First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: How far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

[147] Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as pests and fires, a situation desired by neither level of government.

[148] Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over "Indians" and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province's power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

[149] This Court has recently stressed the limits of interjurisdictional immunity. "[C]onstitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'" and as such "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 24 and 37 (emphasis deleted)). Because of this,

interjurisdictional immunity is of "limited application" and should be applied "with restraint" (paras. 67 and 77). These propositions have been confirmed in more recent decisions: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

[150] *Morris*, on which the trial judge relied, was decided prior to this Court's articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *Canadian Owners and Pilots Association*, and so is of limited precedential value on this subject as a result (see *Marine Services*, at para. 64). To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

[151] For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

[152] The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

## IX. Conclusion

[153] I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

## APPENDIX
PROVEN TITLE AREA — VISUAL AID

*Appeal allowed.*

*Solicitors for the appellant: Rosenberg & Rosenberg, Vancouver; Woodward & Company, Victoria.*

*Solicitors for the respondents Her Majesty The Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region: Borden Ladner Gervais, Vancouver.*

*Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.*

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74

*Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — If so, whether consultation and accommodation engaged in by Province prior to issuing project approval certificate was adequate to satisfy honour of Crown.*

Since 1994, a mining company has sought permission from the British Columbia government to re-open an old mine. The Taku River Tlingit First Nation ("TRTFN"), which participated in the environmental assessment process engaged in by the Province under the *Environmental Assessment Act*, objected to the company's plan to build a road through a portion of the TRTFN's traditional territory. The Province granted the project approval certificate in 1998. The TRTFN brought a petition to quash the decision on grounds based on administrative law and on its Aboriginal rights and title. The chambers judge concluded that the decision makers had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns. She set aside the decision and directed a reconsideration. The majority of the Court of Appeal upheld the decision, finding that the Province had failed to meet its duty to consult with and accommodate the TRTFN.

*Held*: The appeal should be allowed.

The Crown's duty to consult and accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title, is grounded in the principle of

the honour of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the *Constitution Act, 1982*. The duty to consult varies with the circumstances. It arises when a Crown actor has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This in turn may lead to a duty to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation. The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's title and rights claims and knew that the decision to reopen the mine had the potential to adversely affect the substance of the TRTFN's claims. The TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its inclusion in the Province's treaty negotiation process. While the proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation. It is impossible, however, to provide a prospective checklist of the level of consultation required.

In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty to consult and

accommodate. The TRTFN was part of the Project Committee, participating fully in the environmental review process. Its views were put before the decision makers, and the final project approval contained measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN. Finally, it is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if appropriate, accommodate the TRTFN.

[… ]

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

## I. Introduction

1 This case raises the issue of the limits of the Crown's duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven Aboriginal rights and title claims. The Taku River Tlingit First Nation ("TRTFN") participated in a three-and-a-half-year environmental assessment process related to the efforts of Redfern Resources Ltd. ("Redfern") to reopen an old mine. Ultimately, the TRTFN found itself disappointed in the process and in the result.

2 I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval

application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

## II. Facts and Decisions Below

*3* The Tulsequah Chief Mine, operated in the 1950s by Cominco Ltd., lies in a remote and pristine area of northwestern British Columbia, at the confluence of the Taku and Tulsequah Rivers. Since 1994, Redfern has sought permission from the British Columbia government to reopen the mine, first under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, and then, following its enactment in 1995, under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. During the environmental assessment process, access to the mine emerged as a point of contention. The members of the TRTFN, who participated in the assessment as Project Committee members, objected to Redfern's plan to build a 160-km road from the mine to the town of Atlin through a portion of their traditional territory. However, after a lengthy process, project approval was granted on March 19, 1998 by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines ("Ministers").

4 The Redfern proposal was assessed in accordance with British Columbia's *Environmental Assessment Act*. The environmental assessment process is distinct from both the land use planning process and the treaty negotiation process, although these latter processes may necessarily have an impact on the assessment of individual proposals. The following provisions are relevant to this matter.

5 Section 2 sets out the purposes of the Act, which are:

> (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
>
> (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
>
> (c) to prevent or mitigate adverse effects of reviewable projects,
>
> (d) to provide an open, accountable and neutrally administered process for the assessment
>
> (i) of reviewable projects, and
>
> . . .
>
> (e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions.

6 "The proponent of a reviewable project may apply for a project approval certificate" under s. 7 of the Act, providing a "preliminary overview of the reviewable project, including" potential effects and proposed mitigation measures. If the project is accepted for review, "the executive director must establish a project committee" for the project (s. 9(1)). The executive director must invite a number of groups to nominate members to the committee, including "any first nation whose traditional

Province's application. The chambers judge on the judicial review proceedings, Kirkpatrick J., concluded that the Ministers should have been mindful of the possibility that their decision might infringe Aboriginal rights, and that they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001). She also found in the TRTFN's favour on administrative law grounds. She set aside the decision to issue the Project Approval Certificate and directed a reconsideration, for which she later issued directions.

20 The majority of the British Columbia Court of Appeal dismissed the Province's appeal, finding (*per* Rowles J.A.) that the Province had failed to meet its duty to consult with and accommodate the TRTFN ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59). Southin J.A., dissenting, would have found that the consultation undertaken was adequate on the facts. Both the majority and the dissent appear to conclude that the decision complied with administrative law principles. The Province has appealed to this Court, arguing that no duty to consult exists outside common law administrative principles, prior to proof of an Aboriginal claim. If such a duty does exist, the Province argues, it was met on the facts of this case.

## III. Analysis

21 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, heard concurrently with this case, this Court has confirmed the existence of the Crown's duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's claims through its involvement in the treaty negotiation process, and knew

that the decision to reopen the Tulsequah Chief Mine had the potential to adversely affect the substance of the TRTFN's claims.

22 On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

A. *Did the Province Have a Duty to Consult and if Indicated Accommodate the TRTFN?*

23 The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law "duty of fair dealing" to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a "justificatory fiduciary duty". Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an

Aboriginal people. The Province submits that it owes the TRTFN no duty outside of these specific situations.

24 The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida*, *supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

25 As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168. The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is

essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.

26 The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiation ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement and a Framework Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

27 When Redfern applied for project approval, in its efforts to reopen the Tulsequah Chief Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

28 The Province was aware of the claims, and contemplated a decision with the potential to affect the TRTFN's asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

B. *What Was the Scope and Extent of the Province's Duty to Consult and Accommodate the TRTFN?*

29 The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida*, *supra*, at para. 39). It will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.

30 There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim. Their land claim underwent an extensive validation process in order to be accepted into the federal land claims policy in 1984. The Department of Indian Affairs hired a researcher to report on the claim, and her report was reviewed at several stages before the Minister validated the claim based on the TRTFN's traditional use and occupancy of the land and resources in question. In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to

apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

31 The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious. The chambers judge found that all of the experts who prepared reports for the review recognized the TRTFN's reliance on its system of land use to support its domestic economy and its social and cultural life (para. 70). The proposed access road was only 160 km long, a geographically small intrusion on the 32,000-$km^2$ area claimed by the TRTFN. However, experts reported that the proposed road would pass through an area critical to the TRTFN's domestic economy: see, for example, Dewhirst Report (R.R., vol. I, at pp. 175, 187, 190 and 200) and Staples Addendum Report (A.R., vol. IV, at pp. 595-600, 604-5 and 629). The TRTFN was also concerned that the road could act as a magnet for future development. The proposed road could therefore have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim.

32 In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice,

disclosure of information, and ensuing discussion. While it is impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

C. *Did the Crown Fulfill its Duty to Consult and Accommodate the TRTFN?*

33 The process of granting project approval to Redfern took three and a half years, and was conducted largely under the *Environmental Assessment Act*. As discussed above, the Act sets out a process of information gathering and consultation. The Act requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee.

34 The question is whether this duty was fulfilled in this case. A useful framework of events up to August 1st, 2000 is provided by Southin J.A. at para. 28 of her dissent in this case at the Court of Appeal. Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal in November 1994 and were given the original two-volume submission for review and comment: Southin J.A., at para. 39. They participated fully as Project Committee members, with the exception of a period of time from February to August of 1995, when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy.

35 The Final Project Report Specifications ("Specifications") detail a number of meetings between the TRTFN, review agency staff and company

representatives in TRTFN communities prior to February 1996: Southin J.A., at para. 41. Redfern and TRTFN met directly several times between June 1993 and February 1995 to discuss Redfern's exploration activities and TRTFN's concerns and information requirements. Redfern also contracted an independent consultant to conduct archaeological and ethnographic studies with input from the TRTFN to identify possible effects of the proposed project on the TRTFN's traditional way of life: Southin J.A., at para. 41. The Specifications document TRTFN's written and oral requirements for information from Redfern concerning effects on wildlife, fisheries, terrain sensitivity, and the impact of the proposed access road, of barging and of mine development activities: Southin J.A., at para. 41.

36 The TRTFN declined to participate in the Road Access Subcommittee until January 26, 1998. The Environmental Assessment Office appreciated the dilemma faced by the TRTFN, which wished to have its concerns addressed on a broader scale than that which is provided for under the Act. The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or through the environmental assessment process, and assistance was provided to it in liaising with relevant decision makers and politicians.

37 With financial assistance the TRTFN participated in many Project Committee meetings. Its concerns with the level of information provided by Redfern about impacts on Aboriginal land use led the Environmental Assessment Office to commission a study on traditional land use by an expert approved by the TRTFN, under the auspices of an Aboriginal study steering group. When the first Staples Report failed to allay the TRTFN's concerns, the Environmental Assessment Office commissioned an addendum. The TRTFN notes that the Staples Addendum

Report was not specifically referred to in the Recommendations Report eventually submitted to the Ministers. However, it did form part of Redfern's Project Report.

38 While acknowledging its participation in the consultation process, the TRTFN argues that the rapid conclusion to the assessment deprived it of meaningful consultation. After more than three years, numerous studies and meetings, and extensions of statutory time periods, the assessment process was brought to a close in early 1998. The Environmental Assessment Office stated on February 26 that consultation must end by March 4, citing its work load. The Project Committee was directed to review and sign off on the Recommendations Report on March 3, the same day that it received the last 18 pages of the report. Appendix C to the Recommendations Report notes that the TRTFN disagreed with the Recommendations Report because of certain "information deficiencies": Southin J.A., at para. 46. Thus, the TRTFN prepared a minority report that was submitted with the majority report to the Ministers on March 12. Shortly thereafter, the project approval certification was issued.

39 It is clear that the process of project approval ended more hastily than it began. But was the consultation provided by the Province nonetheless adequate? On the findings of the courts below, I conclude that it was.

40 The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (para. 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.

41 The Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of Redfern were clearly shaped by TRTFN's concerns. By the time that the assessment was concluded, more than one extension of statutory time limits had been granted, and in the opinion of the project assessment director, "the positions of all of the Project Committee members, including the TRTFN had crystallized" (Affidavit of Norman Ringstad, at para. 82 (quoted at para. 57 of the Court of Appeal's judgment)). The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult.

42 As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

43 The TRTFN in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project Approval Certificate. It argues that

the Certificate should not have been issued until its concerns were addressed to its satisfaction, particularly with regard to the establishment of baseline information.

44 With respect, I disagree. Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.

45 Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

46 The Project Committee concluded that some outstanding TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course.

Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.

## IV. Conclusion

47 In summary, I conclude that the consultation and accommodation engaged in by the Province prior to issuing the Project Approval Certificate for the Tulsequah Chief Mine were adequate to satisfy the honour of the Crown. The appeal is allowed. Leave to appeal was granted on terms that the appellants pay the party and party costs of the respondents TRTFN and Melvin Jack for the application for leave to appeal and for the appeal in any event of the cause. There will be no order as to costs with respect to the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd.

*Appeal allowed.*

*Solicitors for the appellants: Fuller Pearlman & McNeil, Victoria.*

# Through an Equity Lens: Planning for Healthy and Equitable Communities

/ Victoria Barr, MHSc PhD (PLANNING)

Over the past 10 years, it's been exciting to see the growing interest in planning for healthy communities. And while all the attention on healthy communities is great, it's important to consider the complex factors that underlie health and well-being so that our efforts to support good health can have the most impact.

Many indicators of health – from life expectancy to disease rates to obesity – are linked to social inequities which have their roots in colonialism, racism, discrimination and imbalances of power. This isn't just about poverty, although it's easy to see how poverty and poor health go together.

High levels of inequity, especially related to income, negatively affects the health of all of us, even those with higher incomes. Greater social inequity reduces social connections within a community and can contribute to stress, fear and insecurity for everyone. In order to build healthier communities, we must ensure our work will serve and benefit all residents so that everyone can have access to decent housing, open space and recreation, affordable and accessible transportation options, and safe neighbourhoods.

Faced with these complex issues, how can planners consider equity in their work to foster healthier communities for all? Many cities, including Toronto, Hamilton and Ottawa, have recently introduced policies that encourage city staff and elected officials to use an equity lens - a framework that introduces a set of questions to consider when planning and making decisions about new policies, programs or initiatives. Applying an equity lens means continually asking:

- Who will benefit from a policy, program, initiative or service?
- Who might be excluded from those benefits and why? Indeed, who might be harmed?
- How might some population groups be unfairly burdened today or in the future? How might existing privilege be further entrenched?
- Have important decisions been made with the direct input of those who will be most affected by those decisions?
- From whose perspective is the 'success' of the project or policy being evaluated?

## Why Use an Equity Lens?

*Communities that are more equitable are stronger economically.* Greater equity gives more people the opportunity to participate in the local economy at a higher level, and that adds strength to the economy. The process is also important; broad, inclusive community engagement is also linked to a thriving, resilient economy.

*The use of an equity lens is consistent with a comprehensive approach to sustainability.*

### Equality



The assumption is that **everyone benefits from the same supports.** This is equal treatment.

### Equity



**Everyone gets the supports they need** (this is the concept of "affirmative action") thus producing equity.

### Justice



All 3 can see the game without supports or accommodations because **the cause(s) of the inequity was addressed.** The systemic barrier has been removed.

Defining sustainability beyond a "green" / environmental approach, by adding in the other two Es (economy and equity), allows for a stronger, more integrated triple-bottom line approach that benefits all.

*Using an equity lens is consistent with principles and action towards reconciliation.* One of the essential components of authentic efforts towards reconciliation with Indigenous peoples is to recognize the ongoing legacies of colonialism, and the ways in which racism and discrimination reinforce the gaps between the well-being of Indigenous peoples and non-Indigenous populations. The process of using an equity lens can help to uncover these injustices and foster greater learning and connection for all.

## How can Planners Apply an Equity Lens?

Thinking about applying an equity lens can be daunting – but it's okay to start with one project and grow from there. There are several excellent tools and resources available to help apply an equity lens to planning work. In general, these tools suggest the following components to consider:

1. Create opportunities for people from all walks of life to participate in planning and decision-making processes. Design those opportunities so that priority populations can participate and fully engage in the process. This will take some creative planning - a process I call "extreme outreach".
2. Ensure diversity and inclusivity in the workplace, through explicit policies, leadership, training and continuous learning for every staff member at every level.
3. Use many sources and types of data, gathered with the assistance of community partners, to better understand the diversity of the community and the day-to-day lives of residents. Health authorities can be good partners in the effort to find and understand data.
4. Carefully examine proposed policies or initiatives to understand the potential impacts of those initiatives regarding access, equity, and inclusion for diverse communities and groups that experience racism, discrimination and prejudice.
5. Ensure that all stakeholders and anyone likely to be impacted by the initiative receive information about it and are able respond. Communicate information in clear, direct, easy to understand ways, and use several communication tools, including video, graphics and sound. Use a variety of communication channels to prevent unintended exclusions.
6. Continually evaluate the new policies or initiatives developed, the process of developing them, and the equity framework itself. Seek to understand using a wide variety of types of data and knowledge – from statistics to stories. The effectiveness of an inclusive policy, once implemented, is measured by the extent to which it creates an environment within which all stakeholders feel included and empowered to access resources, opportunities, and see themselves reflected.

Committing to using an equity lens means demonstrating the courage to uncover power differences among individuals or groups, acknowledging privilege, and working to dismantle systemic barriers that can make it difficult for some community members to participate in, and benefit from, local decision-making processes. The result can be policies and strategies that are more responsive to local needs and have more potential to foster better community health and well-being. ■

Victoria Barr is a consultant for LevelUp Planning and Consulting, a multidisciplinary consulting collaborative focused on supporting organizations and communities to become stronger, healthier and more equitable.

## What have Canadian Cities Done?

The idea of using an equity lens is still quite new in North America, but some cities have recently implemented equity lens policies:

**Toronto, Ontario** – The City of Toronto has developed an Equity Lens Tool to assist in identifying and removing barriers for the city's most marginalized populations. The Equity Lens is used to develop Equity Impact Statements, which are required for all major policies and reports to City Council. The City also uses an Equity Responsive Budgeting process, which ensures that equity, especially regarding gender, is considered in the City's budget process.

**Hamilton, Ontario** – in February 2019, Hamilton City Council passed a motion to develop an action plan for the implementation of an equity, diversity and inclusion (EDI) lens. The implementation of the lens will include steps to integrate a consideration of equity into program development, service delivery, budgeting, business planning and prioritization.

**Ottawa, Ontario** - In 2011, Ottawa's Transit Commission prepared a review of bus routes and their frequency. Members of the community brought their concerns to City Council about the potential impact of proposed changes in their neighbourhood. The community requested that a study be undertaken using an equity lens to consider the impact on groups of people who may be most at risk of exclusion. The study documented that the reductions had indeed a disproportionately negative impact on women, seniors, immigrants, people in poverty, youth and people with disabilities. As a result, the Transit Commission initiated a policy to apply an Equity and Inclusion Lens going forward in all their operations. Community groups work with the Commission to help make sure that happens.

# Challenging from within

## To bring equity forward, we must challenge our profession from within

By Jason Syvixay and Lyla Peter

**Summary**

Planning operates on a diverse spectrum, from public policy-making and development application review to compliance and enforcement. Yet within this structure there are often power dynamics at play that can suppress planners from marginalized and equity-seeking backgrounds into positions often perceived by others as subordinate. In this piece, we explore and confront the perceptions and realities of the profession – calling for all areas of planning practice to be celebrated, and for fewer silos. Tangible actions to address these concerns are presented, with the intent of recognizing contributions of all planners, and opening up opportunities across the planning field.

**Sommaire**

L'urbanisme fonctionne sur un spectre diversifié, allant de l'élaboration de politiques publiques et de l'examen des demandes de développement à la conformité et à l'application. Pourtant, au sein de cette structure, il y a souvent des dynamiques de pouvoir en jeu qui peuvent reléguer les urbanistes issus de milieux marginalisés et en quête d'équité à des postes souvent perçus par d'autres comme subalternes. Dans cet article, nous explorons et confrontons les perceptions et les réalités de la profession - en demandant que tous les domaines de la pratique de l'urbanisme soient célébrés et qu'il y ait moins de silos. Des actions concrètes pour répondre à ces préoccupations sont présentées, dans le but de reconnaître les contributions de tous les urbanistes et d'ouvrir des opportunités dans le domaine de l'urbanisme.

In a profession that claims protection of the public interest as a central value and moral compass, it is slightly incongruous how quickly many planners will dismiss the skill-sets, expertise, lived experiences, and contributions of planners not engaged in the so-called visionary planning spectrum of city-building. The continuum of planning work is varied, which means we should celebrate the many areas to which individuals may be drawn. As we advance forward into more uncertain times as planners, we believe it is important to be critical about the systems that suppress many into the positions they currently occupy. As Fergusson aptly questions, "What kinds of jobs are available to the professionals, and do professionals from various backgrounds have equal opportunities to do any of these jobs?"[1]

One part of the planning spectrum is the development review and approvals process. Within Alberta, a significant level of decision-making (or power) is delegated to planners to assess development permit applications against regulatory requirements. However, in some circles, this planning role and responsibility is regarded as run-of-the-mill, mundane, and routine local government work. It is not uncommon for valid concerns about development timelines and costs to be met with continual efforts to streamline the approval process and attempts to remove areas of discretion. Streamlining efforts often do not consider the nuances of sites, the impact that different plans and regulations have on a development, or general good planning principles that shape

decision-making. As such, the complexity of development review can be lost on those who are not involved in the process. One planner shared with us how their opinions are often not heard by policy planners, exacerbating a disconnect between policy and implementation. Another planner working in this area noted how they feel their work is disregarded and perceived as inconsequential. For example:

> "In one case several years ago, I had to sit a policy planner down and explain why statutory plans do not normally apply to permitted use applications," said one planner. "I became highly valued by these groups, but they'll still pass me up for jobs when lateral positions open."

Policy-level positions often require master's degrees, whereas, positions in development review generally accept bachelor's degrees. Costs of attending university and recruitment strategies that do not reach students from underrepresented groups present barriers for racialized people in attaining policy-level positions.[2] Owens points to these criteria as "seemingly benign institutional rules that help to lock out students of colour."[3]

In our own past experiences, we have even heard this area of planning practice compared to "factory work" or "dirt planning," apparently devoid of the need to think critically about context, policy, or implication. These tropes illuminate a stratification in our planning practice – suggesting that policy work is more valuable than the rest, and that "on the ground reviewers" have little to contribute by way of input. On the contrary, in these instances, the planners (or development officers) thoroughly assess developments through the lens of zoning regulations and other policies, and ultimately approve or reject them; a power dynamic that can lead to positive or negative city building impacts. In short, their work matters.

### Underrepresented

Why might we think negatively about development review work? Who is leading the efforts of your city's policy-making and form-shaping? Who might be missing? What perspectives are most salient? What voices are absent? For Williams, planning "has been more like a picket fence, white-washed and reminiscent of the redlining that created gated communities while destroying too many communities of colour."[4] In many planning offices, there is often a lack of representation by women and by people of colour. One planner pointed out to us that development approval teams are generally overrepresented with racialized planners, compared to policy planning teams which are perceived to be predominantly composed of White planners.

> **It is both unfair and hubristic to expect planners who do not know the lived experience of vast proportions of the Canadian population to be adequately equipped to make significant decisions for them.**

"The higher the rank, the less likely you'll see people of colour," one planner said. "And you also see that dichotomy between policy planners and those working in development review."

A study with more than 300 responses illuminated how planners of colour are often passed up for promotions: "The trajectory for planners of colour is different because they have different visibility. To be promoted, you need the sexy projects... Only White planners get the sexy projects."[5] Minority planners also report "feeling that they were subject to lower expectations and given less visible or less important work than their White peers."[6] In the United States, Blacks and Latinos are heavily underrepresented in the planning field, and few minorities hold senior-level positions in their organizations.[7] Additionally, planners of colour are often relegated to "frontline positions in minority neighborhoods while other planners are in positions of influence over development and public policy."[8]

A recent survey of the planning profession (1,850 respondents out of 7,658 members of the Canadian Institute of Planners) showed that only 8% of planners identified as people of colour (National Compensation and Benefits Survey, 2019). Across the nation, the likelihood of Indigenous representation within traditional planning offices is even more severely reduced. In Canada, persons of colour account for 22.3% of the total population and Indigenous Peoples account for 4.9%. This survey demonstrates how racialized planners are underrepresented in planning, and as Fergusson argues, "It is both unfair and hubristic to expect planners who do not know the lived experience of vast proportions of the Canadian population to be adequately equipped to make significant decisions for them."[9]

Viswanathan and Lapointe in a special initiative by the Canadian Institute of Planners note how planners must reflect on their entitlement in order to truly advance a more inclusive profession.[10] Simply acknowledging one's power, however, does not always result in active steps to carve out opportunities for others. For example, if male leadership were to take GBA+ (Gender Based Analysis) or sensitivity training, it might inform and influence their perspectives, but it might not change the fact that women are still absent in positions of power within their office, especially racialized and otherwise marginalized women. Structural change to allow for more representation is difficult when those with power, predominantly male and White planners, benefit from the status quo.[11] To accomplish the former would require an explicit change of hiring, retention, management and evaluation practices.

Indeed, proactive and purposeful action must be taken to ensure that different voices are heard, included, and supported across the spectrum of roles and within the power structure itself. But simply creating space for others to participate does not tip the balance in favour of those who are underrepresented in decision-making roles.

Organizations across the world are embracing diversity and inclusion training and, in some cases, actively seeking out the hiring of Black, Indigenous, and racialized individuals. However, when you look at the organizational structures, these individuals often remain in positions not of creating change, but of enacting the decisions of the change-makers. So, while an organization may support diversity, equity, and inclusion, are they actually meeting these well-intended aspirations? And how does an organization move away from systemic oppression and look to hire those who disrupt, innovate, dissent, or have different lenses on how to achieve organizational goals?

Social identity is tied to those who we perceive to be similar or dissimilar to us. Chaudhary's research explores how people

are taught to socialize and care more about those who are similar to them.[12] Indeed, community make-up is often divided between those who are marginalized (often persons of colour) and those who are not. As city planning and investment proposals are examined, another stratification of power and privilege emerges. Perry explores the system of power and policy that has created and exacerbated the divides: "All researchers need to learn how to centre a community or group other than White people."[13] However, if positions of power and decision-making remain White-centred, will we not continue to reinforce segregation both in how our communities are designed and built and who is doing the work to design and build them that way?

Our unconscious bias carries these power constructs onward, and we often view those who are not similar to us, or not part of these structures, as a threat. If we look at urban planning, it is easy to see that those who develop policy and regulations have a position in which they can either inadvertently, or deliberately, impose their views and desired outcomes onto communities. If communities speak up and identify that these plans do not work for their own neighbourhoods, are we in a position to objectively identify if we are meeting their needs if we ourselves are not able to understand or relate to the community?

As Harris notes, "the 'pain' of those diverse communities is often 'left at the door' and never allowed to cross the threshold into the planning process." Harris further contends that "the planning field would be better positioned to advance issues of equity and social justice if it were more racially diverse."[14] How can we expect those from vulnerable communities to feel safe, believed, and listened-to during engagement sessions, if the planners at the opposite side of the table cannot relate to them, share in their experiences, or understand their cultural, social, and economic circumstances?

### More than technicians

As planning theorist Paul Davidoff has argued, a "planner isn't solely a value-neutral technician; instead, values are part of every planning process." Growing research, however, illustrates a significant technocratic dissonance. Many planners see themselves as being neutral, technical experts, and view the adoption of values as a political process, best left for politicians. Yet, "planners can expect to need more than technical, instrumental knowledge in order to be effective. The planner with the calculator but who cannot cooperate with anyone will not last long."[15]

Planners working on policy may view themselves as greater advocates for inclusion, seeing the work of development approvals as one-dimensional – overtly technical and rational. Perhaps these disconnects and impressions result from the siloed nature of planning work, processes, department structures, and even the physical layouts of departments.

If we want to become more inclusive and just in our profession, we must lead by example, and integrate a lens of compassion while truly modeling a culture of respect for the work and contributions of all planners, including those working in development review and approvals. If we care for and nurture these principles, it may contour and adjust our pedagogical approaches and strategies so that we can more effectively address our own power in order to support the inclusion of others.

