

November 11, 2016

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**VIA E-MAIL**

File 17638.00001

City of Toronto  
North York Community Council  
City Clerk's Office, Ground Floor  
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5100 Yonge Street  
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Allison Meistrich  
Senior Planner, Community Planning, North York District  
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Guy Matthew  
Senior Planner, Community Planning, North York District  
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5100 Yonge Street  
North York, ON M2N 5V7

Dear Sirs/Mesdames:

**Re: North York Community Council ("NYCC") Meeting November 15, 2016**

**Item NY18-34: Sheppard Avenue Commercial Area Secondary Plan Review – City Initiated Official Plan Amendment – Final Report (the "Secondary Plan Review")**

**Item NY18.31: Preliminary Report – Official Plan Amendment and Zoning Amendment Applications – 245-255 Sheppard Avenue West and 250-258 Bogert Avenue (the "Preliminary Report")**

As you are aware, we act as counsel for the following property owners in connection with their respective properties (collectively referred to as the "**Site**"):

1. 2025243 Ontario Inc.: 245 Sheppard Avenue West;
2. 1642989 Ontario Inc.: 253 and 255 Sheppard Avenue West; and
3. JFJ Development Inc.: 250, 256 & 258 Bogert Avenue.

On August 18, 2016, our clients filed complete application for Official Plan amendment and Zoning By-law amendment (the “**Applications**”) with the City for a proposed comprehensive redevelopment of the Site. Those Applications are currently under circulation.

The purpose of this correspondence is to provide our clients’ written submissions in response to the Preliminary Report and to the Secondary Plan Review, both of which are on the Agenda for the NYCC meeting on November 15, 2016.

### **The Preliminary Report and the Secondary Plan Review**

For Mr. Matthew’s benefit, on September 19, 2016 we corresponded with Ms. Meistrich (copy attached), advising of our legal position in respect of the Review. This submission now represents our second correspondence to the City on an important matter of planning policy and principle related to the Secondary Plan Review and our clients’ development applications in respect of the Site: namely, the long-standing “Clergy” Principle and the protection it is intended to confer on the rights of property owners to have their development rights determined on the basis of the planning policy/regime that are in effect at the time of a complete application, rather than planning policies which are adopted or enacted after the fact. That principle has been repeatedly recognized by the Courts and the Ontario Municipal Board (“**OMB**”), subject to the limited right of a planning authority to seek to rely on subsequently-enacted planning policies as part of an ‘emerging policy framework’.

On the basis of the Clergy Principle, we previously requested that the Site be exempted from the Secondary Plan Review. Respectfully, this is a clear case in which fairness dictates that the Secondary Plan Review must accommodate our clients’ development applications, and not vice versa.

Our clients’ request for an exemption was initially verbally communicated to the City during the September 7, 2016 Community Consultation Meetings (the “**CCM**”) and subsequently by correspondence dated September 19, 2016, referenced above. We received assurances that the Clergy Principle was well understood by the Planning Staff in attendance at the CCM (we were directed to a chart that showed active applications as a notation they would be given different status); to date, however, that assurance does not appear to have been implemented in the Secondary Plan Review. Respectfully, not only is that unproductive – it also imposes a significant and unnecessary financial burden on property owners who are merely seeking to protect their property interests and pursue their development rights, on a level playing field and in accordance with well-established law.

We have reviewed the Preliminary Report and have no immediate comments on the facts contained therein. Our only observation is in respect of the third paragraph under “Issues to be Resolved “ on page 9, where the following is noted:

*“The site is located within the Sheppard Avenue Commercial Area Secondary Plan which is under review. **The proposal should be compatible with the emerging vision for the corridor arising out of this review**”.* [emphasis added]

In our respectful submission, that assertion is without foundation as matter of sound planning law and policy. The site must be reviewed and evaluated for planning purposes on the basis of the policies and planning regime in place at the time of the complete applications. Otherwise, it erodes public confidence in the integrity of the planning process, and ignores the legitimate expectations of stakeholders who make significant investment decisions based on the pre-existing planning framework or new initiatives that are already in place.

#### **Further Submissions on the Clergy Principle**

In support of our submission that the Clergy Principle clearly applies in this instance, we attach a copy of the oft-cited decision of OMB Vice-Chair S. B. Campbell in *Sun Life Assurance Company of Canada v. City of Burlington* . At paragraph 43, Vice-Chair Campbell stated as follows:

*“The Board finds that Clergy is not merely a Board policy; it is an enunciation of a principle of natural justice and procedural fairness. It is well-settled law that natural justice and procedural fairness require that the party must know the case it must answer and be permitted to answer that case. **If in the context of planning law, the policy regime were a moving target, natural justice would be absent.**”* [emphasis added]

Further on at paragraph 88, she stated:

*“In considering this application, the Board, having regard to the Clergy Principle as considered above, must make a distinction between the existing, applicable policy and evolving policy”.*

This decision speaks loud and clear to the core principles of natural justice and procedural fairness that should apply when a property owner files a development application to an approval authority. Those core principles demand that the planning merits of the application must be determined in accordance with the planning policies in force at the time of the complete

application. Those principles assume an even greater importance where there is an appeal to the OMB from a non-decision by a municipality such that it no longer occupies the role of approval authority, and in light of the recent Bill 73 amendments to the *Planning Act* which render approved planning documents immune from change for a two-year period.

**Conclusion**


Based on the foregoing, please accept this correspondence as a further formal request that the Site be exempt and excluded from the "study area" for the Secondary Plan Review. We would be pleased to continue discussions with City Staff on how our clients' development applications for the Site can otherwise be appropriately integrated with the Secondary Plan Review.

Given our position as set out above, and despite our clients' other concerns with the Secondary Plan Review, we have refrained from making any detailed presentations, submissions or comments to date. Nevertheless, we ask that this correspondence be recognized as a formal written submission for the purpose of any Planning Act appeal rights that our clients reserve the right to exercise. In the event the Site is not exempt from the Secondary Plan Review as requested, we also reserve the right to make further submissions as warranted.

Thank you for your ongoing attention to this matter.

Yours truly,

**WeirFoulds LLP**



Barnet H. Kussner

BHK/PC:cf  
Enclosure

c: J. Nanos, Director, Community Planning, City of Toronto (North York District)  
P. Chronis, WeirFoulds LLP  
Clients

September 19, 2016

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VIA E-MAIL

File 17638.00001

Allison Meistrich  
Senior Planner, Community Planning, North York District  
City of Toronto  
North York Civic Centre  
5100 Yonge Street  
North York, ON M2N 5V7

Dear Ms. Meistrich:

**Re: Sheppard Avenue Commercial Area Secondary Plan Review (the "Review")**

As you are aware, we act as counsel for the following property owners in connection with their respective properties (collectively referred to as the "Site"):

1. 2025243 Ontario Inc.: 245 Sheppard Avenue West
2. 1642989 Ontario Inc.: 253 and 255 Sheppard Avenue West
3. JFJ Development Inc.: 250, 256 & 258 Bogert Avenue

Further to the community consultation meeting held on September 7, 2016 and the discussions you had with Paul Chronis of our office both before and after that meeting, we wish to confirm our mutual understanding that the Site will be evaluated on the basis of the policies in place at the time of our clients' Official Plan and Zoning Amendment Applications (the "Applications") filed with the City on August 18, 2016. This is consistent with the longstanding "Clergy" principle which has been repeatedly recognized and confirmed by the Ontario Municipal Board.

