

DECISION AND ORDER

Decision Issue Date Tuesday, January 08, 2019

PROCEEDING COMMENCED UNDER section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): CITY OF TORONTO

Applicant: ANDREW FERANCIK

Property Address/Description: 324 RICHMOND ST W

Committee of Adjustment Case File Number: 17 244333 STE 20 MV

TLAB Case File Number: **18 145156 S45 20 TLAB**

Hearing date: Wednesday, August 15, 2018

DECISION DELIVERED BY D. LOMBARDI

APPEARANCES

Name	Role	Representative
Andrew Ferancik	Applicant/Expert Witness	
City of Toronto	Appellant	Adrienne deBacker Sara Amini
Petaluma Building Corp.	Party	Tom Halinski Joe di Giuseppe
Mladen Kukic	Expert Witness	

INTRODUCTION

This is a matter on appeal from the Toronto and East York District Panel of the City of Toronto's (City) Committee of Adjustment (COA) decision to approve on condition the minor variances for 324 Richmond Street West (subject property).

The owner, Petaluma Building Corporation, proposed to alter the redevelopment plan approved under site-specific Zoning By-law 1041-2014 (the By-law) for a 25-storey mixed-use building by adding two (2) additional storeys, for a total of 27-storeys, and by decreasing the number of resident parking spaces.

The subject property is known municipally as 324-332 Richmond Street West and is located mid-block on the north side of Richmond Street West, generally between John Street and Peter Street. More broadly, it is located within the King-Spadina neighbourhood of downtown Toronto.

The subject site is designated '*Regeneration Areas*' in the City's Official Plan (OP), and is located within the Downtown Toronto Urban Growth Centre and the Major Transit Station Area associated with the Osgoode subway station which is approximately 490 metres from the subject site. It is also situated within the *King-Spadina Secondary Plan* area as well as the *King-Spadina Heritage Conservation District*, which has been approved by Council but remains under appeal at the Local Planning Appeal Tribunal (LPAT).

The subject property has a frontage of approximately 48.2 metres and a depth of 28.8 metres, and a total area of 1,399 m². Construction on the below-grade levels of the development on the subject property began in 2017 and, to date construction has included the underground parking garage and portions of the first three storeys of the proposed development.

BACKGROUND

Context

The subject property is situated on Richmond Street West, a major westbound thoroughfare in downtown Toronto, running between Eastern Avenue in the east and Strachan Avenue in the west. The immediate vicinity of the subject property contains a mix of uses and densities ranging from low-rise commercial buildings to high-rise residential and commercial towers, most of which approach or exceed forty (40) storeys.

To the immediate north of the subject property is a public laneway accessed from Peter Street and John Street separating the properties fronting Richmond Street West from those fronting the south side of Queen Street West. The buildings fronting on Queen Street West are generally characterized as low-rise commercial and mixed-use buildings, two to four storeys in height. This section of Queen Street West is designated a Heritage Conservation District.

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The following developments are in close proximity to the subject property and are frequently referenced by both the Applicant and the Appellant in their evidence and written submissions. They constitute a significant part of the contextual discussions utilized by both the Applicant and the Appellant in comparing tall buildings within the study area and the corresponding shadow impact on the north sidewalk of Queen Street West.

I provide a general description of each within its immediate context below:

- Immediately to the east of the subject property is the condominium development at **318 Richmond Street West** known as the '**Picasso**' development. It is a high-rise mixed-use building consisting of a 39-storey residential point tower with retail at-grade. To the east of this building is a series of low- and mid-rise commercial buildings ranging in height from 3 to 9 storeys that stretch to John Street.
- To the immediate south of the subject property is Richmond Street West, a major westbound arterial street that accommodates cars, bicycles, and public transit traffic. On the south side of Richmond street West the built form is characteristically varied in scale. On the corner of Peter Street and Richmond Street West is **125 Peter Street** known as the '**Tableau**' building, a 37-storey mixed-use condominium building. Further to the east are a small public parking lot and a series of heritage row houses that have been converted to commercial uses.
- To the immediate west of the subject property are a number of low-rise commercial buildings and Peter Street. On the west side is **134 Peter Street (QRC building)**, a 17-storey high-rise office building that incorporates heritage facades into its base.

Overview of Project History and Current Proposal

In 2011, the planning firm of Walker, Nott, Dragicevic Associates Limited (WND) was retained by the Applicant for the purpose of assisting in the approvals process for a Zoning By-law Amendment application to permit the redevelopment of the subject property with a high-rise mixed-use building. On February 16, 2012, a Zoning By-law Amendment application was submitted to the City to permit a 24-storey mixed-use building containing 270 m² of retail space and 295 residential units.

In response to comments from City Planning staff, the proposal was modified and resubmitted in September of 2013 to reflect a proposal consisting of a 25-storey building with a modified podium height. In March of 2014, the proposal was further refined by the Applicant through technical revisions and resubmitted to the City along with a Site Plan Application.

On August 28, 2014, the City adopted implementing Zoning By-Law 1041-2014 (attached as Attachment No. 1) to facilitate the proposed development. That By-law was not appealed and is in full force and effect. In the interim, the owner has resubmitted the

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Site Plan Application to the City on four different occasions and that application is currently under review for issuance of Notice of Approval Conditions (NOAC).

The proposed development, as approved by Council on August 28, 2014, consisted of a single mixed-use tower 25 storeys in height (80.8 m in addition to a 6.4 m tall mechanical penthouse), including a 10-storey podium. Above the podium, a tower element is proposed with a floor plate that tapers through a series of step-backs on the north side facing Queen Street West. A floor plate of 896 m² is proposed at the 12th floor, tapering to 756 m² on floors 22 and 23. Floor plate sizes are further reduced to 451 and 427 m² on levels 24 and 25, respectively.

The total approved above-grade residential Gross Floor Area (GFA) is 21,050 m² and the non-residential GFA is 255 m². The total number of parking spaces approved for the development is 162, consisting of 139 residential spaces, 21 commercial pay spaces, and 2 car share spaces.

Current Proposal

On October 5, 2017, the owner submitted an application for Minor Variances to the COA seeking six (6) variances to implementing By-law 1041-2014. The variances being sought related to an increase in height of the proposed development from 25-storeys to 27-storeys, a corresponding increase in density, and a decrease in parking spaces from 162 to 119, along with associated technical variances.

Following the filing by WND of a Zoning Review Waiver to the City (Exhibit 4, Tab 10A) and upon receiving clarification regarding the variances requested, the Applicant resubmitted the Minor Variance application to the COA with a refined list of five (5) variances (the current application).

The following variances to the site-specific Zoning By-law 1041-2014 were requested:

1. Section 2(d) – the height of any building or structure is not permitted to exceed the heights as shown on Map 2. The proposed height would exceed the heights shown on Map 2.
2. Section 2(d) – the maximum permitted projection of a windscreen is 3 metres at storey 24. The proposed windscreen projecting 3 metres on the 26th storey.
3. Section 2 (e-g) – a minimum of 162 resident parking spaces, 18 visitor parking spaces, and 2 car share parking spaces are required to be provided. In lieu, 92 resident parking spaces, 25 visitor parking spaces, and 2 car share parking spaces are proposed.
4. Section 2(b) – a maximum permitted combined gross floor area of 21,305 m². A combined gross floor area of 23,400 m² is proposed.
5. Section 2(b)(i) – the maximum residential gross floor area of 21,050 m² is permitted. A residential gross floor area of 23,100 m² is proposed.

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The current proposal, reflective of the architectural drawings issued by Core Architects on September 5, 2017 (Exhibit 4, Tab 9D), proposes a 27-storey building with a total residential GFA of 23,079 m² and non-residential GFA of 251.9 m². The additional two storeys being proposed are to be inserted between the 21st and 22nd floor, before the tower element of the building begins to taper, and on a portion of the second storey where space has been freed by moving bicycle lockers in to the parking garage. The unit mix within the two additional floors would include two studio units, 23 1-bedroom units, and nine 2-bedroom units, for a total of 34 new units.

Within the underground parking garage (under construction) certain areas previously proposed for vehicular parking are proposed for additional bicycle lockers, storage rooms, and a reconfigured mechanical and elevator room layout. More specifically, the applicant proposes to decrease the required residential parking spaces by 30 to 92 spaces, and to increase paid visitor parking spaces from 18 to 25, representing a net decrease of 23 spaces. Given that the site-specific requirements in By-law No. 1041-2014 are determined by a ratio of the total number and types of units, and the proposal seeks to increase the overall number of residential units, the parking variance requested is for 63 fewer spaces.

The proposed revisions to the development, in summary, resulted in the two additional storeys and a reduction in below-grade vehicular parking which required five variances to the in-force, site-specific Zoning By-law, adopted by City Council on August 28, 2014, that originally implemented the proposed development.

The COA received a number of comments from City staff, including a report dated March 23, 2018 issued by Planning staff (Exhibit 4, Tab 13), providing comments on the proposed variances. That memorandum highlighted concerns with respect to the shadowing resulting from the two additional storeys, as well as the proposed parking reductions. Planning staff recommended that the COA refuse the application.

More specifically, with respect to the increase in height of the building and the resulting shadow, Planning staff noted a concern with the potential impact of shadows produced by the building affecting the north sidewalk of Queen Street West during the spring equinox (March 21st). Staff stated that the approved Zoning By-law for the subject property was, *“the result of a comprehensive review of the project and public consultation. Fundamental to that review was the sculpting of the tower to avoid shadowing onto the north sidewalk of Queen Street West past noon. As a compromise, City Staff agreed to some additional shadowing up to 1:00 pm.”*

Furthermore, Planning staff noted that the Applicant had approach the City on numerous occasions requesting additional height after the rezoning had been approved and were advised that such a request would not be supported. Staff advised that they had remained consistent in their approach to reviewing all development applications to limiting shadowing impact on the north sidewalk of Queen Street West and opined that the proposed building height, and its impact on Queen Street West, is contrary to the intent of the site-specific Zoning By-law, as well as the King-Spadina Secondary Plan.

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With respect to the reduced number of vehicular parking spaces, Planning staff was less critical, advising that they did not object to this variance. However, staff asserted that the removal of spaces from the subject development would result in *“additional strain on the capacity of the local area’s non-vehicular transportation capacity and infrastructure.”*

Finally, Planning Staff recommended that the COA impose conditions if the variances related to the decrease in resident parking spaces were approved.

The COA also received comments from the City’s Heritage Preservation Services (HPS) dated March 12, 2018 (Exhibit 4, Tab 12) and March 23, 2018 (Exhibit 4, Tab 14), noting no concerns with respect to the proposed variances relating to either heritage or archaeological issues.

No correspondence was received by the COA from either the local Councillor or the public, and no members of the public attended the COA hearing.

On March 28, 2018, the COA rendered a decision (attached as Attachment 2) approving the five requested variances subject to two conditions: that 23 bicycle parking spaces in excess of those required by the Zoning By-law be provided by the applicant; and that the Applicant enter into a Section 45(9) agreement tied to an indexed financial contribution in the amount of \$46,000 to be made to the City, for active transportation projects within the King-Spadina area.

On April 17, 2018, the City submitted a Notice of Appeal (Form 1) to the Toronto Local Appeal Body (TLAB) listing the following grounds for the Appeal:

1. *The Variance Application does not maintain the intent and purpose of the Site Specific ZBL, which was approved by City Council. The proposed variances represent a significant departure from what was previously approved for the subject site following a comprehensive review of the 2014 Application and public consultation;*
2. *The Variance Application does not maintain the intent and purpose of the Official Plan;*
3. *In particular, the proposed increase in building height and gross floor area, coupled with the variances already granted in the 2014 Application, will have an adverse impact on surrounding properties and the public realm. The addition of two storeys to the approved 25-storey building will result in increased adverse shadowing on Queen Street West, and is beyond what was determined by City Council to be appropriate for this particular site;*
4. *Despite proposing additional height and density, the applicant is seeking to provide less than the required amount of on-site parking and reduce the site-specific parking ratio set out in the Site Specific ZBL. Reductions to the parking ratio do not maintain the intent and purpose of the Site Specific ZBL. The applicable parking ratio was specifically determined to be appropriate by City Council as part of a comprehensive review of the Subject Site and the proposed development as part of the 2014 Application;*

5. *The requested variances, both cumulatively and individually, are not minor and are not desirable for the appropriate development of the Subject Site;*
6. *The proposal does not represent good planning and approval of the Variance Application is not in the public interest; and*
7. *Any further reasons that counsel may provide and that the TLAB may allow.*

MATTERS IN ISSUE

The issue before the TLAB is whether the difference in shadow impact between the previously approved 25-storey building and the proposed 27-storey building on the north sidewalk on Queen Street West is significant and unacceptable versus whether the impact is imperceptible and negligible.