### Next steps

First, we believe the profession needs to celebrate the work of planners who are engaged in all areas of the planning process. How might this be achieved? Within bureaucracies, perhaps planners might benefit from exposure from both ends of the planning spectrum – implemented through annual staff and portfolio rotations. The Professional Standards Board (PSB) that reviews and accredits Registered Professional Planner (RPP) designations could also seek to reinforce and endorse the varied levels of experience attained.

"Prominent, always White male planners, lectured me on how I needed to get a proper planning degree and get a policy job, and move away from development work – in order to get my RPP designation," recalled one planner.

Provincial planning authorities may also look to expand on their promotion of hard/soft planning competencies with examples of how these are met by planners working in the public and private sectors – acknowledging and celebrating the work undertaken by planners with racialized backgrounds, women, and those who are gender non-

> **The profession needs to celebrate the work of planners who are engaged in all areas of the planning process.**

bunt & associates



conforming. If the planning profession wants to truly diversify its membership, the way in which it narrates and represents itself needs to be critically appraised.

Second, the profession needs to move towards an equitable practice, so that policies and plans themselves are inclusive. Allow minority planners to influence policy, ensure they are provided with meaningful and influential projects and assignments, and increase the number of minority planners at all levels of planning. To support the inclusion of marginalized communities and people, political support and leadership, champions for gender equity, financial and human resources, education, monitoring, and accountability should be made priorities. The Canadian Institute of Planners could play a role in identifying gaps in this regard, researching barriers and best practices, establishing public and private sector benchmarks for diversity, equity, and inclusion, and advocating for change. In the United States, according to information provided by a sample of employers, only 20% of minority planners in public sector agencies hold senior-level positions (APA, 2001).[16] For planning offices to embrace a more inclusive workforce, it is important to acknowledge the implicit biases and structural/systemic inequities embedded in hiring processes, promotion of managers, and doling out responsibilities and portfolios. Cities might explore these biases with those underrepresented, working together to put forward meaningful changes.

Third, the profession needs to nurture a shift towards planners viewing themselves as necessary agents of change. If planners see themselves as more than just technical experts, they may begin to undertake their work through a more intersectional lens, including perspectives on gender, race, class, ethnicity, sexuality, nation, and disability. Viewing their work through this web of values may also help in their self-recognition of entitlement, and privilege. Academia must play an important role, instilling and grounding these values into the practice of young and emerging planners. In addition, our professional organizations have a strong role to play, shifting the mindset of existing practitioners, championing the value of embracing new concepts, ideas, and voices.

If we fail to challenge the system, we perpetuate the norm, which means that we wait for change to catch up rather than embracing and meeting it. On a city building level, do we allow neighbourhoods to decay rather than proactively changing policy and regulation to meet the needs of residents today, and spur investment? As planners, we aspire to create communities that are inclusive. To do this, that lens of inclusivity needs to start at the centre of our planning practice.

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**DORIS CHOW** (pictured) and her sister June formed the Youth Collaborative for Chinatown to change the conversation about Vancouver's Chinatown. "We want to do what's good, and start building what we want to see."
Photo courtesy of Chris Cheung, *The Tyee*

# A BRIEF HISTORY OF CHINESE MIGRATION

### 1850s
Chinese migrants come for the gold rush



### 1880s
Chinese labourers, primarily men, come to work on the railways. They pay a head tax for themselves and any spouse or children that may have been allowed to stay



### 1886
Vancouver's Chinatown is "created," the same year that the City is incorporated

### 1923
Repeal of head tax and a ban on Chinese immigration entirely except for a few (e.g. business owners, clergy)

### 1948
Repeal of immigration ban



# COMMUNITY ENGAGEMENT WITH CULTURAL COMMUNITIES



by **Melody Ma**

CANADIAN GOVERNMENTS like to say that "diversity is our strength." But as cities become increasingly diverse, this can become a source of complexity, especially when making decisions of how people from different cultures coexist in a city.

Planners have to navigate a progressively complex environment where communities may consist of cultures that are vastly different from the planner's and from each other. In this article, I will examine some of the cultural misconceptions, systemic issues, and opportunities to develop cultural competence for community engagement.

I am an example of an ideal highly-engaged citizen who includes Chinese Canadian culture among my identities. I am fluent in English, college-educated, able-bodied, and understand planning concepts like FSR, laneway activation and design guidelines. I learned very quickly through my advocacy work for Vancouver's Chinatown that in order to effectively communicate with planners I must think like a planner, use planning jargon, and learn how to read and interpret planning documents. Simply put, I must immerse myself in planning culture to be heard.

In Chinatown, like many other ethnocultural communities, not everyone has similar privilege or capacity to engage with the planning process. It is not realistic to expect an 80-year-old non-English speaking Chinese senior with limited literacy skills to interpret and convey her concerns on new zoning bylaws that are written in English-only. Or that a recent immigrant will engage fully in a public process when, in their home country, it might have been dangerous to do so. These are examples of real people and urban planning situations in our communities. They highlight the necessity for planners to be culturally competent and aware of the need to take proactive measures to effectively plan with cultural communities.

## RACE DOES NOT EQUAL CULTURE

To begin the journey of developing cultural competence, it is important to first recognize that race does not equal culture. Race is the physical characteristics of a person and their racial ancestry, whereas culture can be defined by history, shared memory, heritage, way of life, and more. People of the same race may not share the same culture and vice versa.

There is a large Chinese population in the Lower Mainland, but it would be simplistic to assume all Chinese people identify with a monolithic "Chinese culture." Although some Chinese people may share some ethnocultural practices and beliefs, the Chinese diaspora in B.C. arrived at different times, from different countries, with different collective memories, languages and dialects, cuisines, and lived experiences that each form unique cultural identities. These distinct cultural impacts shape people's attitudes towards their environment; therefore, using a cultural framework instead of a racialized one is a better approach to engagement.

When working with ethnocultural communities it is important to check potential stereotypes. Researching and learning about different histories within communities is a good starting point. Personal storytelling exercises are a way to draw out different cultural attitudes in a stakeholder group. Bringing a trusted, culturally competent and non-political liaison into the planning process can help with community engagement. However, a liaison can never replace the experience of immersing in a community to listen and learn about their aspirations and desires that are informed by their cultural identities.

## URBAN PLANNING AND CULTURAL BIAS

Secondly, it is important to understand that planning and its institutions in British

**1980s–1990s**
Immigration from Hong Kong due to 1997 handover to China





**2000–2018**
Immigration from mainland China

Columbia are fraught with assumptions and bias towards Western values and people who conform to those values. Planning and consultation tools, such as Town Halls, Open Houses, Robert's Rules of Order, and English-only meetings, may restrict involvement from ethnocultural communities. The result is community engagement that favours some communities over others, and can potentially provoke suspicion and mistrust from those who don't feel included or heard.

At recent City of Vancouver public hearings for development projects in Chinatown, Chinese-only speakers from Chinatown, mostly elders, who required a translator for their speeches were given the same total amount of time to present as English speakers. This meant that Chinese-only speakers received only half the amount of time as English speakers to express their thoughts because time had to be alloted for translation.

Planners must recognize and break through institutional biases and power imbalances such as this when developing community engagement. Ensuring fair and equitable engagement with those who have been denied it allows different perspectives to surface. This ultimately will lead to better engagement, and planning that is more balanced and inclusive.

A cultural community's perception of planners and planning may also be coloured by hostile historic interactions or past injustices. For example, many in Vancouver's Chinatown community mistrust the City of Vancouver's planning because of repeated expropriation and demolition threats it has faced throughout history, for a freeway or condos, all in the name of urban renewal. Planners may represent institutional baggage that must be unravelled in order to break down cultural barriers and rebuild trust in order to plan with, and not for, a cultural community.

## TOKENISM IS NOT COMMUNITY ENGAGEMENT

To plan with a cultural community does not mean to involve only a select few. As a Chinese Canadian millennial woman, I am frequently on government advisory panels as the representative of "diversity". However, I can only speak for myself and my lived experiences and not for the entire Chinese Canadian cultural community. Other examples of tokenism include consulting with the leader of a Chinese seniors care organization without consulting any Chinese seniors who receive the care, or consulting with leadership of a cultural institution without talking with cultural creators and consumers.

Planning for cultural equity means that planners understand how a cultural community is formally and informally organized. Planners must learn how to respectfully navigate and create trust in the community, but not use individual members, especially perceived leaders, as the only voices that are heard. Instead, it is important to figure out who are the underrepresented, missing or even dissenting voices in a cultural community and create safe, accessible and equitable opportunities for those voices to surface.

## MOVING FORWARD

Community planners can use tactics as simple as: translating materials into languages spoken by affected ethnocultural communities; use of communication channels that will reach all voices (e.g. non-English media and social media outlets, informal networks); presenting planning jargon in layman's terms; using participatory engagement techniques that are visual instead of verbal; providing live translation services for spoken consultations; and scheduling consultation sessions at convenient times and locations for subgroups within a larger community.

Developing cultural competence does not happen overnight. You cannot take a cultural training workshop and declare yourself competent upon graduation. The steps suggested above are just some of the many towards developing cultural competence.

A foundational principle of any planning process is to ensure that all members of a community help guide the future of their city or town. It takes time and resources to understand others who may be from differing cultural communities, but integrating cultural competence into planning is an opportunity to recentre planning around all people. ■

**MELODY MA** is a Chinese Canadian neighbourhood advocate for Vancouver's Chinatown.

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***Practical advice, Creative options, Value for local government***

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American Planning Association

*Creating Great Communities for All*

PAS REPORT 593

# PLANNING WITH DIVERSE COMMUNITIES

Ivis García, AICP, Andrea Garfinkel-Castro, and Deirdre Pfeiffer, AICP

## EXECUTIVE SUMMARY

The demographics of the United States are changing profoundly. Our cities and towns are growing more racially, ethnically, and culturally diverse. By the middle of the 20th century, more than half of the U.S. population will be individuals of color. PAS Report 593, *Planning With Diverse Communities*, offers planners the tools and strategies to better engage people of color in planning processes and improve quality of life for all in diverse communities.

Cities and suburbs are reflecting this growing diversity at the macro and micro levels. Many states, such as California and New Mexico, have been "majority minority" for decades, as have many of the nation's largest cities, including Atlanta, Baltimore, Cleveland, and Detroit. This is now becoming true for smaller communities across the United States as well. Many urban cores are gentrifying, bringing whites back to the city, and many Asians, African Americans, and Latinos are moving to the suburbs. Together these demographic and geographical trends paint a picture of increasingly diversifying spaces.

But places in the United States have historically been highly segregated by race, which has translated to economic inequality—creating a gap between white and black or brown as well as between rich and poor. Although these gaps are narrowing with the dissolution of redlining, racial covenants, and other institutionalized discriminatory policies, clear geographic inequalities based on race and ethnicity still exist in our cities and towns today. Many African Americans, Latinos, and immigrants live in concentrated poverty. Whether created by policy outcomes or self-selection, segregated neighborhoods often have fewer employment opportunities, good schools, or quality amenities to offer their residents.

This PAS Report examines these existing conditions and coming demographic changes, and it offers planners tools and techniques to help them better serve their diverse constituencies and plan more equitably and effectively. It aims to provide planners with the necessary knowledge to:

- understand how racial and ethnic diversity is driving demographic changes in the United States and how these changes are manifesting geographically
- recognize some of the historical and current economic and social disparities that affect different races and ethnicities within the nation
- engage people of color meaningfully in the planning process
- explore strategies and tools that promote the well-being of people of color, especially those who are also low income, including economic opportunities, access to transportation, housing options, health and safety, and placemaking efforts
- increase cultural competency and support planning for diversity

Planners are compelled by the ethical standards of the profession to represent all communities, particularly those that are least empowered. The American Institute of Certified Planners (AICP) Code of Ethics and Professional Conduct requires planners to work toward social justice and provide choice and opportunity for everyone. It states that planners should promote racial and economic integration and acknowledges that they have a special responsibility to those who have been historically disadvantaged.

Planners should work with the public, private, and nonprofit sectors to ensure a good quality of life for all residents of diverse communities, especially the underserved. Public participation provides opportunities to create places that are responsive to the values of their communities, and planners must embrace inclusive, participatory practices to encourage the input of people of color, including immigrants, in decision-making processes. Planners can better achieve both of these aims by increasing their cultural competency through attitudes and actions that allow them to function effectively across cultural differences, particularly those of race and ethnicity.

## RACIAL AND ETHNIC DIVERSITY IS DRIVING DEMOGRAPHIC CHANGES

People of color are expected to outnumber whites in the United States by the mid-2040s. These changes are driven by increases in both native-born and foreign-born populations. Latinos, African Americans, and Asians have higher fertility rates than whites; in 2010, about half of infants younger than one year of age were identified by the U.S. Census as people of color. Interracial marriage rates also have grown considerably since the 1970s, along with the number of multiracial individuals. Diverse and interrelated conditions in immigrants'

home countries and the United States, such as economic conditions, the extent of civil liberties and safety, and environmental catastrophes and civil strife, are driving immigration rates toward historic highs. Chapter 1 of this report discusses these demographic changes.

Many kinds of racially and ethnically diverse places are emerging from these demographic shifts. Chapter 3 focuses on two types of quickly changing places frequently encountered by planners: diversifying suburbs and gentrifying central city neighborhoods. Diverse suburbs are those that have no dominant racial or ethnic group. In the 20th century, diverse suburbs existed but were relatively scarce. Interrelated factors, such as reductions in housing discrimination, economic changes in the wake of the recent Great Recession, and central city redevelopment, are now leading people of color and newly arrived immigrants to move to the suburbs.

Gentrifying central city neighborhoods are also experiencing dramatic demographic and socioeconomic changes, often resulting in the displacement of lower-income residents who are people of color. Various forces drive gentrification in these places, including rapid investment following historical disinvestment, changing housing and locational preferences among young professional millennials and white baby boomers, and a lack of strong local affordable housing policies. Both bottom-up and top-down dynamics contribute to gentrification in central city neighborhoods.

The cultural and economic diversity of diverse suburbs and gentrifying central city neighborhoods create many challenges for planners. These include nonconforming uses and code violations, conflicts over the use of public space, social service and amenity mismatches, and a lack of affordable housing. These challenges arise out of the need to balance the broader public interest with meeting the needs of diverse racial and ethnic groups in these communities.

## HISTORICAL AND CURRENT DISPARITIES AFFECT DIFFERENT RACES AND ETHNICITIES

The urban renewal and public housing projects of the 1950s through the 1970s created urban spaces with limited access to employment, good schools, or high quality of life. The consequences of discriminatory housing policies such as redlining and racial covenants have increased social and economic isolation for people of color, especially for African Americans. Planning can play a significant role in addressing systemic racism and barriers to opportunities for people of color related to housing, transportation, employment, and other issues.

Chapter 2 of this report examines how many people of color face significant social and economic challenges stemming from historical patterns of racism and racial and ethnic discrimination. Although today whites are more likely to live with people of color than ever before, segregation between whites and African Americans as well as Latinos and other immigrant groups remains high. Racial and ethnic segregation is an outcome of complex factors, including housing discrimination, income and wealth differences, and immigration status. The consequences of isolation are reflected in lower incomes and levels of educational attainment, along with higher unemployment and rates of incarceration, among people of color. Planners have a responsibility to help work towards remedying persistent racial and ethnic segregation, as these processes contribute to extensive place-based inequalities that affect the well-being and livelihood of people in the United States.

Research shows that access to health care, high-quality education, and high levels of employment opportunities improve the quality of life in a geographic area. In the United States today, there is an ever-increasing divide between those who have access to these amenities and services and those who do not. This divide is prominent and visible between whites and racial and ethnic minorities, including those who are unauthorized immigrants. Immigration status dramatically affects the likelihood of finding quality housing or stable employment. Moreover, unauthorized immigrants live with the fear of being removed from their families and communities by immigration authorities.

## PEOPLE OF COLOR MUST BE INCLUDED IN PARTICIPATORY PLANNING PROCESSES

Community engagement is an ongoing process that entails facilitating the participation of residents, especially diverse or underrepresented groups, in neighborhood and local planning and design efforts. Residents engaged in participatory planning processes feel more informed about, engaged with, and connected to their communities.

Chapter 4 of this report provides planners with guidance for effective community engagement, which is more of an art than a science and can be difficult for practitioners to navigate. Common milestones at the foundation of effective community engagement include getting to know the community, connecting with community partners, and picking the appropriate strategy. The International Association for Public Participation's Public Participation Spectrum—in-

form, consult, involve, collaborate, and empower—provides a framework for engaging community members and building their capacity over time.

Immigrants and people of color often experience barriers that prevent them from participating in community planning processes. Common barriers include lack of transportation, child care, money, time, information, language, literacy, and trust. Chapter 4 offers a wide range of strategies that planners can use to help overcome these barriers. Common to all is the need to engage with underserved communities of color and build partnerships with trusted institutions in those communities to better understand local challenges to participation in planning processes and how to best address those challenges.

## MANY STRATEGIES AND TOOLS CAN PROMOTE WELL-BEING IN DIVERSE COMMUNITIES

Chapter 5 of this report explores a wide range of policies and tools that support the general welfare of people of color—especially those who are also low income—by improving their employment options, access to transportation, housing choices, health and safety, and quality of places and spaces.

One fundamental strategy is to expand economic opportunities. Microentrepreneurship, small and home-based businesses, and day labor can fill widespread and ongoing seasonal and underemployment gaps often experienced by immigrants and people of color. Planners can support these economic opportunities by ensuring that local regulations allow these self-employment options and that licensing and permitting processes are understandable and easy to navigate, even by those who speak a language other than English. Planners can also engage in public education on how these activities add vitality to neighborhoods and fill income gaps.

Another strategy is activating mobility. People of color and immigrants are more likely to be transit-dependent—that is, they must rely on public or active transportation modes for essential and nonessential activities and have little or no access to a car. Critical features of public transit systems that support both transit-dependent and choice riders are high coverage combined with high frequency of service and networks that focus on coverage within an area as well as across different urban areas.

A key strategy to minimize inequity is offering adequate and appropriate housing options for all. People of color and immigrants—who may have lower incomes and more extensive or intergenerational households—require housing that is both adaptable and affordable. Adaptability is a feature of housing that allows occupants and owners opportunities for incremental expansion, multigenerational living, and higher-density occupancy. Affordability for both renters and homebuyers can be supported by a wide range of programs and housing types.

Addressing health and safety concerns is a vital strategy in ensuring the well-being of communities of color, which are disproportionately likely to face negative environmental impacts of unwanted land uses or live in underserved, underresourced areas. The environmental justice movement has brought some awareness of and change around these issues, and there are many ways planners can work to improve the quality of life for communities of color. These include providing better access to healthy foods, parks and green space, and basic services where they are lacking, and improving pedestrian infrastructure and public safety where it is needed.

Placemaking is another important strategy through which diverse communities can celebrate cultural identity, strengthen community, and expand economic opportunity. Planners might engage with formal, top-down, local government-led placemaking projects or events both large and small in scale, or they might help coordinate or expand on more informal, bottom-up placemaking activities or activism. Planners can help create more inclusive places by learning about the social and cultural values of communities of color, engaging residents early and often in culturally meaningful and relevant projects, seeking visions generated from the existing community in areas undergoing or at risk of economic decline or gentrification, and securing funding and modifying regulations to support and enhance placemaking efforts.

## PLANNERS MUST INCREASE THEIR CULTURAL COMPETENCY AND SUPPORT DIVERSITY

One of the pervasive themes throughout this report is the need for planners to become familiar with and engage directly with the people of color within their jurisdictions. Chapter 1 introduces cultural competency as the vital set of skills that enables planners to better communicate and to plan more effectively, respectfully, and compassionately with communities of color. Building cultural competency is central to planning neighborhoods and cities that serve the needs of diverse groups and people.

However, learning and practicing cultural competency is not yet central to planning education, though it has been integrated within other disciplines. Most planners learn about

cultural competency through interacting with others in their workplaces, in their everyday lives, or by seeking out resources on this topic—such as this PAS Report.

To be more effective in serving all of their constituents, planners will need to take the time to understand and move beyond their own implicit biases, which may often be hidden from themselves. Blind spots develop because of personal background and experiences as well as broader societal narratives. Developing cultural competency takes time and practice. Implicit biases are unintentional, but recognizing these biases is an essential first step.

Planners and planning organizations should also commit to improving diversity planning within their jurisdictions. Chapter 6 closes with suggestions to help begin or expand on such efforts.

## CONCLUSION

This report is concerned with racial (e.g., African American, Asian) and ethnic (e.g., Latino) diversity in the United States. Changing demographics mean that planners in the public, private, and nonprofit sectors must plan for an increasing number of individuals and families of color. This is a challenge but also an opportunity. Planners can have a positive impact by working to address both historical and current inequities and providing people of color equitable access to opportunity in housing, transportation, employment, and other domains of life.

Unequal conditions have become so entrenched in our society that they may seem inevitable or irreversible. But this need not be so. Just as earlier planners may have had a hand in creating some of these uneven conditions through land-use decisions and other policies, so too can today's planners play a role in harnessing diverse interconnections to help build more just cities. Planners can rectify some of the harmful effects of racism, anti-immigrant sentiment, and discrimination through more inclusive public policies, programs, and practices. Planners have a responsibility to try to remedy these inequalities, and they are uniquely positioned to help their jurisdictions and communities reap the potential benefits of growing diversity through more equitable strategies and more inclusive forms of engagement.

# Are We Planning for Equity?

## Equity Goals and Recommendations in Local Comprehensive Plans

Carolyn G. Loh Rose Kim

**ABSTRACT**

**Problem, research strategy, and findings:** Social equity goals are supposed to be prioritized in planning along with economic and environmental goals, yet in practice they are often de-emphasized. We developed a publicly available plan equity evaluation tool to investigate to what extent and in what ways local governments incorporate goals and recommendations that would advance equitable outcomes in their comprehensive plans. Using plan content analysis, we find that most plans do not talk about equity, nor do they include many goals and recommendations that would advance equity. More recent plans, plans in communities with more planning capacity, plans in coastal communities, and plans with strong public participation processes have stronger equity orientations. Limitations of our study include that we had a small sample size of 48 plans in a single state, our coding was partly conducted by volunteers, and our study is limited to plan content and so did not investigate existing conditions or equitable outcomes.

**Takeaway for practice:** Plans should make equity a guiding principle. Planning processes need to be multifaceted. Plans should identify vulnerable people and geographic areas and ensure equitable protection from hazards and equitable distribution of amenities. Future land use changes should be more transparent.

**Keywords:** capacity, equity, plan evaluation, sustainability, vulnerability

In S. D. Campbell's (1996) foundational planner's triangle, social equity is one of three main planning goals, along with environmental protection and economic development. The AICP Code of Ethics says that planners should aspire to "seek social justice by working to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration" (APA, 2016). Local comprehensive plans should thus emphasize equity goals to a similar extent as they emphasize environmental and economic goals. Yet, in practice, plans often de-emphasize equity goals or disguise them as an efficiency or economic benefit (Berke & Godschalk, 2009; S. D. Campbell, 2016; Fainstein, 2010; Liao et al., 2019; Moore, 2016).

In this study, conducted in partnership with the Michigan Association of Planning (MAP) Social Equity Committee, we investigate to what extent and in what ways local governments incorporate goals and recommendations (including plan processes, information, and strategies) that would advance equitable outcomes in their comprehensive plans and what community characteristics and plan and planning process characteristics can help explain differences in plan equity orientation. We developed a publicly available comprehensive plan equity evaluation tool that covers many aspects of equity, including the planning process, housing, environmental justice, transportation access, and economic development. Given that planners pledge to make equity a central part of their practice, plans should include equity-related goals or strategies in all of these areas. However, based on a dual-coded content analysis of 48 local comprehensive plans, we conclude that equity is not a main focus of most plans. We find that fewer than half of our sample plans mention equity at all. Many plans do not include race and income in their demographic analyses. Only 42% of plans include a goal that mentions affordable, workforce, or fair share housing, and less than a quarter mention equitable environmental protection. If planners are supposed to emphasize equity to the extent that it is one of three pillars of planning, plans are not yet living up to that expectation. We find that newer plans, plans with more multipronged public participation processes, and plans in coastal communities and communities with more planners on staff have a stronger equity focus.

In this study, we present an analysis of our results and offer a set of good practices to increase emphasis on equity in local comprehensive plans, many of which would be simple to implement. Land use planning is redistributive by nature, both because it allocates public resources and facilities and because it arranges land uses in ways that may have costs and benefits, winners and losers (Harvey, 1973; Talen, 1998). The planner's task, then, is to make that redistribution more

DOI: 10.1080/01944363.2020.1829498 | © 2020 American Planning Association, Chicago, IL.

*Color version available at* ***tandfonline.com/rjpa***

transparent so that participants must ask and answer the question, "Does this goal/policy/decision make the most vulnerable people in our community better off or worse off?" Although this study indicates that many communities are not asking themselves such questions, we are optimistic that this situation can change for the better (H. Campbell et al., 2014).

In the next section, we explore the body of research on planning equity. We then explain our methodology, including the development of the equity evaluation tool, intercoder agreement, and our analytical approach. Next, we present and discuss the major findings about how the communities in our study dealt with equity issues in their plans. Finally, we offer good practice suggestions for how planners may improve the equity focus of future comprehensive planning efforts.

## Equity as a Planning Goal

Planning involves redistribution by allocating public resources and facilities, including those that have negative externalities (Talen, 2008). Thus, the issue of equity is not a special case where redistribution matters but an inescapable fact of planning. Everyday planning practice, such as zoning, has in the last century commonly been used to advance a discriminatory agenda, with varying degrees of intentionality. These practices persist (APA, 2019; Pendall, 2000). Equity has also been a tenet of planning practice for many years, although it has nearly always been positioned in opposition to traditional downtown-oriented planning (Davidoff, 1965; Metzger, 1996). Beginning in the 1960s, some planners, especially those in the administrations of progressive Black mayors, began explicitly to advocate for policies that would direct resources toward the poor and disadvantaged. In response to racial injustices and urban renewal, the theory of advocacy planning and more bottom-up approaches to planning gained traction, challenging planning professionals to represent the interests of low-income and working-class neighborhoods (Davidoff, 1965; Gans, 1969; Hartman, 1964). These efforts were exemplified by Norm Krumholz and his staff in Cleveland (OH) in the 1970s (Krumholz, 1982). By the 1990s, the AICP Code of Ethics included a section that stated, "A planner must strive to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of disadvantaged groups and persons" (APA, 1991, p. 1).