On that basis, please accept this correspondence as our formal request that the Site be exempt from the "study area" for the Review.

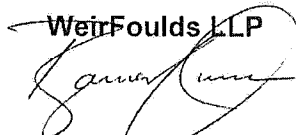
Based on our position as set out above, and despite our clients' many concerns with the ongoing Review, we have refrained from making any detailed presentations, submissions or comments to date. Nevertheless, we ask that this correspondence be recognized as a formal written submission for the purpose of any *Planning Act* appeal rights that may need to be

exercised. In the event the Site is not exempt from the Review as requested, we reserve the right to make further submissions as warranted.

Please provide your written confirmation that the Site has been and will continue to be exempt from the "study area" for the Review on the basis set out above.

Thank you for your ongoing attention to this matter. We look forward to hearing from you at your earliest convenience.

Yours truly,

**WeirFoulds LLP**  
  
Barnett H. Kussner

BHK/PC:cl

c: J. Nanos, Director, Community Planning, City of Toronto (North York District)  
Susan Smallwood, Senior Planner, Community Planning, City of Toronto (North York District)  
P. Chronis, WeirFoulds LLP  
Clients

9615899.2

*Case Name:*  
**Sun Life Assurance Co. of Canada v. Burlington (City)**

**IN THE MATTER OF subsection 51(39) of  
the Planning Act, R.S.O. 1990, c.  
P.13, as amended**  
**Appellant: Sun Life Assurance Company of Canada**  
**Subject: Proposed Plan of Subdivision**  
**Property Address/Description: 395 Martha Street**  
**Municipality: City of Burlington**

**[2007] O.M.B.D. No. 1277**

57 O.M.B.R. 280

Municipal File No.: Plan of Condominium

No. 525-11/03, OMB Case No.:

PL060707, OMB File No.: S060062

Ontario Municipal Board

**Panel: Susan B. Campbell, Vice Chair**

Decision: November 29, 2007.

(93 paras.)

**Appearances:**

Sun Life Assurance Company of Canada: P. Devine, counsel, K. Sliwa, counsel.

City of Burlington: T. Richardson, counsel.

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**DECISION DELIVERED BY SUSAN B. CAMPBELL**  
**AND ORDER OF THE BOARD**

**THE PROPOSAL:**

1 The subject property, 395 Martha St., in the City of Burlington (the "City") is currently developed with a 12-storey, 119 unit residential rental apartment building, constructed in 1973. The property is located within the City's Downtown Centre Area, approximately 50m north of Lakeshore Rd. The City's Downtown Centre is a mixed use area, including residential, commercial (office and retail), civic and cultural uses. The subject property is surrounded by this variety of uses.

2 In September 2003 Sun Life Assurance Company of Canada (the "Appellant") submitted an application for a Draft Plan of Condominium, to the City, to convert the tenure of the building from rental to condominium. There are no physical changes in terms of unit numbers or unit sizes proposed.

3 Staff of the City recommended that the application be approved in a staff report dated August 3, 2005 (Exhibit #3, TAB 3) and again in a staff report dated May 10, 2006 (Exhibit #3, TAB 6). These two reports were signed by the City Manager, the General Manager and the Director of the Planning Department. City Council refused the application and the Appellant appealed that decision to the Board.

#### **THE LEGISLATIVE AND POLICY CONTEXT:**

4 Paul Stagl and Willard Dunning who were qualified by the Board as expert witnesses on behalf of the Appellant and John Gladki and David Hulchanski who were qualified as expert witnesses on behalf of the City provided the Board with a Statement of Agreed upon Facts (Exhibit #2). While the witnesses did not agree about the implications of certain policies, they did agree that the following policies are relevant to a consideration of this application.

#### The Halton Region Official Plan:

##### III-B5a

The goal for housing is to supply the people of Halton with an adequate mix and variety of housing to satisfy differing social and economic needs.

##### III-5b

The objectives of the Region are:

- (1) to establish housing targets by type for the Region as a whole.
- (2) To explore and implement new approaches to reduce residential land and construction costs and to effect an adequate supply of affordable housing.
- (5) to meet housing needs through the provision of assisted and special housing in Halton.
- (8) to encourage the Area Municipalities to maintain the quality of the existing housing stock.

##### III-5c



It is the policy of the Region to:

- (2a) prepare and update every five years in conjunction with the Area Municipalities and in consultation with the development industry and other housing providers, a Regional Housing Statement for Council to adopt that will describe:  
  
the annual demand, supply and need for housing.
- (7) require local Official Plans to ensure, by appropriate density and housing mixes, the provision of a full range of housing types consistent with the Regional population growth targets.
- (15) encourage all levels of government to stimulate rental market housing construction in Halton to meet such needs.
- (16) establish guidelines for the conversion of existing rental housing to protect tenants and rental housing stock.
- (18) require Local Official Plans and Secondary Plans to provide an appropriate mix of housing by type and affordability in each geographic area.

V-C1

This plan calls for the preparation of the following guidelines to provide more detailed directions in the implementation of its policies:

- (a) Rental Housing Conversion Guidelines

VI-3

"Affordable Housing" means housing with a market price or rent that is affordable to households of low and moderate income, which are households within the lowest 60 per cent of the income distribution for the Housing Region, as determined by the Ministry of Housing. Affordable in this context means annual housing costs (i.e. gross rent or mortgage principal and interest payment amortized over 25 years and assuming a 25 per cent down payment and taxes) do not exceed 30 per cent of gross annual household income.

VI-46

"Market Housing" means housing for rental or purchase without government subsidization.

Burlington Official Plan:

Part III

Section 2.1

- (b)

A sufficient supply of owner occupied and rental housing shall be maintained to meet existing and future needs.

- (c) A broad, diverse range of housing types shall be provided including housing which is affordable and accessible for all residents.

#### Housing Supply Objective

- (b) to encourage the retention of existing rental housing.

#### Housing Supply Policies

- (f) the retention and/or renovation of older residential buildings shall be encouraged.
- (g) if redevelopment of a residential rental property is proposed, City Council shall encourage the retention of an equivalent number of rental housing units.

#### Housing Affordability Objective

- (a) to ensure that a range of housing and tenure types are available to meet the various lifestyle and income group needs of the existing and future population.
- (b) to encourage the development of affordable housing throughout the City.

5 A number of other Burlington Official Plan (the "OP") policies are relevant to a consideration of this application in the opinion of Mr. Stagl, the Appellant's planner. Section 3.0 (a) Guiding Principles, says that the City is to "provide a community plan and growth strategy aimed at creating an attractive, liveable community that offers a wide range of opportunities for its citizens. The Plan enhances the quality of life for Burlington residents by providing a range of housing, jobs and leisure opportunities..." Section 3.0 (g) says that the "Plan addresses the need for social fairness by ensuring that all Burlington residents have equal access to housing in different areas by offering transit services to most employment areas and by maintaining a wide range of community facilities".

6 In section 4.3 "the Plan encourages a broader mix of residential dwellings in terms of type, size, cost and ownership ..." Further, the section provides that in the subject Downtown Mixed Use Centre "...special attention will be focused on this area to revitalize it as a traditional 'people place' Downtown". This is to be done, in part, through "maintaining good quality housing stock (and) encouraging residential development in areas where appropriate ..."