Also at issue is whether incremental shadowing on a small portion of that sidewalk will result in an unacceptable shadowing impact for a period up to 18 minutes beyond 1:18pm, thereby decreasing the utility and vibrancy of Queen Street West during the shoulder periods – the spring and fall equinoxes. Finally, the question of whether shadow impact on Queen Street West meets the in-force OP policies or the Downtown Plan must be answered.

In opening remarks, the contrasting positions of the Appellant (City) and the Applicant were succinctly stated by counsel for the Parties. The Applicant's solicitor, Tom Halinski (Aird Berlis LLP), suggested that the proposed variances build on the 2014 site-specific rezoning which permitted a mixed-use tower 25 storeys in height, and that the variances would add two additional storeys to the building and reduce the required number of parking spaces to 119.

He noted that the COA approved the application in 2018, and the variance with respect to required parking (Variance No. 3) is unopposed. In opposing the remaining variances, he submitted that the City has raised only one issue: 18 minutes of additional shadow on the north sidewalk of Queen Street West for a short period of time during the March equinox. He argued that based on this concern alone, the City has taken the position that the variances fail all four tests of subsection 45(1) of the *Planning Act*.

Conversely, the City's solicitor, Adrienne deBacker, suggested that the salient issue in this appeal is the unacceptable additional shadowing impact on Queen Street West, a vibrant part of the City's downtown core, that would result from the Applicant's proposal, by way of variances, for more height and density than agreed to by the owner and approved by City Council in the 2014 site-specific zoning by-law.

Ms. deBacker argued that the City views Queen Street West as a vibrant street for pedestrians, boasting an iconic shopping and fashion district, and a mix of retailers and restaurants. The City considers Queen Street West a commercial and economic hub and views its sidewalks as an invaluable part of Toronto's public realm for local residents and tourists alike.

JURISDICTION

Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the Provincial Policy Statement ('PPS') and conform to the Growth Plan of the Greater Golden Horseshoe for the subject area ('Growth Plan').

Minor Variance – S. 45(1)

In considering the application for variances from the Zoning By-laws, the TLAB must be satisfied that the applications meet all of the four tests under section 45(1) of the *Act*. The tests are whether the variances:

- Maintain the general intent and purpose of the Official Plan;
- Maintain the general intent and purpose of the Zoning By-laws;
- Are desirable for the appropriate development or use of the land; and
- Are minor in nature.

Under s. 2.1 of the Planning Act, TLAB is also to have regard for the earlier COA decision and the materials that were before that body.

Applicable provincial policy is also a relevant consideration.

EVIDENCE

Mr. Halinski, the Applicant's solicitor, called Andrew Ferancik, a Principal with WND Associates Ltd., to provide expert land use planning evidence in support of the minor variances being requested by the Applicant.

As a precursor to his testimony, Mr. Ferancik introduced his Expert Witness Statement (Exhibit 1) and corresponding Curriculum Vitae (Exhibit 3 – Appendix B to his Witness Statement) and Acknowledgement of Expert's Duty filing (Form 6). He briefly reviewed his experience relative to mixed-use residential projects in Toronto and relevant planning work at his current firm, noting extensive familiarity as lead planner managing applications similar to the proposed development.

Mr. Ferancik further acknowledged his firm's involvement in the subject property, noting that the firm was retained by the Applicant in 2011 to coordinate the site-specific zoning by-law amendment application to facilitate the development of the site with a high-rise mixed-use building. His involvement in the subject project commenced following approval of the By-law 1041-2014 and has included managing the Site Plan

approval process for the subject development, as well as the minor variance application which is the subject of this hearing.

Mr. Ferancik's Expert Witness Testimony

I qualified Mr. Ferancik as a professional land use planner capable of giving expert opinion testimony on land use planning matters. In preparing for this Hearing, Mr. Ferancik highlighted his involvement in the preparation of the Applicant's Document Book (Exhibit 4) and his Witness Statement (Exhibit 1) as well as coordinating the preparation of the visual materials (Exhibit 2).

At this juncture in the hearing, I advised that pursuant to the standing direction of Council to the TLAB I had visited the subject property, walked the surrounding streets and was generally familiar with the area.

Mr. Ferancik gave a brief description of the proposal, outlining the context of the subject property, the surrounding situation and an overview of the project's history. In explaining the variances now being sought by the owner, he clarified the rationale for the requested variances given that construction of the development has already commenced.

He noted that the issue of parking was fundamental to the revised development proposal and the corresponding resulting variances requested by the Applicant. He asserted that a concern regarding the number of proposed parking spaces for the development became apparent to the Applicant only after the sales of pre-construction residential units had been initiated.

Although both residential units and parking spaces were marketed for sale, the number of pre-sold parking spaces proved to be disappointing and the Applicant determined that it would be financially unfeasible to proceed with the project as originally planned.

The Applicant commissioned a Parking Demand/Supply and Traffic Impact Review, prepared by Cole Engineering and dated September 28, 2017 (Exhibit 4 – Tab 9E) which was submitted to the COA in support of the revised development proposal. Utilizing the sales data for the project, which revealed that only 73 (or 60%) of the original 122 residential parking spaces were sold representing a resident parking rate of 0.24 spaces per unit, the study concluded that there was a significant over estimation of parking demand in the approved parking supply.

As a result, the consultant proposed that 30 parking spaces be removed and seven paid visitor spaces be added, resulting in a net reduction of 23 parking spaces. Further, Cole Engineering concluded that providing 92 residential parking spaces, 25 visitor spaces, and two car share spaces could sufficiently accommodate the parking demand generated from the approved units and the 34 additional units proposed by the Applicant. This calculus formed the basis of the current redesigned proposal that

includes a 27-storey building, a total of 119 parking spaces, and an additional 34 residential units.

Mr. Ferancik provided a summary of the general context of the subject property and offered a description of the surrounding area. Utilizing his visual materials (Exhibit 2), including a Context Map, 21 photos, a copy of the City's Official Plan Building Height Context map, and zoning and height mapping from the former Zoning By-law 438-86 and the new Zoning By-law 569-2013, he provided evidence to support his proposition that the proposed development is situated within a context of significant building heights.

In identifying the subject property within the area of King-Spadina East Precinct, he established an informal Study Area for the purposes of his analysis, noting the boundaries as Queen Street West to the north, Simcoe Street to the east, Spadina Avenue to the west, and Adelaide Street to the south (Exhibit 2, page 14).

Referencing the Building Height Context mapping in Exhibit 2 (page 13), Mr. Ferancik submitted that recent approvals in the area of the subject proposal, both existing and approved, indicated building heights ranging from 16 storeys to 92 storeys, with the predominant height being 30 to 50 storeys. In this regard, he referenced Photos 1-3 to showing the subject property, and Photos 4 through 21 to demonstrate the comparable general hi-rise context in the surrounding area.

Of particular importance, Mr. Ferancik highlighted Photo 4 showing the Picasso building (39-storeys) at 318 Richmond Street West next to the subject property, Photo 6 of the Tableau building (36 storeys) at 125 Peter Street, and the QRC building (134 Peter Street), and Photos 7 to 9 which incorporated views on the south side of Richmond Street West and the developments at 277-287 Richmond Street West.

Within this context, Mr. Ferancik referenced the colour illustration mapping in Exhibit 4, Tab 11B (3D Massing) to support his proposition that from the perspective of height the subject development, now proposed at 27 storeys, is one of the lowest in the area. He further utilized his visual evidence to illustrate that the proposed location of the two additional floors within the revised building design. This evidence suggested that the additional floors were to be inserted at the level where the proposed building is terraced (at and above the 21st storey), and that this was done purposely to reduce possible shadowing on the north sidewalk on Queen Street West.

Shadow Studies

Mr. Ferancik introduced Exhibit 4 – Tab 11A (Shadow Study), prepared by Core Architects, which consisted of coloured illustrations A500 to A529 showing the shadow impact of various developments during the two 'shoulder seasons' - spring and fall equinoxes periods – of importance to City. Utilizing different colours, these graphics demonstrated two conditions: the approved shadow for the subject development (shown in yellow), the Picasso building (blue), the Tableau building (green), and the QRC

building (pink); and the additional shadow anticipated by the increased height as a result of the two extra floors on the subject development (in red).

Drawings A500 to A509 show shadow impacts between 9:18am to 6:18pm at one-hour intervals. Mr. Ferancik submitted that the Study validates that the subject development casts slightly less shadows on Queen Street West than the other buildings identified and noted within the Study Area.

At 1:18pm, the threshold of most concern to the City, he noted that there was some shadowing on the north sidewalk on Queen Street West but that the modelling suggests that conceptually the shadow covers a small portion of the sidewalk. By 2:18pm, Mr. Ferancik submitted that the graphics show that the north sidewalk on Queen Street West is fully bathed in sunlight and that there is no further shadow impact at this point of time in the year for the rest of the day.

Referencing drawings A510 to A520, he suggested that the modelling exercise undertaken by Core Architects for the two shoulder sessions of most concern to the City, the spring and fall equinoxes, determined that the shadow cast at 1:18 pm on September 21st by the original 25-storey development fell mid-point within the Queen Street West roadway. He therefore opined that there was no shadow impact at this point in the year.

Mr. Ferancik introduced additional shadow studies (Exhibit 5 – Supplemental Shadow Study March 21st/September 21st – A530-A531) focusing on the impacts of shadows at the 1:18 pm time period within the two shoulder seasons. He submitted that the modelling illustrated that the shadow created by the proposed 27-storey building on the Queen Street West north sidewalk is fully off of the pavement at 1:36 pm and that this condition only occurs on March 21st. He suggested that this 18-minute difference is the crux of the City's objection to the proposed development.

He further addressed the extent of shadowing cast by the proposed development on the north sidewalk on Queen Street West referring, again, to his Photo/Visual Book (Photos 11-15, page 9). He submitted that Photo 11, which is a picture of the north sidewalk looking north, suggested there are obstructions within the sidewalk 'clearway' which he referred to as 'utility areas'.

He identified these obstacles as fire hydrants, garbage bins, cycling rings and hydro poles noting their location within that portion of the sidewalk in proximity to the curb. He posited that the modelling shows that any shadow effect created by the subject development at 1:18 pm on March 21st would occur within the sidewalk 'utility area', an area that pedestrians would necessarily avoid. He concluded that given the angle of the sun and the average height of pedestrians, those using the sidewalk would still enjoy adequate sunlight on their upper torso throughout the day, in keeping with the direction found in the Built Form policies in the Official Plan (OP).

Mr. Ferancik then addressed comments received by the COA from Planning Staff regarding the variances being requested by the Applicant. He submitted that Planning

staff, in their March 23, 2018 memorandum, had expressed concerns primarily related to the increase in height of the proposed development and the corresponding shadow that would be produced on the north sidewalk on Queen Street West during the spring equinox. He opined that his testimony and evidence was sufficient to address this concern.

With respect to the conditions of approval recommended by Planning staff, he confirmed that the Applicant had agreed to the two conditions included in the COA decision and is supportive of those conditions being included in any TLAB approval.