In S. D. Campbell's 1996 article, "Green Cities, Growing Cities, Just Cities?," he elevated social equity to equal status in the planner's triangle with economic development and environmental protection. Yet in practice, it seems to be the most neglected of the three (S. D. Campbell, 2016; Moore, 2016). Campbell identifies two conflicts related to equity within the planner's triangle. The property conflict, between equity and economic growth, encompasses issues such as gentrification and affordable housing (S. D. Campbell, 1996). The development conflict, between social equity and environmental preservation, has to do with making decisions that involve tradeoffs between protecting the environment (perhaps in a way that reduces economic opportunity) and materially improving the lives of the most vulnerable. In our opinion, Campbell overstates the conflict because activities that are environmentally harmful often disproportionately harm disadvantaged people.

The era of the equity planner has come and gone, and although in theory the ideas of that era have been absorbed into mainstream planning thought, it often seems as though efforts to promote equity must be disguised as or ancillary to efficiency goals (Bollens, 2002; Fainstein, 2010; Provo, 2009). Recently, there has been renewed interest in equity at the national level and as a component of sustainability, although there is some evidence that local government planning processes do not reflect this emphasis (APA, 2019; Lens & Monkkonen, 2016; Liao et al., 2019; Oden, 2010).

### *What Does Equity Mean in Planning?*

Equity in planning is broadly concerned with access to resources and opportunities for those who are disadvantaged (Talen, 1998). Equity seeks to expand choices and increase agency (APA, 2016; Israel & Frenkel, 2018). Fundamentally, equity is about distributing public resources in favor of those who are less well off (Fainstein, 2010). Those who need additional resources include "groups most lacking in political and financial power and most subject to disrespect," which, in the United States, have included people of color, people with disabilities, low-income people, women, children, and the elderly (Fainstein, 2010, p. 56; Warner & Zhang, 2019). However, equity may look different in different types of communities, and people in different places "hold different ideas of what constitutes well-being and a good life" (Israel & Frenkel, 2018, p. 648).

### *What Does Equitable Planning Look Like?*

Different planning subfields emphasize different aspects of equity, but all find that equity concerns are at the center of planning decisions and debates. In public participation, the expectation is for an inclusive planning process in which residents, stakeholders, and experts come together to engage in shared plan and decision making where at least some power is transferred to nonexperts (Innes & Booher, 2000, 2004; Lane, 2005). However, planners must be careful, because communicative planning may disadvantage already disadvantaged groups, who as part of the process are expected

to work toward a solution that benefits everyone, rather than advocating for their own needs (Brownill & Parker, 2010; Purcell, 2009; Vigar et al., 2017).

Planners who study hazards are concerned about social vulnerability because disadvantaged people are more likely to live in lower quality housing in areas more affected by storms and less likely to hear and believe warnings, have the means to evacuate, and eventually recover (Van Zandt et al., 2012; Zahran et al., 2008). Disadvantaged people are also more likely to be affected by exposure to natural and human-caused environmental hazards, many of which are becoming more extreme as the climate becomes warmer (Heckert & Rosan, 2016; Osland, 2011). And, as the world has recently seen, disadvantaged people may suffer disproportionately in pandemic events (APM Research Lab Staff, 2020). More nuanced characterizations of equity have emerged, especially as cities incorporate social equity and environmental justice into urban resilience planning, distinguishing between dimensions like distribution, participation, recognition, and context (McDermott et al., 2013; Schlosberg, 2004). Yet in general sustainability and resilience planning has been criticized for doing little more than mentioning equity, without which true sustainability cannot be achieved (Burton, 2003; Meerow et al., 2019; Oden, 2010). And even a commitment to addressing inequities in sustainability at the regional level does not yet indicate successful integration of equity into actions for improved outcomes (Arias et al., 2017; Finio et al., 2019; Zapata & Bates, 2017).

Those who look at the distribution of community facilities highlight equity concerns in many areas. Park planners find that cities tend to site and invest in parks in areas with higher incomes that already have good access to amenities, even though making the distribution of amenities more equitable would raise the quality of life of the whole city (Brambilla et al., 2013; Rigolon & Németh, 2018; Talen, 1998). Talen (2001) finds no apparent effort to minimize commutes and maximize access in school siting, even though longer bus rides for elementary school students were associated with lower test scores. With rising interest in green infrastructure, planners are watchful about how equitably those investments are allocated (Heckert & Rosan, 2016). Transportation planners and activists see equity issues in terms of spatially consistent access to transportation, the provision of alternatives to private car use, financing, and funding allocations to different modes (such as between road building and transit investment) or different routes (Delbosc & Currie, 2011; Grengs, 2002; Lowe, 2014; Martens, 2016). But social equity objectives are not as well integrated into urban transportation plans as environmental and congestion reduction goals (Manaugh et al., 2015).

Equity issues remain at the forefront of housing policy research, as planners continue to find challenges in creating enough density and mix of housing types to accommodate lower income households (Szibbo, 2016). It is difficult to achieve an equitable housing mix when many communities continue to oppose housing for middle- and low-income residents and local land use regulations add obstacles and expense to building such housing (Goetz, 2008; Lens & Monkkonen, 2016; Scally & Tighe, 2015). Planners have responded through innovative planning and regulatory approaches such as inclusionary zoning, accessory dwelling units, and the promotion of "missing middle" housing (Mukhija et al., 2010; Schuetz et al., 2009).

High levels of inequality have become a problem in cities and metropolitan areas (Piketty, 2014). Economic development planners recognize that economic development need not be in opposition to environmental sustainability and equity; rather, economic development that also helps further those goals is more effective and long-lasting than traditional business incentives (Zhang et al., 2017). The concept of a triple bottom line, which compels companies to consider society and the environment along with economy, has gained prominence in the last 25 years and has consequently shaped how frameworks for sustainability assessments have developed (Mori & Christodoulou, 2012; Pope et al., 2004). But as in planning, assessing how effectively organizations address sustainability, especially social criteria, is lacking (Labuschagne et al., 2005; Shen et al., 2011).

Taking all of these facets of equity into consideration, an equitable comprehensive plan would be created through an inclusive public participation process. It would recommend an arrangement and mix of land uses that provides enough housing for all income levels, with access to multiple transportation modes. It would identify vulnerable populations and neighborhoods and plan for their protection from natural and human-caused hazards, including those likely to be exacerbated by climate change. The plan would identify and seek to correct inequities in the provision of community facilities. The plan would recommend economic development strategies that benefited the community as a whole, including its most vulnerable members.

## *Are Planners Looking for Equity in Comprehensive Plans?*

Equity has not been a traditional focus of literature evaluating comprehensive plans. The model plan quality evaluation checklist, from *Urban Land Use Planning* (Berke & Kaiser, 2006), a widely used planning textbook, does not mention equity, although it does ask about

gathering the views of a broad spectrum of stakeholders (Stevens, 2013). Baer (1997) considers equity alongside a long list of other considerations under the concept of "adequacy of scope" but does not give it the third point of the triangle status as Scott Campbell (1996) conceptualizes it. Berke and Manta Conroy (2000) include equity as one of the six principles of sustainability and find that plans generally promoted affordable housing programs but included little else that would advance equity. Berke and Godschalk (2009) suggest that plan quality evaluation efforts could expand to include additional topics, including equity, but we are unaware of any efforts that comprehensively focus on equity.

## Michigan Planning Context

Michigan is one of the United States' most politically fragmented states, with 1,856 units of local government. The state is divided into counties. Counties are further divided into cities, townships, and villages. Most of these local governments conduct their own zoning and many conduct their own long-range planning. Governments that do their own planning are required to update the plan every 5 years, but this may simply mean making a determination that conditions in the community have not materially changed and the plan does not need to be significantly updated. Plans form a legal backbone for zoning, but they are not required to be implemented and are not legally binding (Loh, 2012). The local comprehensive plan (referred to in Michigan as a *master plan*) epitomizes "ordinary" planning practice (H. Campbell et al., 2014, p. 49).

## How Do Plans Incorporate Equity Goals and Recommendations?

In this study, we ask to what extent and in what ways local governments (cities, townships, and counties) include goals and recommendations that would advance equitable outcomes in their comprehensive plans. To investigate this question, we gathered data from 48 Michigan comprehensive plans using a publicly available equity evaluation tool and then reconciled coders' answers to ensure reliability. We tabulated descriptive results from the evaluations and developed three models using negative binomial regression analysis to test what kinds of communities include different types of recommendations in their plans. We identified and collected exemplars of good equity planning practice from the cases in our study.

### *The Equity Evaluation Tool*

The equity evaluation tool is a publicly accessible checklist (available at Carolyn Loh's Wayne State website [Loh, n.d.]) meant for planners, local government officials, or any other interested stakeholder to evaluate how well their local comprehensive plan meets a set of equity criteria. The MAP Social Equity Committee had been working for several years to develop a set of criteria to evaluate social equity in planning practice. The committee worked together to think about what an equitable plan would look like, what elements it should include, and what it should emphasize. The committee chose to focus the evaluation tool on the comprehensive plan because it is a publicly available document that anyone could evaluate without any additional specialized knowledge about the community and because the plan is supposed to set goals and objectives that drive subsequent policy choices (Loh, 2011). This means, however, that the tool does not ask about existing conditions or zoning and therefore cannot make any inferences about the relationship between plans and current levels of equity in these communities.

We based the equity evaluation tool on best practices compiled by the committee, planning literature on equity, and the APA Planning for Equity Policy Guide (APA, 2019). We pilot-tested the tool with 10 local governments selected for geographic and demographic diversity. We launched the tool publicly in fall 2019 through an email from MAP's executive director to the entire MAP membership list. We ended up with 24 volunteer participants. We suspected that volunteer participants might be more likely to care about equity issues or to think their plans did a relatively good job on equity, so we also chose a random sample of an additional 24 local governments to add to the volunteer group, for a total of 48 plans.[1] We asked planners in those local governments whether they would be interested in evaluating their plans; five were. One of us evaluated every volunteer plan in both the original volunteer group and the random sample volunteers as a second coder. Each of us independently evaluated the remaining random sample plans.

### *Intercoder Reliability*

The data for this project were generated in part through community science or "research that engages nonprofessionals in the process of creating new scientific knowledge" (Kosmala et al., 2016, p. 551).[2] This approach has become widespread in fields such as ecology and astronomy to extend resources, democratize science, and help disseminate knowledge (Burgess et al., 2017). In our case, the volunteers were planners who, although they were professionals in their own field

**Table 1. Characteristics of equity, general, and total recommendations.**

| | Equity | General | Total |
|---|---|---|---|
| Average inclusion rate | 24% | 54% | 40% |
| Range | 0–18 | 4–19 | 4–36 |
| Count | 21 | 21 | 42 |

and were given detailed instructions with examples of how they were to answer the questions, were not trained researchers. In this project, we did not have the opportunity to conduct training for volunteers aside from written instructions at the beginning of the tool because participation was anonymous, nor did volunteers use the tool more than once. These limitations on the front end are reflected in the level of agreement between coders: The overall percentage agreement (including open-ended questions) when we authors were the two coders was 78%, versus 63% when a volunteer was one of the coders. The initial percentage agreement ranged from 94% (Brooks Township) to 41% (Livingston County). Shorter, simpler plans in general had higher percentage agreement.

We therefore engaged in extensive data validation on the back end (Freitag et al., 2016). We tested for intercoder reliability by calculating percentage agreement and Krippendorff's alpha (*kalpha*) for questions on which we could expect agreement (Stevens et al., 2014). Consistent with Stevens and colleagues' (2014) work on intercoder reliability in plan content analysis, we found that the more dispersed and the greater number the relevant items in a particular category, generally the lower the *kalpha* statistic. We found low or even negative *kalpha* values for some questions with highly skewed distributions (Feng, 2015) and suspect that some other low values may be the result of systematic disagreement between the two coders (Krippendorff, 2004). Overall, we found *kalpha* useful to flag questions to which we needed to pay particular attention during our validation process, but because of the nature of the data and the involvement of volunteers we did not impose cutoffs below which we would not use the data. See Table 1 for percentage agreement and Krippendorff's alpha calculations for the questions.

We flagged every instance of disagreement between coders, whether volunteers or researchers. We then together re-evaluated and reconciled every discrepancy. Most were instances where one of the original coders had simply missed something rather than being areas of genuine disagreement or ambiguity (Norton, 2008); the percentage of plans reporting each element usually went up when we went back to reconcile the answers. This trend suggests that it was often difficult for any single coder to find every element requested in such long and complex documents. It also suggests that as a result of our extensive validation process our revised data likely capture most occurrences of a particular plan element.

## *Data and Analysis*

In this study, we ask to what extent and in what ways local governments include goals and recommendations that would advance equitable outcomes in their comprehensive plans. To help answer this question, we created three models to help us explain why communities might make different types of recommendations. As suggested in the literature, goals, objectives, and policies that would advance equity are often promoted for their ability to advance other goals, particularly economic ones. In our equity evaluation tool, we ask about a long list of possible recommendations that would advance equity goals that might appear in a plan. Some recommendations are explicitly equity focused, whereas others would likely have the effect of improving equity but could also fall into the category of generally accepted good planning practice. For example, adopting inclusionary zoning is a policy recommendation whose primary purpose is to increase the availability of affordable housing. We would categorize this as an equity-focused recommendation. On the other hand, many plans promote walkability. Although walkability can improve equity by making it easier for people who do not or cannot travel by car to get around, it is part of a generally accepted set of good planning practices that are promoted for many other reasons, including economic development. There were 21 equity-focused and 21 general recommendations. Our three models help explain which types of communities include these different types of recommendations in their plans. Model 1 uses a count of equity-focused recommendations as its dependent variable, model 2 uses general recommendations as its dependent variable, and model 3 uses the combined recommendations as its dependent variable. See Table 2 for a list of recommendations and their categories.

## *Community Characteristics*

We hypothesized that certain community characteristics would influence the equity focus of the plans. We describe these independent variables in Table 3. The communities in our sample range from small rural townships to medium-sized cities and two counties with very low-income residents to very high-income residents. The most diverse community was 46% White and the least was 99% White. First, we expected that

**Table 2. Plan equity evaluation tool plan elements and questions.**

| Plan element | % Included (reconciled) | Initial % agreement | *kalpha* | Count | Equity vs. general |
|---|---|---|---|---|---|
| Overall plan organization | | | | | |
| What year was the plan adopted? | n/a | n/a | n/a | n/a | |
| Did consultants write or assist with writing the plan? | 85 | 79 | .404 | 82 | |
| How many pages long is the plan? | n/a | n/a | n/a | n/a | |
| Does the plan include any provisions for monitoring implementation progress? | 92 | 38 | .151 | 44 | G |
| Does the plan include a demographic analysis? | 92 | 45 | .183 | 44 | G |
| Overall equity orientation | | | | | |
| Do the words equity/equality/fairness/justice appear anywhere in the plan? | 46 | 60 | .216 | 22 | E |
| Does the plan mention any obstacles (technical, political, legal, etc.) to implementing equitable policies? | 18 | 77 | –.028 | 9 | E |
| Does the plan identify geographic areas that are underserved or that have particular social needs to be addressed? | 42 | 51 | .263 | 20 | E |
| Does the plan identify groups of residents who are underserved or who have particular social needs? | 65 | 38 | .307 | 31 | E |
| Planning process | | | | | |
| Does the plan describe the public participation process for this plan? | 79 | 53 | .614 | 38 | G |
| Did the plan include: | | | | | |
| In-person visioning session(s) | 46 | 77 | .627 | 22 | |
| Survey | 54 | 70 | .751 | 26 | |
| Focus group(s) | 27 | 83 | .67 | 13 | |
| Charrette(s) | 13 | 89 | .558 | 6 | |
| Scenario planning | 2 | 91 | –[a] | 1 | |
| Neighborhood workshop(s) | 10 | 85 | .238 | 5 | |
| Educational presentation(s) | 17 | 83 | .246 | 8 | |
| Other | 21 | 72 | .3 | 10 | |
| Does the plan mention how officials and/or staff incorporated that community feedback? | 65 | 34 | .411 | 31 | G |
| Does the plan mention efforts to engage historically marginalized groups? | 2 | 70 | .03 | 1 | E |
| Housing and land use | | | | | |
| Does the plan include a housing goal that includes affordable housing, workforce housing, and/or fair share housing? | 42 | 45 | –.166 | 20 | E |
| Does the plan define affordability anywhere? | 19 | 79 | .356 | 9 | E |
| Does the plan recommend the adoption of inclusionary zoning regulations of any kind? | 6 | 92 | .539 | 3 | E |
| Does the plan recommend increasing allowable residential densities in single-family neighborhoods? | 38 | 55 | .175 | 18 | E |
| Does the plan recommend increasing the amount of land planned for multifamily housing? | 60 | 43 | .067 | 29 | E |

*(Continued)*

**Table 2** (*Continued*).

| | | | | | |
|---|---|---|---|---|---|
| Does the plan address housing options for seniors? | 77 | 47 | .361 | 37 | G |
| Does the plan promote mixed-income neighborhoods? | 33 | 57 | .035 | 16 | E |
| Does the plan promote mixed-use developments? | 79 | 47 | .476 | 38 | G |
| Does the plan promote walkability? | 73 | 51 | .571 | 35 | G |
| Does the plan recommend density bonuses or other incentives for affordable housing in new developments? | 6 | 89 | .605 | 3 | E |
| Does the plan recommend accessory dwelling units? | 29 | 81 | .811 | 14 | E |
| Does the plan address supportive/ transitional housing? | 8 | 89 | .422 | 4 | E |
| Transportation | | | | | |
| Does the transportation plan include public transit? | 60 | 72 | .461 | 29 | G |
| Does the transportation plan include Safe Routes to Schools? | 29 | 68 | .49 | 14 | G |
| Does the transportation plan include Complete Streets? | 58 | 62 | .6 | 28 | G |
| Does the transportation plan mention improving transportation access for low-income residents? | 21 | 77 | .402 | 10 | E |
| Does the transportation plan include multi-mobility options for first- and last-mile connections to transit? | 22 | 62 | .196 | 15 | G |
| Does the transportation plan require sidewalks for new development? | 48 | 51 | .065 | 23 | G |
| Does the transportation plan recommend connecting existing neighborhoods with sidewalks or paths? | 69 | 45 | .477 | 33 | G |
| Environment, hazards, and safety | | | | | |
| Does the plan mention environmental justice? | 6 | 85 | –.04 | 3 | E |
| Does the plan mention environmental protection (air quality, noise mitigation, surface and stormwater quality) in geographic areas that are underserved or that have particular needs? | 17 | 49 | .071 | 8 | E |
| Does the plan identify natural hazards? | 63 | 53 | .535 | 30 | G |
| Does the plan talk about ensuring equitable protection from those hazards? | 4 | 66 | .472 | 2 | E |
| Does the plan identify human-caused hazards, such as industrial pollution, nuclear radiation, toxic wastes, dam failures, and transportation or industrial accidents that result in explosions, fires, or chemical spills? | 60 | 47 | .21 | 29 | G |
| Does the plan talk about ensuring equitable protection from those hazards? | 2 | 23 | .511 | 1 | E |
| Does the plan talk about the impact of climate change? | 15 | 92 | .607 | 7 | G |
| Does the plan make recommendations about providing residents or businesses with options for renewable energy? | 56 | 68 | .44 | 27 | G |
| Does the plan mention objectives related to crime or crime prevention techniques? | 27 | 79 | .395 | 13 | G |

*(Continued)*

Table 2 (*Continued*).

| Plan element | % Included (reconciled) | Initial % agreement | *kalpha* | Count | Equity vs. general |
|---|---|---|---|---|---|
| Community facilities | | | | | |
| Does the plan identify any groups of people who are underserved by community facilities? | 13 | 81 | –.114 | 6 | E |
| Does the plan identify any geographic areas underserved by community facilities? | 21 | 77 | .453 | 10 | G |
| Does the plan include at least one descriptive statement about future needs for pre-K–12 school facilities? | 42 | 70 | .563 | 20 | G |
| Food | | | | | |
| Does the plan contain a goal related to food security/access? | 15 | 85 | .354 | 7 | E |
| Economic development | | | | | |
| Does the plan contain a goal that suggests that economic development be equitable, or benefit the entire community, or something to that effect? | 25 | 66 | .078 | 12 | E |
| Does the plan recommend a community benefits agreement ordinance or similar? | 0 | 0 | —[a] | 0 | G |
| Future land use plan[b] | | | | | |
| Does the future land use plan recommend an increase in multifamily housing compared to existing land use? | 54 | 49 | .257 | 52 | |
| To what extent are planned areas of multifamily housing adjacent to transit? | n/a | 51 | .521 | n/a | |
| To what extent are planned areas of multifamily housing adjacent to potentially hazardous or noxious uses | n/a | 34 | –.06 | n/a | |
| Does the plan contain a zoning plan? | 75 | 38 | –.02 | 72 | |

Notes: a. *kalpha* could not be calculated because one or both of the coders returned only 0. b. The future land use questions were difficult to answer both because the range of answers was a poor fit for the actual circumstances and because most plans were silent on whether or not they recommended an increase in multifamily housing and whether or not planned multifamily housing was adjacent to transit or hazards, leading coders to guess based on maps. Even when we went back to validate the answers, we could not be very sure we were characterizing the plans correctly, a problem we did not experience with any other part of the evaluation tool. We therefore report these data but do not feel they were of sufficient quality to include in the model.

more racially diverse communities would have a stronger emphasis on equity. We thought these communities would have been more likely to have conversations about how to distribute community resources in an equitable way and how to mitigate the effects of negative externalities, whereas more homogenous communities might avoid such conversations (Osland, 2011). At a regional level, more heterogeneity can lead to less intergovernmental cooperation (Gerber & Gibson, 2005), but we thought that at the local level, heterogeneity might lead to a planning process that did not evade equity issues. We thought that communities with lower median household income would have plans with a stronger emphasis on equity. We also thought that equity issues would be at the forefront in communities with larger population sizes because people living in densely populated urban areas might be more vulnerable than those in suburban or rural areas (Flanagan et al., 2011). Finally, we thought that coastal communities might be more inclined to focus on equity in the sense of climate vulnerability given their exposure to coastal flooding, although evidence for this is mixed (Norton, 2005; Norton et al., 2018).

### *Plan and Planning Process Characteristics*

We expected that newer plans would have a stronger focus on equity. Given conversations in our state in the past few years about inequality, we thought perhaps those ideas would influence newer plans more than older ones. We thought that higher capacity communities, measured by number of planners on staff, would have a stronger emphasis on equity. Communities that have invested in a planning department with credentialed planners would benefit from that expertise and be more likely to have plans influenced by the AICP Code of Ethics (Loh, 2011, 2012; Loh & Arroyo, 2017). We also tested whether or not the involvement of

**Table 3. Independent variables used in the binomial regression models to predict equity focus.**

| Variable | Measured by | Expected effect on equity | Range | Mean | *SD* |
|---|---|---|---|---|---|
| Community characteristics | | | | | |
| Population | 2018 population[a] | + | 1,099–188,482 | 25,207 | 39,282 |
| Racial homogeneity | % White[a] | – | 46%–99.8% | 89% | 0.12 |
| Coastal | Boundary touching a Great Lake | + | Dummy: 81% no, 19% yes | | |
| Median household income | Median household income in 2018 dollars[a] | – | $31,037–$117,670 | $58,468 | 18,220 |
| Plan/process characteristics | | | | | |
| Capacity | No. planners on staff | + | 0–3 | 0.82 | 0.88 |
| Plan year | Year plan adopted | + | 1990–2019 | 2012 | 6.34 |
| Consultant involvement | Consultants mentioned in plan | + | Dummy: 85% yes, 15% no | | |
| Total public participation | Count of different public participation modes used | + | 0–8 | 2.1 | 2.1 |

Note: a. U.S. Census American Community Survey, 2018.

planning consultants in writing the plan might increase its equity focus. Previous research has shown that the involvement of planning consultants can orient the plan toward smart growth principles (Loh & Norton, 2015), so we thought their involvement might also orient the plan toward equity. Finally, based on our review of the literature, we thought that communities with more robust, multimodal public participation processes would exhibit a stronger commitment to equity (Innes & Booher, 2004).

To test these hypotheses, we use negative binomial regression because our dependent variables are count variables that are overdispersed and do not contain excess zeros. We discuss the results of that analysis in the next section.

## Equity Recommendations in Comprehensive Plans

We first look at descriptive results from the equity evaluation tool and then discuss the results of the negative binomial regression models.

### *Descriptive Results*

Table 1 describes the differences between equity, general, and total recommendations. General recommendations appear with much greater frequency in the plans. The range of recommendations between the strongest and weakest plans is quite large. As shown in Table 2, only 46% of plans contained one or more of the words *equity*, *equality*, *fairness*, or *justice*, indicating that these concepts were not a significant influence on a majority of the plans. Moreover, of the 22 plans that did include one or more of these words, six only included standard language on mobility equity copied from Complete Streets documentation (National Complete Streets Coalition, 2020), with no other mention of equity in the plan. So only one-third of the total plans independently mentioned equity outside of the Complete Streets policy. The proportion of plans that included equity-oriented goals was generally low. Housing was the highest, but fewer than half the plans included it.

A total of 42% of the plans identified geographic areas that were underserved or with particular social needs, but 65% of the plans identified groups of people who were underserved or had particular social needs. This number included age groups. Whereas 90% of the plans included some kind of demographic analysis, many plans only included age demographics, not race. Only Kalamazoo's plan mentioned efforts to include historically marginalized groups in the planning process.

### *Factors Influencing the Equity Orientation of Plans*

Next we report the results of our models, testing which factors influence the inclusion of equity-oriented recommendations in plans. We hypothesized that more heterogeneous communities and those with lower median household incomes would show a stronger equity focus in their plans. We also thought that newer plans and plans in coastal communities and those with more planning staff would show a stronger equity focus. Table 4

**Table 4. Negative binomial regression models predicting inclusion of general and equity-focused plan recommendations.**

| | Equity-focused recommendations | | | General recommendations | | | Total recommendations | | |
|---|---|---|---|---|---|---|---|---|---|
| **Independent variables** | **IRR** | ***SE*** | ***z*** | **IRR** | ***SE*** | ***z*** | **IRR** | ***SE*** | ***z*** |
| Population | 1.00 | 2.03[6] | 0.32 | 1.00 | 1.16[6] | 0.48 | 1.00 | 1.18[6] | 0.45 |
| Racial homogeneity | 1.95 | 1.38 | 0.94 | 1.83 | 0.78 | 1.43 | 1.87 | 0.78 | 1.52 |
| Coastal | 1.49 | 0.32 | 1.91* | 1.04 | 0.12 | 0.30 | 1.17 | 0.14 | 1.26 |
| Median household income | 1.00 | 5.57[6] | −0.85 | 1.00 | 3.09[6] | −1.08 | 1.00 | 3.11[6] | −1.24 |
| Capacity | 1.31 | 0.13 | 2.7*** | 1.21 | 0.06 | 2.07** | 1.18 | 0.07 | 2.93*** |
| Plan year | 1.03 | 0.02 | 1.79* | 1.02 | 0.01 | 2.11** | 1.02 | 0.01 | 2.49** |
| Consultant involvement | 1.02 | 0.24 | 0.07 | 1.04 | 0.14 | 0.26 | 1.04 | 0.14 | 0.27 |
| Public participation | 1.14 | 0.05 | 2.95*** | 1.05 | 0.03 | 1.97** | 1.08 | 0.03 | 2.97*** |
| **Summary statistics** | | | | | | | | | |
| Number of observations | 48 | | | 48 | | | 48 | | |
| LR statistic | 35.01 | | | 29.45 | | | 38.81 | | |
| Prob > $\chi^2$ | 0.0000 | | | 0.0003 | | | 0.0000 | | |
| Pseudo $R^2$ | 0.1392 | | | 0.1097 | | | 0.1198 | | |

Note: *$p < .1$; **$p < .05$; ***$p < .01$. IRR = Incident Rate Ratio; LR = likelihood ratio.

shows the results of the negative binomial regression analysis.