7 Finally, Mr. Stagl pointed to the relevance of section 5.5 Downtown Mixed Use Centre. Objectives are set out in section 5.5.2 and they include "(f) to increase the resident population and provide a variety of housing types at medium and high densities that will strengthen the live/work relationship to ensure the Downtown is used after business hours and create a local market for convenience and service goods. Section 5.5.4(f) provides "senior citizen, assisted and special needs housing shall be encouraged in the Downtown to benefit from a wide range of commercial, transit and social services".

The Planning Act:

**8** Both parties agreed that section 2 of the *Planning Act* (the "Act") is relevant in considering this application. Section 2 directs approving authorities, including Council and the Board, to have regard to certain matters of provincial interest. The City's Issues List (Exhibit #3, TAB 11) queries whether the proposed conversion complies specifically with subsection (h) the orderly development of safe and healthy communities; (j) the adequate provision for a full range of housing; (l) the protection of the financial and economic well-being of the province and its municipalities; and (p) the appropriate location of growth and development.

**9** While the parties agree that subsections (e) through (l) of section 51(24) of the Act are not at issue, the City, in its issues list questions whether the proposed conversion complies with the section 51(24) requirement that in considering such a plan "regard shall be had"...to the "welfare of the present and future inhabitants of the municipality" and whether the proposal "is premature or in the public interest".

The Provincial Policy Statement, 1997:

**10** Section 3 of the Act in force at the time of the application requires that an approval authority "have regard to" provincial policy statements. The Provincial Policy Statement, 1997 (the "PPS") was in force at the time of the application. Section 1.2.1 Housing, provides that provision is to be made in all planning jurisdictions "for a full range of housing types and densities to meet projected demographic and market requirements of current and future residents". Housing forms designed to be "affordable to moderate and lower income households" are to be encouraged.

Municipal Act, 2001:

**11** Section 99.1(1) of the *Municipal Act, 2001* (the "*Municipal Act*") provides "a local municipality may prohibit and regulate the demolition of residential rental properties and may permit the conversion of residential rental properties to a purpose other than the purpose of a residential rental property". This power includes the power to prohibit a conversion of a residential rental property to a purpose other than residential rental property without a permit.

Tenant Protection Act, 1997:

**12** The *Tenant Protection Act, 1997* (the "TPA") is relevant to a consideration of this conversion proposal. Among other things, the TPA repealed the *Rental Housing Protection Act* (the "RHPA") which had allowed municipalities to regulate the demolition or conversion of rental housing. However, in respect of a conversion, the TPA prohibits a landlord from requiring tenants to vacate to facilitate the conversion; guarantees a tenant lifetime security of tenure and the right of first refusal on the purchase of their unit; and guarantees rent control.

Burlington's Condominium Conversion Policy-History and Relevance - The Clergy Principle:

**13** As noted above, the Appellant filed its application in respect of the subject property in September 2003. Staff of the City reviewed the application in light of existing, relevant Provincial, Regional and City policy in reports dated August 3, 2005 and May 10, 2006. Despite the position now taken by the City that staff's review was somehow lacking, the Board finds it instructive to review those reports in the context of considering the City's condominium conversion policy. Again, the Board notes that these reports were approved by the City Manager, the General Manager and the

Director of the Planning Department, individuals who must be taken to have significant knowledge of City policies.

14 In the first report staff notes that the TPA had replaced the RHPA. The report says "with this change in legislation came a shift in the provincial interest from being one of protecting rental units to one of protecting the tenure of those living in the units. The (TPA) protects a tenant's rights to continue to rent a unit, notwithstanding its conversion to a condominium unit". While the RHPA directed municipalities to ensure that a healthy vacancy rate existed before rental units were removed from the market, the TPA contains no such direction. Despite this, staff noted that when one considers "only apartment units" like the ones subject to this application, the vacancy rate is 4.1%, over the 2-3% generally "accepted as the minimum to allow removal of rental units from the market".

15 The report reviews the relevant OP policies and notes that the OP "is not explicit as to how rental housing supply is to be retained with the exception of one policy that encourages the retention of rental units in an amount equal to those that are the subject of the redevelopment". The report goes on to note that "while the subject application is for a change of tenure and not technically a redevelopment, Council in the past two years has approved new condominium/rental unit development which could be considered as replacing any converted units". In this report staff considers the concerns of existing tenants. The "main concern" in condominium conversions was that the units could be sold and the tenants evicted. However, staff note that the TPA, the intent of which is to protect the tenant, not the status of the building, addresses this concern. Therefore staff "are satisfied that the provisions of the (TPA) are sufficient to protect the existing tenants' access to the rental accommodation". (sic)

16 Finally, staff had regard to the issue of affordable housing in the context of this proposed conversion. Staff considered existing rental rates in the building, mortgage rates, and the proposed cost of the units and determined that "a unit could be carried financially for an amount which is in keeping with the current rental rate. Staff consider this aspect of the proposal as contributing towards the provision of affordable housing".

17 City Council considered this report and referred it back to staff for further discussions with the tenants, a further consideration of the application in light of the TPA and for discussions with the Region's Director of Housing Division.

18 While this further consultation, on this specific application was going on, staff issued a report on January 28, 2004 entitled "Conversion of Rental Housing to Condominium". This report recommended that staff be directed to prepare an OP amendment, independent of the existing OP review, that "enhances and clarifies policies to encourage the preservation of existing rental housing and the construction of new rental housing and includes criteria to be considered when processing an application for the conversion of a building from rental to condominium". This report considers recent changes in provincial legislation and their implications; the fact that the City's OP contains "no specific policies dealing with the conversion of rental units to condominium ownership; the history of the City of Toronto's OPA 2; and the fact that since the TPA was proclaimed in 1998, City Council had approved 7 out of 8 conversion applications.

19 Staff concluded that "the current (OP) contains principles and objectives dealing with rental housing supply but provides insufficient guidance in the form of specific policies for dealing with conversions of rental units. It would be beneficial if clarity in the form of policy was provided, such as more specific criteria to be considered in evaluating rental to condominium conversions". Such criteria could include the achievement of specific rental vacancy rates in the City, current rent levels,

site plan issues, baseline rental unit inventory thresholds, compliance with the Zoning By-law and Building Code, consideration of existing tenants, and the number of units affected.

**20** City Council adopted this report in February 2004 and directed staff to prepare the requisite official plan amendment.

**21** It must be noted that the January 2004 staff report recommending the adoption of an OPA enhancing and clarifying condominium conversion policies was prepared, delivered and adopted by Council in advance of the August 2005 staff report recommending approval of the subject application. Nowhere in this August 2005 report does staff reference the review, which they had apparently been undertaking on condominium conversion policies, since at least February 2004.

**22** The Board can draw only one conclusion from the evident separation of the City's consideration of the current application, from its review of its condominium conversion policies. Staff of the City, including the City Manager, the General Manager and the Director of Planning reviewed the current application in light of relevant, in force, Provincial, Regional and City policies.

**23** The May 2006 report demonstrates that, following the direction of City Council, staff had further meetings with the tenants of the building; they consulted with the Rental Housing Tribunal; they consulted with the Region's Director of Housing Division; and they re-examined City policies on rental housing and affordability. Staff, at the end of the day, after all consultation, did not change its recommendation; it recommended that Council approve the application. There was nothing about its own ongoing review of condominium conversion policies which convinced staff, up to the level of City Manager, to recommend against approval of this application.

