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April 2,, 2013

**VIA E-MAIL & COURIER**

Mayor and Members of Council  
City of Toronto  
Toronto City Hall  
100 Queen Street West  
Toronto, ON M5H 2N2

Your Worship and Members of Council:

**Re: Proposed Official Plan Amendment No. 199**

**And Re: Planning and Growth Committee Item PG22.3**

We are solicitors for the Building Industry and Land Development Association ("BILD") with respect to the above-captioned matter. Our client has participated in the consultation process conducted by the City, and wishes to express its appreciation for the efforts made in that regard. That said, while some progress has been made to address client's concerns as articulated in that process, a number of issues remain unresolved.

In this regard, we enclose herewith a communication as previously delivered to city staff which, when compared to OPA 199 as now proposed, serves to provide concrete examples of items where progress has been made and where concerns remain outstanding.

Our client would request that Council defer its consideration of OPA 199 and direct staff to meet us with a view towards seeking an entirely consensual resolution of the matters still in issue because, as OPA 199 is currently drafted, our client would be compelled to object.

Should you wish to discuss the foregoing or this matter more generally, please do not hesitate to contact us.

Yours very truly,

McCarthy Tétrault LLP



John A.R. Dawson

JAD/sc



## Memorandum

January 15, 2013

**To:** City of Toronto c/o Paul Bain

**From:** John A.R. Dawson

**Re:** Proposed OPA 199

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### INTRODUCTION

As requested, below we set out preliminary comments related to the revised draft wording for the proposed OPA 199 as was the subject of the working group meeting on January 11, 2013.

As you know, key principles for BILD on this topic include the following:

1. Views must be appropriate and described with precision;
2. The relative extent and quality of the heritage cultural values to which polices are to be applied must be capable of being challenged;
3. The application of policy directives should be commensurate with, or proportional to, the extent and quality of heritage conservation values in issue; and
4. Heritage evaluations must always take place in the context of the consideration of all other applicable land use planning considerations.

Unfortunately, these principles touch on many specific policies in the proposed OPA 199 with numerous references and cross-references, many of which are only implicit. This renders the provision of written comments, as is the case here, an inferior process for generating policy, especially on a consensual basis: there is no opportunity for the type of exchange which engendered the complete settlement of all BILD and CORRA issues in the last Official Plan review. In distinction, face-to-face meetings permit immediate feedback on policy intent with a high degree of precision, thereby focusing each party on the true issues, as opposed to an inefficient process wherein each party seeks to infer an intent from words written from widely varying perspectives.

This process of the exchange of written comments covering a large portion of the proposed policy framework necessarily focuses on the negative (it quickly becomes too cumbersome to

articulate areas of agreement), and thus obscures substantial areas of agreement which should provide a foundation for further agreement. It would be our submission that, in fact, a consensus seeking approach is likely to engender a better policy result than any adversarial process.

Therefore, although we are co-operating in providing written comments as requested to the extent practicable (we cannot begin to address all the potential issues raised by the varying interpretations of all the wording involved here), BILD continues to request that further face-to-face meetings occur prior to Council's consideration of an amendment for adoption.

## **COMMENTS**

### View Policies

1. It is critical that the direction in Policy 9 should operate only through the implementation provided for in Policy 10.
2. The direction to "create views" in Policy 9 is problematic and should be removed, it puts in question the fundamental purpose of the "views" policies: if such are to create views beyond those existing today, how is one to interpret the description of the views on Maps 7A and B? Furthermore, "create views" and "where possible" indicate the removal of built area is *prima facie* desirable, which we submit is counterproductive in an OP which encourages redevelopment to address, among other things, Growth Plan and PPS objectives. If any concept of "creating views" is to remain it should be strictly limited to encouraging such at the site plan stage, which does not entail limits on height or density. Depending on the balance of the policy wording, it will probably be preferable to replace the word "create" with an alternate term, such as "have regard", "acknowledge" or "enhance".
3. Given the lack of information respecting what actually constitutes the view intended to be protected, in the absence of the detail we presume will be provided on Schedule 4, BILD reserves the position on all the "views" policies. We note that the precise vantage point dramatically affects the view in issue. It would therefore assist us to understand why, for example, the view of Queen's Park is from Queen Street and not College Street and why the view of Old City hall is from Temperance. The subject of a number of views has not been defined to a degree of specificity which allows us to assess it either (at least to date), prime examples of this being the skylines.

