

**ARGUMENT FOR THE CORPORATION OF
THE CITY OF ST. CATHARINES**

**RE: THE PORT DALHOUSIE VITALIZATION CORPORATION
PORT PLACE PROPOSAL**

**Property: 16, 20, 22A, 22 Lock Street, 1 Hogan's Alley,
12 Lakeport Road and 11 Main Street
St. Catharines**

**IN THE MATTER of subsection 34(19) of the Planning Act, R.S.O. 1990,
c. P.13, as amended. Subject: Appeal of By-law No. 2006-228
OMB File No. R060208;**

**IN THE MATTER of subsection 17(36) of the Planning Act, R.S.O. 1990,
c.P.13, as amended. Subject: Appeal of Proposed Official Plan
Amendment No. 31 (By-law No. 2006-227)
OMB File No. R060218;**

**IN THE MATTER of subsection 41(12) of the Planning Act, R.S.O. 1990,
c. P.13, as amended. Subject: Refusal of Site Plan
OMB File No. M070079;**

**IN THE MATTER of subsection 42(6) of the Ontario Heritage Act, R.S.O.
1990, c. O.19, as amended. Subject: Refusal of Heritage Permit
OMB File No. M070073.**

**Prepared by Annette Poulin
City Solicitor for The Corporation
of the City of St. Catharines**

General Outline of Argument

- Description of Appeals**
- Weight of Evidence**
- OHA, Section 41.2(1)**
 - Test: No By-law contrary to objectives of Heritage Plan**
 - Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change = Heritage Conservation District Plan**
 - Process**
 - Study**
 - Public Participation**
 - Designation based on study and guidelines**
 - Adoption of Guidelines and By-law No. 2002-180**
 - Intention to use Guidelines as Heritage Plan**
 - Continued use of Guidelines as Plan by Council and by Heritage Advisory Committees**
 - Guidelines = Heritage Plan therefore must be given primacy**
- What are the Objectives of the Heritage Conservation District Plan and are the by-laws contrary to those Objectives**
 - Review of policies found in objectives and guidelines**
- Intertwining of Heritage and Planning Issues and Policies and potential conflicts**
- Application of other Heritage Policies found in the:**
 - Planning Act**
 - PPS and Places to Grow**
 - Regional Policy Plan**
 - Official Plan**
 - Secondary Plan**

- **Purpose and role of other Heritage charters and doctrinal texts**

- **Application of Planning Policies to determine fit and compatibility**
re: location, parking, design, found in the:
 - PPS
 - Places to Grow
 - Regional Policy Plan
 - Official Plan
 - Secondary Plan
 - Smart Growth

- **Urban Design and Architecture**
 - Role and Purpose
 - Region's Model Urban Design Guideline

- **The way PDVC have approached the development proposal**
 - misapplication of 16.92 (Port Dalhousie Neighbourhood Plan – Secondary Plan)

- **By-laws No. 2006-227 and 2006-228 even if framed as exempting the proposal from certain official plan policies, not all applicable policies have been covered and those that have been exempted by use of the "notwithstanding" clause continue to be reflected in the Port Dalhousie Heritage Conservation District Plan, therefore those policies continue to be binding and must be considered in the evaluation of this proposal.**

- **Conclusions**
 - By-laws and Proposal contrary to:
 - OHA
 - Guidelines, Planning Act, PPS, Regional Policy Plan, Official Plan and Secondary Plan
 - Not good planning in Heritage District
 - Not good planning in strict land use planning sense
 - Not proper fit or compatible

- **Conditions requested in the event of Approval**

- **Final Requests to dismiss appeals by:**
 - **PDVC of Council's decision pertaining to**
 - **Heritage Permit Applications under the Ontario Heritage Act, Section 42 and the Site plan Application**
 - **allow all appeals of By-laws Nos. 2006-227 and 2006-228**

APPEALS

The purpose of this lengthy hearing was to deal with the various appeals pertaining to the Port Dalhousie Vitalization Corporation Development Proposal.

DESCRIPTION OF APPEALS:

There are four major appeals. The appeals pertain to the refusal by Council to issue permits that are required under the Ontario Heritage Act. This appeal was taken by PDVC. Further, PDVC also appealed Council's refusal to approve the site plan agreement. The remaining two appeals by a number of parties pertain to By-law No. 2006-227, being Official Plan Amendment No. 31, and the Zoning By-law Amendment By-law No. 2006-228.