Mr. Ferancik also referenced the memoranda received from HPS staff indicating no issues with respect to the proposed variances as they relate to both heritage and archeological matters. He noted that on-site assessment and monitoring had been done through the previous *Planning Act (Act)* development application and that no further archeological requirements were necessary.

The Statutory Tests

In addressing the statutory tests, Mr. Ferancik was of the opinion that the proposal properly implements the policy thrust and direction provided for in the provincial policy documents. The proposed variances will facilitate growth within a settlement area, and additional intensification in a built-up area that is well served by transit and other municipal infrastructure. In addition, the proposal will promote a transportation mode that is highly supportive of transit and active transportation.

He found applicable policy direction also in the City Official Plan, especially applicable to sites located within the *Downtown* and *Central Waterfront* designations (Exhibit 4 – Tab 3). He specifically referenced Sections 2.1.1, 2.1.3, 2.2.1, 2.2.1.1, 2.2.2. Policies 3.1.2.1 and 3.1.2.3 of the OP address development in the Downtown and direct that new development will:

“fit harmoniously into the existing and/or planned context, and will limit its impact on neighbouring streets, parks, open spaces and properties by:

- a) Massing new buildings to frame adjacent streets and open spaces in a way that respects the existing and/or planned street proportion;*
- b) Incorporating exterior design elements, their form, scale, proportion, pattern, and materials, and their sustainable design, to influence the character, scale and appearance of the development;*
- c) Creating appropriate transitions in scale to neighbouring existing an/or planned buildings for the purpose of achieving the objectives of the Plan;*
- d) Providing for adequate light and privacy;*
- e) Adequately limiting any resulting shadowing of, and uncomfortable wind conditions on neighbouring parks as necessary to preserve their utility.”*

He submitted that the OP designates the subject property *Regeneration Area*, which represents one of the most flexible designations found in the Plan and which

permits a full range of residential and commercial uses in a wide variety of building types and at an amenable variety of building scales, including tall buildings.

He referred to the wording in Section 4.7.2 and specifically to the direction that in each *Regeneration Area*, “a framework for new development will be set out in a *Secondary Plan*,” prior to development taking place. He opined that the applicable in-force Secondary Plan for the subject property is the *King-Spadina Secondary Plan*, enacted in 1996.

In providing an overview of Section 3.6 in the OP, he highlighted policies d), e) and f) from included in the general built form principles in the Secondary Plan most relevant to the requested variances. These policies are listed below:

d) new buildings for any use will be sited and massed to provide adequate light, view and privacy for neighbouring properties;

e) new buildings will achieve a compatible relationship with their built form context through consideration of such matters as building height, massing, scale, setbacks, stepbacks, roof line and profile and architectural character and expression:

f) buildings adjacent to streets, parks or open spaces will be massed to provide appropriate proportional relationships and will be designed to minimize the wind and shadowing impacts on the streets, open parks or open spaces.

Mr. Ferancik continued his testimony focusing on the *King-Spadina Secondary Plan* (Exhibit 4 – Tab 4). He emphasized key policies most relevant to the requested variances, including 2.1 (Major Objectives) and 2.2 (Tall Buildings), and language in the Secondary Plan directing that, “to minimize automobile use Downtown:

- a) The use of public transit will be encouraged and*
- b) Minimum and maximum parking standards will be established which will meet the needs of essential drivers employed or living in the King-Spadina Area and a limited number of other spaces for business and visitor purposes.”*

Within this policy perspective, Mr. Ferancik addressed the requested variances and opined as to how each met the general intent and purpose of the OP for appropriate redevelopment in a *Regeneration Area*, with the particular perspective of the *King-Spadina Secondary Plan* context. He asserted that:

- The variances will result in additional housing options in a desirable area in close proximity to public transit, provide for appropriate development in a *Regeneration Area*, that discourages private vehicle use, and the increase in housing supply far outweighs the near negligible effect of incremental shadowing on Queen Street West.

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- The variances related to increased height will facilitate an appropriately-scaled building for its context minimizing shadow impacts on streets, including Queen Street West.
- Addressing Planning staff concerns regarding the shadowing of the north sidewalk of Queen Street West after the ‘test period’ at 1:18pm in the March/September equinox periods, a review of the in-force policy framework found no policy that specifically limits shadowing on Queen Street West at that or any other time period. The only policies that speak to shadows are found in language in general terms contained in the OP and Secondary Plan that recommend development limit impacts by minimizing shadows on streets.
- The test for adequately limiting shadows on Queen Street West is met by the proposal, asserting that the shadow study prepared by Core Architects demonstrates that incremental shadowing created by the two additional floors will only shadow a small portion of the north sidewalk on March 21st for an extra 17 minutes beyond 1:18 pm. More importantly, the portion of the sidewalk that would be impacted by any shadowing is obstructed thereby limiting its use by pedestrians and the shadow will be off the pedestrian clearway by 1:33 pm further reducing the impact of the proposed development.
- Conversely, modelling illustrated that there is already an existing context of shadows on the north sidewalk of Queen Street West as the Picasso building immediately adjacent to the subject property, approved by City Council at 39-storeys, casts a significantly longer shadow than the proposed development onto the surrounding area, including Queen Street.
- Regarding the parking variance, the language in the in-force policy framework generally discourages private vehicle use in the Downtown in favour of public transit and active transportation. Improvements to public transit infrastructure in the King-Spadina area, including the King Street transit priority project and the Richmond/Adelaide cycle tracks, have made these modes of transportation even more attractive and resulted in the reduction of the demand for private vehicle parking.
- Constructing the amount of parking as was prescribed in by-law 1041-2014 given the lack of demand would be counterproductive to the City goals and policies of reducing vehicle congestion and dependency in the Downtown.
- The remaining variances related to additional GFA, windscreen projections and the zoning by-law map (Map 2) are technical in nature, resulting from the additional two storeys.

Mr. Ferancik opined that the proposed variances will facilitate the construction of a mixed-use tall building with below grade parking, at-grade retail, and residential units above, while minimizing the shadow impacts on adjacent streets. The proposed variances would continue to facilitate an approved building type and form in a manner that meets the general intent and purpose of Zoning By-law 1041-2014 and continues to meet most of the site-specific standards.

He posited that the intent of site-specific Zoning By-law 1041-2014 was to ‘limit’ shadow on the north sidewalk of Queen Street West but was not intended to ‘eliminate’

(emphasis added) shadowing completely. He highlighted the fact that modelling illustrated that the approved 25-storey tower would already cast shadows on to Queen Street West at the equinoxes prior to the 1:18 pm time period. If the two additional floors are added, the proposed development would add only 17 minutes of shadowing on the north sidewalk of Queen Street West (or 15 minutes measured to the clearway). He opined this condition would still maintain direct sunlight on Queen Street West for the balance of the afternoon period, and for the vast majority of the year, particularly during the summer.

With respect to the parking variances, he posited that providing fewer spaces in response to lower parking demand upholds the general intent and purpose of By-law 1041-2014 and is representative of what he termed evidence based “*right sizing*” that could only occur after the actual demand was known by the Applicant.

Mr. Ferancik opined that the requested variances are desirable for the appropriate development of the property and the surrounding area, asserting that the added density would enhance the viability of public transit infrastructure in the area allowing for the more efficient use of public transit, active transportation and servicing infrastructure investment.

In addressing the last statutory test, whether the variances, both individually and cumulatively, are minor in nature, he provided an assessment of impact. In this regard, he opined that the variances will not result in any unacceptable impacts on nearby properties, nor significantly alter the proposed development as approved by Council through the in-force zoning by-law.

In Mr. Ferancik’s opinion the difference in shadow impact between a 25-storey and 27-storey building is negligible especially in a context that includes taller buildings that already shadow Queen Street West. The additional proposed height of the building will result in incremental shadows on a small portion of the sidewalk for 17 minutes as measured at one point in the year.

He suggested the differences in GFA are minor and technical in nature and the change in GFA is less than 10% and will not result in any unacceptable impacts. The reduction in vehicular parking spaces will be offset with an increase in the amount of bicycle spaces, which he posited better reflects the evolving mode share in the study area.

In summary, Mr. Ferancik submitted that in his professional opinion the proposed variances, both individually and collectively, meet the four tests under the Act for minor variances, represent good planning, and merit approval by the TLAB. He opined that the proposed variances will facilitate an appropriately-scaled building for its context which maintains adequate light and privacy and minimizes shadow impacts on streets, including Queen Street West.

He then focused his testimony on the Witness Statement (Exhibit 6) of Mladen Kukic, specifically addressing the planning documents considered by Mr. Kukic in reviewing the subject application.

- **King-Spadina Urban Design Guidelines (2006)** – Mr. Kukic’s Witness Statement (on page 8, at paragraph 44) explicitly references these guidelines as providing direction on the protection of sun access to the City’s public realm. Again, at paragraph 45, he references Chapter 2.5 in those Guidelines and Chapter 5.4.2 (paragraph 46) which identify “*sunlight streets*.”
 - Mr. Ferancik suggested that these are guidelines and should be read as such and not interpreted as policies. In addition, Chapter 5.4.2 expressly recognizes Bathurst, King, Wellington Streets and Spadina Avenue as “*sunlight streets*” but fails to include Queen Street West in that inventory.
- **King-Spadina Built Form Study** – Mr. Kukic noted in his Statement (page 11, paragraph 48) that in a Status Update to Council, dated August 5, 2014, Council endorsed Recommendation 3.b., which references limiting heights approaching Queen Street West to prevent shadowing on the north sidewalk after 12:00 pm (noon) in the spring and fall.
 - Mr. Ferancik opined that this Study has been on-going for the past 12 years and is currently under appeal. He also opined that this is the only City document in which there is a specific reference to shadowing on the north sidewalk on Queen Street West. Nevertheless, he submitted that the proposed development attempts to mitigate any impacts and maintains the expected threshold.
- **TOCore Planning Downtown (OPA 406)** – This document updates the planning framework for the Downtown area and the subject property falls within the Study Area boundaries. On page 12 of his Statement (paragraph 53), Mr. Kukic notes that Chapter 9 addresses the potential negative impacts associated with intensification, including the issue of shadowing.
 - Mr. Ferancik opined that Policy 9.17 in the TOCore document speaks to minimizing shadows to preserve the utility of sidewalks, among other parts of the public realm. He noted that this policy offers very specific shadow policy language and that the proposed 27-storey building will maintain the functionality and attractiveness of the sidewalk in question.
- **Queen Street Heritage Conservation District Plan** – Mr. Ferancik acknowledged that the section of sidewalk on Queen Street West on which the proposed additional two storeys would create incremental shadow impact is within this District but noted that the HPS did not express any concerns with the proposed variances.

On cross-examination of Mr. Ferancik, the City’s solicitor, Ms. De Backer, initially introduced the City’s Combined Document Book (Exhibit 7 – Index and Volumes 1-5) and proceeded to review the historical context of the subject development relative to the approval of site-specific Zoning By-law 1041-2014. Ms. deBacker, also briefly addressed Mr. Ferancik’s involvement with the project since 2011 focusing specifically on the COA application.

She reiterated the City's primary concern with mitigating shadow impacts from the proposed development on the north sidewalk of Queen Street West and noted that there had been extensive negotiations between the City staff (Urban Design) and the Applicant regarding design aspects of the building. In this regard, she submitted that Planning staff supported the original proposed development based on the shadow study submitted by the Applicant's architect (Exhibit 7, Vol, 3 – page 166) which indicated that shadows created by the proposed 25-storey building would be off of the north sidewalk of Queen Street West by 1:18pm during the spring and fall equinoxes. She submitted the on this basis, Council adopted staff's recommendations and approved the site-specific Zoning By-law.

Ms. deBacker questioned Mr. Ferancik regarding the absence of references to the *King-Spadina Urban Design Guidelines* and *Tall Buildings Guidelines* (Exhibit 7 – Vol. 5) in his Witness Statement. She particularly highlighted OP policy 2.2.1.6 which speaks to the development of design guidelines specific to districts of historic or distinct character.