### Heritage Policies

1. Policy 1 can serve to make heritage policies apply to any development application in Council's discretion, which is arbitrary and unfair. The failure to distinguish between designated and listed properties is symptomatic of this larger problem. However, BILD's suggestion is that the best "fix" is to make whatever amendments to the heritage policies as a whole are necessary to give effect to the following:
  - (a) The extent, degree and quality of cultural heritage value in question is open to effective challenge;
  - (b) The application of any directives contained in ultimately approved policy to a given circumstance will be commensurate with the determination in (a); and

- (c) All legitimate planning concerns (e.g. other official plan, Provincial Plan or Policy Statement policies) will also be applied to the determination under “(b)”.
2. The directions for the considerations to inform Heritage Conservation Districts in Policy 2 (i.e. social or community value and natural or scientific value) are problematic. At the outset, the wording in the Policy itself refers only to the “District”, and not the “District Plan”. Therefore, it is not clear whether the policy is intended to apply only to the setting of the boundary or to the determination of the directions which will be contained within the HCD Plan. Further, it is not clear whether the “evaluation” spoken of is intended to relate to the evaluation necessary to create the District and/or HCD Plan or an evaluation of an application under such a HCD Plan (in which case we question whether it would be effective). In part depending on the above, it also is not clear whether it merely allows the City to consider the identified matters or effectively requires it. Finally, it is not clear what “social or community value etc.” is intended to encompass. Is it the full range of potentially applicable land use planning considerations or something different?

BILD submits that Official Plan directions respecting the creation of both Heritage Conservation Districts and Plans must:

- (a) Ensure that the fully panoply of land use planning considerations will form part of the considerations; and
  - (b) Result in a HCD Plan where approval thereunder requires the full panoply of planning considerations to be considered along with such heritage directions as are contained within.
3. The last sentence of Policy 2 would vest any property with any cultural heritage value with significance under the PPS, thus potentially attaching significance which would not otherwise accrue by the application of the cultural heritage policies in the PPS directly. This is inappropriate.
4. The intent of the wording in the “sidebar” to Policy 2 is unclear. The following would improve clarity consistent with the overall OP structure.

SIDEBAR: Council has adopted a guideline, “Heritage Conservation Districts in Toronto: Procedures, Polices and Terms of Reference” which will inform the implementation of the policies of this Plan, the Provincial Policy Statement and Provincial Plans, respecting potential and existing Heritage Conservation Districts and Plans.

5. Policy 3 makes it mandatory for all “significant heritage properties”, an undefined term, to be included on the Heritage Register and thus subject to the heritage policies of this Plan, which do not acknowledge any gradation in heritage value. This is not good planning: please see our comments in the Introduction and paragraph 1 hereof.
6. Policy 4 should acknowledge a gradation of cultural heritage values for the properties on the Heritage Register, and thus a gradation in conservation/maintenance directions. As well, purporting to allow a third party to revise policy is an illegal unauthorized sub-delegation of Council’s powers.