The City's position is that the present Council for the Municipality of St. Catharines has dealt with the entire Heritage Permit Application process from beginning to end, and after consultation with the two Heritage Committees, being the St. Catharines Heritage Advisory Committee and the Port Dalhousie Heritage Advisory Committee, the City refused to issue the said permits. Without Heritage Permits, this proposal cannot proceed regardless of whether Official Plan Amendments or Zoning By-laws are approved, pursuant to s.42 of the O.H.A.

Notwithstanding the effect of s. 42 of the OHA, PDVC will advance the proposition that the current Council directed me to attend before this Board to oppose the zoning and official plan amendment by-law, without the benefit of a full public meeting. It is my position that both the Official Plan Amendment By-law No. 2006-227 and the Zoning Amendment

By-law No. 2006-228 should not be approved because they are contrary to the Objectives of the Port Dalhousie Heritage Conservation District Guidelines for conservation and change (throughout my argument these Guidelines may be referred to as the Heritage Plan for Port Dalhousie).

WEIGHT OF EVIDENCE

After several months of hearing evidence, the Board now has to decide whether the proposal represents good planning within a Heritage Conservation District and whether the proposed development is in the public's best interest.

The subject lands are located within the Heritage Conservation District and as a result of that, the issues before this Board are not purely planning but are very much intertwined with the Heritage issues and policies which must be considered. [re: primacy of Ontario Heritage Act over Planning Act whereby the more specific intended legislation takes precedence over the more general].

It is my suggestion that the weight of the various experts should coincide with the weight of the issues as they relate to a Heritage Conservation District, therefore, I would urge the Board to grant the weight of the Heritage Planners as most significant, then secondly, weight the evidence given by Land Use planners, taking the context and taking some guidance on best practices through the evidence of Mr. Herb Stovel as to how the heritage charters and doctrinal texts should be used to clarify various tests to be met as outlined in

the Port Dalhousie Heritage Plan. Finally, the least amount of weight should be given to the evidence of the architects and urban designers,

The policies of heritage and planning are intermingled. In reviewing the said documents there do not appear to be any blatant conflicts. Generally the Planning Act envisages the matter of heritage as significant and that is reflected in the Ontario Heritage Act and those policies are not only found in the Port Dalhousie Heritage Plan but are also evident in the Port Dalhousie Secondary Plan and City's Official Plan. Those policies are further generally bolstered by the policies found in the Regional Policy Plan which are all consistent with the Provincial Policy Statements. Therefore throughout my argument, those are the documents I will concentrate on, to show how the applicable policies are not reflected in the development proposal by PDVC.

Firstly, I will address, the Heritage policies found in the provisions of the Ontario Heritage Act, the Guidelines, the Planning Act, Provincial Policy Statement, and then I will move into the Heritage policies found in the City of St. Catharines Official Plan and Secondary Plan for Port Dalhousie, and then I will deal with the Heritage guidance we can derive from the various heritage charters and doctrinal texts.

Secondly, I will address the Land Use Planning framework in order to determine whether or not the proposal is good planning in the sense of whether or not this development proposal represents an appropriate fit and is compatible with the surrounding area in terms of land use, impact and traffic. It is my respectful submission that unless, in the heritage sense

and the planning sense, PDVC have been able to establish that this development is an appropriate fit, there is no need to address the urban design or architectural compatibility tests put forth by Mr. Kirkland, as those factors, merely serve to maximize the compatibility only after the basic compatibility has been achieved. It is the City's position that even a minimum level of compatibility has not been achieved with this proposed development.

HERITAGE

Section 42 of the Ontario Heritage Act requires that every component of the entire proposal before this Board obtain a permit because the lands which, are the subject of these four appeals, are located within the Port Dalhousie Heritage Conservation District designated under Part V of the Ontario Heritage Act. The Heritage Conservation District includes a large part of the residential area of the actual Ward of Port Dalhousie, and the entire area of the Commercial Core and industrial core which abuts the Martindale Pond travelling northerly along the piers towards Lake Ontario and to the Lake Ontario shores including Lakeside Park which extends beyond the subject site. The subject site constitutes slightly less than half of the entire Commercial Core. The corner of Main Street and the unnamed road is not the tip of Port Dalhousie's Heritage Conservation District as was frequently referred to by experts of PDVC. In light of the recent uncovering of the first lock of the First Welland Canal in Lakeside Park, it further emphasizes the size of the entire District and the importance of the entire Heritage District.