Mr. Ferancik agreed that he considered those planning documents included guidelines relevant in reviewing the proposed development, but he opined that, as guidelines, he was hesitant to give them the same weight as policy. Hence, they did not form a significant part of his planning analysis.

In further addressing this matter, Mr. Ferancik acknowledged that the *Tall Building Guidelines* had been adopted by Council and were to be read in conjunction with the City's OP Built Form policies (3.1.2). However, in addressing the absence of this document in his evidence, he questioned its relevance given its exclusion from Mr. Kukic's Witness Statement and testimony as well. I note this as an important distinction which becomes relevant in later testimony from both planning experts.

Ms. deBacker questioned Mr. Ferancik's failure to established what she termed a hard 'study area' in his Witness Statement, to which he submitted that although a 'sharp perfect edge' study area had not been delineated as he had undertaken a broader analysis of approved heights and shadow impacts within the King-Spadina Precinct with an emphasis on pertinent surrounding tall developments such as the Picasso building.

Finally, Ms. deBacker addressed the evidence provided by Mr. Ferancik regarding shadowing on Queen Street West. She again referenced his photo evidence (Exhibit 2) highlighting the north sidewalk on Queen Street West. She argued that what the photo evidence actually shows is that the majority of the width of the sidewalk is unobstructed and accessible to pedestrians. She questioned his claim regarding the uncontroverted evidence related to the particular way the shadow manifested on Queen Street West and suggesting that the shadow modelling illustrated in the Study was a "rough estimation." (City's Reply Submission – para. 9, p. 4)

In response, Mr. Ferancik reminded the solicitor that the Study was completed to address shadowing on Queen Street West which he suggested was City Staff's main concern the subject proposal. He noted that the Study was originally prepared in

September of 2013 but that a revised Study was completed on March 2, 2018 and submitted to the COA in support of the proposed variances.

He opined that the Study illustrates shadowing on a small part of the north sidewalk on Queen Street West past 1:18 pm on March 21st and there is 'some nuance' (emphasis added) as to what the actual length of that shadow on the sidewalk will be. He expressed confusion as to the actual threshold time period the owner was required to comply with since Mr. Kukic's Witness Statement included various thresholds (i.e., 11:18 am, 12:18 pm and 1:18 pm).

He posited that an additional 18 minutes of shadow on March 21st is an acceptable impact and that it reflects the Applicant's attempt to limit the amount of shadow on the north sidewalk.

On re-examination, Mr. Ferancik confirmed that the Shadow Study (Exhibit 4 – Tab 11) validated that any shadowing on the north sidewalk on Queen Street West on March 21st would be entirely removed within a one-week time period.

Mr. Kukic's Expert Witness Testimony

Mladen Kukic was qualified as the Appellant's expert land use planning expert without objection. Mr. Kukic has been an Assistant Planner with the City's Community Planning Section in the City Planning Division since November 2015, and has previously been qualified by the TLAB and the Local Planning Appeal Tribunal (LPAT) to provide expert evidence in land use planning. His Witness Statement (Exhibit 6) included his *curriculum vitae* (Appendix 1) and an executed Acknowledgement of Expert Duty form (Form 6) in Appendix 2 to the Statement.

He confirmed his involvement with this application noting that he is the planner assigned to the active Site Plan Control application for the approved 25-storey mixed-use building for the subject property. He also confirmed he had reviewed the proposed minor variance application that is the subject of this hearing and had authored the comments provided to the COA.

He noted that his March 23, 2018 memorandum to the COA recommended refusal of the variances related to the increase in permitted height and, further, recommended that the COA impose conditions if the variances related to the decrease in resident parking spaces was approved.

Mr. Kukic confirmed that in reviewing the subject application, he sought to establish a Study Area (Exhibit 7 – Vol. 4, page 380) which he noted as being consistent with the east, north and west boundaries of the East Precinct of the *King-Spadina Secondary Plan*.

More specifically, he defined the boundaries as Spadina Avenue to the west, Queen Street West to the north, Simcoe Street to the east and Adelaide Street West to the south. He submitted that all the properties within the study area are designated

Regeneration Areas in the OP and the zoning by-laws. He advised that he had excluded the properties fronting onto Spadina Avenue and Queen Street West and chose Adelaide Street West as the southern boundary as the majority of buildings south were too distant to create a shadow impact on Queen Street West.

He also reviewed previous Council approved decisions for tall buildings within the Study Area as far back as 2006, as well as an application for a 92-storey and 82-storey towers outside of the area, to determine the shadow impact on the north sidewalk of Queen Street West.

He identified and grouped these developments by municipal address and approval dates (in brackets) in his Witness Statement (in paragraphs 67 to 96) and included City Staff Reports for each in his Witness Statement (Exhibit 8 – Volumes 1 & 2). For brevity, I provide a summary narrative of Mr. Kukic's written testimony for each development below:

- **118, 199, 203 Richmond street West and 10 Nelson Street (2010)**
- Two towers (41 storeys and 31 storeys) fully built – The applicant removed shadowing from the north sidewalk of Queen Street W. after 11:18am at the spring and fall equinoxes. The proposal was supported by City staff.
- **102-118 Peter Street and 350-354 Adelaide Street west (2017)**
- 47-storey mixed-use building that has not yet been built. A shadow study submitted by the applicant confirmed that the shadow cast will have moved off of the north sidewalk of Queen Street W. by 11:18am. This impact was acceptable to and supported by City staff.
- **328-340 Adelaide Street West (2010)**
- 40-storey mixed-use building at 324 Adelaide Street W. approved at the Ontario Municipal Board (OMB). The development creates no shadow impact on the north sidewalk on Queen Street W. past noon during either the spring or fall equinox.
- **117 Peter Street and 218 Richmond Street West (2011)**
- 36-storey mixed-use building (the Tableau building) at 117 Peter Street, southwest of the subject property. The applicant submitted a shadow study which identified a shadow impact on Queen Street W. Although City staff recommended that the building's height and massing be revised, Council approved the zoning by-law application for the 36-storey tower. This building does not cast shadows on the Queen Street W. right-of-way at 1:18 pm during the spring and fall equinoxes.
- **134 Peter Street (2009)**
- 16-storey office building was refused at the COA, appealed and subsequently approved by the OMB. The building creates a partial shadow impact on the north sidewalk of Queen Street W. at 12:18 pm during spring and fall equinoxes but is off by 1:18 pm.

- **306-322 Richmond Street West (2009)**
 - *The original rezoning application proposed to redevelop 318 Richmond Street West, directly east of the subject property, as a 19-storey mixed-use building. The proposal was revised to reflect a 35-storey mixed-use development (the Picasso building). City staff recommended refusal based on many issues, including shadow impacts on Queen Street W through much of the year and specifically at the spring and fall equinoxes. Council approved what Mr. Kukic termed an ‘anomaly’ in 2009 and the building is fully built.*
- **81-87 Peter Street (2013)**
 - *49-storey mixed-use building at 87 Peter Street that is fully built. Shadow impact on Queen Street W. was not an issue.*
- **288A, 290 and 294 Adelaide Street West (2011)**
 - *Council approved a 49-storey mixed use building at 294 Adelaide Street West. Although City staff recommended refusal of the application, shadow impact on Queen Street W. was not an issue.*
- **40-58 Widmer Street (2016)**
 - *Council approved a 41-storey residential building at 40 Widmer Street. Shadow impact on Queen Street W. was not an issue.*
- **260-270 King Street West and 274-322 King Street West (2014)**
 - *OMB approved settlement for two towers (Mirvish-Ghery building) at 92 and 82–storeys. Although not located within the Study Area, the shadow impact of the approved heights for this development was reviewed by Planning staff and it was determined that there would be no impact on the north sidewalk on Queen Street West after 11:18am during the spring and fall equinoxes.*

Mr. Kukic concluded that with the exception of two, approval of the ten developments identified within the Study Area is reflective of City staff’s consistency in recommending limitations on height to mitigate shadowing on the north sidewalk of Queen Street West. He acknowledged that two exceptions recommended by staff for refusal, the Tableau and Picasso buildings, cast shadows to some degree during the two shoulder periods of most importance to the City.

The Statutory Tests

Mr. Kukic reviewed the proposed variances against the criteria outlined in Section 45(1) of the Act and addressed the four tests.

In reviewing the provincial policies, he specifically referenced Policy 4.7 of the PPS and submitted that this policy directs that official plans are the most important vehicle for implementation of the PPS.

He also highlighted Policies 4.g) of Chapter 2.2.1 and 5.2.5.6 in the *Growth Plan for the Greater Golden Horseshoe (2017) (the Growth Plan)*, which support the achievement of complete communities by ensuring “*the development of high quality built form, an attractive and vibrant public realm, including public open spaces, through*

site design and urban design standards” through the implementation of official plan policies and other supporting documents.

Mr. Kukic opined that the subject property is designated *Regeneration Areas* in the OP and is within the *Downtown and Central Waterfront* land use designations. As a result, he submitted that the proposal is subject to the policies of Section 2.2.1 of the OP, among others, noting particularly Policies 2.2.1.6 (Urban Guidelines), 3.1.2.3(e) (Built Form), 3.1.3 (Built Form – Tall buildings), 3.1.5.3 (Heritage Conservation Districts) and 4.72 (Regeneration Areas).

He submitted that these OP policies provide guidance in addressing the scale, massing, and built form of buildings ensuring that they respect and fit harmoniously within the existing and/or planned context and limit the impacts of new development on neighbouring streets, open spaces and adjacent properties.

He posited that within the planned context a major objective for the City is buildings designed so that they do not physically and visually overwhelm adjacent streets, parks and the surrounding neighbourhoods, thereby blocking sunlight. OP policy objectives related to the development of tall buildings (3.1.3) direct that new development adequately limit any resulting shadow impact.

In this regard, he opined that Policy 4.72 requires that development within *Regeneration Areas* not proceed until a Secondary Plan is in place. The proposed development is subject to the *King-Spadina Secondary Plan* policies identified in Chapter 6.16 of the OP (Exhibit 7 – Vol. 4), a document which he proposed reinforces the character and quality of the area through paying special attention to the built form and the public realm.

He focused his testimony on the policies of Section 3 (Built Form) and, in particular, Section 3.6 (General Built Form Principles) which specify that:

*(d) new buildings will be sited for **adequate light** (emphasis added in Mr. Kukic’s Witness Statement at paragraph 43), view, privacy and compatibility with the built form context:*

*(f) buildings adjacent to streets, parks or open spaces will be massed to provide appropriate proportional relationships and will be designed to minimize the wind and **shadowing impacts on the streets** (emphasis added in Mr. Kukic’s Witness Statement at paragraph 43), parks or open spaces.*

Mr. Kukic addressed a number of Council adopted studies and guidelines applicable to the proposed development. These documents were reviewed in a more general manner in Mr. Ferancik’s previous testimony and, therefore, I provide the following brief summary of each as offered by Mr. Kukic both in his testimony and through evidentiary materials (Exhibit 8 – Witness Statement/Vol.1).

1. King-Spadina Urban Design Guidelines (2006)

Council adopted guidelines that provide direction on how to assess development proposals to ensure that new buildings and public realm improvements preserve and reinforce the area's heritage character. Importance is placed on the protection of sun access to the public realm and ensuring there is adequate sunlight on both sides of "*sunlight streets*," especially east of Spadina Avenue (Chapters 2.5 and 5.4.2)

2. *King-Spadina East Precinct Built Form Study*

The objectives of this Study created an up-to-date policy framework to evaluate development applications to ensure that the King-Spadina area could grow, with a focus on ensuring a balance between growth and necessary amenities. Recommendation 3.b. of the Study reinforced Council's direction to City staff to limit heights in development approaching Queen Street W. to prevent shadowing on the north sidewalk after 12:00 pm (noon) in the spring and fall equinoxes.