**24** On June 26, 2006 City Council refused approval of the application. Following this refusal a number of legislative and policy changes, generally relevant to condominium conversion occurred. In January 2007 the province amended the *Municipal Act*, providing municipalities with the authority to prohibit or regulate conversion of residential rental properties; in May 2007 the Region released its Sustainable Halton Housing Report; and on June 11, 2007, City Council adopted Official plan Amendment No. 62 ("OPA 62") setting out policies with respect to the conversion of residential rental properties. OPA 62 (Exhibit #11, TAB B8) amends section 2.3.2 of the OP by deleting current subsections (f) and (g) and replacing them with new subsection (f):

The demolition or conversion to freehold or condominium ownership of residential rental properties containing six or more units should not be permitted unless the following conditions are satisfied:

- (i) the rental vacancy rate by dwelling/structure type for the City of Burlington as defined and reported yearly through the C.M.H.C. Rental market Survey has been at or above 3 per cent for the preceding two-year reporting period;
- (ii) the building for which conversion is proposed meets the requirements of the property standards by-law, the Ontario Building Code, and any other applicable law, or will be upgraded in accordance with these standards and requirements;
- (iii) where demolition occurs, replacement rental housing units are provided for those units that are demolished;

- (iv) that negative economic and other impacts upon tenants are minimized;
- (v) the requirements of any applicable Provincial legislation or regulation, as amended, are met.

**25** While the City did not take the position during the hearing that OPA 62 is "determinative" in this case, the evidence of both Mr. Gladki and Dr. Hulchanski on behalf of the City was certainly informed by the OPA. Mr. Gladki reviewed the "recent history regarding conversion policy in Burlington" and opined that this history "shows a consistent interest on the part of the Council of the City of Burlington...to control the conversion of rental housing" (Exhibit #21). He considered the current application in light of what he terms the "evolving policy context", maintaining that while post-application policies are "strictly speaking ... not applicable policy, they do provide an important indication of the direction in which the legislative and policy context is evolving". Therefore, while the in force OP makes no reference to, for example, vacancy rates, Mr. Gladki tests the subject application against a 2.5% to 3% vacancy rate for rental accommodation. Three per cent is the vacancy rate set out in OPA 62 for considering a condominium conversion.

**26** In argument, Counsel for the City submitted that while the provisions of OPA 62 are not determinative in this case, evidence with respect to OPA 62 is "admissible, relevant ... (and) helps to define OP policies".

**27** This Board has repeatedly been asked to determine what impact or relevance policy documents adopted after the filing of an application, have on the disposition of that application. As Counsel for the Appellants argued, the "Clergy Principle" was clearly enunciated in *Clergy Properties Ltd. v. Mississauga (City)* (1996), 34 O.M.B.R. 277. The Board in that case said "the Board in determining the policy framework under which an application should be examined has consistently stated that an application must be tested against the policy documents in place at the date of the application. It has done so in order to lend some certainty to the land use planning process".

**28** The Divisional Court upheld this decision, saying that it is within the Board's jurisdiction to determine the scope of the issues before it, the procedures to be followed and the appropriate policy choices to be applied to arrive at a decision. Counsel for the City argues that the Divisional Court decision means that the Court was not approving the *Clergy* principle, but rather, was approving the Board's authority to establish its own procedures.

**29** Counsel cites cases like *Dumart v. Woolwich (Township)* (1997), 37 O.M.B.R. 165 and *James Dick Construction v. Town of Caledon* (2003) O.M.B.D. No. 1195 as following this proposition. In establishing its own procedures the Board may look to new policies as they may be "relevant, valuable and informative to the Board's deliberations..." (*Dumart*) The Board in that case said that the "practice of the Board is not perfectly clear or rigidly consistent" and that there may not be a "one size fits all solution" in cases involving a changing policy regime. In *James Dick* the Board went so far as to say that the Board is "authorized to conclude when it is fair to apply the *Clergy* principle...it has the authority to conclude when the circumstances of a case warrant the application of another principle".

**30** With all due respect to previous panels of this Board, this panel does not accept the proposition that the choice of policy regime to be applied to an application is merely a matter of Board procedure. The application of the relevant policy regime goes to the heart of procedural fairness in matters heard by this Board. The logical corollary of the reasoning in *Dumart* and *James Dick* is that an applicant, at the time it files an application with a municipality, can not know what policies against which its

application will be tested. Such a situation would be patently unfair. It would facilitate a process whereby a municipality, with policies in place, could receive an application and decide that, while current policies would mandate approval, it does not wish to approve the application. Upon making this determination, policies could be changed and *ex post facto* applied to the application.

31 The fact that public policy considerations are germane to planning decisions made by a municipal council or this Board, does not allow for the abrogation of the rules of natural justice or procedural fairness. Both private parties and representatives of the public interest are entitled to understand the "rules of the game" from the outset. This Board's authority to set its own procedures does not permit it to allow one party to change these rules in mid-application. The *Planning Act* certainly does not contemplate such authority. Furthermore, any authority that may be afforded the Board by the *Ontario Municipal Board Act* must be tempered by a due regard to the principles of natural justice.

32 The Board finds that the *Clergy* principle is not merely a Board policy; it is an enunciation of a principle of natural justice and procedural fairness. It is well-settled law that natural justice and procedural fairness require that a party know the case it must answer and be permitted to answer that case. If, in the context of planning law, the policy regime were a moving target, natural justice would be absent.

33 The Board finds that the *Planning Act* has due regard for procedural fairness and natural justice. The Act sets out notice provisions, limitation periods, and proper parties and includes comprehensive procedures for the adoption of planning instruments, including policy documents. The Board will not permit derogation from these principles by finding that an instrument like OPA 62, adopted on June 11, 2007, is relevant to an application filed with the City on September 30, 2003.

34 In reaching this conclusion the Board takes into consideration the fact that City Council applied the existing policy regime to six other condominium conversion applications which were received by the City after the TPA was enacted in 1998. The January 28, 2004 staff report on condominium conversion (Exhibit #11, TAB B1) details these applications and notes that as the TPA does not require municipalities to give consideration to the protection of rental units, condominium conversions must be considered in light of OP policies. City Council, in applying these policies, approved the six applications. Only the subject application was denied. The Board must query why it would be fair and appropriate to apply an existing policy regime to some applications but consider another application in the light of an evolving policy regime.

35 The Board will consider this application in light of the Provincial, Regional and City policies in force at the time the application was made.

#### **POSITION OF THE APPELLANT:**

36 Mr. Stagl's review of the application, the relevant policy regime and his planning opinion are set out in his witness statement, Exhibit #1. In his opinion the application has appropriate regard for section 2 of the Act. Section 2(j) of the Act speaks to "the adequate provision of a full range of housing". It does not direct what the range is to be nor does it address tenure. The City has recognized section 2(j) in its OP by encouraging a broad and diverse range of housing and tenure types, but it has not set out a prescribed housing mix.

37 Further, in Mr. Stagl's opinion, section 2 of the Act is addressed in the application as the conversion will not result in a physical change to the property, thereby having regard to orderly

development. The proposal will allow for affordable ownership, therefore having regard to financial and economic well-being considerations.