ONTARIO HERITAGE ACT

In dealing with all appeals before this Board, it is my respectful submission that when there is a rezoning or a development proposal before the Board which is located within a designated heritage district under Part 5 of the Ontario Heritage Act, the planning framework that would normally apply becomes intertwined and in some instances superceded by the Heritage considerations pursuant to the Ontario Heritage Act.

Test

- Section 41.2 of the Ontario Heritage Act provides that, despite any other general or special Act, if a heritage conservation district plan is in effect in a municipality, the council of the municipality shall not:
 - a) carry out any public work in the district that is contrary to the objectives set out in the Plan;
 - or
 - b) pass a by-law for any purpose that is contrary to the objectives set out in the plan (Exhibit 5A, Tab 2, page 43 of 64).

- Therefore it is my suggestion that the by-laws referred to in this section of the Ontario Heritage Act, which a municipality would pass, would include the following:
 - a by-law approving a site plan agreement;
 - the official plan amendment by-law - By-law No. 2006-227;

- the rezoning by-law amendment - By-law No. 2006-228;
 - and the by-laws necessary for implementing and issuing any of the heritage permits which may result in such agreements as authorizing heritage easement agreements and the like.
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- These are all matters which are before this Board.

 - One of the first issues to be determined by this Board is whether the "Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change" prepared for the City of St. Catharines, March 2001, (Exhibit 5D, Tab 5, page 151), for the purpose of this hearing should be considered as a Heritage Conservation District Plan pursuant to the provisions of the Ontario Heritage Act.

 - It is my position that the Port Dalhousie Conservation District Guidelines for Conservation and Change do in fact constitute the Heritage Conservation District Plan referred to in the Ontario Heritage Act.

REASONS:

- Reference, in Section 41.2 of the OHA is made to "if a heritage conservation district plan is in effect in the municipality". It is my respectful submission that the Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change is in fact the Heritage Conservation District Plan for Port Dalhousie. This Heritage

Plan is in effect and has been used as the Heritage Conservation District Plan since the designation of Port Dalhousie under Part V of the Ontario Heritage Act, and it has been consistently used by both Council and the Port Dalhousie Heritage Advisory Committee since that time, for evaluating all applications under the Ontario Heritage Act.

HISTORY

Today, Section 41.1(1) OHA provides that a By-law under Section 41 designating one or more heritage conservation districts in a municipality shall adopt a Heritage Conservation District Plan for each district that is designated in the By-law. At the time of designation and passing of By-law No. 2002-180 there was no requirement in the Ontario Heritage Act to prepare or adopt a study or a plan. However, in looking at By-law No. 2002-180 (Exhibit 5D, Tab 7, page 341), the "By-law to designate Port Dalhousie as a Heritage Conservation District under Part V of the Ontario Heritage Act and repeal the designations under Part IV of the OHA of certain properties within such area", was passed on June 17, 2002. In its recitals the By-law refers to the study done by Archeological Services Inc. (Exhibit 5D, page 341) and in the second recital of the said By-law one notes that it refers to Council's adoption of the Policies and guidelines contained in Sections 1 through 6 of the Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change (District Plan) and the recommendations in Section 7 have been adopted in principle. Notwithstanding that at the time of passing the By-law there was no mention of a Heritage

Conservation District Plan even made in the Ontario Heritage Act, the City then referred to the Guidelines as a District Plan.

- Council had relied on the Guidelines as the equivalent of a Heritage Plan and relied on the Study prepared by Archeological Services Inc. in making its decision to designate the District. The process of designating Port Dalhousie as a Heritage Conservation District underwent extensive public consultation. During the process the Study and the Guidelines were established as the cornerstone of the moral contract between the City and the residents of Port Dalhousie to assure the residents that the designation would be implemented pursuant to the terms and provisions contained in those Guidelines.

- It is my respectful submission that the 2005 Ontario Heritage Act included the provisions in Section 41.1(2) that provided a municipality that had passed a by-law designating one or more heritage conservation districts with the option to pass a by-law adopting a Heritage Conservation District Plan for any one of the designated districts. This provision is not mandatory, however, I suggest it might be helpful for those municipalities who had proceeded to designating a district without the benefit of having prepared a detailed set of guidelines, which are now referred to as a Heritage Conservation District Plan. The benefit to adopting a heritage plan would be to give the residents of the designated area the assurances of how the district would be managed and how the character would be maintained through the implementation of the guidelines. However, this had already been done by St.