3. *TOCore Planning Downtown (OPA 406)*

An inter-divisional Planning staff led initiative to update the planning framework for the Downtown in response to the rapid intensification of downtown Toronto. The subject development falls within the boundaries of the TOCore study area. Chapter 9 in the document, which includes built form policies, and specifically Policy 9.17, address the minimization of shadows from developments to preserve the utility of sidewalks, parks, open spaces, natural areas, child care centres, playgrounds, institutional open spaces, private open spaces, outdoor amenity areas and POPS.

4. *Queen Street Heritage Conservation District Plan (HCD)*

Mr. Kukic noted that the subject development is within the HCD boundaries. Chapter 5.4 of the HCD Plan provides direction on development guidelines for building heights within the HCD and acceptable shadow impacts of buildings outside the boundary area. The Plan states that the "*shadow impact of new buildings outside the HCD should not result in greater shadowing on Queen Street W. than what is permitted by the Plan.*" (*Exhibit 8- Vol. 1, paragraph 53*)

Mr. Kukic opined that the OP Built Form policies noted above specifically reference the importance of preserving sunlight and limiting shadow impacts on neighbouring streets. These policies are further strengthened through the *Tall Building Urban Design Guidelines* and OPA 406 (*TOCore*).

He submitted that the *King-Spadina Secondary Plan* makes explicit reference to 'sunlight' streets and the *King-Spadina East Precinct Built Form Study* expands on these 'sunlight street' policies by introducing references to limiting heights on new developments that approach Queen Street West to prevent shadowing on the north sidewalk after 12:00 (noon) in the spring and fall equinoxes. Additionally, the Queen

Street West HCD Plan adds a further layer of policies that seek to limit shadowing on Queen Street W.

He posited that the subject proposal for the two-storey addition would cast shadows on the north sidewalk of Queen Street West for an additional '20 minutes' longer during the spring and fall equinoxes than what was approved under site-specific Zoning By-law 1041-2014 and almost 100 minutes longer than anticipated by the built form policies of the *King-Spadina East Precinct Plan*.

In his professional opinion, therefore, the proposal does not maintain the general intent and purpose of the OP.

Regarding the second statutory test, Mr. Kukic posited that shadowing on the north sidewalk of Queen Street W was a considerable concern for Planning staff during their review of the zoning by-law amendment application. He submitted that staff reached a compromise as to the proposed building's design that would allow the structure, as approved at 25-storeys, to cast shadows after the noon hour, but not past 1:18 pm. He submitted that Zoning By-law 1041-2014 "***was specifically written with the intention of permitting heights at 324 Richmond Street West that would not result in shadowing on the north sidewalk past 1:18 pm during the equinox dates***" (emphasis added by the Witness) (Exhibit 8 – Vol. 1, paragraph 108).

As a result, he opined the proposal is not consistent with other approvals within the Study Area and does not maintain the general intent and purpose of the site-specific Zoning by-law.

As to the third statutory test, Mr. Kukic submitted that during the two 'shoulder seasons', the spring and fall equinoxes, access to direct sunlight and shelter from the wind are extremely important to improving the comfort, usability and enjoyment of outdoor spaces. He posited that the proposed development would adversely impact the enjoyment of the Queen Street West public realm, and that there is desirability associated in creating finality to the planning process and not adding additional impact through further variances to site-specific by-laws.

As such, he opined that the proposed development is not desirable for the appropriate use and development of the land.

With regard to whether the proposed variances are minor in nature, Mr. Kukic posited that the vast majority of the tall buildings within the Study Area do not cast shadows on the north sidewalk of Queen Street west past noon during the equinox dates. Further, he noted that Zoning By-law 1041-2014 already permits shadow "***beyond what the planned context envisions, and what the majority of the existing buildings cast.***"

He opined that the proposed variances are not minor since the Shadow Study modelling submitted as part of the COA application and the subject TLAB appeal

illustrated an incremental shadow increase on the north sidewalk during the spring equinox (March 21st) as a result of the proposed additional two storeys.

In Mr. Kukic's professional opinion the proposed variances should be refused. He submitted, however, that should the TLAB choose to approve the application before it, then the conditions recommended in Planning staff's report to the COA, dated March 23, 2018, and subsequently approved by the COA be imposed by the TLAB.

Cross-examination by T. Halinski

Mr. Halinski submitted that the facts in dispute in this matter related to the creation of additional shadow on a portion of the north sidewalk on Queen Street West, west of Beverly Street, between Peter and Duncan Streets. He submitted to Mr. Kukic that Mr. Ferancik's evidence corroborates that the segment of sidewalk in question contains a pedestrian 'clearway' area along with an obstructed section in proximity to the curb.

He posited that the modelling in the shadow studies submitted by Mr. Ferancik confirmed that no shadow created by the proposed development falls on any of the buildings on the north side of Queen Street West past 1:18pm and that the shadow is present only for the 17-minute period beyond 1:18 pm, after which the shadow gradually decreases, and only during the spring equinox. Mr. Kukic acknowledged this supposition.

Mr. Halinski then addressed the issue of policies versus guidelines referencing the documents identified by Mr. Kukic in his Witness Statement and testimony. Mr. Kukic agreed that Policy 4.7 in the PPS (Exhibit 7 – Tab 15, page 226) postulates that official plans are to provide clear, reasonable and attainable policies and that as a general principle in interpreting planning policy documents "*they say what they mean.*" In this regard Mr. Halinski posited that policies are typically adopted and in-force and anything else is to be considered a recommendation or a guideline.

In addressing the OP and the *King-Spadina Secondary Plan*, Mr. Halinski submitted that the policies dealing with the approach to shadowing accepted by the City are neither 'absolute' nor quantitative but rather represent a '*qualitative context specific approach*'. He posited, and Mr. Kukic agreed, that the operative language is reflected in Policy 3.1.2.3 e) in the OP which directs that new development will "*limit its impact on neighbouring streets, parks, open spaces, and other properties by adequately limiting shadows of, and uncomfortable wind conditions on neighbouring streets...*"

Mr. Halinski questioned similar language related to shadow impact on Queen Street West in other documents highlighted by Mr. Kukic in his evidence, including the *King-Spadina Urban Design Guidelines*, the *King-Spadina East Precinct Built Form Study*, *TOCore Planning Downtown*, and the *Queen Street west Heritage Conservation District Plan*.

On being challenged as to whether the policy language in the *King-Spadina Urban Design Guidelines (Chapter 5.4.2)* directs shadow impact to actually be 'eliminated', Mr. Kukic acquiesced to Mr. Halinski's suggestion that the operative word used is 'limiting'. Mr. Kukic also acknowledged that where there is reference in the policies to 'sunlight' streets, specific streets are indeed identified by name, and Queen Street West is not identified as such.

Further, Mr. Kukic acknowledged that when guidelines such as the *King-Spadina Urban Design Guidelines* intend that no new additional shadow be created by new development within a specific time period, it says just that. In this regard, Mr. Halinski highlighted the language in Chapter 5.4.2 (Exhibit 7 – Vol. 4, page 419, which states that:

“Any development that proposes additional height in King-Spadina must demonstrate, as a minimum, that it creates no new additional shadow on the designated park spaces from the period 11:00 am to 3:00 pm on March 21st other than that created by existing or approved buildings and the existing built form permissions in the vicinity of parks”.

Mr. Halinski noted, and Mr. Kukic agreed, that the above-referenced wording speaks specifically to the creation of no new additional shadows **on parks and opens spaces** (emphasis added), and not on streets such as Queen Street West.

With respect to the *Queen Street HCD Plan*, Mr. Kukic accepted that it was enacted under the *Ontario Heritage Act* and is not a *Planning Act* policy document and should be read as a guideline. He also accepted that where the *Queen Street HCD Plan* intends direction to be mandatory the terms 'must' and 'not permitted' are used, as found in the Plan in Chapter 5 – *Heritage Attributes + District Guidelines* (Exhibit 7 – Vol. 4, page 320). Mr. Kukic concurred with Mr. Halinski that Planning staff received no objections from HPS regarding the revised proposal.

Mr. Halinski then addressed Mr. Kukic's March 23, 2018 Planning staff memorandum to the COA, specifically highlighting paragraph 108 in his Witness Statement (Exhibit 7, Vol. 1, page 78). He questioned Mr. Kukic on his interpretation of the wording in Zoning By-law 1041-2014 and obtained acknowledgement from Mr. Kukic that the By-law does not speak to shadow impact, or any impacts for that matter. Mr. Kukic also acquiesced to the fact that the wording he employed with respect to the By-law in his Statement could have been clearer.

Mr. Kukic agreed with Mr. Halinski's proposition that given the above-referenced interpretation of Zoning By-law 1041-2014, an applicant could never meet the four statutory tests with respect to an increase in building height because additional height would necessarily result in shadow encroachment on the street for some period of time, whether that was 3 minutes, 18 minutes, or 3 hours.

He questioned Mr. Kukic regarding the policy documents he reviewed as a basis for concluding that the proposed variances do not meet the general intent and purpose

of the OP. Mr. Kukic conceded that the only document referenced in the March 23, 2018 Planning staff report to the COA, other than the OP and the Zoning By-law 1041-2014, was the *King-Spadina Secondary Plan* (Exhibit 7 – Vol. 4, page 79), which he acknowledged does not address building heights.

In concluding his cross-examination of the witness, Mr. Halinski highlighted the first paragraph on Page 78 of the Planning staff March 23rd memorandum (Exhibit 7 – Vol. 1). Although Mr. Kukic submitted that he had reviewed numerous other previous approvals for tall buildings within his Study Area, he also acknowledged that the staff had employed a variety of approaches to permitting shadow encroachment on Queen Street West. He conceded to Mr. Halinski's proposition that staff shadow impact times vary from 11:00 am, 11:18 am, 12:00 (noon), 1:00 pm and 1:18 pm, and that none of these times references is found in the City's policy documents as they relate to the proposed development.

Mr. Kukic was asked to acknowledge that the Picasso development, at 35-storeys and approved by Council in 2009, is substantially taller than the subject proposal. He recognized that although Planning staff had recommended refusal of that application, it was approved by Council and he conceded that this approval should count as an expression of Council's intent in the area.

On re-examination, Mr. Kukic provided his perspective understanding of the difference between a planning policy and a guideline and opined that Planning staff should have regard for guidelines as part of any planning application review, in addition to Council endorsed direction.

Following Mr. Kukic's testimony, it became clear that the Hearing, which had been scheduled for one day, could not be completed in its entirety in the time remaining. There were a number of outstanding matters including closing arguments by Parties, in order of evidence, and reply arguments. In considering this situation, I canvassed the Parties to determine the time required to complete their closing arguments and solicited potential options available to proceed, including investigating a second future hearing date, and whether allowing written closing and reply arguments was a viable alternative acceptable to the Parties.

In considering these options, and pursuant to TLAB Rules 2.1, 2.2, 2.3, 2.5 and 2.10, I found that permitting a written final argument submission option to be the just, most expeditious and cost-effective approach to effectively and completely adjudicate the matter before this Tribunal.

As a result, I issued a Decision and Order, dated August 20, 2018, directing the submission to the TLAB of final arguments from the Parties by no later than August 27, 2018, and reply of final argument responses by no later than September 4, 2018.