These models generally do not support the hypotheses that more diverse and lower income communities are more likely to have plans with a stronger equity focus. Homogeneity and median household income are not significant in any of the models. Capacity, plan year, and public participation, however, are highly significant in all of the models. A plan that is 1 year newer would be expected to include 3% more equity-focused recommendations, 2% more general recommendations, and 2% more total recommendations, holding all other variables constant. Therefore, newer plans are "better": They include a more comprehensive list of policy recommendations. Even more than that, though, they are slightly more likely to be more equitable in those recommendations. For every additional public participation mode used, a plan would have 14% more equity-focused recommendations, 5% more general recommendations, and 8% more total recommendations. Capacity shows the greatest influence on plan equity. For every additional planner on staff, all other variables being constant, a community's plan would be expected to include 31% more equity-focused recommendations, 21% more general recommendations, and 18% more total recommendations. According to our models, having more planning staff makes plans better and more comprehensive; it also makes them much more likely to include equity-focused recommendations. Coastal communities have 49% more equity-focused recommendations than noncoastal communities, but there are no significant differences between coastal and noncoastal communities in either general or total recommendations. We speculate that coastal communities focus more on climate vulnerability than inland communities.

## Are We Planning for Equity?

We find that the third corner of the planner's triangle is indeed neglected in local comprehensive plans. Partly this is because it can be genuinely hard, politically and fiscally, to recommend redistribution away from the status quo, although plans in Michigan are advisory and commit no resources by their recommendations. We argue that this neglect is also partly because planners have not been looking for and testing for equity in these plans. Compared with Berke and Kaiser's (2006) model plan quality evaluation tool, our plan equity evaluation tool focuses much more explicitly on particular plan content rather than plan structure. The model tool would give a high score to a plan that paid little attention to equity if it were well structured, written, and reasoned, whereas our tool gives much more weight to equity-related content. The equity evaluation tool allows us to see that many plans give the impression that local government officials are not aware of or interested in identifying vulnerable populations, even though they exist in even generally affluent areas. The plan equity evaluation tool used in this study is one attempt to put forward a set of expectations about what equity-related recommendations plans could include. The involvement of volunteers was meant to help disseminate the ideas contained in the evaluation

**Table 5. Good equity practices for local comprehensive plans.**

| Plan element | Good equity practice |
|---|---|
| Overall plan organization | Ensure the plan reflects community conditions and good planning practice. |
| | Make sure the planning committee leadership represents the community's diversity. |
| | Make plan accessible to all users. |
| | Make sure plan data and maps comprehensively describe the community. |
| Overall equity orientation | Make equity an organizing principle for the plan. |
| | Include a detailed demographic analysis that identifies socially vulnerable populations. |
| | Identify neighborhoods where there are concentrations of socially vulnerable people. |
| Forms of public participation | Make sure the community's full range of diversity is represented in the planning process. |
| | Incorporate feedback into the plan. |
| Housing and land use | Include housing goals and objectives that provide for housing for all ages and income levels. |
| Transportation | Make sure there are transportation options for all residents. |
| | Plan for nonmotorized options. |
| Environment, hazards, and safety | Identify natural and human-caused hazards. |
| | Identify areas of high crime and/or areas where residents do not feel safe. |
| Community facilities | Take inventory of and map community facilities. |
| Food | Include goals and objectives about food security and food access. |
| Economic development | Make equitable economic development an explicit goal in the plan. |
| Future land use plan | Make future land use choices transparent. |

tool and spur communities to have conversations about equity.

We find that plans in communities with more planners on staff had more equity-focused recommendations. Additional capacity has been associated with many positive planning outcomes; it is not surprising that it also influences equity. If most planners care about equity, as we suspect they do, having more planners around allows them to nudge plans toward an equity focus. This finding is especially poignant because the typical Michigan local government has no full-time planner on staff. Consultants were involved in writing 85% of the plans, so most of the plans were written by experienced, trained planners, yet having more planners on staff still seems to matter. Planners who work full time in a community develop independent knowledge of that place's social landscape, whereas consultants may only know what local officials tell them about community needs, but our study does not fully explain this finding. In any case, there is a clear role for planners to share ideas about equitable planning and lead discussions about what equitable planning would look like in a particular community.

We also find that newer plans had more equity-focused recommendations. We consider this good news, because it suggests that the idea that equity is important, advanced by both national APA and MAP, is percolating through local governments over time. However, we cannot be sure that a community's interest in equity, as expressed through the plan, will have staying power. Liao et al. (2020) find that the presence of a citizen task force is associated with more sustainability actions in following the adoption of a sustainability plan. Although our study does not measure the presence of equity-oriented citizen task forces in the local governments, the MAP Social Equity Committee has a strong and ongoing commitment to identifying and disseminating equity best practices throughout the state. The existence and efforts of this group may help keep up interest in planning for equity.

Finally, plans with robust public participation processes that involved multiple modes of gathering public input were significantly more equity focused. It is possible that participants in the process brought up equity issues and those priorities guided the plan. It is also possible that a community that invests resources in an extensive public participation process is already committed to equity, and the plan reflects that commitment.

## Ways to Increase the Equity Focus of Plans

In this section, we highlight some of the major plan elements and provide some examples of good planning equity practices from our study. Table 5 presents a starting place for good equity practices and ways to incorporate those practices into plans (see the Technical

Appendix for an expanded version of Table 5 that includes more detailed action steps). Communities should be able to implement most of these changes in their next planning cycle. Many of them require only better mapping and analysis or putting existing maps together in new ways. Some of these practices do require more effort, but especially in the current climate of increased awareness about racial inequality, continuing to marginalize equity in plans should no longer be acceptable.

Overall, plans need to make equity an organizing principle of the plan. Livingston County's plan, winner of national and state APA awards, serves as a model for other communities to establish equity within the framework of their plans. It has a 10-page "Social Equity" section that includes issues of aging, access to core services, and mobility. It includes examples of best practices in local governments within the county, which helps its constituent communities see local exemplars that they can emulate (Livingston County, 2018). Communities also need do a much better job of identifying vulnerable people and areas of the community and explicitly linking people to place. Plans should have a demographic analysis and explicitly identify socially vulnerable groups and underserved areas in the community. For example, as part of its extensive demographic section, Fenton Charter Township has a "Families in Poverty" map that shows although the overall poverty rate is low, families living in poverty are concentrated in one corner of the township, with rates as high as 33% in one block group (Fenton Township, 2018). This approach makes visible an issue and a group of people who might otherwise have been invisible.

Planning processes must do a better job of representing the community's diversity. Planners are already aware of this but in many cases need to work harder and more creatively. We find that increasing the types of public participation approaches is strongly correlated with a more equity-focused plan. In a large, diverse city, this might mean a multifaceted approach like Kalamazoo's:

> Meetings were held throughout the City at community-wide events and in neighborhoods. The City partnered with neighborhood leaders, local businesses, nonprofits, religious institutions, and residents to spread the word about [Imagine Kalamazoo 2025] events. Outreach tools were wide-ranging: City staff knocked on doors, left flyers in little free libraries, published notes in neighborhood newsletters, and engaged through social media. (City of Kalamazoo, 2017, p. 6)

In a smaller, less diverse community with fewer resources, this might mean conducting an inexpensive online survey in addition to in-person meetings. Presque Isle Township created an online survey that received responses from more than one-third of residents, which they analyzed and found generally represented overall population characteristics (Presque Isle Township, 2014). Regardless of the type and size of the place, planners should know who needs to be heard and keep working until they have reached and included them.

Every plan can be expected to have a goal about providing a variety of housing types to accommodate all ages and income levels. We were surprised at how many plans did not have a goal related to housing affordability and how many did not explain what affordability looked like in the local context. The plan should identify any demographic groups underserved by the community's current housing stock and plan to accommodate them, as the City of Richmond does in its "Housing Needs Assessment" (i.e., young families, seniors) in the context of providing affordable housing alternatives (City of Richmond, 2002).

Communities should plan for equitable transportation access. Cities with transit should conduct analysis to see whether some neighborhoods have less access to transit (and to find out who lives in those neighborhoods). Rural communities may not have any transit, but they do have the ability to do nonmotorized planning. For example, Benton Charter Township's plan included Rural Complete Streets, with wide, paved shoulders or accompanying bike paths (Benton Charter Township, 2019).

Plans should identify natural and human-caused hazards in the community and explain whether or not climate change is likely to exacerbate them. The plan should explain whether or not some people or areas are more likely to be affected by hazards and work to ensure equitable protection. Many coastal communities in Michigan are already paying attention to these issues, but other communities must also do so. Bridgman is one such coastal community that conducted hazard-specific vulnerability assessments to build community resilience (City of Bridgman, 2019). These assessments describe current hazards such as lakeshore flooding, windstorms, and extreme heat; how they are likely to change as the climate warms; and how they are likely to affect vulnerable populations, such as those living in poverty and those with disabilities, which helps the community focus resources on those most in need.

Finally, we urge planners to make land use changes much more transparent. Plans should include tables that show changes in amount of acreage and percentage changes in land use categories. They should provide maps that highlight major land use changes. And they should explicitly link land use decisions to the information in the plan's fact base. GIS allows us to easily overlay future land use with information like hazards, transit routes, and community facilities. These maps should be

included to show how decision makers have considered both hazards and amenities when planning future land uses. These three recommendations make it much more difficult to hide future land use planning that puts people in harm's way or distributes amenities inequitably.

## Conclusion

Planners hold equity to be one of the most important principles of planning practice, yet it is often subsumed by other goals. In this study we evaluate local comprehensive plans to see how and in what ways local governments incorporate equity recommendations into their plans and find, in general, a very low orientation toward equity. Newer plans, plans in places with higher planning capacity, plans in coastal communities, and plans with multimodal public participation have a greater equity orientation. We provide a set of good equity practices for plans that could mostly be implemented within any community's next comprehensive planning cycle. We challenge planners to overhaul their next plan to make equity on a par with environmental and economic concerns, completing the planner's triangle.

Although we do not directly investigate implementation, we hope that more equity-focused goals and recommendations will ultimately lead to more equitable outcomes, as Liao et al. (2020) have found. In addition, we do not investigate the influence of existing equity conditions (such as in the index created by Heckert & Rosan, 2016) on plan documents. We hope that future research will investigate the links between plan equity focus, regulation (including zoning), and equity outcomes such as measures of inequality.

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**ACKNOWLEDGMENTS**

*We thank Andrea Brown, Harmony Gmazel, and the members of the Michigan Association of Planning Social Equity Committee for their work in developing the plan equity evaluation tool, the planners who volunteered to evaluate their plans, and Anna Osland and Mildred Warner for their helpful comments on the article.*

**RESEARCH SUPPORT**

*This research was funded in part by the Wayne State University College of Liberal Arts and Sciences.*

**SUPPLEMENTAL MATERIAL**

*Supplemental data for this article can be found on the publisher's website.*

**NOTES**

**1.** We conducted independent *t* tests for the volunteer and random groups for the variables total population, median household income, and percentage White, which we felt covered the most important potential differences between the two groups of local governments. There were no significant differences between the groups' mean percentage White and median household income. The mean population size between the two groups was significantly different because the volunteer group contained more mid-sized cities and two counties. However, as we discuss, population size was not a significant explanatory factor in any of our models.

**2.** *Citizen science* is the original term for this type of research, but *community science* is becoming more widely used (Bonney et al., 2016; Wilderman et al., 2007).

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# Racial inequities in rural, remote, and northern Canadian planning

By Jonathan Boron, Katherine Levett, and Myfannwy Pope

**Summary**

This reflection outlines the ways in which planning has and continues to fail Indigenous and Black rural communities across Canada. In this article we briefly document the legacies and impacts of systemic racism within the planning of major infrastructure and resource exploitation sectors on rural, northern, and remote communities in Canada. Specifically, we discuss environmental impact assessment and consultation processes, drawing from examples to reflect on resultant disparities in health, economic outcomes, and climate change impacts between urban and rural communities. We provide recommendations that may help to foster truly equity-based planning in environmentally-sensitive and resource-rich rural regions within Canada.

**Sommaire**

Cette réflexion décrit les façons dont la planification a laissé et continue de laisser de côté les communautés rurales autochtones et noires du Canada. Dans cet article, nous documentons brièvement les héritages et les impacts du racisme systémique dans la planification des grandes infrastructures et des secteurs d'exploitation des ressources, sur les communautés rurales, nordiques et éloignées du Canada. Plus précisément, nous abordons les processus d'évaluation et de consultation des impacts environnementaux, en nous appuyant sur des exemples, pour réfléchir aux disparités qui en résultent en matière de santé, de résultats économiques et d'impacts du changement climatique, sur les communautés urbaines et rurales. Nous fournissons des recommandations pouvant aider à favoriser un urbanisme véritablement fondé sur l'équité dans les régions rurales, en matière d'environnement et de ressources au Canada.

## Structures of anti-Indigenous and anti-Black Racism in Canada

The year 2020 brought systemic racism and inequity into mainstream planning discourse. As researchers in resource and environmental planning, we see this as an opportunity to reflect on and examine the procedural inequities and racism within the fields of rural resource planning. Canada is founded on an ongoing structure of settler colonialism, which aims to erase Indigenous identities to secure access to territory on which Indigenous nations have sovereign claims.[1] This process is evidenced by a series of assimilation and genocide efforts, including residential schools and the outlawing of Potlatches and other political and spiritual practices.

Slavery was practiced in Canada from the 1600s into the early 1800s.[2] The social, political, and economic oppression from slavery embedded anti-Black racism into Canadian institutions and society, which works to disempower and bring violence on Black communities and individuals.

Slavery and settler colonialism particularly underpin ongoing inequities among Indigenous and Black communities in rural areas. Black and Indigenous peoples have historically and presently defied the notion that rural Canada is white, along with numerous racialized communities often considered solely urban, including Japanese, Chinese, and Sikh communities.

In this article we briefly document the legacies and impacts of systemic racism within the planning of major infrastructure and resource exploitation sectors on

rural, northern, and remote communities in Canada. We then turn our attention to recommendations that may help to foster truly equity-based planning[i] in environmentally-sensitive and resource-rich rural regions within Canada. Throughout this article we provide references to case examples of racism in resource planning. While our examples primarily focus on Indigenous and Black communities, we emphasize that the processes described in this article and other rural planning practices impact a diversity of rural and remote racialized communities.

Path dependence and institutional memory of white supremacy and settler colonialism in our political and social systems is at the root of procedural injustice in the environmental assessment process, including infrastructure siting and resource exploitation that undermine socially just and equity-based planning in rural and remote communities.[3] Procedural injustice includes a lack of treaty-right recognition in major project development and colour-blind processes of impact assessment.[4] Impact assessment rarely recognizes cumulative effects of development and fails to capture the full holistic impact on the lands, water, and communities affected.[5] Such exclusionary engagement processes maintain disregard for Indigenous and Black communities' abilities to consent to harmful development in their communities (**Figures 1** and **4**).

Dispossession of land represents the key mechanism of settler colonialism and a fundamental legacy of slavery. Land is necessary for survival through spiritual, economic, and social means. Canada's founding, including the myth of *Terra Nullius* (empty land) and the development of the Indian Act and reserve system underlie ongoing dispossession through regional infrastructure and resource development that increasingly contribute to settler-created climate change impacts.[6] The inability of enslaved people to own land, reneged promises of decent land to Black loyalists, and discriminatory zoning and ownership laws against Black individuals fed the segregation of Black and white communities.[7] Segregation has allowed the development of white communities at the expense of Black ones, including the siting of a mega waste treatment plant in Lincolnville, Nova Scotia (**Figure 1**) .

**Figure 1. Lincolnville, Guysborough County, Nova Scotia Landfills**
Lincolnville is a small African Nova Scotian rural community that was settled by Black loyalists in 1784. A first-generation landfill was opened a kilometer away from the community in 1974, despite protests. In 2006, the Municipality of the District of Guysborough closed the first landfill and opened a second-generation landfill. Residents assert the municipality failed to properly consult, ignored and denied attempts by residents to organize and present views, and neglected issues of race.



Unist'ot'en Protest, Vancouver. Source: Jonathan Boron.

Undeniably, we see racism in planning and policies in urban spaces, as evidenced by exclusionary zoning, land use, law enforcement, surveillance, and data collection processes.[8] Insidious acts of structural racism in rural planning appear in the historic and ongoing disparities, and social and environmental impacts associated with land use for resource extraction and development in rural regions (**Figures 1**, **3** and **4**). This results in the suppression of rights of Indigenous peoples defending their land and the history of Black and other communities of colour advocating for the right to land.

## Rural-Urban Disparity

Urban centres in Canada benefit from the displacement, as a tactic of exploitation, of Black, Indigenous, and racialized communities in rural areas. Natural resources account for 16.9% of Canada's GDP and generate $21.4 billion a year in government revenues. In 2019, natural resources including energy, minerals and metals, and forestry accounted directly and indirectly for 1.9 million jobs.[9] Much of the benefit of these jobs and the revenues generated flow directly to urban communities in the form of the resulting goods and services along with the management, investment, and logistics jobs related to these industries. At the same time, urban communities benefit from hydropower, oil and gas, mining, and waste disposal taking place outside of their communities. These decisions about land use and resource management create an illusion for urban communities that hides the impacts on rural communities. By design, the Site C dam in British Columbia, the Lincolnville Landfill in Nova Scotia, the Giant Mine site in the Northwest Territories, housing development in Six

i According to the American Planning Association, "Planning for equity is intended to challenge those planning practices that result in policies, programs, and regulations that disproportionately impact and stymie the progress of certain segments of the population more than others."

**Figure 2. Six Nations of the Grand River territory, Ontario – 1492 Landback Lane**
Land reclamation by the Haudenosaunee of Six Nations to stop housing developments on land that has been a part of a specific land claim since 1989. The Haldimand Accord sets aside the title of land on six miles of either side of the Grand River for the Kanien'kehá:ka and other Haudenosaunee. The federal government refuses to settle these specific claims, and developers continue to try to build on this territory without proper consultation of the Six Nations community.

**Figure 3. Dene First Nation Traditional Territory; Yellowknife, Northwest Territories – Giant Mine Site- Arsenic Deposit**
During the operation of the Giant Mine from 1948 to 2004, arsenic poisoning as a result of gold extraction methods caused First Nation members of the Wiliideh Yellowknives Dene First Nation to get sick, impeded on their ability to exercise treaty rights to hunt and fish, and caused the death of a Dene toddler from eating snow in 1951. Today, the soil around the Giant Mine site has tested at nearly three times the arsenic safe exposure limit.



W.A.C. Bennett Dam, Peace River. Source: Jonathan Boron.

Nations territory in Ontario, and fracking in British Columbia have or will benefit urban communities across the country, while protestors and land defenders have been and continue to be criminalized.

### Health Disparities

Land use policy has and continues to fail Indigenous, Black, and other racialized communities across Canada which has resulted in increasing health disparities. Indigenous, Black, and other racialized communities have been exposed to noxious land uses and infrastructure for the good of Canada's economy (**Figures 3** and **4**). While Environmental Assessment (EA) proponents, who in many cases are planners, are required to consult with Indigenous communities, often we see that these consultations are inadequate even if they meet legislative requirements (**Figures 1**, **2**, **3** and **4**). Further, as in the case of natural gas development within Treaty 8 (**Figure 4**), environmental impact assessment processes do not address cumulative impacts or impacts resulting from hundreds of small-scale developments that are outside EA triggering thresholds. Further, the absence of any landscape-scale planning and management to monitor and mitigate overall cumulative impacts from resource development results in widespread habitat fragmentation, ecological degradation, and unknown impacts on hydrological systems – all of which impact ecological and social resilience of rural and Indigenous communities.

Decisions on land use, lack of adequate or any consultation with those affected, and extraction and exploitation of resources have created systemic inequities that includes the slow violence of environmental contamination, evidenced by arsenic poisoning in Giant Mine site (**Figure 3**). Indigenous communities across Canada have had boil water advisories in place for generations, while health experts have documented cancer clusters in many Indigenous communities.[10] Importantly, the social impacts of land and resource decisions have had and continue to have detrimental effects, as evidenced by the loss of sacred and cultural sites with historic significance, a decline in population, and increasing violence against Indigenous people, especially women and girls, which have been exacerbated by proximity to remote work camps.[11]

Many rural, northern, remote, and Indigenous communities are also on the frontlines of climate change and are experiencing increased vulnerability due to climate change's associated impacts. Coastal communities are vulnerable to the impacts of sea level rise, while all Indigenous communities are affected by the rapid decline in biodiversity and species abundance which threatens food security, subsistence living, cultural practices, and livelihoods. Further, rural and northern communities are often under-resourced in their ability to address these challenges due to provincial and federal economic priorities, as discussed under the urban-rural disparities section of this article.[12]

### Recommendations

Current environmental and resource planning processes in Canada maintain systems of oppression and inequality that planners can address. We provide several recommendations on how planning professionals can personally, and within their organizations, practice equity-based environmental and resource planning in rural communities:

#### 1. Commit to reconciliatory action and recognize Indigenous consent

Land acknowledgements that are not attached to action hold no meaning. Advocate for 'colonial audits'[13] within your organisation and commit to truth recognition. This requires meaningful consultation that is consent-based, even if there are competing or non-existent jurisdictional requirements. Indigenous

**We must bring increased awareness and attention to environmental racism in Canada. We have to talk about it, acknowledge its existence, and understand that inaction maintains these structures of oppression.**

peoples must be consulted early on and throughout these processes, provided space to voice their concerns and most importantly, be a part of the decision-making process. This also requires recognition of Indigenous jurisdiction and decision-making processes. In many cases a lack of senior government action on land and resource policy has created much conflict for municipalities. Develop strategies for de-escalation, negotiation, and solidarity to push senior governments to honour their responsibilities.

### 2. Plan for cumulative effects, climate impacts, and community resilience

Across many jurisdictions, cumulative effects assessments are under-utilized and lack climate impact consideration. Social diversity is an important aspect of socio-ecological resilience, however state-based impact assessments inadequately consider or recognize alternative and specifically Indigenous values and views within decision-making frameworks that may consider more holistic interrelation of the impact of development decisions.[14] Further, consideration of both intra- and inter-generational equity factors improve the long-term resilience of planning decisions for rural communities. Are the decisions we make today good decisions for our community generations into the future? Climate change impact forecasting should be an important factor in project decisions.



Site C Dam, Treaty 8 Territory. Source: Jonathan Boron.

**Figure 4. Treaty 8 Territory, British Columbia – Natural gas drilling and fracking operations**
Increased fracking for liquefied natural gas in northeast BC has resulted in unauthorized dams, substantial increases in water use, and dangerous contamination in water supply as First Nations have no control over industry activity, despite their inherent and treaty rights.

**Figure 5. Site C Dam**
A 1,100-megawatt hydro dam currently under construction on the Peace River in northeastern British Columbia. Proposed in the 1970s, the project has faced many court challenges from First Nations who oppose flooding 128 km of the Peace River, putting burial grounds, traditional hunting and fishing areas and habitat for vulnerable species under 50 m of water.



# Disability justice in the city

By Thea Kurdi and Anika Abdullah

**Summary**

Over 6.2 million Canadians self-report having a disability, a statistic not fully representative of the population requiring accessibility measures in daily life. Impacts of an inaccessible built environment are analyzed within a planning context, primarily addressing the 15-Minute and Walkable City frameworks. While sustainable urban planning efforts are needed, legislation regarding accessibility integration is essential. We pose a series of questions and design considerations to demonstrate the severity and how planners must think to overcome them.

**Sommaire**

Plus de 6,2 millions de Canadiens déclarent avoir un handicap, mais cette statistique n'est pas pleinement représentative de la population qui a besoin de mesures d'accessibilité dans la vie quotidienne. Les impacts d'un environnement bâti de manière inaccessible sont analysés dans un contexte de planification, en tenant compte principalement des cadres des villes de 15 minutes et des villes accessibles à pied. Si des efforts de planification urbaine durable sont nécessaires, la législation concernant l'intégration de l'accessibilité reste à améliorer. Nous posons une série de questions et envisageons des options de design pour démontrer la gravité et la manière dont les planificateurs doivent penser pour les surmonter.

Modern planners are pronouncing the benefits of active transportation, pedestrian-friendly communities, and energy efficiency under the spectre of climate change fears in medium and high-density cities. This wave of planning is resulting in wide sidewalks, bike lanes, minimum parking reduction removals, mobility pricing, building energy regulations, and multi-user paths intended to reduce vehicle traffic in urban areas. Planners must be wary that these grand ideas that purport to move us towards greater sustainability fail to acknowledge or include accessibility.

Historically, people with disabilities have been dismissed and under-represented in issues regarding the built environment and planning policies. This is primarily due to systemic ableism since disabled people are being left out of all conversations regarding city planning. A lot of this discrimination is caused by inaccessible venues for town halls, unreliable public transit systems, and lack of accommodations in education for people with disabilities to become industry professionals.

While people with disabilities often cannot join the conversation as stakeholders, educators, or as industry professionals, it is essential for the community's voices to be heard and amplified in order to overcome the challenges of systemic ableism and ensure it is not being perpetuated in the built environment. This article will focus on a selection of the many areas in design that must be reimagined for better accessibility integration and consideration in urban planning.

## Who are people with disabilities? How many of 'them' are there?

According to Statistics Canada's 2017 *Canadian Survey on Disability*, approximately 22% of Canadians aged 15 and above self-reported as having at least one long-term disability, representing at least 6.2 million people across the country. The problem with this data is the reliance on self-reporting, which will miss Canadians who need accessibility accommodations but do not identify with having a disability or will not admit on a census form that they do. This might include people living with diabetes, arthritis, dementia, or chronic pain from common injuries, as well as, people losing their sight and hearing with age or beginning to use a cane or walker.

When designing public space, it is also often helpful to consider who benefits from accessibility measures other than those with disabilities. None of our census data captures those with temporary or situational disabilities or those who also may find accommodations beneficial. From a universal design perspective, for example, many parents using strollers benefit from curb cuts, clear floor space at rest areas, elevators and accessible eating areas. Consider that children and people of short stature greatly benefit from lower height handrails and drinking water fountains. These are all impacts of the 'curb cut effect' where studies revealed curb cuts were beneficial to more than just the disability community.[1]



**A walkable community must provide accessible paths and space for people with disabilities to ensure that all members of the community can appreciate the benefits of a higher quality of life. At the same time, integrating necessary accessibility measures to improve safety is essential to encouraging holistic sustainability in cities.**



Inaccessible public art featuring blue poles rising up from the sidewalk hazardously at various heights and obstructing the path of travel. Source: Thea Kurdi.