Catharines before the 2005 revisions to the OHA.

Since the approval of the designation of the Port Dalhousie Heritage District by the Ontario Municipal Board, the Guidelines adopted by Council and referred to in By-law No. 2002-180 have been applied, in evaluating all applications for heritage permits in Port Dalhousie. It has been an important tool which has been used for even minor alterations by individual residents seeking to modify their homes. It is my suggestion that it would be unfair to all residents of the district to now say that these Guidelines are not a heritage plan and that the rules applied to the individual home owners consistently since December 2003 were not really the rules of the game. The PDVC is a huge proposal and the Guidelines should be applied to this proposal as it has consistently been applied to all proposals within the Port Dalhousie Heritage District. The Port Dalhousie Heritage Advisory Committee plays an important role, as does the St. Catharines Heritage Committee, in fulfilling their duties, as established under the Ontario Heritage Act and we urge the Board to consider their recommendations in evaluating the proposals before this Board, in that the Port Dalhousie Heritage Advisory Committee has the most experience in applying the rules and requirements of the Port Dalhousie Heritage Conservation District Plan.

PROCESS AND STUDY – Establishment of Moral Contract

- Under the previous Ontario Heritage Act, under Part 5 for excerpt – see handout),

at the time of passing By-law No. 2002-180, Section 40 of the Ontario Heritage Act then provided that prior to designation, there was no requirement for a study. The municipality merely was required to define an area for future designation and to examine the area and prepare provisions for its official plan with respect to the designation. It was a prerequisite to have provisions in the Official Plan for designations of heritage districts, prior to designating a district under Part 5. A further requirement was to consult with the local Heritage Advisory Committees. In the City of St. Catharines' official plan provisions providing for the designation of certain heritage conservation districts existed since 1991. These policies are found in Policy 7.10, the heritage policies, of the City of St. Catharines' Official Plan (page 199 of Exhibit 5B). There are further provisions, more specifically for Port Dalhousie, which are in the Port Dalhousie Neighbourhood Secondary Plan found in the Heritage provisions (page 220 of Exhibit 5B) which more specifically provide guidance for what a conservation district study should consider. These policies have been in the Port Dalhousie Secondary Plan since the early 1980's. More specifically the policies pertaining to what a heritage district study should consider are found at Section 16.90 (Exhibit 5B, pages 221 and 222). However, Section 16.89 of the City of St. Catharines Official Plan actually provides what the objectives of the heritage district plan will be, therefore, in the absence of clarity in the Guidelines one must go back to 16.89 and see clearly what the objectives are. I will deal with those objectives later in my argument.

- Further, at the time of passing the By-law designating Port Dalhousie as a Part 5

Heritage Conservation District, the Ontario Heritage Act, Section 41 (excerpt – provided as handout), required that once an official plan contain the provisions relating to the establishment of a heritage conservation district, that Council could then pass a by-law designating the area. Subsection 2 provided that Part 4 designated properties could not be included in a Part 5 heritage district. Therefore, that is why City of St. Catharines By-law No. 2002-180 specifically repealed the Part 4 designated properties. Section 41(3) of the Heritage Act, which applied in June 2002, required that the by-law then be approved by the Ontario Municipal Board before it became effective.

- Even though there was no statutory requirement for a study, other than those included in our Official Plan for what a study should cover, the study completed by Archeological Services Inc. covered those steps that are presently outlined in the post 2005 Ontario Heritage Act in Section 40(2) (Exhibit 5A, Tab 2, page 37 of 64). Today that Section requires that a study shall, "a) examine the character and appearance of the area that is the subject of the study, including buildings, structures and other property features of the area, to determine if the area should be preserved as a heritage conservation district; b) examine and make recommendations as to the geographic boundaries of the area to be designated; c) consider and make recommendations as to the objectives of the designation and the content of the heritage conservation district plan required under Section 41.1; d) make recommendations as to any changes that will be required to the municipality's official plan and to any municipal by-laws, including any zoning by-laws." The City undertook a Study and Mr. Cuming gave evidence that the contents of his Study

together with the Guidelines cover the requirements set out in today's legislation, as to what a study should contain. As indicated by Mr. David Cuming, the purpose of the Study and the Guidelines were tools to be used to establish the merits of designating Port Dalhousie as a Heritage Conservation District. Further, the Study was prepared in compliance with the requirements of the Official Plan provisions for the City of St. Catharines.