Written Closing Submissions

The Applicant

**Decision of Toronto Local Appeal Body Panel Member: D. Lombardi
TLAB Case File Number: 18 145156 S45 20 TLAB**

In his written closing submission, dated August 27, 2018, Mr. Halinski summarized Mr. Ferancik's evidence as follows:

- *The proposed variances satisfy the four tests in subsection 45(1) of the Act and represent good planning;*
- *The proposed variances meet the general intent and purpose of the Official Plan and, in particular, the King-Spadina Secondary Plan that is responsive to the existing and emerging context;*
- *The proposed variances will facilitate an appropriately-scaled building for its context in a form that meets the general intent and purpose of site-specific Zoning By-law and which maintains adequate light and privacy, and minimizes shadow impact on streets, including Queen Street West;*
- *The proposed built form is modest in terms of height relative to recent development approvals in the study area, and the change in height from 25 to 27-storeys is minor, largely imperceptible and will have a negligible impact on how the building is experienced from any adjacent street, including Queen Street West;*
- *The proposed variances do not change the use, public realm elements, setbacks, or architectural character of the proposed development, and maintain the same general scale and massing of the development;*
- *The additional two storeys will allow for an increase in housing options and improve the viability of public transit in the area, which far outweighs the incremental shadows on a small portion of a sidewalk for only 17 additional minutes at one point in the year; and*
- *The proposed variances will also allow for a more efficient use of the underground parking garage, which has excess supply.*

He submitted that Mr. Ferancik's testimony had provided the following uncontroverted physical evidence (Exhibit 4, Tab 11A & B, pp. 205-207):

- *The City does not take issue with shadow on the north sidewalk before 1:18 pm., and that shadow impact beyond that only occurs during the March equinox;*
- *During the 18-minute period between 1:18 pm. and 1:36 pm. disputed by the City, the shadow falls on the ground and not on the building facades, the shadow gradually moves south and off the sidewalk, and a pedestrian's upper body would remain in sunlight throughout that time period;*
- *A portion of the north sidewalk impacted by shadow is obstructed; and*
- *The shadow disappears altogether from the north sidewalk within a week of the March equinox and further greatly diminishes toward June.*

Mr. Halinski posited that the City's objection with respect to the general intent and purpose of the OP rests primarily on interpreting the intent of the policy language regarding shadow impact which is simply not there. He also submitted that the PPS, in s. 4.7, requires official plans to provide policies which are clear and that ought to govern the interpretation of the OP.

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He highlighted policies 3.1.2.3 (d) and (e) in the OP and 3.6 (c) in the *King-Spadina Secondary Plan*, positing that both documents take a contextual and qualitative approach to shadows on streets “adequately limiting, rather than eliminating, impact.” He further noted that neither provides specific timeframes or parameters in this regard.

Additionally, he submitted that Queen Street West is not identified as one of the ‘sunlight streets’ in section 5.4.2 of the *King-Spadina Urban Design Guidelines* and that the direction in the Guidelines does not translate to either a prohibitive or specific timeframe restriction. He echoed Mr. Ferancik’s opinion that while guidelines are contemplated and permitted by the OP, they are not themselves official plan policies nor are they subject to appeal.

Mr. Halinski submitted that the City has relied heavily on the *King-Spadina East Built Form Study* in its analysis of the subject application and asserted that the *Study* is still an ongoing, evolving, multi-year process. He posited that although one of the current, Council-endorsed directions of the *Study* is to limit heights approaching Queen Street to prevent shadowing on the north sidewalk after noon in the spring and fall equinoxes the *Study* itself has not resulted in the formulation of any actual policies. Accordingly, and as opined by Mr. Ferancik, the current direction of the *Study* comes nowhere near the level of purpose and intent of the OP.

He argued that the City’s approach to the issue of height in the study area and the resulting shadow on Queen Street has also been inconsistent. In this regard, he highlighted paragraphs 71-96 of Mr. Kukic’s Witness Statement, noting that staff has set their desired cut-off with respect to shadow variously at different times, none of which are contained in policy.

For guidance regarding an approach to the issue of minor additional shadow, Mr. Halinski provided *621 King Developments Ltd. V. Toronto (City), [2013] O.M.B.D, No. 11*. The decision relates to an application to the City for a site-specific Zoning By-law seeking to add three additional storeys and 90 residential units to an OMB approved mixed-use development. The location and particulars of the application are generally similar to the subject proposal.

In that matter, the City argued that the proposal would cause loss of sunlight for pedestrians on King Street West. OMB Member Hussey wrote, at paragraph 41, regarding the shadow impact studies completed by the applicant that:

“The studies demonstrate that there would be little or no adverse shadow impacts in the summer months but there would be additional shadowing on the rooftop of 650 King Street and the north sidewalk of the street in the fall and spring. The Board agrees with the opinion of the Applicant’s consultant that, while there is additional shadowing on the King Street sidewalk in the fall and spring, a reasonable amount of sunlight would remain. On balance, the shadowing created by the additional three storeys is an acceptable impact in the context of the downtown area.”

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Mr. Halinski submitted that the proposal before the TLAB represents a quintessential example of a minor adjustment to the provisions of the Zoning By-law and that the evidence of Mr. Ferancik with respect to the four tests ought to be preferred to the City's evidence.

With respect to the conditions requested by the City, he confirmed that the Applicant is in agreement with the two conditions imposed by the COA, but that the language of the new condition being sought by the City (No. 3 in Exhibit 10) would create, from a practical perspective, "a scenario whereby the 'sum to be negotiated' cannot be agreed on between the parties, thus blocking the implementation of the variance.

City of Toronto

In the City's closing *Written Submissions*, also dated August 27, 2018, Ms. deBacker asserted that the appeal before the TLAB was principally about unacceptable shadowing impact on a vibrant part of the City's downtown core that would result from the Applicant's proposal for more height and density than was agreed to and approved by the Council for the subject property through the 2014 site-specific Zoning By-law.

She submitted that the City's submission was based on three key points: the history leading to the passing of the site-specific by-law; the position that additional shadowing on the north sidewalk on Queen Street West was neither minor in impact nor desirable; and the TLAB should prefer Mr. Kukic's evidence.

She argued that a variance must meet all four tests of the Act in order to be approved and failing even one of the tests must result in that variance being refused. She noted that Mr. Kukic provided professional planning evidence that the proposed variances related to the increased height of the building (Variances 1, 2, 4 and 5) do not meet the general intent and purpose of the OP or Zoning By-law 1041-2014; are not desirable for the appropriate development of the land; and are not minor in nature.

In addressing the history of the site-specific Zoning By-law, Ms. deBacker established that there had been extensive negotiations between Planning staff and the Applicant which resulted in an agreed-upon revised proposal for a 25-storey mixed-use building that ensured no shadow would be cast on the north sidewalk of Queen Street West past 1:18 pm during the spring and fall equinox dates.

She submitted that Planning staff's intention to limit shadowing on the north sidewalk through the form of the Applicant's revised design was a consistent position evidenced through staff's Refusal Report in December 2012 (Exhibit 7 – Tab 11, p. 132) and a Final Report in July 2014 related to the rezoning application. An increase in height and density resulting from the approved rezoning included a Section 37 agreement pursuant to the *Planning Act* which was finalized in 2014 (Exhibit 7 - Tabs 12 & 3).

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Ms. deBacker submitted that this historical context was significant as it corroborated that shadowing had been a meaningful issue in negotiations with the Applicant and that the Applicant's revised building design at 25-storeys satisfied the City's shadow impact concerns.

Concomitantly, she then argued that the subject variance application before the TLAB for more height and density represented, in the City's viewpoint, a "*second kick at the can*" by the Applicant (emphasis added by Counsel) and could be characterized as "*planning by incremental approvals.*"

She submitted that the Applicant was well aware that shadowing on the north sidewalk past 1:18 pm during the two shoulder seasons was the City's test period, and she posited that Planning staff had maintained a consistent position that shadow impact past the test period was unacceptable and did not constitute good planning. In support of this contention, she referenced Mr. Ferancik's testimony in this regard in cross-examination

As to whether the additional shadowing on Queen Street West is minor or desirable, Ms. deBacker again submitted that Mr. Kukic's evidence had corroborated the City's policy stance that reducing access to sunlight affects the comfort, quality and use of the public realm, and that access to sunlight in the shoulder seasons – spring and fall – is important in improving the usability of this realm. She submitted that this position had been established in City planning documents such as the OP, *the King-Spadina Secondary Plan*, *Tall Building Guidelines*, *OPA 406*, and the *Queen Street HCD Plan*.

She then debated whether Mr. Ferancik's opinion evidence that the utility of that part of the north sidewalk is impacted by existing obstacles such as a hydrant, garbage receptacle *et al*, limiting its use for pedestrians was in fact accurate. She referenced Mr. Ferancik's own photo book to illustrate that the area in issue, a segment of the north sidewalk on Queen Street West between Peter and Duncan Streets, is still accessible to pedestrians and that it continues to be an important part of the public realm.

She also questioned the validity of the shadow studies submitted as part of this Hearing, suggesting that such modelling is not an exact science and provides only a "rough estimate" as to the shadow would be completely off of the sidewalk between March 21st and June 21st. As such, she suggested that the TLAB prefer Mr. Kukic's opinion evidence that allowing additional shadowing through the minor variance process past 1:18pm during the spring equinox is not desirable for the appropriate development of the subject property.

Ms. deBacker concluded her written submission by proposing that the TLAB prefer Mr. Kukic evidence because it was thorough, extensive and included a review of the relevant policy framework. She noted that in his evidence Mr. Ferancik had omitted the *King-Spadina Urban Design Guidelines* and *Tall Building Guidelines* in reviewing the subject application. Echoing Mr. Kukic's opinion, she submitted that documents such as the *King-Spadina East precinct Built Form Study* and the *King-Spadina Secondary Plan*,

in addition to the more recent *TOCore* initiative, should be considered as relevant to the proposed development and should be viewed as Council's most current and intended direction for new tower development in the area.

She reiterated that Mr. Kukic had provided the Tribunal with an appropriate and well-defined study area for analysis of the application and submitted that he was successful in demonstrating a consistency in Planning staff's approach to evaluating tall buildings within the study area with respect to shadow impact on the north sidewalk of Queen Street West.

She asserted that the vast majority of those tall buildings in Mr. Kukic's analysis do not cast shadows on the north sidewalk on Queen Street West past noon during the equinox dates. As to the Picasso building which the Applicant has relied on as justification for the proposed variances and is the only other approved building that casts shadow on Queen Street West past 1:18pm, she noted that it pre-dates the approval of Zoning By-law 1041-2014. She submitted that relying on this 2009 approval as a rationalization for requesting more height and density for the subject development now, does not constitute good current or long-term planning.

Ms. deBacker offered case law for guidance in addressing development applications in which shadow impact from additional building height is applicable. She submitted two relatively recent decisions of the Local Planning Appeal Tribunal (LPAT) - *Beaux Properties International Inc. V. Toronto (City)*, [2017] O.M.B.D. No. 93, and *2071430 Ontario Inc. v. Toronto (City)*, (2015) O.M.B.D., No. 1138.

Beaux Properties International Inc. is a decision regarding a COA application seeking relief from the site-specific zoning by-law for variances to permit two additional floors to an approved 32-storey apartment building. The primary issue was shadow impacts on a public parkette.

The LPAT ultimately refused the variances, noting at paragraph 27 in the decision that adequately limiting shadows on neighbouring open spaces and preserving the utility of those spaces was a guiding force leading to the development of a site-specific by-law. Evidence showed that efforts were made to arrive at an acceptable revised design intended to minimize shadow impacts on the parkette.

At paragraph 31 in the decision, Member Bruce concluded that the intent of City Planning staff in supporting the site-specific zoning by-law was predicated on the negotiated and refined building design being built. Ms. deBacker submitted that the subject proposal had similar historical experiences to that in the above-referenced LPAT case, in that the City had demonstrated that shadowing on the north sidewalk of Queen Street West had been a consistent and principle concern for Planning staff and that subsequent approval of site-specific Zoning By-law 1041-2014 by staff was based on the expectation that the Applicant would build the approved 25-storey building.

The second decision, *2071430 Ontario Inc. V. Toronto (City)*, involved variances requesting relief from a site-specific by-law for an increase in height and associated

GFA for a property located in the King-Spadina area. In that case, the City argued that approval of site-specific zoning by-law followed an agreement reached between the applicant and the City which was subsequently endorsed by the former OMB at a settlement hearing.