**38** In Mr. Stagl's opinion the PPS is appropriately considered in this application. The application has regard to section 1.2.1, provision of a full range of housing. The conversion would allow for the provision of affordable home ownership opportunities.

**39** Mr. Stagl considered the application against the requirements of section 51(24) of the Act in some detail. A Draft Plan of Condominium must have regard to the criteria set out in this section. The City, in its issues list, specifically queried whether the application has regard to "the present and future inhabitants" of the City and "whether the proposal is premature or in the public interest". With respect to present and future inhabitants, it was Mr. Stagl's opinion that as only tenure is to change there are no health, safety, disability access or welfare considerations in the application. With respect to the issues of prematurity and the public interest, he testified that as the building exists there are no issues of infrastructure phasing or financial contributions which would render the application premature. With respect to the public interest, Mr. Stagl had regard to the City's in force OP which seeks to ensure affordability and choice in the range of housing provided, but which does not set out a condominium conversion policy. In his opinion the proposed conversion of residential units from rental to condominium contributes to a range of housing, specifically, affordable home ownership.

**40** Mr. Stagl reviewed the provisions of the Halton Region Official Plan which the expert witnesses agreed were relevant to the application. The Halton OP directs lower tier municipalities to provide for an adequate mix and variety of housing types but does not direct what the range or mix should be. The Halton OP does not address the issue of tenure. While the plan does anticipate the preparation of "Rental Housing Conversion Guidelines", no such guidelines were in place at the time the application was filed. The Halton OP specifically defines "affordable housing" and "market housing". In Mr. Stagl's opinion the proposal would contribute to the provision of such "affordable housing" in the City.

**41** Therefore, in his opinion, the proposal gives appropriate consideration to the relevant policies of the in force Halton OP.

**42** Finally, Mr. Stagl considered the application in light of the in force City OP policies set out above. The policies encourage the provision of an "adequate mix and variety of housing". However, Mr. Stagl notes that while the City has sought to ensure affordability and choice in the range of housing provided, the in force OP does not identify or prescribe a housing mix by either form or tenure and does not set out a specific conversion policy.

**43** The objective set out in section 2.3.1, Housing Supply -- Objective "to encourage the retention of existing rental housing" is to be pursued by the policies set out in section 2.3.2 Housing Supply -- Policies. Policy (f) provides "the retention and/or renovation of older residential buildings shall be encouraged" and policy (g) provides "if redevelopment of a residential rental property is proposed, City Council shall encourage the retention of an equal number of rental housing units". In Mr. Stagl's opinion the retention of rental housing objective is specifically focused on the context of redevelopment. The proposed conversion, in his opinion, is not a redevelopment: "the proposal does not alter the existing number of units, unit sizes or supporting facilities but proposes only to convert the tenure from rental to condominium". Mr. Stagl testified that the number of residential units provided in this Downtown Area would remain the same with the conversion. The units are to be sold at prices within the range of defined affordability of ownership and rents for existing tenants will not be increased following the conversion.



44 Having reviewed the City's Issues List Mr. Stagl was of the opinion that the proposal has regard to section 2 of the Act in that it contributes to the provision of a full range of housing in the City; it complies with section 51(24) of the Act in that it provides affordable home ownership opportunities in the City's Downtown; it complies with the City's OP policies requiring a sufficient supply of affordable owner occupied and rental housing. With respect to the issue raised about "housing sector realities", Mr. Stagl testified that these realities must be considered in the context of the existing OP which is to be a clear, unambiguous statement of the intent of City Council. The application was thoroughly reviewed by City staff in light of the in force OP policies. The interests of the existing tenants were considered after consultation with the tenants. City staff responsible for reviewing a number of condominium conversion applications was satisfied that given "housing sector realities", the relevant City policies were met in this application. Mr. Stagl agreed with what he termed a "fulsome, comprehensive and appropriate review, signed off by managers and the department head".

45 With particular focus on the concerns of the existing tenants, Mr. Stagl recommended to the Board that if it allows this appeal, Draft Plan of Condominium Approval should be subject to certain conditions set out in Exhibit #8. Condition 5(c) provides for a "tenant package" of conditions which reflect statutory requirements, and which would be registered on title. This package addresses issues like security of tenure following conversion, a tenant's right of first refusal to purchase his or her unit, the passing on of property tax saving through rent reduction and a protocol for the showing of units.

46 Willard Dunning was qualified by the Board to provide expert evidence on behalf of the Appellant on matters related to the City's housing market, including housing supply, housing costs and housing market data. Mr. Dunning reviewed policies relevant to condominium conversions, staff reports on the proposal, the affordability of home ownership within the City, the cost of living in an owner-occupied condominium at the subject property and the impact of the proposed conversion on rents.

47 Mr. Dunning concluded that there are few home ownership opportunities in the City that are affordable to households with the lowest 30% of incomes. His work shows that 90% of the units in the subject property would be affordable to households within the lowest 30% of incomes. Further, for tenants who remain tenants, rents should be reduced as property tax savings attendant upon conversion are passed on to tenants. Mr. Dunning therefore concludes that from both home ownership and rental perspectives, the proposed conversion would result in improved housing affordability in the City's Downtown. This would contribute to the City's OP objectives with regard to the provision of affordable housing and a broad range of housing.

48 Having reviewed the rental housing market in the City, Mr. Dunning concluded that a "period of chronic under-supply and low vacancy rates has ended, as movement of tenants to home ownership has reduced the demand for rentals".

49 Mr. Dunning was therefore of the opinion that the proposed conversion "would not negatively affect the City's ability to meet housing requirements of current and future residents".

50 Forming an important part of the Appellant's case were the two reports prepared by City staff. The City's planning and housing witnesses retained for this hearing condemned the reports as "seriously flawed due to their limited scope" and not based "on the planning legislative and policy framework in place at the time". Mr. Gladki, the City's planning witness, stated that in rejecting these staff reports and refusing to permit the conversion, City Council was "... consistent with its position on the application and its longstanding interest in protecting rental housing all along". In light of this condemnation and the purported consistency of Council decisions, the Board has reviewed these

reports and a staff report on condominium conversion policy, in some detail, and makes the following findings.

**51** As noted above, the two reports recommending the approval of this application were signed by the City Manager, the General Manager and the Director of the Planning Department. The Board can only assume that staff of this seniority has a thorough understanding of the City's in effect OP policies. Further, they must be presumed to have an appreciation of how these policies have been applied in similar applications.

**52** The August 2005 report refers to the in force OP, noting that it "contains principles and objectives related to the retention of rental housing". However, the report goes on to say "the Plan is not explicit as to how rental housing supply is to be retained with the exception of one policy that encourages the retention of rental units in an amount equal to those that are the subject of the development. While the subject application is not technically a redevelopment, Council in the past two years has approved new condominium/rental unit development which could be considered as replacing any converted units".

**53** This report also considers the implications of the replacement of the RHPA with the TPA, noting that there has been a "shift in provincial interest from being one of protecting rental units to one of protecting the tenure of those living in the units".

**54** The issue of the City's rental apartment vacancy rate is considered in the report. It notes that when one considers only apartment units, the type of unit addressed in the subject application, the vacancy rate is 4.1%. The report says "this is indicative of newer rental units coming into the Burlington market".