- In 2002, there was no right of appeal required under the Ontario Heritage Act. After June of 2002 there were revisions effected to the Ontario Heritage Act by the Government Efficiency Act in 2002, which became force of law November 26, 2002. Therefore, after the City had passed its by-law designating Port Dalhousie as a Heritage Conservation District, a right of appeal was then introduced in the legislation. Therefore prior to a hearing taking place the City was required to advertise and provide the right of appeal to those who would want to appeal the passing of the designating by-law, therefore making the process which had already been very open and public, an even more open and public one. There were appeals and all parties before the Board were given an opportunity to cross examine the witnesses, which included Mr. Cuming, who presented both the Study and the Guidelines in his evidence, to support the merits of the designation.

PROCESS RE: HERITAGE DISTRICT PLAN

- Section 41.1(1), requires that a designating by-law, if passed today, shall adopt a Heritage Conservation District Plan for each district that is designated in the by-law.

Evidence of adoption of the Guidelines as a district plan, as previously indicated, are found in the second recital of By-law No. 2002-180, and in the Minutes approved by Council (Exhibit 5D, Tab 6, page 282), which contain the Council Minutes of July 23, 2001, I refer you to the Council Resolution where Council adopted the policies guidelines contained in Sections 1 to 6, and they approved in principle the contents of Section 7 of the Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change. As further evidence, I refer you to the Board Order (Exhibit 5D, Tab 8, page 345) which was issued on December 12, 2003, as Order No. 1665, where the Board approved the designating By-law No. 2002-180, together with the Amendment 2003-63 (which only had the effect of deleting the reference of being subject to the approval of the Ontario Municipal Board), where we find (at page 349) in the Decision issued by R. E. Drury and M. A. Stockton, reference that it is the finding of the Board "that the process followed by the City had been a full public process and all requirements of the Province have been complied with. The Board finds that the designation of the subject area as a Heritage Conservation District represents good planning and will not have any undo, adverse impact on any person or the environment." Therefore finding that the designation was consistent with Provincial Policy and all applicable planning policies.

- Therefore, it is my submission that the entire designation process, including the adoption of the Port Dalhousie Heritage Conservation District – Guidelines for Conservation and Change, were done completely within the requirements of the then Ontario Heritage Act and the provisions of the City of St. Catharines Official Plan and Secondary Plans.

PORT DALHOUSIE HERITAGE CONSERVATION GUIDELINES FOR CONSERVATION AND CHANGE CONSTITUTE A HERITAGE CONSERVATION DISTRICT PLAN BECAUSE THE DOCUMENT CONTAINS ALL THE STATUTORY COMPONENTS REQUIRED IN SECTION 41.1(5) OF THE ONTARIO HERITAGE ACT

- I would suggest that not only did Council adopt the Guidelines at the time that Port Dalhousie was designated as a Heritage Conservation District as referred to in By-law No. 2002-180, but when one compares the Port Dalhousie Guidelines adopted by Council in 2001, to the present requirements of the Ontario Heritage Act, for what the contents of a Heritage Conservation Plan should be, which are outlined in Section 41.1(5) of the current Ontario Heritage Act, each of the required components listed as A through E (Exhibit 5D, Tab 2, page 42 of 64), was provided for in the document prepared by Archeological Services Inc., entitled “Port Dalhousie Heritage Conservation District – Guidelines for Conservation and Change”. All the Heritage Planners who testified at this hearing agreed that the provisions required to be included in a heritage conservation district plan as outlined in the Ontario Heritage Act, were included at least generally in the document I refer to as “The Guidelines”.

- This was agreed to by Robert Martindale, Kevin Blozowski, David Cuming, and Wayne Morgan. Phil Goldsmith, the Heritage Architect, felt that in fact the Guidelines included the components as outlined in Section 41.1(5) of the Ontario Heritage Act. Paul Chapman, a Land Use Planner, felt that the guidelines sufficiently described the character of Port Dalhousie. Michael McClelland, liked the

Guidelines, as he indicated he had prepared several pre 2005 Ontario Heritage Act Guidelines, that resembled these. He did not find the guidelines wanting.