### Accessibility regulations

Despite the goal of the 2006 *Accessibility for Ontarians with Disabilities Act* (AODA) to make Ontario accessible by 2025, today, in 2020, we still see significant accessibility barriers in all aspects of the built environment as demonstrated in numerous AODA Alliance YouTube videos.[2] There are many lessons, successes, and mistakes to be learned from the approach that Ontario took that will benefit provinces that have also adopted provincial legislation, like the *Accessibility for Manitobans Act* of 2013 and the *Nova Scotia Accessibility Act* of 2017. With the addition of the new federal *Accessible Canada Act* of 2019 with its 2040 deadlines, it would seem critical for success that these initiatives involve developing action plans and frameworks with measurable goals and five- to 10-year interim deadlines, instead of repeating Ontario's mistake of hoping for the best.

In order to move towards a more equitable built environment, urban planning must rethink accessibility as a critical part of the built environment. Neglecting accessibility when building housing, roadways, transportation, parks, public squares, parking lots, and all other features of cities and towns contravenes the *Canadian Charter of Rights and Freedoms* and our *Human Rights Codes*. Integrating accessibility is critical to the principles of design. Furthermore, ensuring accessibility as a principle from the inception of all projects and developments in consultation with people with disabilities is the necessary first step of achieving disability justice. Establishing accessibility in transit networks, roadways, and pedestrian infrastructure creates environments where people with disabilities may benefit from being as independent as non-disabled neighbours, seamlessly able to get from housing to employment, healthcare, shopping, and entertainment.

### Walkable Cities and 15-Minute Cities through a disability lens

Walkable Cities and 15-minute Cities have been a model for more sustainable cities, and are now getting a great deal of attention and generating a lot of excitement since lockdowns to protect against the spread of COVID-19 began across the globe. The 15-minute city was originated by Carlos Moreno who advocates for increasing the quality of life by providing a diverse range of active mobility options in a city. In 2020, the mayor of Paris embraced this concept and advocated for its integration in city planning measures during the pandemic to encourage a healthy outdoor lifestyle. The Walkable City is an older concept with many aspects of the 15-Minute City but it focuses on the location of amenities, housing, employment, and recreation within communities.

Both ideas focus on decentralized services within walking distance from residential areas and redeveloping infrastructure to support active and multi-modal transportation to reduce vehicle reliance. Multimodal transportation systems are interconnected networks of pedestrian, bike, bus, streetcar, subway, and other transport infrastructure that make leaving the car at home possible and preferable. In addition to access to essential services and employment, benefits also include exercise and opportunities for greater social interaction. This approach to city planning reduces traffic congestion and provides the impetus to evolve and fix old pedestrian infrastructure.

What these two frameworks are missing is a consideration of the needs of the disability community. They do not consider that many people with disabilities rely on vehicles because of limited mobility or require a companion for navigation and safety. Furthermore, people with disabilities cannot access housing, employment, or shops if the buildings and the routes leading up to the buildings themselves are not accessible. A walkable community must provide accessible paths and space for people with disabilities to ensure that all members of the community can appreciate the benefits of a higher quality of life. At the same time, integrating necessary accessibility measures to improve safety is essential to encouraging holistic sustainability in cities.

### How do we move forward towards greater accessibility?

As planners develop walkable and 15-minute cities, the following questions must be considered in order to build in greater accessibility measures within the design of paths of travel and the interaction of these pathways with public spaces and buildings. For example, are pedestrian paths wide and protected from traffic? Are they safely connected by accessible ramps and curb cuts? To provide equitable access we must also consider: are the paths navigable for blind people or people living with dementia? Do bike lanes take into consideration intersection points with pedestrians such as bus stops and street corners? Have hazards like crosswalks, transit stops, and construction obstructions been made easy to navigate through the use of tactile walking surface indicators and tactile signage? How are grocery stores and shopping or community centres and spaces identified by accessible signage and maps?

Is a disability perspective being used? Who is traditional walkable design accommodating

and not accommodating? Stamina and endurance vary wildly between gender, age, and health, let alone physical ability or disabilities. For example, if we determine the appropriate walkable distance carrying groceries is 1.5 kilometres, are we accounting for the abilities of older persons who may need rest areas en route? Are we considering whether or not that same route is navigable during snowy or icy conditions? What do our communities look like when we overlook these factors? When we talk about diversity and inclusion in the design of our communities, is accessibility inclusion part of those decisions?

## Addressing common accessibility integration issues

In Ontario, Section 37 of the *Planning Act 1990* authorizes municipalities to pass bylaws supporting densification in return for facilities or services beneficial to the municipality and their residents. Section 37 amendments are accepted if the project meets municipal Official Plan (OP) objectives, but OPs do not necessarily include specific accessibility provisions to ensure developers are creating inclusive and accessible spaces. Section 37 also creates a gap in legislation where privately developed sites for public use do not have to meet municipal accessibility standards. In 2020, Section 37 was amended to include Community Benefit Charges (CBC) which changed the applicability of the regulation to certain developments. However, many of the issues apparent with Section 37 still exist with CBCs.[3] This amendment does require single- and lower-tier municipalities to re-examine their practices and bylaws, providing an opportunity to fill the gaps of accessibility considerations. In the provinces and territories that do not have an AODA equivalent, how is accessibility being incorporated?

Accessible design specialists and municipal accessibility design guidelines or standards are bringing attention to the issues caused by unaddressed but foreseeable design barriers resulting from the application of incomprehensive planning acts. An amenity zone is part of the public's right of way and is adjacent to the sidewalk. This area is usually a part of a site's frontage, and, in high-density areas with mixed-use developments, amenity zones tend to feature public art, rest areas, and landscaping. Today, most rest areas and amenity zones are rarely made to be accessible, because the aesthetics of the design are valued more highly than equal access for people with disabilities. Additionally, these amenity zones are not navigable and can obstruct the clear path of travel and resting places due to defensive architecture. Defensive architecture is often included by developers to minimize what they perceive as costs to manage public spaces for which they are responsible.

Inadequate accessibility accommodations are also apparent with the absence of relief areas for service animals and appropriate lighting in urban areas. As an accommodation issue, animal relief areas are not included in federal, provincial, or local building legislation and design requirements, so they are often placed in isolated areas with limited signage and inaccessible navigation. Likewise, the parameters for sufficient lighting are undefined, with some municipal standards stating 10 lux while accessible design standards require a minimum of 50 lux. This requires planners to assess the level of lighting being provided; if it is too low for people with disabilities, then they are unprotected when using that area.

These are only a sampling of the many issues faced by the disabled community across Canada. City planners, urban designers, architects, landscape architects, etc. are not taught to see these issues and therefore, rarely have awareness, resources, or strategies to solve them. The solutions to complex design can be better addressed with existing resources from the disability justice community, many of which have been around for decades. The experts on accessibility and the built environment are disabled people with lived experience. This is why the *Accessibility Canada Act* has focused on the principle of "Nothing About Us Without Us."

## Conclusion

When cities integrate features of the Walkable and 15-Minute-City without addressing disability issues from the outset they are further entrenching systemic ableism in the built environment and dismissing the needs of far more than the 22% of self-reporting Canadians. When we spend time considering what we normally find in policy and standard practice and how many people it fails to assist or how it does not align with the *Canadian Charter of Rights* or *Human Rights Code*, it is troubling. The good news is there is growing interest in supporting new strategies and policies that are capable of addressing a rapidly aging population, accessibility, social and racial equity and inclusion, and life-altering events like COVID-19 – all working towards building acceptance of equity and justice on the basis of, "Who are we designing for?"

**Thea Kurdi**, RAIC Affiliate, Dip. Arch. Tech., CPABE Level 2 – Expert (IAAP) – Accessibility Specialist and Vice-President, DesignABLE Environments Inc., has 20 years of experience in barrier-free and universal design for architectural projects of varying size and complexity. She is a frequent guest speaker at local and international conferences, and schools of architecture and interior design, a monthly contributor to AMI's Now with Dave Brown Show, and on the Board of Directors for ArtsBuild Ontario and the Universal Design Network of Canada. Thea has focused her career on helping clients understand how universal design is better design for everyone, and how to achieve usable accessibility and comply with the Human Rights Code.

**Anika Abdullah** BES – 4th Year Undergraduate Student of the School of Planning, University of Waterloo, is completing her bachelor's degree at the University of Waterloo with a plan to graduate in 2021. Her interests include examining land use and built form with a disability lens to integrate universal design in planning policy and action. The researcher and junior accessibility specialist has worked with DesignABLE Environments for multiple co-op terms.

## Endnotes

1 Disability Science Review, "The Curb Cut Effect: How Making Public Spaces Accessible to People With Disabilities Helps Everyone," Medium, December 11, 2016, https://link.medium.com/gH00eOCxXdb.

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3 Urban Strategies, "What you need to know about Community Benefits Charges (CBC)," November 2, 2020, https://www.urbanstrategies.com/news/ontpolicy-3/.

# Viewpoint

## Human Rights and the City: A View From Canada

Sandeep Agrawal

**ABSTRACT**
In planning matters, human rights challenges are increasing, so planning scholars and practitioners must understand the issues and find ways to address them. In this Viewpoint I argue that the Canadian state, through constitutional and quasi-constitutional protections as well as its active judiciary, has strengthened the rights of Canadians to tackle issues at the city level. Nonetheless, the pursuit of these rights is ongoing, especially regarding issues of access to housing, universal accessibility to public services, and freedoms of expression and religion. Educating practicing and budding planners, and the public, about the implications of human rights on planning is a key way forward.

**Keywords:** Canada, Charter of Rights and Freedoms, cities, human rights, planning

Planning matters are increasingly being challenged in the human rights arena. Several recent court cases have challenged government action, including municipal bylaws, through human rights legislation. Examples include a) five municipalities in Ontario (Canada), with zoning bylaws defining group homes through user characteristics and minimum separation distances (Agrawal, 2013, 2014; Canadian Broadcasting Corporation, 2012); b) in Calgary (Canada), a bylaw banning all livestock farming within the city limits (*Calgary [City] v Hughes*, 2012); and c) in Delta (British Columbia, Canada; *Tenants' Rights Action Coalition v Corp. of Delta,* 1997), a bylaw allowing only families to reside in secondary suites.[1] Such lawsuits potentially create serious and costly issues for municipalities and threaten major planning tools by making them void. However, human rights violations jeopardize planning practitioners' legal *and* moral obligations to the public they serve. Significantly, the implications of human rights for planning are not well understood by planners, planning scholars, and city councillors.

In this Viewpoint, I analyze case law, legal jurisprudence, and the municipal bylaws of more than 60 Canadian municipalities. I draw on more than 45 interviews with planners, legal experts, and human rights advocates across the country. I also invoke my decade-long involvement in multiple human rights cases in Canada. I make the following three key assertions: 1) The Canadian state safeguards its citizens' human rights at the city level through constitutional and quasi-constitutional means, thereby affecting scores of urban issues; 2) the Canadian judiciary has expanded the scope and meaning of legal rights through their generous and liberal interpretations; and 3) several areas of concern remain—such as access to housing, universal accessibility to public services, and freedom of expression in public spaces—demonstrating that human rights are not the definitive solution for all complex urban problems. I weave these arguments into discussions on the human rights approach to the city and show how human rights affect both inhabitants and planning in Canadian cities and beyond.

I begin by defining human rights and summarizing human rights protections available in Canada. I then expound on two cases to illustrate how human rights affect planning at the city level. Following this, I identify key human rights factors shaping planning, illustrate some progressive steps taken by Canadian cities, and indicate some unresolved issues. I conclude that planners must follow human rights obligations; however, the lack of awareness of human rights is a big challenge. I suggest educating practicing and budding planners, and the public, about the implications of human rights on planning.

## Human Rights

The literature on human rights is exhaustive (see Donnelly, 2013; Sandel, 1998; Sen, 2004, 2005; and others). Here, I define human rights as inalienable rights that we each possess by virtue of being human, based on our inherent dignity and equal worth as human beings. These are considered moral rights of the highest order. The concept of human rights is primarily Western, mostly secular, and better achieved in liberal democracies.

Rights are institutionally defined rules specifying how people can act with one another, upheld by

DOI: 10.1080/01944363.2020.1775680 | © 2020 American Planning Association, Chicago, IL.

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enduring legal protections granted to individual citizens by the liberal-democratic state. They encapsulate two moral and political claims: rectitude (i.e., righteousness or the right thing to do) and entitlement (i.e., having a right, or a right that is owed to someone either by an individual or the state; Donnelly, 2013).

The United Nations' Universal Declaration of Human Rights (UDHR) is the foundation of modern human rights law, inspiring extensive and legally binding laws. Although almost all nation-states have ratified the UDHR, the domestic instruments of implementation vary considerably from one country to another because the implementation of human rights is largely political.

Several Western liberal democracies, such as Canada, the United States, and several European nations, along with the United Nations, have long championed the human rights agenda at home and abroad. In Canada, the constitution and federal, provincial, and territorial human rights statutes provide rights to individual Canadians, supported by a legal framework to protect their rights. In the following sections, I argue that humanely developing inclusive cities depends on these legal guarantees and on their judicial enforcement *and* planners' commitment to incorporating them into their practice.

## The Charter, Human Rights Legislation, and Canadian Cities

Human rights in Canada exist in constitutional and quasi-constitutional forms. The constitutional guarantees are encapsulated in the Charter of Rights and Freedoms of the Constitution Act of 1982. The quasi-constitutional forms are federal, provincial, or territorial human rights statutes meant to fulfill constitutional imperatives but supersede all other laws when conflict arises.

Prior to 1982, few rights and freedoms were guaranteed. For example, language and denominational school rights, women's voting rights, and freedom of the press were derived from the original Canadian constitution, the British North American Act of 1867, later renamed the Constitution Act. Constitutional rights resulted mainly from duties owed by governments as a result of political compromises, rather than from the idea that individuals possess natural (or moral) liberties without government interference, as is the case with the U.S. Bill of Rights (Greene, 2014). The principle of legislative supremacy limited individuals' civil liberties in the acts prior to the enactment of the Charter.

In the American context, although the American Declaration of Independence of 1776 reflected the liberal ideals of individual freedom and equality, a Bill of Rights was added in 1789 consisting of the first 10 amendments to the American Constitution. These spelled out and guaranteed civil rights and liberties to individuals, such as freedom of speech, press, and religion (Orend, 2002).

In Canada, individual provinces took the lead in granting individual rights and liberties, beginning with Saskatchewan passing a provincial Bill of Rights in 1947, even before the UDHR. A genuine rights revolution began in 1962 with Ontario's adoption of a Human Rights Code, followed by British Columbia's own Human Rights Code of 1974 (Clement, 2016). The federal government enacted the Human Rights Act in 1977.

The credit for the enactment of the Charter goes to Pierre Trudeau, the former prime minister of Canada. The primary drafter of the UDHR, John Humphrey, later advised Trudeau regarding the wording of the Canadian Charter. Although scholars disagree on many aspects of the Charter, they all agree that the Charter has raised rights consciousness in Canadian society; it provides a clear mandate to the judiciary to interpret the Charter liberally (Greene, 2014; Morton, 1987; Smithey, 2001).

The Canadian Charter delineates the rights and freedoms of all Canadians, but *only in relation to government activities*. Quasi-constitutional legislation—the federal, provincial, and territorial human rights acts—encompass *private and public acts* in the provision of goods, services, facilities, employment, or accommodation. So, for example, interactions between individuals and private organizations (such as employers or landlords) are governed by human rights legislation—like the Canadian Human Rights Act, Alberta Human Rights Act or the Ontario Human Rights Code within their respective jurisdiction—rather than the Charter. However, overlaps do occur between the Charter and the quasi-constitutional legislation when a government action occurs in an employment context or when the federal, provincial, or municipal government provides services, facilities, or accommodations.

Section 15 of the Charter guarantees equality before the law and the right to equal protection and benefit of the law without discrimination based on race, disability, and analogous grounds.[2] Under Charter Section 2, Canadians can follow the religion of their choice. In addition, they are guaranteed freedom of thought, belief, and expression. Section 7 guarantees the life, liberty, and personal security of all Canadians. Laws inconsistent with the Charter (including municipal government bylaws) may be declared invalid and may lead to the payment of damages or other remedies. Notably, these constitutional guarantees are not absolute. Charter Section 1 places "reasonable limits [on rights] prescribed by law as can be demonstrably justified in a free and democratic society."

## Case Studies

Using two cases I illustrate how Canadian human rights protections are applied in planning matters. They exemplify court and human rights agency rulings, or both, that pushed Canadian municipalities to make changes to their bylaws or decision-making processes.

### *Case 1: Toronto—Group Home Definition and Minimum Separation Distances*

In 2010, a housing advocacy group of psychiatric treatment survivors challenged the City of Toronto's proposed citywide zoning bylaw at the Ontario Human Rights Tribunal, contesting its definition of a group home. They alleged the city had singled out the residents of group homes because of their mental health-related disabilities for a specific set of provisions in the bylaw (*The Dream Team v. The City of Toronto*, 2012). This is discriminatory. They also claimed the bylaw's mandatory separation distance of 250 m between any two group homes restricted the availability of their housing options and negatively affected their dignity (Agrawal, 2013, 2014).

The city's legal counsel initially objected to the tribunal's jurisdiction over the application. However, when the Divisional Court (*City of Toronto v Dream Team*, 2012) refused the city's request and returned the petition to the Tribunal, the City Solicitor's Office agreed to retain an expert to advise on the matter. Acting as the expert in this case, I reviewed the definition of group homes and the related mandatory separation distances between them and provided an opinion on the merits of the group homes bylaw by examining them vis-à-vis planning principles, the Ontario Human Rights Code, and the Canadian Charter of Rights and Freedoms (Agrawal, 2013, 2014).

I concluded that both the definition and the separation distances contravened Charter Section 15, the Ontario Human Rights Code, and Section 35(2) of the Ontario Planning Act, which prohibits "people zoning" (Agrawal, 2013, 2014). Based on this, in 2014 the city amended the definition of group homes. It also removed the attached minimum separation distance and deleted the contentious phrase in the zoning that identified the characteristics of the people living in group homes, both of which served no planning purpose and were discriminatory by restricting housing locations. My recommendations also resulted in changes to the Ontario Provincial Policy Statement of 2014, which mandated every municipality in Ontario ensure their plans, policies, and bylaws be consistent with the Charter and the Ontario Human Rights Code.[3] Ontario is the only province that has so far done this.

This case demonstrates that definitions and separation distances, common elements in municipal bylaws, have clear implications for access to housing, thus making them subject to human rights legislation.

### *Case 2: Village of Lafontaine, Quebec: Place of Worship and Freedom of Expression*

In 1992, the Jehovah's Witnesses, a religious group, were looking for a parcel of land in the Village of Lafontaine in Quebec to establish a place of worship. The municipality's zoning bylaw allowed places of worship in regional community use zones. Because no suitable land was available for sale in this zone, the group bought land in a commercial use zone. They applied twice for a zoning change, but the municipality refused to grant either application, giving no reasons for its refusal while invoking absolute discretion to refuse the variance with no explanation. In their application to the court, the Jehovah's Witnesses alleged that the municipality's refusal to amend its zoning bylaw violated their freedom of religion under Section 2(a) of the Charter.

The trial judge at the Superior Court of Quebec dismissed the application after finding parcels were still available in the regional community zone. The Court of Appeal disagreed with this finding of fact, but the majority nonetheless dismissed the appeal on the grounds that the municipality could not be held responsible for the unavailability of land or to preserve freedom of religion. In 2004, the Supreme Court of Canada sided with the Jehovah's Witnesses and allowed their appeal, stating that the municipality acted in bad faith and did infringe upon the appellants' freedom of religion (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine [Municipality]*, 2004). This excerpt from the majority's decision is revealing:

> In refusing to justify its decision to deny the second and third applications for zoning variances, the Municipality breached the duty of procedural fairness it owed to the Congregation—a duty heightened by the expectations established by the Municipality's own conduct and the importance of the decision to the Congregation, impacting as it did on the right of the Congregation to practise the religion of its choice. (p. 652)

This case exemplifies how municipal council's decisions can impinge on citizens' freedom of religion. In such a situation, a planner sensitive to human rights concerns might strongly advise the council against taking steps that could violate citizens' fundamental freedoms.

## Municipal Planning Challenges That Respect Human Rights

Both case examples illustrate the types of legal conflicts Canadian municipal governments face in undertaking planning work and that court decisions favor protecting human rights. Issues include alleged violations of

Charter Section 2 (right to expression, religion, and peaceful assembly), Section 15 (right to equality), and/or Section 7 (right to life, liberty, and security). Section 7, in particular, is open to broad interpretations, and the courts have supported and applied it. Human rights agency decisions have also favored protecting rights enshrined in respective legislation.

A few more examples of litigated issues are the removal of an advertisement on public transit that made explicit references to the honor killings of Muslim girls (*American Freedom Defence Initiative v Edmonton [City]*, 2016), improving working conditions of city sex workers (*Downtown Eastside Sex Workers United Against Violence Society v Canada [Attorney General]*, 2012), and the right of the homeless to erect tents on public properties (*Abbotsford [City] v Shantz*, 2014; *Victoria [City] v Adams*, 2008, 2009). The judge's finding in the *Abbotsford v Shantz* (2014) case about this issue is compelling:

> It is the Impugned Bylaws that prevent the homeless from camping in public spaces or erecting temporary shelters, without permit, in public spaces that are asserted to subject the City's homeless to decreased dignity and independence and increased physical and psychological harm. The section 7 liberty interest is thus engaged by the Impugned Bylaws that interfere with the fundamentally important personal decision to shelter one's self in circumstances where there is no practicable alternative shelter. (para. 188)

The judge found the city bylaws preventing camping in public parks breached the right to life and liberty (Section 7) and restricted access to public space, declaring it void. The decision gets to the heart of perennial urban issues, such as who the public space "belongs" to and who gets to use it.

## Federal and Court Actions That Identify and Protect Human Rights

When those affected by municipal planning decisions push back with legal action, and when federal legislation addresses human rights, planners are called to pay more attention to human rights. Examples include federal legal approval of safe injection sites, methadone clinics, and cannabis dispensaries, where neighbors or municipal officials reject proposed locations. In such cases, the courts tend to support federal over municipal law to assure the effective protection of human rights.

For instance, in the PHS Community Services case regarding safe injection sites (*Canada [Attorney General] v PHS Community Services Society*, 2011), the Supreme Court based its decision on Section 7, finding the benefits of such sites to the health of the drug addicts far outweighed any detriment to the community or to society generally. This ultimately led to their legalization. The Court agreed with the finding that "[t]he risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals" and that the "denial of access [by the Minister] to the health services provided at [the supervised injection site operated under special exemption] violates its clients' section 7 rights to life, liberty and security of the person" (p. 154).

Citing the above decision, the federal court recently allowed the requested locations of safe injection facilities, dismissing a business association's opposition to them on the grounds that they unfairly burdened their community (*Chinatown Area Business Association v the Attorney General of Canada & Access to Medically Supervised Injection Services Edmonton*, 2019). The court found no violation of procedural fairness or other legal rights of the people living in proximity to the sites.

## Implications

Now more than ever before, human rights are a critical issue at the municipal level. Inattention to human rights legislation and the Charter is a moral issue, violating constitutional and legal obligations, with potentially serious implications for municipalities. A successful legal challenge could also make a municipal bylaw or policy ultra vires (beyond the powers of the municipality); this, too, generates significant implications for planning practice and policy. Using a human rights lens may resolve conflicts before issues fester and opponents become entrenched, thereby ensuring more inclusive planning policies and processes and avoiding costly and time-consuming litigation. Table 1 presents a list of planning issues affected by human rights.

### *Progress With Human Rights*

Provincial and municipal governments continue to make significant human rights progress (Agrawal, 2014, 2017, 2018). Numerous provincial examples exist: revising legislation to align with the Charter; providing legal aid to those who have experienced discrimination; expressly prohibiting discrimination based on age, sexual orientation, or gender identity; becoming more inclusive of Indigenous peoples; and, in Winnipeg and Toronto, municipal councils revealing new awareness of the primacy of human rights issues as they pertain to their own decisions and processes (see more examples in Table 2). Further, many municipalities have changed or are revisiting the problematic definitions of various

**Table 1. Summary of human rights and planning issues by category.**

| Topic | Issues | Violation of the Charter/ other legislation | Examples |
|---|---|---|---|
| Universal accessibility | Limited or no accommodations for those with disabilities<br>Inconvenient location of accessible parking<br>Lack of accessible transit routes (i.e., connecting to accessible transit stations or audible announcements for transit stops)<br>Inconvenient location of accessible parking spaces | Charter Section 15<br>Accessibility for Ontarians with Disabilities Act<br>Ontario Human Rights Code<br>Accessibility Act (Nova Scotia) | Ontario (Toronto)<br>BC (Vancouver)<br>Nova Scotia (Truro)<br>Newfoundland and Labrador (St. John's) |
| Indigenous people | Freedom of religion: Destruction of a sacred site<br>Duty to consult: The question of whether a municipal entity has a duty to consult conferred upon it as with a province or the federal government | Charter Section 2<br>The Local Government Act of BC<br>The Planning Act of Ontario | BC (the Province; Salmon Arm)<br>Ontario (Brantford) |
| Freedom of expression | Prohibited advertising on public property<br>Prohibited expressions in public spaces (i.e., limits on what one can or cannot do)<br>Prohibitions on signs along the highway | Charter Sections 1 and 2 | BC (Vancouver)<br>Alberta (Edmonton; Calgary; Grand Prairie; counties of Red Deer, Mountain View, and Leduc)<br>Ontario (Toronto; Peterborough)<br>Quebec (Montreal; Quebec City; other municipalities) |
| Freedom of religion | Restrictions on locating places of worship<br>Prohibition on religious festivities | Charter Sections 2, 7, and 15 | Toronto<br>Quebec (Quebec City; Outremont; Montreal) |
| Housing and homelessness | Prohibition on camping in parks<br>Minimum separation distances on housing types, such as group homes and emergency shelters<br>Regulations affecting secondary suites, student housing, lodging houses, and rooming houses<br>Prohibition on panhandling | Charter Sections 2, 7, and 15<br>The Planning Act of Ontario<br>The Planning and Development Act of Saskatchewan<br>The Land Use Planning and Development Act of Quebec<br>Ontario Human Rights Code<br>BC Human Rights Code<br>Quebec Charter of Human Rights and Freedoms | BC (Victoria; Abbotsford; Vancouver)<br>Ontario (Toronto; Hamilton; London; Kitchener–Cambridge–Waterloo; Markham; Brampton; Oshawa; St. Catharines; Kingston; Windsor; Guelph; Peterborough)<br>Saskatchewan (Saskatoon)<br>Quebec (Montreal) |
| Other:<br>Drugs and addictions<br>Keeping livestock | Arbitrary density and setback requirements related to safe injection sites and methadone clinics<br>Prohibition on keeping livestock within the city limits | Charter Section 7 | BC (Vancouver; Mission; Surrey; Coquitlam; Abbotsford)<br>Ontario (Toronto; Regional Municipality of Peel)<br>Alberta (Calgary) |

Note: BC = British Columbia.

forms of supportive housing, restrictions on their locations, and the contentious user characteristics and minimum separation distances in zoning classes. For example, Toronto removed arbitrary separation distances for group homes and municipal shelters; Calgary eliminated the prohibition on secondary suites in residential areas; and Edmonton changed the group homes use class, commenced a pilot study on backyard chickens, and reviewed its zoning bylaw from a human rights perspective.