**55** Finally, the report deals with the concerns of the existing tenants, noting that "it has always been the over-riding objective to protect people and their access to rental accommodation". Having regard to the provisions of the TPA which "protect(s) only the tenant, and not the status of the residential unit", staff was satisfied that existing tenants would be protected. The TPA guarantees reasonable security of tenure, and gives tenants the right of first refusal on the purchase of units. Staff was also of the opinion that the proposed conversion would create needed affordable home ownership opportunities.

**56** The May 2006 report was prepared after City Council sent staff back to consult further with the tenants, to consult with the Director of Housing Division with the Region and further consider the implications of the TPA and the *Condominium Act*. Staff did all this. They learned that the Region was working on a Comprehensive Housing Strategy which would address condominium conversions. However the strategy was not yet in place. Staff noted following the completion of such regional guidelines, that the City's OP policies could be amended to provide for enhanced protection for rental and affordable housing.

**57** This report continued to recommend approval of the application, subject to the Appellant providing a "tenant package of upgrades".

**58** The Board notes that neither of these reports makes a reference to any initiative on the part of the City to amend its OP policies to enhance or clarify policies to encourage the preservation of existing rental housing or to set out criteria to be considered when processing a conversion application. This is despite the fact that the Planning Department had prepared a report in January 2004, addressing precisely that issue. The Board concludes that staff properly treated the disposition

of this application in accordance with the in force OP policies as distinct from any policies which might be adopted after a review of the subject of condominium conversion. While it may not have been apparent to City Council that policies put into place some years after the filing of an application are not determinative of that application, staff, up through the Director of Planning and the City Manager understood which policies applied to this Application.

**59** The January 2004 staff report on the new conversion policies expressly says that "changes in Provincial legislation over the past few years have reduced the City's ability to control the conversion of rental housing to condominium. The impact of such conversions on the existing supply of rental housing can be more effectively managed if the Official Plan is amended to clarify and enhance housing policies." (Emphasis added). The Board finds, that despite what position the City may now take at this hearing, this is an explicit admission that the in force OP policies are not necessarily effective in addressing condominium conversions, and more in terms of criteria for conversion is required.

**60** This report reviews the history of Council resolutions directing staff to report "on the possibility of adopting Official Plan policies supporting the preservation of existing rental housing and restricting the conversion of rental housing to condominium". The City apparently made the decision to defer work on these policies in 1999 after litigation was initiated on the validity of the City of Toronto's OPA 2. Work on the policies apparently recommenced only after the Ontario Court of Appeal determined in October 2003 that the intent of the TPA was not to limit the authority of municipalities to control condominium conversions, and after the current application was filed. Therefore the City was not ready to implement policies to provide enhanced protection of rental housing stock until the enactment of OPA 62 on June 11, 2007, some three and one-half years after the Court of Appeal decision and the filing of this Application.

**61** Mr. Gladki is of the opinion that this history demonstrates Council's "... longstanding interest in protecting existing rental stock" and is relevant to the disposition of this Application. The Board finds that Council's history with respect to the actual conversion of rental housing to condominium is in fact delineated in staff's January 2004 report on proposed condominium conversion policies. After the enactment of the TPA in 1998, the City received eight applications for conversion between October 1998 and October 2003. With the exception of the subject application and one which was withdrawn, City Council approved all the applications, permitting the conversion of 146 rental units.

**62** The Board finds that, contrary to what Mr. Gladki believes, Council between October 1998 and today, in applying the City's in force OP policies, has demonstrated a long standing willingness to permit the conversion of rental housing, be it apartment, maisonette or townhouse, to condominium. While Council has demonstrated an intent to amend the OP to provide for enhanced policies to encourage the preservation of existing rental housing and criteria against which a conversion application should be assessed, the fact is that such an amendment was not adopted by Council until June 11, 2007, a month before this hearing commenced.

#### **POSITION OF THE CITY:**

**63** Dr. David Hulchanski was qualified by the Board to provide expert land use planning evidence in relation to housing issues. Dr. Hulchanski's evidence focused on the public interest criterion set out in section 51(24) of the Act, in considering this Application. He reviewed material on "recent housing trends and prospects" in the City; the importance of purpose-built rental housing; the growing income gap between owners and renters; the failure of the private sector to build new rental housing; the decline in the number of households occupied by renters; vacancy rates; the preservation of existing

rental housing stock; the loss of purpose-built rental housing as a human rights and Charter issue; and the City Planning Department's support for the Application. After this review, Dr. Hulchanski concluded that the proposed conversion "...is not in the public interest and would undermine the housing policy framework contained in the Burlington Official Plan, the *Planning Act* and in relevant Provincial housing policy statements" (Exhibit #14).

**64** During the course of Dr. Hulchanski's testimony, the Board warned Counsel for the City that it was concerned about Dr. Hulchanski moving from the role of expert witness to the role of advocate. Dr. Hulchanski's report, Exhibit #14, and his testimony demonstrated to the Board that while Dr. Hulchanski has impressive qualifications in the field of housing policy, he is also a passionate advocate for the homeless, the inadequately housed and those members of society who are often forgotten by the more privileged. His work, his passion and his advocacy are admirable, but they make it very difficult for this Board to give much weight to his expert evidence. While expert witnesses are not expected to be free of bias, the Board does expect them to be able to differentiate between providing opinion evidence based on expertise, and advocating a position in an adversarial manner.

**65** The Board finds that Dr. Hulchanski's evidence is irretrievably coloured by the following statement in his report:

What troubles me is that the proposal to convert Martha Terrace was submitted when the promoters either knew or ought to have known that Burlington Council was in the process of developing an OPA to protect rental housing. They submitted their proposal for a condo conversion in the same month as the Court of Appeals (sic) ruled in favour of the legality of such OPA's. Therefore it is wrong for the proponent to assert, if they are doing so, that Burlington's OPA 62 is a retroactive policy move to prevent their conversion. It is the proponent who entered midstream into the process of Burlington's development of a rental housing protection OPA. They should have waited for the result of the policy process, rather than attempting to slide through before the process is finished.

**66** The Board finds that these are the words of an advocate, not an expert witness.

**67** Mr. Gladki, a qualified land use planner, retained by the City for the purposes of this hearing, reviewed all relevant policy documents, cited above, what he termed the "evolving policy context" and City Council's "long standing interest in protecting existing rental housing", and the staff reports which he believes do not adequately address the land use policy and regulatory context, to determine if the conversion of the units from rental to condominium is supportable.

**68** Considering the existing rental housing market in the City, Mr. Gladki concludes that the proposed conversion is not in the public interest as it "would undermine the healthy functioning of rental housing". His conclusion is based on the fact that the City has a small rental housing market, vacancy rates are low and no new purpose built rental housing is being constructed.

**69** In his opinion the welfare of the present and future inhabitants of the City would be negatively impacted by the proposed conversion. This conclusion is supported by the fact that so many of the current residents of the building are opposed to the conversion.

70 Mr. Gladki testified that the proposed conversion would not contribute to the provision of the full range and diversity of housing mandated by the policy documents. Referring to the May 2007 Sustainable Halton Housing Directions, he concluded that the proposed conversion would not contribute to the maintenance of a reasonable choice of accommodation for the residents of the City. Therefore he was of the opinion that the proposed conversion would contravene section 2 of the Act, section 1.2.1 of the PPS and the relevant sections of the Regional and City OP's, regarding the provision of a full and diverse range of housing types.