In the decision by the Vice Chair Seaborn, the Member concluded that the by-law at issue was site specific and tied to the development proposal for a 17-storey mixed-use building, including a s. 37 agreement, and to vary the terms of the by-law to permit additional height and density would substantially alter both the purpose and intent of the By-law. At paragraph 9, Vice Chair Seaborn explicitly noted that *“to seek approval now for what is largely the original development concept by way of a minor variance is not supportable.”*

Ms. deBacker submitted that the subject applicable for the proposed variances related to height represents the very circumstances that Vice Chair Seaborn warns of in *20171430 Ontario Inc. v. Toronto (City)*. In this regard, she argued that the requested variances which would result in shadows cast on the north sidewalk of Queen Street West past 1:18pm were not supported by Planning staff. She concluded that to seek approval now for what was essentially the original proposal by way of a minor variance is simply not supportable, and in fact, in her words, could be considered *“an abuse of process.”*

Her written submission concluded by arguing that Mr. Kukic’s evidence was thorough and had regard for the relevant policies, guidelines and directions from Council. She submitted that the proposed variances, particularly with respect to an increase in height, do not meet the general intent and purpose of the OP, directly contradict the general intent and purpose of the Zoning By-law, are not desirable for the appropriate development of the property, and are not minor. She submitted that should the applicant fail to meet even one of the four tests, the TLAB should refuse the requested variances.

In the alternative, she requested that should the TLAB approve the application before it, the Tribunal should impose the conditions put forward by the City which are found in Exhibit 10. These include the two conditions contained in the COA decision dated March 23, 2018, as well as the following third condition requested by the City related to the increase in height and density sought by the Applicant in addition to what was agreed to in 2014:

3) The owner shall enter into a Section 45(9) (Planning Act) agreement, in a form satisfactory to the City Solicitor, to be registered on title prior to the issuance of the first above grade building permit, for a financial contribution in a sum to be negotiated between the City and the owner, to go towards community services and facilities within the King-Spadina Secondary Plan, as may be determined by the Chief Planner and executive Director, City Planning Division, in consultation with the Ward Councillor. In response to the increase in height and density sought, the TLAB shall withhold the final order until the City and owner have agreed on a quantum and notified the TLAB that they have reached an agreement and that they have entered

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into a Section 45(9) agreement to secure the contribution. If the parties cannot reach agreement on the amount to be secured, the TLAB may be spoken to. .

In his written *Reply Submissions*, dated September 4, 2018, Mr. Halinski submitted that the City's usage of language such as '*reneging*' and '*abuse of process*' (at paragraphs 16 & 36, respectively, in the City's Written Submission) was an attempt to paint a picture which was not factual. Additionally, he posited that this was also an attempt by the City to distract from the fact that its entire case pivots on approximately 18 minutes of shadow, on a small portion of the north sidewalk, during one particular time of the year.

He submitted that the City's opposition to the original form of development cannot be equated with Council's intent in passing the Zoning By-law 1041-2014. In fact, he suggested that Council's adoption of a site-specific zoning by-law, contrary to Planning staff's opposition, authorizing the Picasso project which is taller and casts materially more shadow on Queen Street West than the subject proposal, as quite germane to the City's position.

He also suggested that the City's arguments regarding the omission of the *Tall Building Guidelines* from Mr. Ferancik's analysis ignores his evidence as to the weight to be given to guidelines and neglects to underscore the City's own failure to discuss these *Guidelines* in either Mr. Kukic's August 2018 Witness Statement or his March 2018 comments to the COA in relation to the proposed variances.

As to the case law offered by the City in its written submissions, Mr. Halinski suggested that the City's solicitor took the Panels' findings out of context and misconstrued critical facts in those decisions. He submitted that *2071430 Ontario Inc. v. Toronto (City)* is clearly distinguishable from the subject application in that the matter in that referenced case was an application to vary a by-law resulting from an OMB-approved settlement. The variances being requested amounted to an abrogation of the OMB settlement on the part of the applicant, and the COA had denied the application in any event.

In addition, the site could not physically support the development proposed which contributed to the Member writing that "*on the evidence provided on the facts of this case...to seek approval now for what is largely the original development concept by way of a minor variance is not supportable.*" [para. 9]

He submitted that *Beaux Properties International Inc. v. Toronto (City)* is also distinguishable from the present case because the requested increase in height in that matter would have resulted in additional shadowing on a children's playground in a park, whereas the OP policy specifically required "*minimizing any additional shadowing... on neighbouring parks.*" [para. 25] Again, the COA had denied the application.

By contrast, Mr. Halinski noted that a review of the various Staff reports regarding the subject proposal (Exhibit 7 – Tab 110) indicated that shadow was only one

component of the review and the resulting building design revisions, and that it would be more reasonable to conclude that the reduction in shadow was a by-product of built form revisions, as opposed to a decisive factor.

He suggested that the interpretation urged on the TLAB by the City would result in a ‘*straightjacket approach*’ to site-specific zoning by-laws, an approach not found in or supported by subsection 45(1) of the *Act*.

He submitted that contrary to paragraph 20 in the City’s submissions, requesting a minor variance several years after a rezoning was approved, and where circumstances have changed, does not in his judgement disturb the “*finality of the planning process.*” Instead, Mr. Halinski offered the approach adopted in *Berkeley Parliament Inc. v. Toronto (City)*, [2018] O.M.B.D No. 48, where the Board took the position that “*the test of the success of variances under s. 45 of the Act was whether the variances maintain the general intent and purpose of the zoning by-laws and not the specific intent of the site-specific by-law.*” [para. 34] (emphasis added by the Mr. Halinski)

He further suggested that, in that case, the Board acknowledged that “*the site-specific by-law is not ‘frozen in time’, as to follow that approach would make s. 45(1) meaningless and when considering the general intent and purpose of the zoning by-laws, the additional storeys meet such general intent.*” [para. 75]

Lastly, he referenced paragraph 79 of that decision, which provided, and I am paraphrasing, that “*tweaking*” a development in the planning process, through minor variances, should not be seen to denigrate the efforts and result of the planning processes.

In the City’s written Reply Submissions, also dated September 4, 2018, Ms. deBacker addressed Mr. Halinski’s contention that the City’s analysis of the variances related to height is overly focused on the history of the project rather than the policy framework and physical aspects. She reiterated that the history of the development is significant, and its context directly impacts the intent and purpose of the Zoning By-law, and noted that the present appeal is on direction from City Council.

She submitted that fundamental to the approval of the site-specific By-law was the agreed-upon, revised design approved in 2014 which would not result in shadowing on the north sidewalk past 1:18pm during the equinox dates.

In response to Mr. Halinski’s proposition that the City’s approach to the issue of height in the study area and resulting shadow on Queen Street West has been inconsistent, she argued that Mr. Kukic’s evidence is supportive of Planning staff consistently recommending that tall buildings be limited in height so as not to cast shadows on the north sidewalk after the noon hour during the equinox dates. Ultimately, she submitted that Counsel’s assertions in this regard do not provide justification for giving the Applicant *carte blanche* (emphasis added) to push the limit past 1:18pm, particularly given the agreed to, revised design.

Ms. deBacker then addressed Counsel's suggestion that evidence with respect to the particular way in which the shadow manifests on Queen Street West was uncontroverted, noting that Mr. Ferancik agreed in cross-examination that the shadow modelling was not prepared by a surveyor and, therefore, not an exact science. Mr. Ferancik submitted that there would be a shadow impact encroaching on a portion of the north sidewalk where pedestrians walk but that a pedestrian's upper body would remain in sunlight throughout the 18 minutes in question.

She submitted that the above-referenced opinion relies exceedingly on assumptions regarding the stature of pedestrians and shadow length, and she suggested that the Applicant has provided no concrete evidence before the TLAB to demonstrate exactly when the shadow disappears from the north sidewalk after the March equinox. She submitted that this was a '*red herring*' that should not detract from the fact that the shadow studies submitted by the Applicant's consultant clearly show a resultant shadow past 1:18pm. As well, the City contended that obstructions on a portion of the sidewalk as suggested by Mr. Ferancik would not detract from its functionality.

Ms. deBacker submitted that the City's OP employs much stronger language than merely "contemplating" and "permitting" guidelines, as implied by Mr. Halinski. She reiterated that Section 2.2.1.6 of the OP directs that design guidelines *will be developed and applied* (emphasis added by City Counsel), and submitted that Council direction on land use planning matters must be consistent with the OP.

She then addressed the case law provided by Mr. Halinski, specifically noting *621 King Developments Ltd. V. Toronto (City)*. She argued that this case can be easily distinguished from the subject matter, and that it is neither relevant with respect to the correct test or analysis to be applied, nor helpful. Conversely, she submitted that the cases provided for guidance by the City engaged the proper tests and are directly relevant to the matters at issue in the present case.

Finally, Ms. deBacker focused on the requested conditions (as included in Exhibit 10) should the TLAB see fit to grant the parking-related variances being requested by the Applicant. She confirmed that the Applicant and the City negotiated a Section 37 agreement based on the approved 25-storey design; however, given the increase in height and density being sought, the City is recommending that the TLAB impose a condition requiring a Section 45(9) agreement for the contribution of funds towards community services and facilities within the King-Spadina Secondary Plan.

The City is also recommending that the TLAB withhold the Decision and Order until the City and Applicant have agreed to a quantum of funds contribution.

ANALYSIS, FINDINGS, REASONS

As stated under '*Matters in Issue*', I believe the issues in this Hearing to be; do the proposed variances that increase the height and density of the subject proposal create a shadow impact on the north sidewalk of Queen Street West that is

unacceptable; do the variances satisfy the four tests in subsection 45(1); and, do they represent good planning and merit approval.

Both Counsel for the City and the Applicant provided a number of cases for guidance. I am appreciative of the assistance. However, ultimately the determination of the appeal must bear strong bonds to the evidence heard. A summary *ratio decidendi* of the referenced cases was provided in the previous section of this Decision.

In the City's closing remarks, Ms. deBacker submitted that this case is about the unacceptable shadowing impact on a vibrant part of the City's downtown core that would result from the Applicant's proposal, by way of variance application, for more height and density beyond what was agreed to and approved in the 2014 site-specific Zoning By-law.

In support of its position, the City focused on three key points: the significance of the history leading to the passing of the site-specific Zoning By-law; the position that additional shadowing on the north sidewalk of Queen Street West is neither minor in impact nor desirable; and, the evidence of the City's land use planning witness should be preferred to that of Mr. Ferancik.

The City asserted that Mr. Kukic had provided persuasive evidence of extensive and ongoing negotiations between City staff and the Applicant which had resulted in an agreed-upon revised proposal for a 25-storey mixed-use building that incorporated design features to ensure that no shadow would be cast on the north sidewalk of Queen Street West past 1:18pm, during the spring and fall equinox dates.

The City argued that this historical perspective clearly supported the fact that shadow impact on Queen Street West was a relevant component of extensive discussions with the Applicant and that the City's objective was consistent, to limit shadow past 1:18pm timeframe. This is reflected in paragraph 11 (page 5) in the City's Written Submissions (dated August 27, 2018) in which Ms. deBacker highlights Planning staff's July 18, 2014 *Final Report* to the Toronto and East York Community Council, which recommended approval of the rezoning application for the subject property based on a revised building design.

On page 12 of that *Report*, under the heading "Sun and Shadow", staff indicated that the shadow cast by the revised proposed 25-storey building would be off the north sidewalk of Queen Street West by 1:18pm for the spring and fall equinoxes (March 21 and September 21). As a result, Planning staff advised that they were satisfied with the proposed shadow impact. (Exhibit 7 – Tab 11, p. 177)

It was Mr. Kukic's opinion that the current proposed 27-storey proposal would result in additional shadows which does not meet the intent of Zoning By-law 1041-2014. He opined that the importance of limiting shadow impact is echoed in the planning policy context – through the *OP*, the *King-Spadina Secondary Plan*, *Tall Building Guidelines*, *OPA 406*, and the *Queen Street HCD Plan*.

He further opined that adding further shadow impact through the minor variance process to allow shadowing past 1:18pm during the spring equinox is not desirable for the appropriate development of the subject property. It was Mr. Kukic's opinion that a proposal that now creates additional shadow impact on the north sidewalk of Queen Street West beyond what was negotiated in 2014 is not minor.