USEFULNESS AND CLARITY OF THE PORT DALHOUSIE HERITAGE PLAN

Various experts expressed a comment on the usefulness and clarity of the said Heritage Plan:

- Paul Chapman, felt the Guidelines were sufficient in describing the character of Port Dalhousie, however indicated that he relied on Spencer Higgins and Michael McClelland's determination of whether any adverse effect or positive contribution was made by the proposed development. Spencer Higgins, who is not a Heritage Planner (and did not seem to understand the framework pursuant to the evidence heard by Mr. Herb Stovel), but rather is a Heritage Conservation Architect and Urban Designer, with experience in heritage, felt that the Port Dalhousie Heritage Guidelines were lacking and therefore because he felt they were incomplete he treated them as not being binding. He spent very little time examining the Guidelines and determined that he would create his own precincts, however, one must be mindful that under cross-examination, Mr. Higgins' position was that he did not recognize Port Dalhousie's distinctiveness in comparison to the City of St. Catharines. Therefore I suggest that this witness was not very respectful of what a designated heritage conservation district is.

- Both the St. Catharines Heritage Advisory Committee and the Port Dalhousie Heritage Advisory Committee's evidence by the four representatives called, felt that the Guidelines were very useful and very clear and had served as a useful tool in evaluating heritage applications since their adoption.

- Michael McClelland in his witness statement spent much time avoiding outlining the details of the Guidelines and avoiding dealing with issues of compliance with the Guidelines directly. Rather, he dealt with the economic factor and his evidence was more solution driven and focused on the Regional Model Urban Design Guidelines as he had been asked to focus on in the terms of reference provided to him by Mr. Paul Chapman for the City of St. Catharines.

- Tom Smart was qualified as an Urban Land Use Planner, and from his witness statement basically said that the application properly had regard to the Heritage District Plan. However it is my submission that the Ontario Heritage Act requires that the Heritage Conservation District Plan, that we find in the Port Dalhousie Guidelines, be given more importance than appears to have been given by Mr. Smart in his evidence. The reason Mr. Smart dismissed the Guidelines rather quickly, was that he felt the Guidelines did not contemplate high buildings or a development proposal of this size. Therefore, because the Guidelines did not anticipate this type of development, PDVC assumed that the Guidelines should not apply, however it is my respectful submission that clearly the Port Dalhousie Guidelines' objective was to conserve the existing character of Port Dalhousie and to ensure preservation of that character, which is a low profile Commercial Core,

that it only stands to reason that the Guidelines would not provide for direction on how to build anything higher than three storeys as clearly anything higher than three storeys would be contrary and detrimental to the existing character of Port Dalhousie's Designated Heritage District. Mr. Smart chose to disregard them and just deal with the urban design aspect which was put forth by Mr. Kirkland and re-echoed by Mr. Smart. However, in fairness to Mr. Smart, he did recognize that the height of the proposal was certainly a deviation and an exception to the Port Dalhousie Heritage Conservation Guidelines. Mr. Smart's position with regards to compliance with the Guidelines was that as long as it was four storeys along the façade and that the materials used were compatible everything was deemed to be compatible.

INTERPRETATION OF SECTION 41.1(2)

- To interpret Section 41.1(2) as requiring a municipality to pass a by-law to make a heritage plan effective when the word "may" is used creates an illogical consequence.

- It makes no sense for the Board to determine that the Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change are not the same as a Heritage Conservation District Plan after they have clearly been adopted by Council and were used as the cornerstone of the designation of Port Dalhousie as a heritage district. Since, after their adoption and the approval of the designating by-

law, every one within the district, including the Port Dalhousie Heritage Advisory Committee and Council, have treated them as a Heritage District Plan.

- The Port Dalhousie Heritage Advisory Committee and the St. Catharines Heritage Advisory Committee, when asked to, have fulfilled their role as assigned under the Ontario Heritage Act and have implemented, interpreted and applied the Port Dalhousie Heritage District Guidelines as a Heritage Conservation District Plan. All their decisions pertaining to all applications reflected the contents expressed in the Guidelines.
- It would be unfair at this point in time to say that the Guidelines, notwithstanding they were treated as a Heritage Conservation District Plan before this hearing for all applications made under the Ontario Heritage Act, no longer constituted a Heritage Conservation District Plan. The perception would be that the Guidelines merely applied to the individual small residents and that when a big development occurs that the Guidelines do not need to apply.
- Since the adoption of By-law No. 2002-180 as approved by the OMB and the adoption of the Guidelines, all changes made within Port Dalhousie have been made in consideration of the heritage character of the District and pursuant to the Guidelines.