71 Mr. Gladki gave considerable weight in his evidence to what he described as the "consistent interest on the part of the Council of the City...since the repeal of the *Rental Housing Protection Act* in 1998, to control the conversion of rental housing". He reviewed the history, discussed above, which lead to the adoption of OPA 62. Despite the staff reports on this Application and despite the fact that Council has, with one exception, a withdrawn application, approved all condominium conversions prior to this one, Mr. Gladki is of the opinion that Council has maintained a consistent position on condominium conversion.

#### **POSITION OF THE PARTICIPANTS:**

72 The Advocacy Centre for Tenants Ontario ("ACTO") and a number of current tenants of the building appeared in opposition to this Application. Counsel for ACTO submitted that ACTO has become involved in condominium conversion cases throughout the province as it takes the position that such conversions reduce the already limited supply of affordable rental housing. Condominiums cannot be relied upon to provide affordable rental housing as they tend to be at the high end of the market, she submitted. There is no guarantee that units converted to condominium will remain within the rental market in the long term. In the view of ACTO the conversion in this case would not contribute to increasing the supply of affordable home ownership opportunities. Tenants like those in the subject property may not have access to the required down payment, or the ability to obtain the mortgage necessary to purchase a unit.

73 Counsel for ACTO submitted that after conversions tenants' privacy rights are imperilled as landlords or real estate agents have a right to show units for 12 hours per day on only 24 hours notice.

74 While existing tenants are afforded security of tenure by the RTA, successor tenants have no such security. Again, this reduces the availability of units for rental.

75 It is ACTO's position that the proposed conversion is not in the public interest. It would decrease the supply of rental housing in an already tight market; it would not contribute to housing affordability; the privacy of tenants would be jeopardized; and a convenient, reliable rental home for seniors would be lost.

76 The tenants from the building who appeared in opposition to the conversion spoke for many in the building. Many of the tenants are seniors who value the convenience of the building. As one tenant noted, she is near her doctor, the hospital, stores and her network of friends. She does not want to cope with strangers viewing her unit or the cost and complexity of homeownership. As another tenant said, the proposed conversion is having a negative impact on the seniors, causing uncertainty and anxiety. They do not want their lives disrupted by a conversion. Tenants do not know where they would go if they had to move as there are few, if any, affordable options in the City.

#### **BOARD'S FINDINGS:**

**77** In considering this Application, the Board, having regard to the *Clergy* principle as considered above, must distinguish between the existing, applicable policy regime and evolving policy. In this case, evolving policy is clearly reflected in OPA 62 and both Counsel for the City and Mr. Gladki confirmed that this application is not subject to OPA 62.

**78** Having reviewed the testimony of the City's witnesses, the Board finds that while the City formally acknowledges that the Application is not subject to OPA 62, its witnesses considered and tested this Application against criteria now found in the OPA. Mr. Gladki was admirably forthright about this, discussing the "Evolving Policy Context" as noted above.

**79** Dr. Hulchanski, in his witness statement, is also clear that his evidence and his ultimate opinion are, at the very least, informed by the evolving policy context. He is "troubled" by the fact that the Applicant submitted the conversion proposal when it knew that City Council "was in the process of developing an OPA to protect rental housing". In his view "the proponents...entered midstream into the process of Burlington's development of a rental housing protection OPA. They should have waited for the result of the policy process, rather than attempting to slide through before the process is finished". With all due respect, there is no statutory or policy requirement that a proponent await the outcome of a policy review before exercising its statutory rights. As noted above, the Board finds that Dr. Hulchanski's evidence is coloured by his belief that this Application should be considered in light of the policy context reflected in OPA 62.

**80** The Board will not permit the City to do indirectly what it cannot do directly; that is, impose the policies found in OPA 62 on an application filed four years in advance of the adoption of the OPA. For the reasons discussed above, in the context of considering the *Clergy* principle, testing an application against an "evolving policy contest" can contravene the principles of natural justice.

**81** The Board has above considered, in detail, the change OPA 62 has made to the City's OP. OPA 62 deletes subsection 2.3.2 (f) and (g) of the in force OP. It is apparent from a review of staff reports on the issue of condominium conversion, and Council's expressed concerns, that the existing subsections do not adequately address the issue from the City's perspective. The City determined, as it says in the Basis for the Amendment, that "at the present time there are no specific standards in the Official Plan to provide guidance in the evaluation of applications to demolish or convert rental housing units". Therefore OPA 62, in subsection 2.3.2 (f) sets out conditions which must be met before condominium conversion is permitted. The conditions speak directly to the criteria Mr Gladki, Dr. Hulchanski and the City now seek to impose on the Applicant: a vacancy at or above 3 per cent for the preceding two-year reporting period, replacement of rental housing units and minimization of negative impacts on existing tenants.

**82** The Board finds that the adoption of OPA 62 is an acknowledgement by the City that the conditions to approval of condominium conversion now found in subsection 2.3.2 (f) are not embodied in the existing OP, subsections 2.3.2 (f) and (g). The staff reports of August 2005 and May 2006 which recommended approval of the Application are based on the existing OP which does not contain OPA 62 criteria. There is no suggestion that an evolving policy framework should be imposed on the Application. Finally, the opinions of Messrs Stagl and Dunning are founded on the existing, relevant policy framework.

**83** The Board must therefore prefer the opinions found in the staff reports and the evidence of the Appellant's witnesses. As discussed above, the evidence of Dr. Hulchanski is coloured by his advocacy, and his apparent belief that the Appellant had no right to file an application in reliance on an existing policy regime. Mr. Gladki evidence was thorough, but the Board finds based on a

fallacious premise. While acknowledging that OPA 62 and other recent policy documents are "strictly speaking...not applicable policy", his focus on the evolving policy context colours his evidence. The Board cannot separate his opinions on the Application in light of existing policy from his opinions in light of the evolving policy context.

**84** The Board finds that Mr. Stagl reviewed the existing, applicable policy framework in comprehensive detail and Mr. Dunning considered the issues of rental unit vacancy, rental unit availability and the affordability of the units as rental or condominium in the appropriate policy context.

**85** The Board accepts Mr. Stagl's evidence that the "draft plan of condominium is appropriate, timely, reasonable and desirable and represents good planning". Further, the Board accepts his evidence that the application has appropriate regard for section 2 of the *Planning Act*; the policies of the PPS, especially section 1.2.1; the requirements of section 51(24) of the Act; the requirements of in force Regional OP policies; and the requirements of the in force City OP.

**86** The Board finds that the City staff reports of August 2005 and May 2006 fairly review the Application and support Mr. Stagl's opinion. These reports consider the change in provincial legislation represented by the TPA, which focused on the protection of existing tenants' tenure, rather than the protection of rental units. The Application is appropriately considered by staff in light of in force legislation and policies of all levels of government.