## *Outstanding Areas of Concern With Human Rights*

It is not yet possible to declare that human rights for citizens of Canadian cities are settled and unproblematic based on these actions and legal revisions, because several issues persist: Among them are housing and homelessness, universal accessibility, Indigenous rights, and freedoms of expression and religion. Judicial reluctance and legislative silence have exacerbated the housing issue. For instance, in the Tanudjaja case, the

**Table 2. Progress made on the human rights front in various Canadian provinces and cities.**

| | Steps taken |
|---|---|
| **Provinces** | |
| Ontario | Mandates every municipality to adhere to the Charter and the province's human rights code<br>Provides legal aid to eligible individuals who have experienced discrimination that contravenes provincial human rights legislation |
| British Columbia | Passed legislation implementing the United Nations Declaration on Indigenous Peoples, the first jurisdiction in Canada to do so |
| Alberta | Revised its human rights legislation to include, as grounds of discrimination, age (in relation to the provision of goods, services, accommodation, or facilities), sexual orientation, and gender identity and expression |
| **Cities** | |
| Toronto | The municipality made changes to two key elements:<br>• changed the language describing group homes<br>• removed separation distances associated with group homes and municipal shelters<br>Established the Human Rights Office and Ombudsman Toronto:<br>• The Human Rights Office provides advice, information, and assistance regarding human rights and accommodation issues involving city services and facilities<br>• Ombudsman Toronto, an arm's-length agency, investigates administrative decisions, acts, and omissions of the municipal government that are unjust or discriminatory, as well as systems that poorly serve the public |
| Calgary | Removed its prohibition on secondary suites in residential areas |
| Edmonton | Completed a review of zoning bylaws<br>Lifted a funding pause on supportive housing in certain inner-city neighborhoods<br>Added a separate land use class for supportive housing, partly based on the human rights concerns I raised with the Edmonton City Council in each case (City of Edmonton, 2019a, 2019b; Fida, 2019) |
| Montreal | Adopted its own Charter of Rights and Responsibilities that<br>• allows its citizens to initiate a public consultation on a municipal matter<br>• led to the establishment of the municipal Office of the Ombudsman, which hears complaints from the Montreal residents who believe they are adversely affected by a decision, act, or omission of the city |
| Winnipeg | Created the Human Rights Committee of the City Council, which serves as an advisory body to the mayor and city council on human rights, equity, diversity, peace, access and disability-related issues and emerging trends as they affect residents of Winnipeg |

Ontario Supreme Court rejected "inadequate housing" as analogous grounds pursuant to Section 15 of the Charter (*Tanudjaja v Canada [Attorney General]*, 2013). The Court went on to conclude that Section 7 of the Charter "does not provide a positive right to affordable, adequate, accessible housing and places no positive obligation on the state to provide it" (para. 81).

Housing and homelessness cases often relate to municipal decisions affecting the survival tactics of the homeless, such as panhandling and the occupation of public spaces. Even in the Shantz case, the court's decision concerned whether government action deprived individuals of their liberty rights, not with imposing positive obligations on government to fix the (homelessness) problem. Other issues intersect with municipal restrictions on locating secondary suites (Agrawal, 2018; Ontario Human Rights Commission, 2012), student housing (Ontario Human Rights Commission, 2008; *The Neighbourhoods of Windfields Ltd. Partnership v Death*, 2009), rooming houses (Freeman, 2013), and group homes (Agrawal, 2014), as discussed before.

Universal accessibility cases highlight barriers posed by public transportation systems, like lack of accessible transit stations or audible announcements for transit stops. Conflicts in freedom of expression emerge where municipal bylaws restrict the public from carrying out various activities such as public demonstrations, making noise in public areas, or displaying posters or signs on public property. Issues related to freedom of religion, mostly in Quebec, surface when the municipal government or the public oppose the construction of places of worship, as with Islamic mosques and Jewish synagogues. At issue with Indigenous rights is whether municipalities, like a province or the federal government, have a "duty to consult" with Indigenous people on decisions that may affect Aboriginal and Treaty rights.[4]

## Conclusion

The foregoing discussion makes it abundantly clear that the Canadian state protects its citizens' human rights. The judiciary has further clarified, applied, and even expanded the scope of human rights in relation to various aspects of city life. These changes have prompted municipalities to review, revise, or even rescind existing bylaws and practices; create new land use classes; or revise existing zoning or other municipal bylaws to accommodate new resulting land uses.

Certainly, human rights are not a remedy for all urban problems, as my review of the outstanding concerns elucidates. Law and legal processes, and their interpretations, are limited in the degree and extent to which they can deal with wide-ranging, deeper, and entrenched economic and social issues. As Qadeer (2016) also contends, even if rights exist in law, their actual realization depends on the institutionalization of equality in economic, social, and cultural matters. The reality is that entrenched institutional and structural biases and power politics still prevent legal progress. Many of the ongoing issues are attributable to poor awareness of human rights among planning practitioners and local politicians.

To counter the issue of awareness and inform planning practice adequately about human rights, I have three recommendations:

- Municipalities could institute a training program to help their municipal planners and local politicians understand the provisions in their national constitution and/or human rights and disabilities legislation, along with their implications for planning policies and practice. Educating the public about human rights through an awareness campaign can supplement this.
- Municipal officials would be wise to look at their documents closely, from a human rights perspective, and make the necessary changes. They could also develop a citizens' guide to zoning or other planning-related bylaws, briefly presenting the planning rationale for restrictions, such as minimum separation distances.
- Curricula in planning schools must be revised to include course content covering human rights history, philosophy, theories, and law, including how these factors intersect with planning. Law and theory courses are logical contexts to introduce these intersectional topics.

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**ACKNOWLEDGMENT**

*I acknowledge my several research assistants who contributed to the research.*

**RESEARCH SUPPORT**

*This work was supported by the Social Sciences and Humanities Research Council of Canada [435-2017-0040].*

**NOTES**

**1.** A secondary suite is a separate dwelling located within a single-detached, semi-detached, or row house with its own living, cooking, sleeping, and sanitary facilities (City of Edmonton, n.d.).

**2.** Analogous grounds are additional prohibited grounds of discrimination, over and above those enumerated in Section 15 of the Charter. The courts can interpret the Charter broadly to arrive at these grounds.

**3.** The Ontario's Provincial Policy Statement is issued under the Planning Act (1990, Section 3(5)(a)) and requires that all decisions in the Province affecting land use planning matters "shall be consistent with" the Provincial Policy Statement.

**4.** In Canada, "duty to consult" with Indigenous peoples arises when the government considers an action that might adversely affect potential or established Aboriginal or Treaty rights.

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CANADIAN INSTITUTE OF PLANNERS
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# POLICY ON
# CLIMATE CHANGE PLANNING

## POLICY CONTEXT

The global climate is changing, leading to increased hazards, extreme weather conditions, and transformations to the physical environment in Canada and beyond. Public awareness and global support for taking action on climate change are increasing, and targets have been adopted in Canada and globally. Achieving these targets requires immediate and committed action at every level of government and society, and across all communities and sectors.

The Canadian Institute of Planners (CIP) recognizes that climate change planning (or, more accurately, climate change-informed planning) is the domain of all planners, including those working on energy, land-use, transportation, infrastructure, and community planning. Reducing emissions and preparing for the unavoidable impacts of climate change requires a drastic shift in the way our communities are built and function. Climate change planning includes the mitigation of future climate change, primarily by reducing greenhouse gas emissions, adaptation to existing and projected environmental changes, and disaster risk reduction measures.

Climate change-informed planning must balance multiple – and sometimes competing – considerations. Interventions must avoid burdening already vulnerable populations, such as Indigenous people, the young and elderly, and those living in resource-dependent communities and remote areas. Actions taken to mitigate climate change may come into conflict with adaptation measures and addressing different climate-related risks may entail seemingly contradictory solutions. The complexity and breadth of climate change requires an integrated and collaborative approach. Planners are uniquely positioned to bring together officials, citizens, and allied professions in a program of careful, equity-oriented planning.

### WHAT IS CLIMATE CHANGE PLANNING?

"Climate change planning" and "climate change-informed planning" are used interchangeably throughout this document to refer to planning activities that seek to mitigate or adapt to climate change. These activities are not simply the work of a specialized few, but encompass all aspects of planning, including energy planning, land-use planning, and community planning in addition to the development of specific climate change adaptation or mitigation plans.

## POLICY GOAL

CIP envisions a future in which Canadian communities are planned, designed, developed, and managed to contribute to climate stability and to be more resilient in the face of unavoidable changes in the climate, and in the process, to become more liveable, prosperous, and equitable.







## POLICY OBJECTIVES

To achieve the climate change policy goal, CIP supports the following objectives for the built, natural, and social environments:

### BUILT ENVIRONMENT

- Communities integrate mitigation, adaptation, and disaster risk reduction considerations into all regional and local planning and intentional design.
- Urban areas are compact and walkable, and neighbourhoods in all communities have a mix of land uses, to reduce transportation-associated emissions and infrastructure.
- Communities have robust multi-modal transport systems in place, including infrastructure for active transportation, public transit, and evolving zero-emissions vehicular technologies.
- New and existing residential, commercial, and industrial developments have near- or net-zero energy and/or emissions profiles, and avoid introducing climate vulnerabilities (e.g., no buildings on coastlines or in flood plains).
- Regional and metropolitan bodies have robust strategies in place to incorporate climate change considerations for new developments, as cities grow and boundaries change.
- Waste management systems are configured to reduce greenhouse gas (GHG) emissions from the transport of waste materials and their disposal.

- Communities are designed to support the circular economy, which minimizes the use of virgin materials, the energy used in manufacturing, and the production of waste over the full life cycles of material goods.

- Communities work collaboratively with utilities to facilitate energy conservation, efficiency, and the integration of distributed energy resources, especially in remote areas. This may include renewable energy and thermal technologies and systems.





## NATURAL AND RURAL ENVIRONMENTS

- Communities assess, prioritize, and mitigate the risks posed by extreme events (e.g., flooding, wildfires).

- In areas facing changing physical surroundings (e.g., sea level rise, thawing permafrost), land use and infrastructure are adapted to new and evolving circumstances.

- In response to changing precipitation patterns and temperatures, water resources are protected and usage is planned.

- Natural areas and their ecological characteristics, including biodiversity, are recognized as playing a vital role in adapting to the impacts of climate change and are protected accordingly.

- Planners support sustainable food systems and strive to mitigate agriculturally-related emissions.

## SOCIAL ENVIRONMENT

- Public and professional perspectives on climate change fully recognize scientific evidence, contributing to a broad societal commitment to reduce impacts from climate change.

- Solutions to climate change support the social development and well-being of all citizens.

- Communities are more liveable and successful, as they adopt climate change solutions that reinforce other principles of good planning.

- The impacts that climate change and associated hazards have on mental health (post-traumatic stress, anxiety, etc.) and social health (social fragmentation, declining sense of place, etc.) are minimized.

- Local Indigenous knowledge and planning traditions are integrated into planning processes, respecting the rights of Indigenous peoples.

## THE ROLE OF PLANNERS

CIP recognizes that planners have a key role to play in reducing GHG emissions from energy, housing, transportation, waste management, and agriculture, and in adapting communities to environmental changes that are already happening and are forecast to occur in the future. Accordingly, planners have the following professional obligations:

### ENSURE EFFECTIVE DECISIONS

- Act in the public interest, incorporating measures to mitigate climate change and adapt to its impacts in all relevant planning decisions.

- Champion climate change solutions that counteract, rather than exacerbate, impacts on vulnerable groups and under-resourced areas.

- Be familiar with federal emissions reduction targets and frameworks, as well as provincial/territorial, regional, and/or local targets where they exist, and advance policies and regulations that work towards achieving those objectives.

- Know the climate and hazard projections for their regions and make decisions accordingly.

- Account for increased disruption and unpredictability by incorporating flexibility and redundancy into their plans.

- Plan for worst-case scenarios and incorporate risk-reduction measures into their plans, in line with the precautionary principle or "no-regrets" approach to decision-making.

- Base planning advice on authoritative climate and energy data and projections.

- Use established metrics and approaches to data collection, wherever possible, to facilitate sharing data with other communities.

- Model environmentally responsible decision-making in their professional practices.
- Ensure maximum transparency of the decision-making process to improve community engagement and accountability.

## COLLABORATE ACROSS SECTORS

- Collaborate across sectors, departments, and jurisdictions to ensure an integrated and comprehensive approach to climate change planning, as well as effective implementation of climate change, energy, sustainability, or other similar policies.
- Collaborate with each other and other professionals – including landscape architects, architects, engineers, environmental scientists, public health practitioners, and first responders – on climate change adaptation and mitigation solutions.
- Seek to develop a shared language with others working on climate change and avoid siloed or compartmentalized approaches.
- Collaborate with other professionals to monitor the impact of planning decisions on GHG mitigation and progress on climate change adaptation, and revise plans and policies accordingly.

## ENGAGE INDIGENOUS PEOPLE, STAKEHOLDERS, YOUTH, AND THE GENERAL PUBLIC

- Consult and engage elected officials and leaders, the private sector, Indigenous and non-Indigenous communities, youth, and the general public in all aspects of planning for climate change;
- Be inclusive and respectful of Indigenous peoples, striving to promote understanding, validation, and respect of Indigenous knowledge and cultural practices to ensure decisions and interventions are culturally relevant and appropriate.
- Ensure that the perspectives of vulnerable communities and populations are actively considered in planning processes and reflected in the climate change solutions adopted.
- Work with relevant partners to develop effective communication strategies that inform the public of any mitigation, adaptation, or disaster response measures that require the public to be informed and prepared.

- Be ready to experiment with innovative methods and technologies for engaging and collaborating with the public and special interest groups.
- Communicate information to elected officials – and the public – on how climate change planning will strengthen communities and bring economic, environmental, and social benefits.
- Build on CIP's national-level work to improve public awareness of, and support for, climate change planning by promoting the multiple benefits of climate change planning solutions.
- Encourage local, provincial/territorial, and federal governments to update development standards, planning regulations, and incentives to address adaptation and emissions.
- Encourage the development sector and utilities to update business models and planning processes to incentivize climate change mitigation and adaptation.

**CALL TO ACTION**

The global climate is changing, leading to increased hazards, extreme weather conditions, and changes to the physical environment in Canadian communities. CIP recognizes that all planners have an ethical obligation to consider climate change in their practices and strives to ensure that members have access to the resources, data, training, and other support they need to do so. CIP is also committed to collaborating with other professions, planning associations and governments, stakeholders, and the general public to help address the climate change that Canadians are facing.

## THE ROLE OF CIP

CIP strongly believes that addressing climate change is an essential part of planning in the public interest. To support implementation of the policy, CIP will undertake the following actions to ensure the organization contributes to the advancement of climate change-informed planning:

- Promote climate change planning in its communications, policy advocacy, educational standards, professional development activities, and its work with other professions.
- Make developing and deepening partnerships with other professional organizations a priority in its approach to climate change planning.
- Ensure that practicing planners have access to the resources, data, training, and other support they need to fully integrate a climate-change lens into their work.
- Advocate for international and federal policies and actions that contribute to more robust climate change planning.
- Consider additional implementation priorities, based on an annual environmental scan and membership survey.

## ABOUT THIS POLICY

The Canadian Institute of Planners (CIP) is a professional body that works on behalf of over 6,900 members nationally and has served as the voice of Canada's planning community since 1919.

CIP's policies guide the organization's daily work and special initiatives to advance best practices in Canadian professional planning.

This policy was led by the CIP Climate Change Committee and developed through a thoughtful and extensive consultation with professional planners, climate change researchers, advocates, and other partner organizations using interviews, surveys, and focus groups. The policy was ratified by the CIP Board of Directors in November of 2018.

## ADDITIONAL RESOURCES

For additional resources on climate change produced by CIP, including thematic annotated bibliographies, model climate change adaptation plans, and a range of case studies and resources, please see the CIP Climate Change website.

## KEY TERMS AND DEFINITIONS

**Adaptation** describes interventions to natural or human systems intended to reduce risks or exploit beneficial opportunities arising from changes in climatic conditions.

**Climate change** describes any systematic change in climate elements (e.g., temperature, pressure, or winds) sustained over several decades or longer. Although the climate can change for reasons including internal processes of the climate system or changes in solar emission, scientists agree that the current warming trend is largely due to anthropogenic (human-caused) factors.

**Disaster risk reduction** is described by the UN Office of Disaster Risk Reduction (2017) as "aimed at preventing new and reducing existing disaster risk and managing residual risk, all of which contribute to strengthening resilience and therefore to the achievement of sustainable development."

**Greenhouse gases (GHGs)** are gases in the atmosphere, both naturally occurring and produced by human activity, that absorb and emit radiation at specific wavelengths within the spectrum of thermal infrared radiation. This property causes the greenhouse effect, trapping heat within Earth's atmosphere and causing climate change. The primary greenhouse gases in the Earth's atmosphere are water vapour ($H_2O$), carbon dioxide ($CO_2$), nitrous oxide ($N_2O$), methane ($CH_4$), and ozone ($O_3$).

**Mitigation** describes interventions to reduce climate changes caused by human activities and includes measures to reduce greenhouse gas emissions and to enhance greenhouse gas sinks. Mitigation measures are used to slow the rate of climatic change and also have economic and social co-benefits.

The **no-regrets approach** adopts the precautionary principle which will involve plans, actions, and measures that consider all possible perspectives and factors to avoid or mitigate future harm and negative consequences.

# Climate Change-Glossary of terms

Climate Change Committee, Spring 2018

## Introduction

Language is extremely important, especially when trying to express technically challenging topics like climate change. If the language is too technical, or complicated, the message will not be consistent and may lead to confusion among the recipients. This results in an inefficient effort, that may also include incorrect or incomplete results.

Striving for clarity, the Climate Change Committee believes it is important there be a common language all Canadian Institute of Planners (CIP) members can rely upon in climate change related communications, policies, and actions.

The following Glossary has been developed by the Committee and provides terms selected (with some minor revisions) from several recent and reliable sources:

- European Climate Adaptation Platform (Climate-ADAPT): http://climate-adapt.eea.europa.eu/
- IPCC's 4th assessment reports of the different working groups (Working Group I, II and III): http://www.ipcc.ch/report/ar5/wg2/
- United Nations Framework on Climate Change: Glossary of climate change acronyms and terms: http://unfccc.int/essential_background/glossary/items/3666.php
- Engineers Canada, Public Infrastructure Engineering Vulnerability Committee (PIEVC), Glossary: https://pievc.ca/glossary
- Climate Risk: Getting to Action. Professionals' Perspectives on Climate Change Challenges: First Summary of Discussions. SFU Adaptation to Climate Change Team, December 6th, 2016.

This Glossary has been prepared primarily for the use of CIP members; recognizing that our profession is involved in many different types of planning, terms have been categorized for clarity and simplicity:

## 20 Terms CIP Members Should Know:

### 1.Adaptation

Adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities. Several types of adaptation can be distinguished, including anticipatory (before an event) and institutional (after an event) adaptation.

### 2.Adaptation strategy

Adaptation strategy refers to a broad plan of action that is implemented through policies and measures. A climate change adaptation strategy for a country, region, or municipality refers to a general plan of action for addressing the impacts of climate change, including climate variability and extremes. It may include a mix of policies and measures, selected to meet the overarching objective of reducing the country's vulnerability.

### 3.Baseline

The baseline (or reference) is the state against which change is measured. It might be a 'current baseline', in which case it represents observable, present-day conditions. It might also be a 'future baseline', which is a projected future set of conditions excluding the driving factor of interest. Alternative interpretations of the reference conditions can give rise to multiple baselines.

### 4.Carbon market

A popular term (but misleading) for a trading system through which countries may buy or sell units of greenhouse-gas emissions in an effort to meet their national limits on emissions under the Paris Agreement. The term comes from the fact that carbon dioxide is the predominant greenhouse gas, and other gases are measured in units, called "carbon-dioxide equivalents."

### 5.Climate

Climate is long-term (months to many years) and weather is short term (today, tomorrow, a week). Technically, climate is a statistical description of the mean and variability of relevant quantities over a period of time, ranging from months to thousands or millions of years. These quantities are most often surface variables such as temperature, precipitation, and wind. The World Meteorological Organization (WMO) considers 30 years to be a "normal" period.

### 6.Climate change

Climate change refers to any change (higher or lower) in climate over time, whether due to natural variability (defined below) or as a result of human activity (anthropogenic). Climate change is any systematic change in the long-term statistics of climate elements (such as temperature, sea level, precipitation, humidity, or winds) sustained over several decades or longer. Climate change may be due to natural external forces;

such as changes in solar emission or slow changes in the earth's orbital elements; natural internal processes of the climate system; or anthropogenic forces.

### 7.Climate variability

Climate variability refers to variations in the mean state and other statistics (such as standard deviations, the occurrence of extremes, etc.) of the climate on all spatial and temporal scales beyond that of individual weather events. Variability may be due to natural internal processes within the climate system (internal variability), or to variations in natural or anthropogenic external forcing (external variability).

### 8.Community-based adaptation

Community-based adaption focuses attention on empowering and promoting the adaptive capacity of communities. It is a proactive problem-solving and forward-looking approach that takes contexts, culture, knowledge, agency, preferences, and particularities of communities and their members as strengths.

### 9.Critical infrastructure

Critical infrastructures are those physical and information technology facilities, networks, services, and assets which, if disrupted or destroyed, would have a serious impact on the health, safety, security, or economic well-being of our communities. Critical infrastructure includes: energy installations and networks; communications and information technology; finance (banking, securities and investment); health care; food; water (dams, storage, treatment and networks); transport (airports, ports, intermodal facilities, railway and mass transit networks and traffic control systems); production, storage and transport of dangerous goods (e.g. chemical, biological, radiological, and nuclear materials); government (e.g. critical services, facilities, information networks, assets, and key national sites and monuments).

### 10.Disaster Risk

The potential for consequences where something of value is at stake and where the outcome is uncertain, recognizing the diversity of values. Risk is often represented as probability of occurrence of hazardous events or trends multiplied by the impacts if these events or trends occur. Risk results from the interaction of vulnerability, exposure, and hazard. In climate change planning, disaster risks are those that could potentially lead to losses in lives, health status, livelihoods, assets, and services, which could occur to a particular community or a society over some specified future time period. Comment: The definition of disaster risk reflects the concept of disasters as the outcome of continuously present conditions of risk. Disaster risk comprises different types of potential losses which are often difficult to quantify. Nevertheless, with knowledge of the prevailing hazards and the patterns of population and socio-economic development, disaster risks can be assessed and mapped, in broad terms at least.

### 11.Emissions

Refers to greenhouse gases released into the air that are produced by numerous activities including burning fossil fuels, industrial agriculture, and thawing permafrost to name a few.

### 12.Extreme weather

Extreme weather is an event out of the norm, that seems to be happening with greater frequency. A thunderstorm, for example to be extreme would be one that lasts a shorter time than typical for the area, while including more intense periods of rain, stronger winds than usual and may result in more community damage. Weather forecasts more regularly predict extreme weather events, ironically making these events the "new norm".

### 13.Greenhouse gases (GHG)

Short Answer

Greenhouse gases are generated by the burning of fossil fuels: gasoline, diesel fuel, natural gas, propane. Burning of fossil fuels generates $Co_2$ which effectively absorbs thermal infrared radiation, emitted by the Earth's surface, by the atmosphere itself due to the same gases, and by clouds.

Longer Answer

Greenhouse gases are those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and emit radiation at specific wavelengths within the spectrum of thermal infrared radiation emitted by the Earth's surface, the atmosphere itself, and by clouds. This property causes the greenhouse effect. Water vapour (H2O), carbon dioxide (CO2), nitrous oxide (N2O), methaneCH4), and ozone (O3) are the primary greenhouse gases in the Earth's atmosphere. Moreover, there are a number of entirely human-made greenhouse gases in the atmosphere, such as the halocarbons and other chlorine- and bromine-containing substances, dealt with under the Montreal Protocol. Beside CO2, N2O and CH4, the Paris Agreement, and other international agreements with the greenhouse gases sulphur hexafluoride (SF6), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

### 14.Impacts

The term "impacts" is used primarily to refer to the effects on natural and human systems of extreme weather and climate events and of climate change. Impacts generally refer to effects on lives, livelihoods, health status, ecosystems, economic, social, and cultural assets, services (including environmental), and infrastructure due to the interaction of climate changes or hazardous climate events occurring within a specific time period, and the vulnerability of an exposed society or system. Impacts are also referred to as consequences and outcomes. The impacts of climate change on geophysical systems, including floods, droughts, and sea level rise, are a subset of impacts called physical impacts.

### 15.Impact assessments (climate change)

The practice of identifying and evaluating, in monetary and/or non-monetary terms, the effects of climate change on natural and human systems.

### 16.Intergovernmental Panel on Climate Change (IPCC)

Established in 1988 by the World Meteorological Organization and the UN Environment Programme, the IPCC surveys world-wide scientific and technical literature and publishes assessment reports that are widely recognized as the most credible existing sources of information on climate change. The IPCC also works on methodologies and responds to specific requests from the Convention's subsidiary bodies. The IPCC is independent of the Convention.

### 17.Mainstreaming

Climate policy mainstreaming means incorporating this specialized policy within municipal tools including Official Community Plans and Zoning By-laws for implementation. Without mainstreaming, climate policy rests in the purview of the academic and not-for-profit sectors, where it may be completed to satisfy funding requirements, and may not have the political or technical support to be implemented at the community level.

### 18.Maladaptation

Any changes in natural or human systems that inadvertently increase vulnerability to climatic stimuli; an adaptation that fails in reducing vulnerability, but increases it instead.

### 19.Mitigation

The longer-term cousin of climate adaptation. Mitigation is a type of intervention used to reduce the anthropogenic forces of the climate system; it includes strategies and measures to reduce greenhouse gas sources and emissions including the use of ‘sinks’, which are natural features that absorb carbon such as forests. Planners address mitigation through intensification, active transportation, promoting public transit, encouraging the use of renewable energy, and reducing fossil fuel use with vehicle traffic.