7. This sidebar to policy 4, the reference to the “Toolkit” should include a specific “as of” date to avoid the unauthorized sub-delegation issue.
8. Policy 5 should be amended to reflect the concern outlined in paragraph 1 hereof.
9. BILD reaffirms that it does not object to the principle of the City creating an engagement protocol respecting First Nations and Metis. However, Policy 13 should be amended to delete the reference to “consultation”. The constitutional entitlements of First Nations cannot be negatively affected by a municipal official plan. However, there is equally no basis under the *Planning Act* to change the effect of any party’s participation in any process thereunder (i.e. Council’s decision must be driven only by land use planning considerations and unfettered otherwise). Also, as drafted Policy 13 is incomplete; BILD reserves further comment pending an opportunity to review a completed version.
10. In policy 21(d), the word “minor” should be added before the word “historic” or the policy otherwise re-written to capture that intent.
11. Heritage Impact Assessments: The policies/non-policy language respecting the demolition of adjacent properties should be clarified to indicate that the only concern is in the nature of physical interference (for example, the failure to properly shore causing a designated building to collapse).
12. Policy 27 does not, as drafted, address the concerns underlying the BILD comment in paragraph 1 hereof. The following is BILD’s suggestion for an appropriate approach to this topic:
  27. Council shall consider the following matters in its consideration of any application for development on or adjacent to a property on the Heritage Register.
    - (a) The cultural heritage values, attributes and character of the property;
    - (b) The extent to which the proposed development creates unacceptable negative effects on such values, attributes and character; and
    - (c) The extent to which any such impacts require mitigation, and may be mitigated, in the design of new development with due regard for other policies of this Plan.
13. Policy 28 is another policy that does not acknowledge that the extent of cultural heritage value varies between properties and that this variability should be acknowledged in policy. It provides that even the slightest of cultural value may not be “negatively affected”. The policy should be re-drafted to provide for protection commensurate with the importance of the cultural heritage value in issue.
14. Policy 29 should explicitly indicate that the preservation of a façade may be a valid approach in some circumstances. As the policy is currently written it is better to tear down the entire building than to preserve the façade only.
15. Policy 30 should be amended to provide that the full panoply of land use planning considerations will apply to the decision to move heritage buildings. As written, for example, any building on the Register, no matter the extent of its value, could not be moved to create a public park or to locate important public infrastructure if the move

negatively affects the heritage value, no matter the extent of the affect. The comments in paragraph 13 hereof respecting Policy 28 are also applicable here.

16. Heritage Conservation Districts: see the comments in paragraph 2 hereof. In addition, HCD Plans should maximize flexibility/opportunities for amendment to deal with new land use planning and infrastructure considerations as may emerge.
17. Policy 32 should specifically provide for the policies respecting the creation of Heritage Conservation District Studies and HCD Plans: it is not appropriate to permit Council to adopt policies outside of the OP to control the creation of such powerful instruments.
18. Policy 37 requires further discussion. Preservation is *situ* should not always be preferred strategy, yet it is always “possible” by halting development. Without a better understanding of the intent it is not possible to offer meaningful comment.
19. Policy 39 should be amended:
  - (a) To remove the direction for satisfying the City. Archaeologist are bound by provincial licensing requirements;
  - (b) To remove the direction to provide a “Provincial concurrence letter” to the City. The Province may choose not to issue such letters in the future.

To be clear, BILD does not object to the requirement for work to be undertaken by a licensed archaeologist or the requirement to provide that work product to the City.

20. Policy 40 should be amended to provide that a development proponent’s only duty is to provide information to interested First Nations or Metis who have self-identified or been identified by the City (presumably through the City’s engagement protocol).
21. Policy 42 should be amended to indicate that the City will do these things unless the law provides otherwise (e.g. the licencing requirements for archaeologists might require something different).
22. Cultural Heritage Landscapes: Further discussion is required to understand the intent of this policy and to create the proper balance with other planning objectives. For example, as written, the policy enables planning tools and strategies in support of Cultural Heritage Landscapes of insufficient significance to merit including on the Heritage Register. The extremely broad definition of Cultural Heritage Landscape coupled with broad and vaguely worded enabling powers will lead to arbitrariness and is not good planning policy.
23. Policy 46 should be amended to account for the issues raised in “Views Policies” hereinabove. Any view which is sought to be conserved must be precisely defined.