**87** Due regard has been given in the evidence of both the Appellant's witnesses and City staff, in their reports, to the interests of the existing tenants in the subject building. Having heard from ACTO and some of the tenants, the Board recognizes the tenants' concerns. However, as staff set out in their reports, and as the Board heard in evidence and submissions, both the TPA and the "tenant package" of conditions set out in Exhibit #8 deal with these concerns. Existing tenants have security of tenure protected by legislation. Tenants cannot be evicted by purchasers of units. Rents cannot be increased in any extraordinary manner. The inconvenience arising from the showing of units will be expressly limited. The Appellant, subject to condition 5(c) of the proposed Conditions of Draft Plan of Condominium approval, will register on title a "tenant package" of conditions explicitly setting out security of tenure, tenants' rights of first refusal to purchase units, rent reductions attendant on taxes reduction and a formal protocol for showing units.

**88** On the issue of affordability, and policy objectives encouraging the provision in a municipality of a full range of housing options, the Board accepts Mr. Dunning's evidence that the conversion will provide opportunities for affordable home ownership. City staff also accepted this proposition, based on the projected purchase price of the units. As staff said in its August 2005 report, in comparing current rents to the cost of carrying a purchased unit "staff consider this aspect of the proposal as contributing towards the provision of affordable housing". Mr. Dunning's evidence on affordability was not successfully challenged by the City during the hearing, so the Board accepts his conclusion that "on a home ownership basis the occupants will receive a financial benefit through the retirement of mortgage principle...on average the net cost of home ownership would be \$143.62 per month lower than the average rent". Furthermore, Mr. Dunning determined "that for tenants who remain as tenants following the conversion, rents would be reduced by 4.35%, an average of \$47.77 per month or \$573 per year" (Exhibit #9). The Board therefore finds that the proposed conversion meets key policy objectives in that it will contribute to housing affordability. The Board finds that such affordability for both rental housing and home ownership is in the public interest. It is important to reiterate, in this context, that no tenant will be forced into homeownership either to remain in the building or to realize the benefits of affordability.

**89** Having regard to the City's Issues List (Exhibit #3, TAB 11) the Board finds that the Application complies with section 2 of the Act; it complies with section 51(24) of the Act, specifically having regard for present inhabitants (affordable rents, security of tenure) and future inhabitants (affordable home ownership) and therefore is in the public interest.

**90** The proposal complies with the existing provisions of the OP which does not set out any criteria for condominium conversion. Under these OP policies, City Council found a number of other condominium conversions to be appropriate. The proposal need not comply with "emerging policies" for the reasons set out above. Housing issues have been adequately addressed in light of in force policies. The affordability attendant on the conversion meets in force policy objectives. Finally, the Board finds that both the Appellant and City staff who recommended approval of the Application "considered the above legal requirements and planning and housing principles and mandates",

**91** With respect to the concerns of the tenants, the Board finds, that both statutory provisions and the "tenant package" appropriately address these concerns. No tenant will be forced to leave his or her unit; security of tenure is guaranteed. No one will be forced into homeownership, although some may choose to pursue this arguably affordable option. Tenancy may in fact become more affordable as tax savings will be passed through to tenants. While units must be shown to potential purchasers, the showings are limited by a strict protocol. Attendant upon conversion will be improvements and upgrades to the building, the cost of which may not be passed on to the tenants.

**92** The Board therefore allows the appeal, grants Draft Plan of Condominium approval in accordance with Exhibit #6, subject to the Conditions contained in Exhibit #8, Attachment #1 to this Decision/Order.

**93** This is the Order of the Board.

SUSAN B. CAMPBELL  
VICE CHAIR

\* \* \* \* \*



**ATTACHMENT 1****Conditions of Draft Plan of Condominium Approval  
395 Martha Street, City of Burlington**

Draft Approval of the Plan of Condominium for 395 Martha Street, as outlined on Sheets 1 – 3, dated September 3, 2003 (revised January 13, 2004), prepared by Vladimir Krcmar, Ontario Land Surveyor, subject to the following conditions:

1. Prior to September 1, 2010, the plan of condominium shall be registered.
2. That prior to registration, the owner shall satisfy the City Solicitor with respect to the following:
  - a) file a Statutory Declaration with the City Clerk confirming compliance with respect to first right of refusal and the rights of existing tenants to continue to occupy their unit following the registration of a plan of condominium.
3. Prior to the registration of the plan, the owner shall satisfy the City of Burlington's Director of Engineering with respect to the following:
  - a) submit a detailed 'as built' servicing and grading plan, certified by a professional Engineer and including the following information:
    - i) sewer diameters, grades and inverts, top of manhole and catch basin elevations;
    - ii) location of above/underground utilities;
    - iii) water valve locations; and,
    - iv) driveway grades.
4. That prior to registration, the owner shall satisfy the City's Director of Building with respect to the following:
  - a) submit an 'as constructed' plan showing the locations of all buildings and underground parking structures where applicable;
  - b) submit details regarding parking (quantity and assignment of owner/tenant/visitor parking and parking stall sizes);
  - c) submit a report from an architect or professional engineer that addresses matters such as structural safety, the general condition of the building, servicing and any

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other matters required herein by the City, and correct any deficiencies identified in the report and identified by the City. Said report to include:

- detailed list of exterior improvements that will be completed (i.e. windows, doors, balconies, etc.);
  - detailed list of interior improvements in common areas that will be completed (i.e. flooring, handrails, moisture repairs, leak repairs, electrical repairs, etc.);
  - breakdown of work to be performed for rental units and work to be performed for units which are to be sold, including but not limited to plumbing, electrical, heating and ventilation, insulation (weatherproofing and windows), internal structural deficiencies (walls, ceiling and floors) and any other deficiency deemed to impact on the safe habitation of the unit; and,
- d) obtain any variances to the Zoning By-law that may be required.
5. That prior to registration, the owner shall satisfy the City's Director of Planning with respect to the following:
- a) obtain Site Plan Approval for any required changes to site layout including, grading, parking (including underground parking) and landscaping;
  - b) undertake site modifications to address accessibility for the physically challenged (including automatic doors and ramps); and,
  - (c) that the following 'tenant package' of conditions are appropriately reflected in the Agreement with the City, to be registered on title:
    1. Sun Life confirms that all leases in force and effect prior to the date of registration of Plan of Condominium would continue to be valid and would not require any amendments as a result of registration of the Plan of Condominium.
    2. Sun Life confirms that it recognizes its obligations to the tenants under the *Residential Tenancies Act* and would agree to warrant compliance with those provisions, namely:
      - (a) Tenant's security of tenure following condominium conversion thereby ensuring the tenant's right to continued occupancy under the terms of their lease (or month to month tenancy);

- (b) Tenants' right of first refusal to purchase their unit; and
  - (c) In the event that conversion to condominium results in the reduction of the property taxes payable to the municipality, then such a reduction would be rebated to the tenants as provided for under the *Residential Tenancies Act*.
- 3. With respect to the agreement confirming the rights under the *Residential Tenancies Act*, as set out above, Sun Life also confirms that its obligations to tenants under the Act would be to all those persons who are tenants, at the time of final approval, namely, as of the date of registration of Plan of Condominium; and
- 4. Sun Life would agree that the showings of occupied units would be subject to the following protocol:
  - (a) All showings would be limited to be between the hours of 9:00 a.m. and 5:00 p.m.;
  - (b) There would be a maximum of two (2) showings per week; and
  - (c) A minimum of 24 hours prior notice would be provided.
- 6. That prior to registration, the owner shall satisfy the City's Director of Finance with respect to the following:
  - a) property taxes must be paid, including all installments levied; and,
  - b) development charges in connection with the subject application must be paid.