### 20.Resilience

The ability of a social or ecological system, community, or society exposed to hazards to resist, absorb, accommodate, and recover from the effects of a hazard and/or disturbance in a timely and efficient manner, while retaining the same basic structure and ways of functioning, the capacity for self-organisation, and the capacity to adapt to stress and change, including through the preservation and restoration of its essential basic structures and functions.

# Statement of Principles

PURPOSE

The Statement builds on the CIP Policy on Climate Change and establishes principles of responsible professional practice for addressing climate change.

PRINCIPLES

1. Climate change is real and immediate and will impact on planners' responsibility to advance the public interest through the promotion of a sustainable future and better communities.
2. Climate change presents a dual challenge, requiring a response toward two objectives:
    - There is a high degree of certainty that anthropogenic sources of greenhouse gases are causing climate change. Mitigation efforts are interventions that decrease the rate of climate change by reducing sources or enhancing sinks of greenhouse gases.
    - It is now certain that, even with effective mitigation, some degree of climate change will occur and is, in fact, already occurring. Adaptation efforts are interventions to minimize the negative impacts of climate change and take advantage of any opportunities it brings.
3. Mitigation and adaptation are different kinds of challenges, but cannot be considered in isolation from each other or from broader sustainability objectives, be they environmental, economic or social. Pursuing these objectives in a linked and coordinated manner will allow conflicts between them to be recognized and rectified, and potential synergies exploited.
4. Planning for climate change is an essential part of ethical and responsible planning practice. Planners are well suited to this challenge. Our profession has long been concerned with balancing present needs and future requirements to ensure the long term prosperity of our communities. Planning rarely occurs in circumstances of perfect information and planners are accustomed to developing adaptable and flexible responses to deal with uncertainty. For these reasons, planners must play a leadership role in enabling a climate-neutral society and preparing our communities for climate change impacts.
5. Solutions to mitigation and adaptation challenges are not the preserve of any one group or profession. The scale of the climate change challenge requires a comprehensive response and an evaluation of the full range of options. An effective response requires cooperation and coordination between different professions, between different levels of government, between jurisdictions and between the public, private and non-profit sectors. Planning is part of an interdisciplinary response that must work to make the connections necessary to achieve the best possible outcomes.
6. The impacts of climate change as well as the consequences of responses to climate change will be borne unequally by different segments of our communities. Already vulnerable groups are likely to feel these impacts most acutely. Planners must pay special attention to issues of equity and environmental justice in the formation of responses to climate change.

7. Just as in other areas of practice, public involvement in planning decisions on climate change will create a better informed and more resilient response. Planners will use public processes to inform, educate, gather information and opinions and learn from community members. In so doing it will make the public, stakeholders and political officials partners in developing climate change solutions.

8. Planners' responsibility to address climate change extends beyond our duty to the communities we directly serve to our ethical responsibilities to the global community impacted by our actions, as well as the integrity of the biosphere as a whole, its component ecosystems and species.

# Framework Organization

The framework is organized into three layers:

LAYER 1 – EXPLANATION OF CORE ISSUES AND SUMMARY OF KEY ELEMENTS

Layer 1 presents a conceptualization of climate change's core issues in an effort to help planners understand their differences and similarities from the issues they already address in their day-to-day practice. A summary of Key Elements provides a snap shot of the organization of the rest of the Standard.

LAYER 2 – KEY ELEMENTS

Layer 2 expands on the Key Elements identified in Layer 1. Further detail is provided on the considerations to be addressed in advancing each Key Element. Examples of how jurisdictions have addressed Key Elements in practice are included in text boxes.

LAYER 3 – RESOURCES

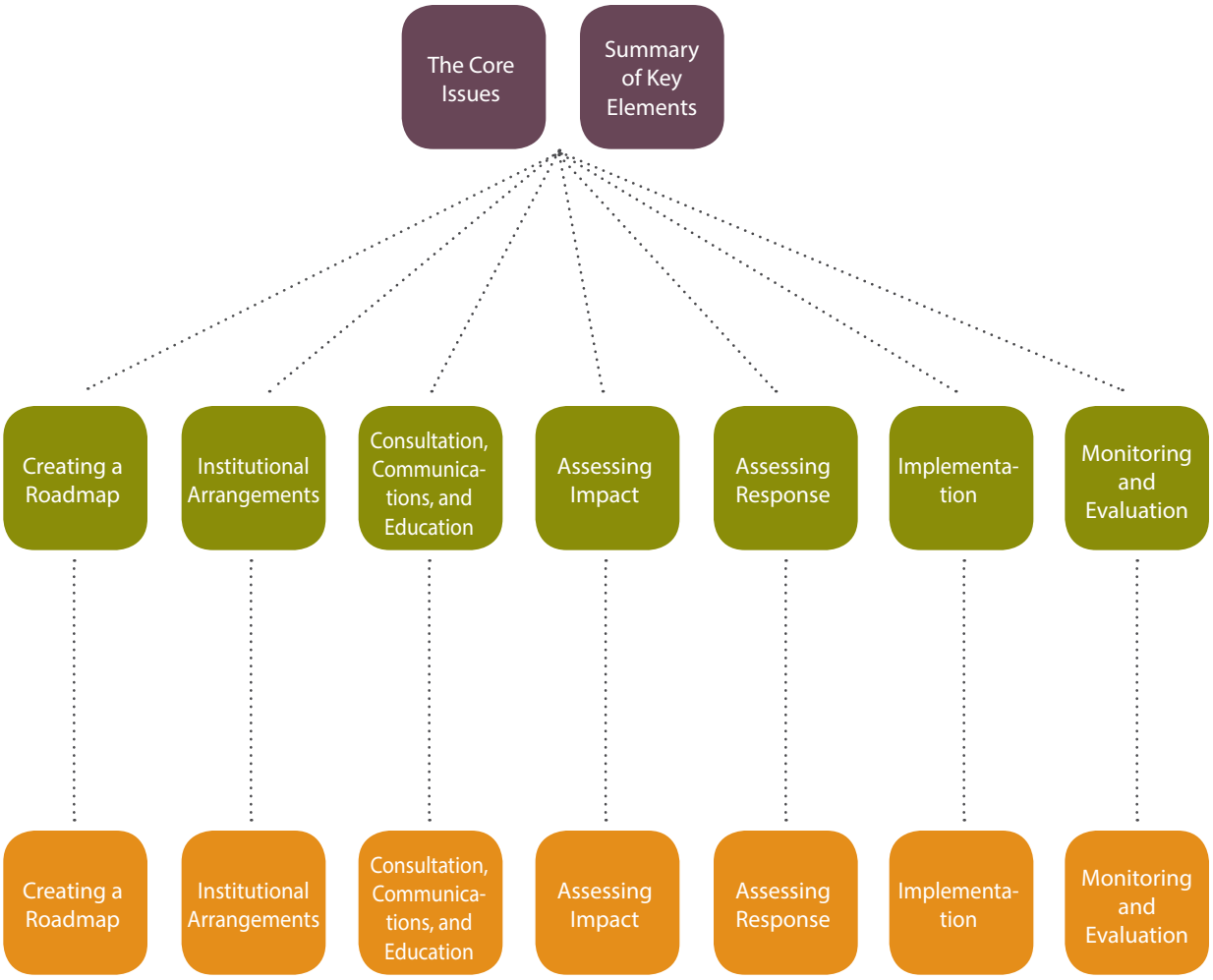
Layer 3 is an annotated list of documents and web pages that planners can draw on for further detail on the issues discussed in the Standard. They are organized by Key Element. Documents and web pages referenced elsewhere in the Standard are included here. The documents in Layer 3 range from climate change plans and strategies, to resources on effective process, to descriptions of practical implementation ideas.

# Statement of Principles

LAYER 1

LAYER 2

LAYER 3



# The Core Issues: Mitigation and Adaptation

The Standard addresses both planning for climate change mitigation and adaptation. In many plans and strategies, they are considered separately. There is some justification for this approach, as mitigation and adaptation are different kinds of challenges in some essential ways: their objectives; the nature of the motivation to address them; and the relationship between action and impact. Despite their differences, at a practical level, strategies to address them share some similarities and responses often overlap and can impact on each other positively or negatively. Therefore they are presented in the Standard together. However, before key elements to advance climate change mitigation and adaptation are detailed, a short discussion of their differences is provided.

## MITIGATION

Mitigation has been the focus of many of the efforts to address climate change to date. There is a high degree of certainty that climate change is being caused by anthropogenic activities which have increased the levels of GHGs present in the atmosphere. Mitigation actions aim to either reduce GHG emissions at source, or capture and store them where they will not contribute to climate change.

Climate change is a global problem requiring a global response. However, the specific level of intervention will range from the macro to the micro; national action is essential to establish a policy regime that achieves across-the-board reductions in GHG emissions, but many actions on the local scale will also have a cumulative positive impact.

Action on climate change mitigation requires us to acknowledge two related motivations:

- Mitigation is an example of enlightened self-interest – In short, we can only benefit by benefiting everyone: communities want to avoid the impacts of climate change; they initiate a mitigation response; the impacts of reducing local emissions or preserving carbon sinks benefit the global community; only the cumulative impacts of many similar responses will achieve the desired effect.
- Mitigation is an ethical responsibility – As well as holding promise for addressing climate change mitigation, the cumulative impacts of many local actions are also the cause of increased concentrations of GHG in the atmosphere. Our actions have had and will have a negative impact not only on our own communities, but on communities around the world. Different communities have contributed unevenly to the problem; different communities will be affected unevenly by climate change; there is no just relationship between the two. In circumstances where local actions have global impact, our actions hold the potential to negatively impact others. In a country such as Canada, with high per capita GHG emissions, this reality emphasizes our responsibilities to our fellow global citizens – and beyond, to our ethical responsibilities to the other species with which we share the biosphere and which are impacted by climate change as well.

These motivations may be strong, but they have yet to bring about climate change mitigation on a national level which would allow us to meet our international obligations. The lack of progress is in part due to the nature of the climate change challenge: the requirement for a collective response, the need for a radical departure from business-as-usual and the perceived conflict with other societal goals. Tinkering with the status quo will not create the scale of impact required. A more substantial change is necessary.

ADAPTATION

On the face of it, climate change adaptation is in some ways a more straightforward challenge for planners than mitigation:

- Whereas mitigation is motivated by enlightened self interest and ethical responsibility, adaptation is motivated by direct self interest, since the core question it addresses is, "How can we protect ourselves from new vulnerabilities?";
- Whereas mitigative actions are in part local but their impacts are only meaningful at the global scale, adaptation consists mostly of local actions that have direct local impacts;
- Whereas mitigation seems to require a departure from the status quo, the tools needed for some aspects of adaptation may already be in place and simply need to be recalibrated to meet new requirements; for example, municipalities already have systems for identifying and limiting development on flood plains and regulating storm water requirements for infrastructure.

If adapting to climate change is more straightforward than addressing mitigation in some ways, it raises larger challenges as well:

- Communities may have to face entirely new challenges for which they currently do no planning;
- The potential impacts of the most severe projections of climate change are cataclysmic (see sidebar). The magnitude of change may overwhelm traditional means of dealing with problems and, more significantly, overwhelm our capacity to adapt altogether;
- Existing infrastructure may be damaged because it was built to the specifications of a different climate reality;
- Economic disruption may result from changes to local environments, such as declining fish stocks, new invasive species such as the pine beetle, and increased extreme weather events;
- Climate change and adaptive responses may cause increased inequality as some groups are more vulnerable to their impacts than others;
- Impacts directly caused by climate change will be accompanied by a host of side effects which will increase the burden of adaptation; for example, scarce resources may lead to international conflicts.

These adaptive challenges are daunting. What links these potential complications is the core challenge of climate change adaptation: how to assess and plan for vulnerabilities, as well as any opportunities climate change brings, in the face of uncertainty.

The potential impacts of climate change are large and they are long term. Climate change is already occurring and, even with effective mitigation, will take some time to reverse. While short- and medium-term adaptation requirements are understood to some extent, long-term adaptation requirements cannot be predicted with absolute certainty because mitigation efforts today and in the future will alter the range and scale of impacts. Part of responsible planning is to project future risks and requirements and ensure our communities are prepared to meet them. Climate change makes this task even more vital, while, at the same time, more difficult to accomplish.

A summary of the differences between mitigation and adaptation is included in the table below.

SUMMARY OF FEATURES: MITIGATION AND ADAPTATION

| | Mitigation | Adaptation |
|---|---|---|
| Motivation | Enlightened self interest<br>Ethical responsibility | Direct self interest |
| Action/Impact | Action at various levels/Global impact | Local action/Local impact |
| Key Challenges | Challenge to the status quo | Uncertainty<br>Adaptive Capacity |

WHY PLAN FOR MITIGATION AND ADAPTATION NOW?

The reason to plan for climate change is straightforward: to limit harm. The reasons to begin right now are also clear. The decisions planners make today will have impacts far into the future: on our ability to prevent climate change and to adapt to it. The changes required are significant and will take time to accomplish; getting started now is imperative if they are to take effect when we need them.

On mitigation, the need for immediate action is particularly strong. Calls for action are at least 20 years old, yet progress to date has been inadequate. Past emissions are already causing climate change and will persist in the atmosphere for years to come. Climate change has its own momentum, meaning that once put in motion by emissions, a certain amount of climate change is inevitable. Any delay in reducing emissions to sustainable levels adds force to climate change's trajectory and increases the severity of its impacts (see text box Canadian Communities and Climate Change).

The rate at which climate change will occur is not clear. It is possible that specific effects of climate change will in turn accelerate its pace in examples of positive feedback. For example, thawing permafrost caused by rising temperatures will release significant amounts of methane, a GHG, into the atmosphere, thereby acting as an accelerant of further climate change. As the full extent of the impacts of climate change are uncertain, it would seem prudent to limit our liabilities. Effective mitigative action now will allow us to limit climate change and therefore its impacts. Economists have demonstrated that effective mitigation in the present will be cheaper and easier to achieve than adaptation later (see Stern Report in Layer 3).

In considering the urgency of adaptation, it must be recognized that, even with effective mitigation, the scientific community has confidence that some climate change will continue to occur. Again, the argument for taking action now is strong. Proactive adaptation in anticipation of climate change is likely to be cheaper than reactive adaptation once major impacts have occurred. In some cases, proactive adaptation will not represent a significant increase in required resources, only new parameters for planning. In others, costs will be higher than planning for the status quo but reduce future exposure to risk. Proactive planning for climate change may also help identify and take advantage of beneficial aspects of climate change.

Both climate change mitigation and adaptation require immediate action by planners. The remainder of the Standard serves as a framework for developing an appropriate response to these challenges.

# Canadian Communities and Climate Change

WHAT KINDS OF CLIMATE CHANGES CAN CANADIAN COMMUNITIES EXPECT?

Changes in the Canadian climate will differ in variety and intensity in different parts of the country, and include:

RISING TEMPERATURES

The Canadian Coupled Climate Model shows average temperatures rising by 1-2°C by 2020, 2-4°C by 2050 and 5-10°C by 2090 in most parts of Canada, with the exception of the Arctic which is projected to face higher increases. Higher average temperatures will increase the number of extreme heat events and decrease air quality, especially in urban areas already impacted by the Urban Heat Island effect and air pollution. Permafrost conditions will be altered and further reductions will be seen in snow cover and sea ice. A changing climate will alter eco-systems, shift the range of species, allow pests and diseases such as the pine beetle to thrive and increase the potential for the spread of vector-borne diseases. Rising temperatures are also likely to lengthen the growing season and thereby benefit agriculture and forestry.

CHANGES IN PATTERNS AND LEVELS OF PRECIPITATION

Climate change is predicted to increase precipitation, although not necessarily during the growing season, and increase heavy precipitation events. Higher temperatures will be accompanied by higher rates of evapotranspiration and therefore increased aridity. Drought and wildfires will occur with greater frequency. River and lake levels will fall and water resources may be compromised.

EXTREME WEATHER EVENTS

Changing weather patterns will include more extreme weather events. Flooding and weather-related damage to communities will increase. In coastal regions, these effects will be compounded by extreme weather-related storm surges.

RISING SEA LEVELS

Parts of Atlantic Canada could see a sea level rise of 50 to 70 cm by 2100; over the same period, sea level could rise from 18 to 59 cm in British Columbia and the Western Arctic. Sea level rise will lead to coastal erosion and increased vulnerability to flooding. Rising sea levels may also result in saltwater intrusion into the water table, thereby salinating supplies of water for drinking and irrigation.

WHAT ARE THE POSSIBLE IMPACTS OF THESE CHANGES?

Impact on eco-systems – Climate change could cause profound changes to marine and terrestrial eco-systems. Some species will thrive and expand their range; others, especially those already vulnerable, such as varieties of Pacific Salmon, could further deteriorate or disappear. Resource-dependent communities – those that rely on agriculture, forestry, fishing and hunting as a primary source of their livelihood – will be particularly impacted by climate change.

Impact on infrastructure and built environment – Climate change will have dramatic impacts on infrastructure maintenance and design: roads and housing built on permafrost may be damaged; existing coastal flood defences may have to be enhanced; stormwater systems will need to be upgraded to new extreme weather specifications; and energy generation and transmission will be put under stress.

Impact on human health – Past experience indicates that extreme heat and other extreme weather events have consequences in terms of human mortality. As the frequency of these events increases so does the threat to human health. These threats will be compounded by other health risks associated with climate change: deteriorated air quality, vector- and rodent-borne diseases, and food and water contamination.

Impact on economy – Adapting to climate change will be costly and involve climate-proofing infrastructure and the built environment. It is likely that failing to prepare will be many times more costly. Previous extreme weather events have been estimated to cost communities hundreds of millions, if not billions, of dollars. The stresses climate change puts on other systems, such as the energy grid, may also have negative economic consequences. Resource dependent industries, including fishing, forestry, and agriculture, are especially vulnerable to climate change impacts. Given the truly global nature of the world economy, impacts on industries in one part of the world may cause disruptions of trade flows which will lead to economic reordering at a global scale.

Impact of a world under stress – Compared to many parts of the world, Canada has a high capacity to adapt to climate change; we live in a society characterized by high levels of technology and education which prepare us better than most to find solutions and dedicate resources to adaptation. However, even if Canada manages to limit the direct negative consequences of climate change, it is uncertain how effective we will be at insulating ourselves from climate change's consequences in less well prepared parts of the world, where climate change might bring widespread suffering, economic collapse, conflict and displacement.

For more:
From Impacts to Adaptation: Canada in a Changing Climate (2007). Natural Resources Canada.

# Summary of Key Elements

The framework presented in the Standard is organized into a series of key elements, each essential in developing a well-supported approach to climate change planning. While the Standard is a model of good practice, it is also intended to be a practical tool. The key elements are well-suited to shaping a comprehensive strategy for climate change, but can also be drawn on strategically to meet specific needs.

In using the framework, it is important to keep several points in mind:

- Although presented as a linear progression, it is likely that the actual process of developing an approach to climate change will be iterative in nature and require planners to circle back to various key elements during the formation of a response.
- Climate change is not an issue that can be "solved" before moving on to other priorities. Strategies will need to be re-evaluated as new information is available and progress is assessed. Ideally, climate change will become a filter through which planners view their responsibilities and the range of choices they make everyday in their professional practice.
- The scale of the climate change response must be proportional to the scale of the problem. Attention must be paid to this fundamental calculus. The danger of ignoring it is that climate change is given superficial treatment, actions are window dressing and communities fail to meet their mitigation and adaptation obligations.

Below is a summary of the key elements of climate change planning. Together they form a framework which serves as the organizing principle for the rest of the Standard. Subsequent sections address each key element in detail and provide examples and further resources.

Key elements are:

1. CREATING A ROADMAP

A logical starting point in addressing any issue is to frame the challenge, establish broad objectives, and map out an approach to determine a response. In this, planning for climate change is not fundamentally different from planning that already goes on in communities across the country. The steps are the same: evaluating the A logical starting point in addressing any issue is to frame the challenge, establish broad objectives, and map out an approach to determine a response. In this, planning for climate change is not fundamentally different from planning that already goes on in communities across the country. The steps are the same: evaluating the present, projecting future needs, outlining a vision, establishing a course of action, implementation and evaluation.

The Standard itself can serve as a roadmap for addressing climate change issues. This element addresses strategic approaches to the climate change challenge and links to other models and resources.

2. INSTITUTIONAL ARRANGEMENTS

The planning function is a powerful tool in preparing a community response to climate change. However, at the local government level, planning is one avenue of response among many. For an approach to climate change to be most effective, it must be "joined up" and the product of significant inter-departmental and, possibly, inter-jurisdictional cooperation and coordination.

This element considers the institutional arrangements necessary to enable a response to climate change, including: mechanisms and structures to facilitate interdepartmental collaboration; the role of organizational change in more deeply incorporating climate change into

all public sector activities; and the issue of organizational leadership.

3. CONSULTATION, COMMUNICATIONS AND EDUCATION

Planning is public decision-making and, as such, public and stakeholder involvement is a critical component for a number of reasons: to access local knowledge and opinion, to inform and educate, to build consensus on possible directions and approaches, to enhance the legitimacy of the end product and create partners in implementation. Planners involve the public in much of their work. In the case of climate change, because the response may require a shift from the status quo and action on climate change may compete with other widely validated societal goals, extra effort will be required through communications and education to build popular support. This element examines examples of successful public processes focussed on climate change.

4. ASSESSING IMPACT

In planning for climate change, a core task is to use scientific and technical evaluations to assess impacts. Evaluations are needed for both mitigation and adaptation, although they differ in their requirements. In the case of mitigation, an evaluation assesses an organization's or community's impact on climate change. This is most often done through a GHG inventory which acts as a benchmark against which targets can be set for corporate or community reductions. For adaptation, an evaluation assesses climate change's impacts on our communities. An analysis of adaptation requirements entails a multi-step process: first a forecast of the range of impacts; then an assessment of vulnerabilities. Combined these assessments allow planners to carry out the principal function of adaptation planning: the analysis and management of risk. The section on this element discusses the requirements of these evaluations and possible approaches.

5. ASSESSING RESPONSE

If assessing impacts allows planners to understand the nature and scale of the climate change challenge, assessing the response is about examining, tailoring and selecting solutions. Planners work to shape their communities in the short and long term. Their response to climate change will depend on the tools at their disposal, the capacity within existing systems to change, and an analysis of the costs and benefits of overhauling existing systems or shaping new ones. This element is also one of the core tasks of planning for climate change. It is the process of selecting the best means to meet the climate change challenge and the point at which a case is made for implementation. The section on this element explores the range of responses open to planners.

6. IMPLEMENTATION

Once planning approaches are finalized they must be implemented and, where necessary, supported through allocation of resources. This element deals with the challenges of putting planning tools and approaches into action and realizing results.

7. MONITORING AND EVALUATION

Many planning tools are presumed rather than proven to effectively address specific issues. Performance measurement against identified goals should be the basis for a periodic re-evaluation of climate change objectives and approaches. Evaluation will help determine the on-the-ground results of planning approaches and identify the need for additional efforts or resources. Because of the nature of climate change, ongoing monitoring and reassessment is especially important. As forecasts become more precise and the effectiveness of initiatives is determined, climate change plans will need to be re-examined.

# LEGAL IMPLICATIONS OF CLIMATE CHANGE

## Opportunities and risks for the Professional Planner

By Joanna Kyriazis, BSc, JD and Christine Callihoo, MSc., RPP, MCIP



**SUMMARY**

*The frequency of extreme weather events is putting more people and infrastructure in harm's way. In both proactive and reactive ways, the law is evolving to better direct the incorporation of climate change into infrastructure decision-making and to hold certain parties to account for failing to better prepare for the risks. Legislation, policies, and plans that direct the consideration of climate change are emerging. Professional planners should consider how these developments impact their work and take steps to ensure that planning and management of resources and infrastructure are carried out in a way that minimizes and prepares for climate change impacts.*

**RÉSUMÉ**

*La fréquence des événements météorologiques extrêmes compromet de plus en plus la sécurité des populations et de l'infrastructure. Le droit évolue, tant de façon réactive que proactive, vers une prise en compte plus directe des effets du changement climatique sur l'infrastructure dans la prise de décisions et une plus grande responsabilisation de certaines parties intéressées pour avoir failli à la tâche de préparation à affronter ces risques. On constate qu'il y a davantage de lois, de politiques et de plans pour faire face au changement climatique. Les urbanistes professionnels devraient être attentifs aux impacts de ces changements sur leur travail et prendre des mesures pour veiller à ce que les ressources en urbanisme et en gestion de l'infrastructure soient utilisées pour atténuer les répercussions du changement climatique et s'y préparer.*

Local governments are responsible for understanding the risks of climate change in their regions and making appropriate land use and infrastructure decisions that limit harm. This article explores ways in which those responsible for local infrastructure and planning – including the governments that own the infrastructure, as well as the professionals involved in the planning, design, construction, and maintenance of that infrastructure – could be required to better integrate climate change into decision making or be exposed to potential legal liability for failing to adequately adapt.

As professionals involved in infrastructure planning and design with a responsibility to the public, professional planners should be aware of the changing law and policy landscape and consider how their practice could be impacted by the legal implications of climate change.

## LEGAL AND POLICY DRIVERS TO CONSIDER CLIMATE CHANGE

Canadian governments are working diligently to better integrate climate change into infrastructure and land use planning by updating relevant legislation. The federal government has signalled its commitment to addressing climate change through its ratification of the Paris Agreement and release of the Pan-Canadian Framework on Clean Growth and Climate Change (PCF).[1]

To meet some of the climate resiliency goals set out under the PCF, Infrastructure Canada has recently announced that applicants seeking federal funding for new major public infrastructure projects will now be required to assess the project's greenhouse gas (GHG) emissions, as well as the climate resilience of their project in terms of location, design, and planned operation. This development is relevant to planners because the resiliency aspect of the assessment must be validated by a professional engineer, registered planner, specialized biologist, or hydrologist to ensure it is consistent with the relevant guidance.[2]

At the provincial level, legal requirements to integrate climate considerations are also starting to emerge. The B.C. Climate Leadership Plan[3] mandates the creation of 10-year adaptation plans for provincial public-sector operations. Similarly, a recent amendment to provincial Flood Hazard Land Use Management Guidelines incorporates sea level rise into the determination of building setbacks and flood construction levels in coastal areas.[4] In Ontario, the *Infrastructure for Jobs and Prosperity Act*, 2015 requires public sector entities to carry out infrastructure planning and investment in a way that minimizes environmental impacts and will "ensure that infrastructure is designed to be resilient to the effects of climate change."[5] Ontario's most recent Provincial Policy Statement (PPS) directs that climate change mitigation and adaptation considerations be integrated into planning decision processes, and particularly those related to the areas of energy conservation, air quality, natural hazard resiliency, and public health and safety.[6] Ontario municipalities must use the PPS to develop their official plans and to guide and inform decisions on other planning matters. In Manitoba, the Made-in Manitoba Climate and Green Plan[7] is in the development stage with a specific focus upon mitigation and economic opportunity, including the proposed carbon savings account process made to, in part, address the anticipated economic contraction as a result of addressing GHG. How the Made-in Manitoba Climate and Green Plan will look 'on the ground' as it relates to the professional planner remains to be seen, but there is little doubt that it will impact the planning process and outcomes. Similar statements can be made about emerging policies in other provinces and territories.