- The effect of not complying and treating the Port Dalhousie Guidelines as a Heritage Conservation District Plan is in effect a breach of the implied contract and verbal contract between The Corporation of the City of St. Catharines and the residents of the Port Dalhousie Heritage District as the designation made of Port Dalhousie's Heritage District was based on the Study and the Guidelines prepared by Archeological Services Inc. Since the designation approval on December 12, 2003, the Guidelines have been used consistently by the Heritage Committees and the Council for evaluations and determination of all Heritage Permit Applications within the District.

- To allow such an interpretation would create an illogical consequence of Section 41.1(2) and therefore would not represent good statutory interpretation as intended to create a fair and equitable treatment. It is our submission that there is only one interpretation to be given and that is that the Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change are in fact the Heritage Conservation District Plan for Port Dalhousie referred to in the Ontario Heritage Act.

- However, in the event this Board should rule that the Guidelines are not a Heritage Conservation District Plan as anticipated in the Ontario Heritage Act, we urge the Board to give those Guidelines the equivalent weight to a Heritage District Plan because the provisions pertaining to a Heritage Plan contained in the St. Catharines Official Plan and Secondary Plan have been met. We further urge that the said Heritage District Plan be given the required weight as dealt with in Section

16.88 and 16.89 of the Port Dalhousie Secondary Plan.

REVIEW OF POLICIES FOUND IN OBJECTIVES AND GUIDELINES OF THE PORT DALHOUSIE HERITAGE CONSERVATION DISTRICT PLAN

Port Dalhousie Heritage Guidelines = Heritage Conservation District Plan and Weight to be Given to the Plan Pursuant to Section 41.2 of The Ontario Heritage Act.

- Section 41.2 of the Ontario Heritage Act requires that council shall not pass a by-law for any purpose that is contrary to the Objectives set out in the Heritage Plan.
- All matters before this Board require a By-law for the implementation of the PDVC proposal. It is my submission that those by-laws are contrary to the Objectives found in the Port Dalhousie Heritage Plan.
- Need to look at what the Objectives of the Port Dalhousie Heritage District Plan are.

OBJECTIVES

- The Objectives of the Ontario Heritage District Plan for Port Dalhousie, as agreed to by all Heritage Planners who gave evidence during this Hearing, are found in the Conservation Intent (Exhibit 5D, starting at page 162) and in the Priorities (Exhibit 5D, pages 162 and 163) with the exception that Michael McClelland agreed that

Objectives could be generally found in the Guidelines. Wayne Morgan indicated that, in addition to the Conservation Intent he found some Objectives in Section 1 of the Guidelines.

- David Cuming's opinion was that the Objectives were expressed in the Conservation Intent and Priorities and felt that buildings are clearly not to exceed the existing height of 2 to 3 storeys.
- Bob Martindale agreed that the Objectives were found in the Conservation Intent and Priorities.
- Kevin Blozowski agreed that the Objectives were found in the Conservation Intent and Priorities.
- Michael McClelland felt that the Guidelines generally expressed the Objectives as required by the Act.
- Objectives found in Section 1 of the Guidelines. Section 1 (Exhibit 5D, at page 156) in the second paragraph provides "The purpose of this document, Port Dalhousie Heritage Conservation District: Guidelines for Conservation and Change, is to provide guidance in the care and protection of the heritage character of the Port Dalhousie Heritage Conservation District". This essentially explains the intended objective on how the Guidelines should be used. I suggest that one should derive

from this section, the first test which is the care and protection of the character of the district.

- Conservation Intent (Exhibit 5D, page 162), the second paragraph provides “the conservation intent within the Port Dalhousie Heritage Conservation District is to maintain the existing stock of residential, commercial and industrial heritage buildings, whether of high style architectural design or of vernacular construction. It is recognized that the heritage building stock is in various states of repair and maintenance. It is not the intent within the Port Dalhousie Heritage Conservation District to force property owners to restore their property. On the contrary, the Port Dalhousie Heritage Conservation District seeks to ensure that when change is considered, heritage buildings and their defining features and/or materials are protected as part of that process of change and development. ”

- The test to be met from this Objective is whether a proposal maintains the existing stock of residential, commercial and industrial heritage buildings. Further, the test provides that the maintaining of the existing heritage building stock does not only apply to high style architectural design but also includes vernacular construction.

- Objectives are also found in Section 3 of the Port Dalhousie Heritage District Plan. The last paragraph under Section 3.1, expresses the conservation principles and provides: “accordingly, it is useful to provide the following principles of conservation and change to assist in setting the tone and context for the future of Port Dalhousie.