The City reiterated that Mr. Kukic's review of the relevant planning policy framework was thorough and should be preferred to Mr. Ferancik's evidence. Notwithstanding that Mr. Ferancik agreed on cross-examination that section 2.2.1.6 of the OP states that "*design guidelines specific to Districts of historic or district character will be developed and applied to ensure new development respect the context of such districts in terms of the development's fit with existing street, setbacks, heights, and relationship to landmark buildings,*" Ms. deBacker submitted that Mr. Ferancik omitted the *King-Spadina Urban Design Guidelines* and *Tall Building Guidelines* from his analysis, contrary to Mr. Kukic's position that while guidelines may not be policy per say, they must be given regard to.

The City solicitor argued that it was Mr. Kukic who had provided the Tribunal with a detailed history with respect to the approval of the site-specific Zoning By-law for the subject property and that this history is significant and directly relevant to establishing the intent and purpose of the Zoning By-law. His evidence supported his opinion that not only do the proposed variances with respect to an increase in height not meet the general intent and purpose of the Zoning By-law they are directly contradictory to that general intent and purpose. On this basis, Ms. deBacker requested that the Tribunal prefer Mr. Kukic's evidence and refuse the application.

I find that the uncontroverted facts are as follow: the proposed variances build on a 2014 site-specific rezoning which permitted a mixed-use, 25-storeys tower, comprised of 21,050 m² of residential GFA, 255 m² of non-residential GFA, and 162 parking spaces; the requested variances would add two additional storeys to the building resulting in a total GFA of 23,079 m² and reduce the required number of parking spaces to 119; the variance with respect to parking is unopposed; and, the COA approved the application.

In addition, with respect to the issue of shadow on the Queen Street West sidewalk, I agree with the Applicant that the following physical evidence is also uncontroverted:

- The City does not take issue with shadow on the north sidewalk of Queen Street West before 1:18pm, and there is no shadow past 1:18pm during any other season other than the March equinox (Exhibit 4 – Tab 11B);
- During the 18 minutes between 1:18pm and 1:36 pm, the shadow created by the proposed building would fall on the ground and not on the building facades;
- Even during the 18 minutes in issue, the shadow gradually moves south and off the north sidewalk (Exhibit 4 – Tab 11A); and,
- The shadow also disappears from the north sidewalk after a number of days (Mr. Ferancik estimated about a week) after March 21st and further greatly diminishes toward June. There is no additional shadowing in September.

I concur with the City's submission that the history associated with the passing of the site-specific zoning by-law and agreed-to building design is relevant and that the Applicant was well aware of the City's concern with shadowing on the north sidewalk of Queen Street West. This was acknowledged by Mr. Ferancik in cross-examination; however, I disagree with the City solicitor's characterization on page 7 (para. 16) in her Written Submissions document that the Applicant is now back in her words "*reneging*" on that agreed-upon revised design.

I find that characterizing the application before the TLAB using hyperbolic terminology such as reneging is inaccurate and not based on the evidence at hand.

In opposing the variances, I agree with the Applicant that the City has only been able to identify one substantive issue: 18 minutes of shadow on a small portion of the north sidewalk of Queen Street West for a brief time period during one specific time of the year. As such, the City has taken the position, based essentially on this concern alone, that the requested variances fail all four tests in subsection 45(1) of the *Act*.

I agree with Mr. Ferancik's evidence and opinion that the variances satisfy the four statutory tests and represent good planning. I agree that the variances meet the general intent and purpose of the OP with respect to providing appropriate redevelopment in a *Regeneration Area* and, in particular, the *King-Spadina Secondary Plan* area that is responsive to the existing and emerging context. The Applicant submitted, and I agree, that the variances will facilitate an appropriately-scaled building for its context which maintains adequate light and privacy and attempts to 'minimizes' (emphasis added) shadow impacts on streets, including Queen Street West.

I agree with his opinion that the difference in shadow impact between a 25-storey and a 27-storey building is negligible, especially in the context that includes taller buildings such as the Picasso building that already shadow Queen Street West. However, as noted by Mr. Ferancik, and supported through his visual evidence in Exhibit 2, even at 27-storeys the subject building would be substantially lower in height than the neighbouring buildings along Richmond Street West. This point was supported through various evidentiary materials including the buildings cited in the informal study area shown on the Building Height Context map. (Exhibit 2)

With respect to both the OP and the Secondary Plan, I accept Mr. Ferancik's opinion that both policy documents take a contextual and qualitative, as opposed to quantitative, approach to shadow impact directing that new development limit, rather than eliminate, impact, without prescribing specific timeframes or parameters.

I agree that the *King-Spadina Urban Design Guidelines* address shadow from new development within the King-Spadina area and identify four current 'sunlight streets' in the area – Bathurst, King, and Wellington Streets, as well as Spadina Avenue (section 5.4.2).

However, as noted by Mr. Ferancik in his testimony, Queen Street West is not identified as one of these 'sunlight streets' in section 5.4.2, and I agree with his opinion

that the concern identified in the *King-Spadina Urban Design Guidelines* does not translate into a prohibitive or specific timeframe restriction. Further, the document does provide a rather specific guideline for development directing “no new additional shadow on the **designated park spaces**” from 11:00am to 3:00pm on March 21st, found in the same section (Exhibit 7-Tab 19, p. 285).

I agree with the Applicant that the City has relied greatly on the *King-Spadina East Precinct Built Form Study* in reviewing the requested variances. I also accept Mr. Kukic’s evidence that *the King-Spadina East Precinct Built Form Study* should be viewed as Council’s most current and intended direction for tower development in the Precinct and that limiting heights approaching Queen Street West to limit shadowing on the north sidewalk after noon during the spring and fall equinoxes is one of the Council-endorsed directions within the Study.

Nevertheless, I agree with Mr. Ferancik’s position that the *Study* itself has not yet resulted in the formulation of any actual policies, as the study process is ongoing, and I accept his opinion that the current direction in the *Study* lacks the level of purpose and intent of the OP. In cross-examination by the Applicant’s counsel, Mr. Kukic agreed that the current and intended policy direction of Council was not one of the tests in subsection 45(1) of the *Act*.

By contrast, the *Downtown Plan*, which was recently adopted by Council but remains under appeal and accordingly not in force, in policy 9.17, speaks to development ‘minimizing’ shadows to ‘preserve the utility’ of sidewalks, opens spaces, etc. (Exhibit 7 – Tab 22, p. 337). I accept the Mr. Halinski’s argument that the subject proposal does in fact attempt to limit shadowing on Queen Street West and in doing so, meets both the in-force OP policy and the *Downtown Plan*.

I find on the evidence that the proposal before the TLAB represents a quintessential example of a minor adjustment to the provisions of the Zoning By-law. I accept Mr. Ferancik’s opinion that while the proposed development will result in additional shadowing on a portion of the Queen Street West north sidewalk during the spring equinox, a reasonable amount of sunlight would remain.

I also accept that the shadowing produced as a result of the additional two storeys proposed by the Applicant is an acceptable impact especially in a context that includes taller buildings that already shadow Queen Street West. Further, I accept Mr. Ferancik’s testimony that if the requested variances are granted, the shape and setbacks of the proposed building will remain the same as approved by Council in 2014.

As to the City’s suggestion that the variance application before the TLAB represents the Applicant’s ‘second kick at the can’ for more height and density and ‘planning by incremental approvals (para. 15, *City’s Written Submissions*, dated Aug. 27, 2018), I concur with Halinski’s argument that this interpretation if supported by this Tribunal would result in a ‘*straightjacket approach*’ to site-specific zoning by-laws.

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I accept his argument that such an approach is not found in or supported by s. 45(1) of the *Act* and I agree that requesting a minor variance after a rezoning is approved, and where circumstances have changed, does not disturb the “finality of the planning process.” (para. 14, *Reply Submissions of the Applicant*, dated Sept. 4, 2018)

In this regard, I have considered and prefer the approach adopted in the 2018 OMB decision in *Berkeley Parliament Inc. v. Toronto (City)*, offered for guidance by Counsel. In that decision, at paragraph 34, the Board accepted the evidence that “*the test of the success of variances under s. 45 of the Act was whether the variances maintain the general intent and purpose of the zoning by-laws and not the specific intent of the site-specific by-law.*”

Further, the Board accepted (para. 75) that “*the site-specific by-law is not ‘frozen in time’ as to follow that approach would make s. 45(1) meaningless and when considering the general intent and purpose of the zoning by-laws, the additional storeys meet such general intent.*”

Of paramount significance in my mind is what the Board held at paragraph 79 in the decision:

“Put another way, the subsequent ‘tweaking’ of a development in the planning processes, through minor variances, should not be seen to denigrate the original efforts of the parties or the ultimate result of the planning processes that led to the eventual endorsement of what was then considered a final version of the development in 2015. To the contrary, they are an extension of that process arising from a subsequent change in circumstances, such that the ultimate form of the development, with the additional variances, can be considered to be the result of the entire process, from beginning to end, inclusive of those additional variances that meet the four tests.”

In light of the foregoing, having considered the decision of the COA, the applicable statutory tests and the evidence, I find that the minor variances, as listed below, satisfy the four tests in subsection 45(1) of the *Act*, meet the general intent and purpose of the OP with respect to providing for appropriate redevelopment in a *Regeneration Area* and, in particular, the *King-Spadina Secondary Plan* area.

They are appropriate and desirable, minor in nature, and in keeping with the general intent and purpose of the site-specific Zoning By-law. I accept that the variances will facilitate an appropriately-scaled building for its context that is responsive to the existing and emerging milieu, and which will maintain adequate light and privacy and minimizes shadow impacts on streets, including Queen Street West.

With respect to the three Conditions proposed by the City in Exhibit 10, I find that Conditions 1 and 2, which were imposed by the COA in their decision dated March 28, 2018, are appropriate and I note that the Applicant is in agreement.

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However, the City is also requesting that the TLAB impose the following third condition:

3. The owner shall enter into a Section 45(9) agreement, in a form satisfactory to the City solicitor, to be registered on title prior to the issuance of the first above grade building permit, for financial contribution in a sum to be negotiated between the City and the owner, to go towards community services and facilities within the King-Spadina Secondary Plan, as may be determined by the Chief Planner and Executive Director, City Planning Division, in consultation with the Ward Councillor. In response to the increase in height and density sought, the TLAB shall withhold the final order until the City and owner have agreed on a quantum and notified the TLAB that they have reached an agreement and that they have entered into a section 45(9) agreement to secure the contribution. If the parties cannot reach agreement on the amount to be secured, the TLAB may be spoken to.

In addition, the City is requesting that the TLAB withhold its Order until the City and the Applicant have agreed on the quantum of the funds contribution.

I have given the request for this condition serious consideration, understanding that the City has associated Condition No. 3 to the increase in height and density being sought by the Applicant in addition to what was approved in 2014. The City argued that the Council approval of the site-specific By-law in 2014 required the Applicant to enter into a s. 37 agreement with the City that included a number of community benefits. The City argued in its Written Submission (para. 41) that the funds secured through a Section 45(9) agreement would contribute towards community services and facilities within the *King-Spadina Secondary Plan* area.

In considering the evidence before me, I agree with the Applicant that this additional condition requested by the City was not supported by the evidence of either planning witness and has not been justified. From a practical perspective, I see the overall intent of Condition No. 3 as excessive and I agree with Mr. Halinski that if imposed, the language in the Condition could create an unreasonable scenario for the Applicant which could result in blocking the implementation of the requested variances.

I also question the City's timing in introducing Condition No. 3 at this point in the appeal process. If warranted, this condition could have been included, along with Conditions 1 and 2, in Planning staff's March 23, 2018 comments to the COA, and then incorporated into the COA's decision of March 28, 2018. The City chose not to do so

As such, I find the request burdensome, and the request to withhold the TLAB Order to allow the City to engage in further negotiations with the Applicant at this point in the process problematic.

DECISION AND ORDER

The appeal is dismissed; the decision of the COA dated March 28, 2018 is confirmed.

X 

Dino Lombardi
Panel Chair, Toronto Local Appeal Body