## A PLANNER'S POTENTIAL EXPOSURE TO COMMON LAW LIABILITY

With legislative requirements to consider climate change in planning and infrastructure matters emerging, more imminent legal risks likely arise from the common law. Extreme weather events continue to stress infrastructure in Canada. The resulting damage to personal property and human health could increase exposure to liability, particularly in the form of negligence and nuisance lawsuits.

Those who design, construct, operate, or maintain infrastructure could be subject to negligence lawsuits if their actions breach the reasonable standard of care and lead to injury or property damage. Negligence and nuisance lawsuits related to climate impacts, such as flooding, may implicate a wide range of potential defendants, including public authorities and other infrastructure actors such as developers, engineers, professional services firms, and design consulting companies.

**"Negligence and nuisance lawsuits related to climate impacts, such as flooding, may implicate a wide range of potential defendants, including public authorities and other infrastructure actors such as developers, engineers, professional services firms, and design consulting companies."**

Planners, along with engineers, architects, and other professionals, will be among the infrastructure decision-makers called upon to interpret and apply these emerging requirements. Professional planners should consider how these developments impact their work and determine whether they possess the skills and information they need to properly respond and comply.



companies. These types of lawsuits can result in costly awards or settlements, in some cases in the range of hundreds of millions of dollars.[8]

Climate change can increase the risk of negligence claims by increasing the risk of harm that may be the subject of lawsuits (e.g., more frequent and intense extreme weather events such as flooding). Further, the risk increases with the changing standards that governments and other actors are expected to meet in light of new climate information and professional practitioner expectations.[9] As climate modelling and attribution science become more sophisticated, courts could find that such events and their associated risks **were reasonably foreseeable** and that governments and associated professional service providers should have taken appropriate action to protect against those risks.[10]

In light of these risks, professional planners should continue to work to integrate climate change into their decision making, applying rigorous and rational methods to properly document their decisions/approaches, and take appropriate adaptation actions where they can to help reduce exposure to potential risk and liability.

## SPECIAL ISSUES FOR PROFESSIONALS

Licensed professionals, such as planners, often have unique and special duties to those who procure or benefit from their services and work. These duties can arise under legislation, the common law, contracts, or professional codes of conduct, all of which contribute to the scope of professional responsibility and potential liability. Planners should consider the following issues when determining the appropriate level of care that should be taken in their daily practices.

First, like doctors, lawyers, or engineers, planners may be subject to a higher standard of care due to their professional training and specialized knowledge. Depending on the circumstance, as climate science improves and foreseeability increases, the scope of liability may expand and anticipating climate change could be seen as an integral component of professional duty.[11]

Second, planners may seek to rely on industry standards or practice to demonstrate the appropriate standard of care was met. Although following industry standards may help prevent liability, in some cases the standards themselves could be found to be negligent if they involved reasonably foreseeable risks.[12] Already, as practitioners, the application of risk analysis within the established industry standards is commonplace; in doing so, this analysis may abate potential risk of liability when done according to industry standards – at minimum. Professional planners are encouraged to keep in mind that, as suggested in this article, industry standards and the resulting standard of care is not static.

Finally, planners should consider how other sources of professional responsibility, such as professional codes of conduct, inform their duties and responsibilities. For instance, professional planners practicing in British Columbia and Yukon are guided by the Planning Institute of British Columbia (PIBC) Code of Ethics and Professional Conduct.[13] The PIBC Code provides that professional planners have a responsibility to the public, which includes, among other things "[a]cknowledging the inter-related nature of planning decisions and the consequences for natural and human environments." Similarly, the PIBC defines "good professional planning"[14] as forward thinking, comprehensive, informed, collaborative, and inclusive. Climate change considerations could be relevant to these duties and responsibilities.

For all of these reasons, it would be prudent for professional planners to work together to define clear industry standards and guidance that use the best available climate information to help mitigate potential risk and liability. The Canadian Institute of Planners' Model Standard of Practice for Climate Change Planning[15] is a helpful tool for this purpose. Its forthcoming Policy on Climate Change may also be of interest to those planners who are looking for more guidance at the operational level.

## THE PLANNING PROFESSION'S OPPORTUNITY

As the levels of government turn their minds to the inclusion of climate change considerations in infrastructure and land use planning and as the potential for legal liability grows, professional planners are encouraged to:

- promote and incorporate up-to-date information;
- consider current levels of climate change preparedness in projects and planning;
- work to ensure standards and practices are consistent, updated, and meaningful to the professional planning practitioner (for example, flooding mitigation and avoidance; what is an appropriate threshold to set when the planner is doing this work?);
- draw on specialized expertise to develop climate change mitigation and adaptation strategies; and
- draw on specialized expertise to further develop the required approach, application, and guidance provided via risk assessment and implementation.

Professional planners have the knowledge, expertise, and responsibility to guide thoughtful incorporation of climate change into everyday practice. Here is an opportunity for them to lead the way. ■

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The authors would like to acknowledge the contribution of Deborah Carlson of West Coast Environmental Law who had co-presented the "Legal Framework for Climate Change Adaptation: Legal Implications of Climate Change for Professionals" workshop. We would also like to acknowledge Margaret Dickson for her editorial acumen.

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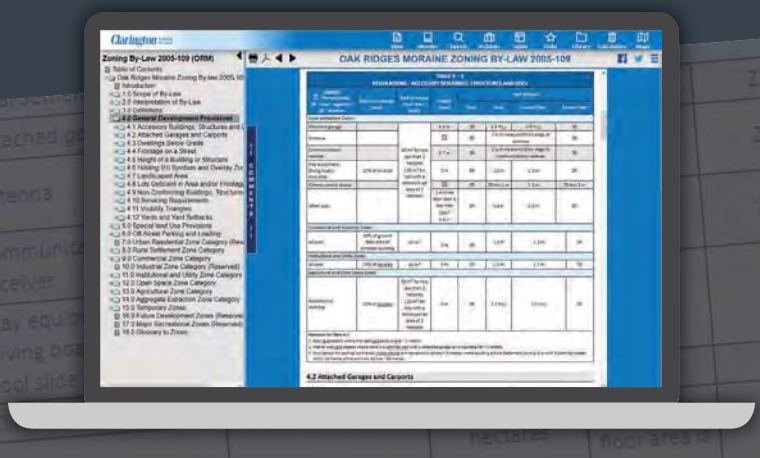
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# Viewpoint

## Seven Principles of Strong Climate Change Planning

Sara Meerow Sierra C. Woodruff

**ABSTRACT**

As greenhouse gas emissions and climate change impacts increase worldwide, there is an urgent need for communities, and thus urban planners, to simultaneously mitigate and adapt to climate change. We synthesize recent research to examine whether the field of planning is adequately addressing climate change. We conclude that although there has been progress in recent years, it is insufficient given the scope of the climate change challenge and the myriad ways climate impacts negatively affect communities. We argue for seven principles of strong climate change planning: 1) clear goals; 2) strong fact base; 3) diverse strategies; 4) public participation; 5) coordination across actors, sectors, and plans; 6) processes for implementation and monitoring; and 7) techniques to address uncertainty. For each of these principles we discuss the current state of research and practice.

**Keywords:** adaptation, climate change, mitigation, planning, resilience

Communities are not adequately planning for climate change. Global carbon emissions continue to rise (Le Quéré et al., 2018), even as alarming studies point to the Greenland ice sheet melting at an accelerated rate (Bevis et al., 2019), warming ocean temperatures (Cheng, Abraham, Hausfather, & Trenberth, 2019), mass extinctions (Intergovernmental Science–Policy Platform on Biodiversity and Ecosystem Services, 2019), and mounting climate- and weather-related disaster costs (National Oceanic and Atmospheric Administration, National Centers for Environmental Information, 2018). The latest Intergovernmental Panel on Climate Change (IPCC) report argues climate change is already affecting human and natural systems; limiting global temperature increases to 1.5 °C would reduce risks but also require rapid, unprecedented "transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems" (IPCC, 2018, p. 15). Practicing planners and planning scholars have a role to play in these transitions and in helping communities prepare for climate change impacts (IPCC, 2014a). An important first step is to create strong climate change plans. In this Viewpoint, we discuss what that entails. We begin with an overview of climate planning, determining that although planners are engaging with climate change in research and practice, planning can still improve. We then propose seven principles for strong climate plans, including ambitious yet attainable goals; a strong fact base; diverse strategies; meaningful public participation and justice; coordination across actors, sectors, and plans; specific processes for implementation and monitoring; and strategies that address uncertainty. We conclude with a few promising developments that may facilitate more effective climate change planning.

## The Current Status of Climate Change Planning

The international planning community has not ignored climate change. Discussions of global climate change in this journal date back to 1990 (Titus, 1990). At first, planners focused on climate change mitigation, or reducing greenhouse gas (GHG) emissions and increasing GHG sinks. The Cities for Climate Protection program, led by the international organization ICLEI – Local Governments for Sustainable Development, provided an early framework for climate mitigation: conduct a baseline GHG emissions inventory, adopt emissions reduction targets, develop a climate action plan (CAP), implement actions, and monitor progress. Cities became important climate mitigation innovators (Anguelovski & Carmin, 2011; Bulkeley, 2010); many developed CAPs (compare Bassett & Shandas, 2010; Boswell, Greve, & Seale, 2010). This suggests a central role for planners in reducing GHGs; however, planning departments and professionals were rarely the main authors of CAPs (Bassett & Shandas, 2010).

Recently, the focus has broadened from mitigation to adaptation planning. Adaptation is "the process of adjustment to actual or expected climate and its effects" (IPCC, 2014b, p. 118). Some cities now develop adaptation plans before mitigation plans (CAPs; Reckien et al., 2018). A global assessment of 401 cities finds 18% were engaged in adaptation planning, and those furthest

DOI: 10.1080/01944363.2019.1652108 | © 2019 American Planning Association, Chicago, IL.

*Color version available at* ***tandfonline.com/rjpa***

along were large cities in the Global North (Araos et al., 2016). A study of 885 European cities finds 66% had a mitigation plan and 26% had an adaptation plan (Reckien et al., 2018). In the United States, approximately 50 cities and counties have adopted standalone adaptation plans since 2007 (Woodruff & Stults, 2016). This growth should be applauded, but given that by 2035 more than 150 communities on the U.S. east and Gulf coasts alone face chronic inundation from sea level rise (Spanger-Siegfried et al., 2017), it is insufficient.

Climate change planning is now increasingly embedded within a broader resilience agenda (Davoudi et al., 2012; Meerow & Mitchell, 2017). This is driven in part by international organizations. For example, one of the United Nations' Sustainable Development Goals is to make "cities inclusive, safe, resilient and sustainable" (United Nations 2015, p. 24). The Rockefeller Foundation's 100 Resilient Cities initiative has also been influential, supporting cities worldwide in hiring a chief resilience officer and developing a resilience plan (Rockefeller Foundation, 2018). Whereas climate action plans focus on mitigating GHGs and adaptation plans on preparing for the impacts of climate change, resilience plans seek to enhance communities' abilities to cope with a variety of shocks and stresses, from earthquakes to extreme weather to racial inequity. Resilience plans' broader systems approach addresses certain weaknesses of climate change planning but comes at the expense of other planning elements (van den Berg & Keenan, 2019; Woodruff, Meerow, Stults, & Wilkins, 2018). We briefly reflect on these trends, but future research should further examine these tradeoffs and the implications of this resilience shift.

Even where communities develop climate mitigation, adaptation, or resilience plans, they are often lacking in ambition or quality. In an early assessment of 170 city CAPs across the United States, Wheeler (2008) found CAPs lacked sufficiently ambitious targets and monitoring and failed to address adaptation. A study of 200 European cities similarly showed that although 65% of cities had a mitigation plan, their actions were insufficient to achieve GHG reduction targets, and adaptation strategies were less common and concrete (Reckien et al., 2014). Adaptation plans can also be improved, particularly in terms of implementation processes (Baker, Peterson, Brown, & McAlpine, 2012; Preston, Westaway, & Yuen, 2011; Woodruff & Stults, 2016). Scholars have critiqued resilience plans for providing few truly new strategies to help cities prepare for future risks (van den Berg & Keenan, 2019).

According to the APA, the goal of planning is to "maximize the health, safety, and economic well-being of all people living in our communities" (APA, 2019). The APA also has an official policy recognizing that climate change "will almost certainly prove to be one of the most important planning challenges of the 21st century" (APA, 2011). Therefore, planners need to work with communities to ensure they are producing high-quality climate change plans. Practicing planners undoubtedly face many political pressures and constraints in climate change planning (Mitchell & Graham, 2017). Numerous studies examine the barriers to climate change planning (Hamin, Gurran, & Emlinger, 2014; IPCC, 2014a; Moser & Ekstrom, 2010), but few outline what quality climate change planning entails.

We argue for seven key principles of strong climate change planning (Table 1). We derive these from the broader plan quality literature (Berke & Godschalk, 2009; Lyles & Stevens, 2014) and apply them to evaluate climate and resilience plans (Woodruff et al., 2018; Woodruff & Stults, 2016). Here we reflect on the current state of knowledge and practice for each principle. We draw on planning literature from the last 10 years and our own research on climate change adaptation and resilience planning, which is admittedly U.S. focused. Though this does limit generalizability, research suggests cities in higher income countries like the United States are the most engaged in climate change planning (Araos et al., 2016).

## Set Ambitious, Yet Attainable Goals

Tackling climate change requires setting ambitious goals for reducing GHG emissions and preparing for climate change impacts. Plans should have a clear purpose, vision for the future, well-defined outcomes, and measurable objectives to achieve goals (Baker et al., 2012; Woodruff & Stults, 2016). As noted, the primary goal of climate change planning has expanded from mitigation to include adaptation. Though CAPs may not set sufficiently ambitious GHG reduction targets, these mitigation plans at least have a measurable goal: reduced GHG emissions (Wheeler, 2008; Reckien et al., 2014). In comparison, the goals and outcomes for adaptation planning are difficult to define. As such, adaptation plans often lack specific goals (Woodruff & Stults, 2016). Vogel et al. (2016) provide one vision of successful climate change adaptation based on lessons learned from multiple successful cities. Resilience plans tend to better define goals and objectives than do climate adaptation plans and also helpfully recognize the connections between climate change and other challenges, such as aging infrastructure and systemic inequities (Woodruff et al., 2018). For example, Boston's (MA) resilience plan recognizes the need to address systemic racism to improve disaster outcomes and economic growth.

**Table 1: Seven principles of strong climate change planning.**

| Principle | Lessons for climate change planning practice |
|---|---|
| Set ambitious, yet attainable goals | Provide a clear purpose, vision for the future, and measurable objectives |
| Provide a strong fact base with the best available data | Incorporate empirical data on current conditions (GHG inventory or vulnerability assessment), future projections, and modeled impacts to ensure strategies are well informed |
| Outline diverse strategies to achieve goals | Include diverse strategies such as planning processes, policies and design standards, land use, physical infrastructure, green infrastructure, individual behavior, education, capacity building, technology, and research. Rank strategies in terms of their importance. Emphasize strategies with co-benefits and adaptation/mitigation win–wins |
| Engage the public and foster justice in all planning processes | Use participatory techniques in planning processes and specific strategies to engage marginalized populations and address injustices. Plans should detail these efforts as well as how the public will be engaged in plan monitoring or updates |
| Coordinate efforts to address climate change across actors, sectors, and plans | Engage diverse stakeholders in the planning process, integrate climate change into all plans, and ensure different plans are connected and consistent |
| Include a clear process for implementation and monitoring | Identify an implementation timeline, funding source, and responsible agency or organization for each strategy. Monitor plan implementation and progress to goals and evaluate distributional consequences |
| Address climate change uncertainty | Identify sources of uncertainties and use different scenarios in plan making. Use adaptive management to learn and iteratively plan and prioritize no- or low-regret and robust strategies |

Source: Based on concepts from Stults and Woodruff (2017).

## Provide a Strong Fact Base Using the Best Available Data

To combat climate change, cities need data on current conditions, future projections, and modeled impacts (Baker et al., 2012). For mitigation planning, this entails a detailed GHG inventory; for adaptation planning, the fact base usually consists of vulnerability assessments (Bassett & Shandas, 2010; IPCC, 2014a). Numerous resources provide guidance on conducting these assessments. One analysis of online adaptation resources finds more than 1,000 related to vulnerability assessment (Nordgren, Stults, & Meerow, 2016). Plans should explain how data were collected or analyzed as well as break down emissions and vulnerability by sector and population. Vulnerability assessments should identify projected climate change impacts on the water system, natural system, built environment, economic system, public health, cultural assets, and public services. Generally, resilience plans appear weaker in terms of their fact base than do climate change adaptation plans, often lacking basic climate projections or vulnerability assessments, although resilience plans better acknowledge the underlying drivers of human vulnerability (Woodruff et al., 2018).

## Outline Diverse Strategies to Achieve Goals

Given the simultaneous need to mitigate and adapt, strong climate change planning will require many different strategies. These should include efforts to change planning processes, policies and design standards, land use, physical infrastructure, green infrastructure, individual behavior, education, capacity building, technology, and research (Stults & Woodruff, 2017). It is critical to rank identified strategies and attempt to calculate the costs of both implementation and inaction (Berke & Godschalk, 2009). Identifying co-benefits associated with actions—including adaptation and mitigation win–wins—is also important for broadening support, particularly in the Global South, where mitigation is a lower priority than adaptation (Ayers & Huq, 2009). Green infrastructure is an increasingly popular climate change strategy worldwide, in part because of its numerous co-benefits (Kabisch et al., 2016).

## Engage the Public and Foster Justice in All Planning Processes

Planners generally agree on the importance of broad participation in planning processes (Burby, 2003). This same

principle applies to climate change planning, yet there is room to improve procedural equity, or fair participation, in decision making (Schrock, Bassett, & Green, 2015; van den Berg & Keenan, 2019). Research suggests elites and technocrats dominate CAP and adaptation planning processes (Bassett & Shandas, 2010; Haverkamp, 2017). Because of the perceived urgency for climate investments, Long and Rice (2019) point out that cities may further relegate equity concerns. Woodruff et al. (2018) find resilience plans did a better job outlining the public engagement processes than did adaptation plans but rarely described steps taken to include marginalized communities. Stronger climate change planning should recognize and seek to address injustices and employ different participatory approaches to ensure all local populations can shape the framing of the climate challenge, plan development, and implementation and monitoring (compare with Blue, Rosol, & Fast [2019] for guidance on participation parity in climate planning). The plan should outline these engagement processes and their outcomes (e.g., who participated; Woodruff & Stults, 2016).

## Coordinate Efforts to Address Climate Change Across Actors, Sectors, and Plans

Concerns that climate change planning will detract from efforts to foster social justice point to the inescapable planning challenge: negotiating conflicting priorities. If anything, climate change is complicating the conflicts between economy, environment, and equity that Campbell sketched out two decades ago (Berke, 2016; Campbell, 1996). For example, cities may want to avoid new construction in flood-prone areas, but they face housing affordability and development pressures. Cities have limited resources and therefore need to coordinate efforts. Planners can use the Plan Integration for Resilience Scorecard to identify inconsistencies across a city's network of plans that stem from conflicting priorities and may increase vulnerability (Berke et al., 2015; Berke, Malecha, Yu, Lee, & Masterson, 2019).

One way to reduce inconsistencies is to integrate climate change into other planning efforts and seek win–win strategies. Yet incorporating future climate projections or risks into hazard mitigation, for example, is still relatively uncommon (Stults, 2017). This represents a missed opportunity because integrating adaptation into other planning efforts—or mainstreaming—can help highlight the consequences of climate change for different sectors and the need to consider climate change in all decision making (Woodruff, 2018). Boston's comprehensive plan, Imagine Boston 2030, provides a good example of mainstreaming. Climate change is discussed throughout the plan and projected sea level rise mapped on future land uses. Though the plan still proposes investment and development in areas at risk of sea level rise, incorporating climate considerations into the plan demonstrates the imperative for regulatory and protection measures in those areas.

Whether climate change is addressed in standalone plans or mainstreamed, it cuts across traditional sectors and jurisdictional scales, requiring collaboration. Strong climate change planning requires broad internal support within the city organization and diverse representatives from local universities, different levels of government, the private sector, nongovernmental organizations, and neighboring jurisdictions (Innes, 1996). Yet a study of 350 cities worldwide suggests many relevant municipal agencies are only marginally involved in climate change planning (Aylett, 2015). The growing focus on resilience may be helpful in this regard because resilience planning supposedly facilitates collaboration and breaks down siloes (Goldstein et al., 2018; Sharifi & Yamagata, 2018).

## Include a Clear Process for Implementation and Monitoring

A major implementation gap remains in climate change planning. Many climate mitigation and adaptation plans exist, but few are put into practice and monitored, or even outline clear steps for doing so (Moser, Coffee, & Seville, 2017; Woodruff & Stults, 2016). One study in the United Kingdom finds that although more than 80% of local governments had conducted climate risk assessments by 2010, fewer than 40% had a plan for addressing them, none of which had been implemented (Porter, Demeritt, & Dessai, 2015). Correspondingly, many resources focus on the early planning phases, with fewer for implementation and monitoring (Nordgren et al., 2016). To facilitate implementation, plans should have a clear timeline, funding source, and responsible organization for each strategy. Research suggests that mainstreaming climate change into other sectors or plans increases adoption. Even if a standalone climate change plan is being developed, it should be linked to other planning efforts (Smit & Wandel, 2006; Vogel et al., 2016).

Access to funding and finance have been persistent challenges to implementation (Hinkel et al., 2018; Shi, Chu, & Carmin, 2015). But some cities are creatively applying existing financing instruments to fund adaptation projects. For example, San Francisco (CA) is proposing a general obligation bond and a special tax on waterfront property to begin fortifying the 3-mile seawall that protects its iconic waterfront area (Seawall Finance Work Group, 2017). Cities may also consider resilience fees or insurance-based fees, which provide a

new revenue stream while also creating a market signal for developers to avoid high-risk areas or to invest in risk reduction (Levy & Herst, 2018).

It is critical to monitor plans' implementation and evaluate outcomes. Plans should outline the method of evaluation, responsible parties, and requirements for reporting and updating. This is relatively straightforward with climate change mitigation, which focuses on reducing GHG emissions. Indicators and metrics for evaluating adaptation are much more contested and are clearly an avenue for future research (Arnott, Moser, & Goodrich, 2016).

It is important to monitor who is being affected by climate change planning. Most climate justice discussions have focused on the inherent injustice of global climate change, namely, that the people and countries most affected are not the primary contributors of GHG emissions (Bulkeley, Edwards, & Fuller, 2014). Recent studies have also pointed to justice issues inherent to local climate change planning. First, there may be inequities between cities in terms of their capacity and resources to plan for climate change. Studies find city size and wealth are predictors of whether they will plan for climate change (Shi, Chu, & Debats, 2015). Within cities, climate change—like other disasters—will have disproportionate impacts on vulnerable communities, including children, the disabled, and the elderly. These and other marginalized groups tend to live in more vulnerable areas and have less-resilient housing, access to fewer resources to deal with disasters, and limited options for evacuation or relocation (Shi et al., 2016). These inequalities may be exacerbated by adaptation investments. Anguelovski et al. (2016) document a number of international examples where adaptation planning has negative justice implications, which they group into acts of commission, whereby efforts displace poor communities, and acts of omission, or instances where investments prioritize wealthier communities. Adaption investments may also lead to climate gentrification, where perceived climate vulnerability (either because of geography or protective infrastructure) make safer parts of a community more attractive, driving up real estate prices and either displacing or excluding low-income populations. Evidence from Miami (FL) suggests this may already be happening, with higher elevation properties appreciating more (Keenan, Hill, & Gumber, 2018). This highlights the importance for planners to examine the consequences of adaptation strategies for disadvantaged populations and couple adaptation strategies with housing policies that protect existing neighborhoods (Levy & Herst, 2018).

## Address Climate Change Uncertainty

Numerous uncertainties, from scientists' imperfect understanding of physical climate processes to unknown future GHG emissions and political responses, make climate change planning difficult (Stults & Larsen, 2018). Many planners' responsibilities entail managing uncertainty, so planners are equipped to address climate uncertainty (Berke & Lyles, 2013). Plans should identify sources of uncertainties and consider different scenarios reflecting the range of possibilities. One promising strategy is adaptive management, a flexible, iterative governance approach whereby adjustments are regularly made based on new information learned through system monitoring (Tompkins & Adger, 2004). Another is to prioritize no- or low-regret strategies that would be beneficial regardless of future climate impacts (Preston et al., 2011). When evaluating different scenarios, it is useful to prioritize robust strategies that are effective across a range of possible climate futures (Lempert & Schlesinger, 2000). At a minimum, plans should acknowledge the need for strategies that account for uncertainty. Yet a recent assessment of 44 U.S. adaptation plans found none uses scenario planning or robust strategies (Stults & Larsen, 2018), and resilience plans were even worse in addressing uncertainty (Woodruff et al., 2018).

## Seeds of Good Climate Change Planning

Although communities and planners are still not doing enough to plan for climate change, there is some cause for optimism. We end here by highlighting a few promising "seeds" for climate change planning (Bennett et al., 2016). First, surveys show the public is increasingly concerned about climate change (Leiserowitz et al., 2018; Poushter & Huang, 2019). Second, communities worldwide are increasingly developing climate change mitigation, adaptation, and resilience plans and exploring novel approaches (Reckien et al., 2018; Woodruff & Stults, 2016). Third, planners have a wealth of resources for climate change planning at their fingertips, from the APA, the American Society of Adaptation Professionals, the Urban Sustainability Directors Network, EcoAdapt, and more. One effort to catalog adaptation-related tools finds more than 3,500 resources from more than 80 organizations, which is promising but also makes it challenging for practitioners to locate what they need (Nordgren et al., 2016). There is a clear need to document, curate, and share climate change planning successes to inform practice and increase support (Moser et al., 2017).

Planners' abilities to think long term, handle uncertainty, integrate across systems, and bring together diverse actors align well with skill sets required for climate action (Berke & Lyles, 2013; Crane & Landis, 2010; Mitchell & Graham, 2017). Indeed, adaptation plans prepared by planners demonstrate stronger goals,

strategies, implementation and monitoring, and coordination than plans prepared by other actors (Woodruff & Stults, 2016). Urban planners must continue to work toward better climate change planning; focusing on the seven principles we discuss here is a good way to start.

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## RESEARCH SUPPORT

*This material is based upon work supported by the National Science Foundation under award numbers CMMI-1825367 and CMMI-1825123.*

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