They should always be consulted if the more detailed guidelines do not appear to specifically address an issue or problem." Section 3.2 of the said Heritage District Plan continues to list the priorities.

- The last paragraph of 3.1 requires reference to the Priorities in the event of any problem or deficiency which one might encounter, therefore the Priorities are very important in order to uphold the intent of conservation as expressed in the Port Dalhousie Heritage Plan. Section 3.1 is important to note as it sets the context of the Guidelines in order to ensure the tone and context of Port Dalhousie as a Heritage District continues to be maintained in the future.

Conservation Priorities

- The priorities listed are as follows: "The designation of the Port Dalhousie Heritage Conservation District seeks to ensure the wise care and management of the heritage character of the area. Physical change and development are to be managed in a way that the component buildings, streets, beach and open spaces are either protected or enhanced.
- Here I would bring to the Board's attention that the reference is not merely to heritage buildings but to component buildings, meaning all the buildings which constitute the importance of the designation of Port Dalhousie. The Conservation Priorities provided in the Port Dalhousie Heritage Plan found at Section 3.2 are as

follows:

- i) the protection of all remnants of the Welland Canals as significant elements of industrial archeology in the landscape;
- ii) encouraging the current vitality of the commercial area by promoting its unique architecture and contemporary commercial adaptive reuse as well as continuing to protect its distinctive heritage fabric;
- iii) maintaining the low profile, compact, building forms of the cottage and residential areas by encouraging any future changes to develop in depth or in width on lots rather than vertically in height;
- iv) maintaining and enhancing existing open space, sport and recreation areas in a manner consistent with protecting distinguishing heritage features;
- v) ensuring that supporting and contextural landscape features such as grass, boulevards, street trees, hedgerows, front yard plantings and many mature boundary plantings, such as trees, mixed shrub borders and hedges, are conserved and managed; and
- vi) encouraging new development, construction and any public works where it is clearly demonstrated that such changes will have no adverse effects upon the heritage attributes of the district and will positively contribute to the character of the area. "

BASIC TESTS DERIVED FROM THE OBJECTIVES OF THE PORT DALHOUSIE HERITAGE CONSERVATION DISTRICT PLAN

- The basic tests are as follows:
 - care and protection of heritage character of the district;
 - maintain existing stock of commercial heritage buildings whether of high style architectural design or of vernacular construction
 - ensure that when change occurs heritage buildings and their defining features and/or materials are protected as part of change.

- The Purpose of the Guidelines as set out in the priorities and Conservation Intent is to set the tone and context of the future Port Dalhousie.

- The main tests derived from the Priorities are:
 - to ensure that physical change and development is to be managed in a way that the component buildings, streets, beach and open spaces are either protected or enhanced,
 - to encourage current (not future) vitality of the commercial area by promoting commercial adaptive re-use, as well as continuing to protect its distinctive heritage fabric (priority 2),
 - maintain and enhance existing open spaces (priority 4),
 - and most importantly (priority 6) that for new development and construction the proponent has the onus to clearly demonstrate that changes will have no

adverse effects on heritage attributes of the District (not just the Commercial Core) and will positively contribute to the character of the area. Effectively, as we have heard throughout this hearing, this means, do not harm and make a positive contribution.

City's Position

- The City's position is that clearly the PDVC has not met this onus of clearly demonstrating that the proposal will do no harm and make a positive contribution to the character of the area.
- To evaluate the proposal under these tests one needs to know what the character of the district is and what the heritage attributes of the district are.

Character of District

- Throughout this hearing we have heard evidence to describe the district as a compact settlement perched on table lands of a small peninsula that separates Lake Ontario to the north from Martindale Pond to the south.
- The character of the area, being the Commercial Core, is described on Page 158, being a description of the character and key elements of the Commercial Core, as

being inherently associated with the fortunes of the port, canal and local industry and residents. Primarily the core is centred on Lakeport Road and Hogan's Alley and Lock Street. As the experts testified, the character of the Commercial Core is distinguished by:

- its 19th century and early 20th century architecture;
 - its 2 and 3 storey terrace blocks; and
 - individual hotels
- All experts and non-experts who have testified before this Board have agreed that the Commercial Core could be described as a low profile 2 to 3 storey, 19th century and early 20th century settlement.

Heritage Attributes of the District

- I would suggest that the most significant of the heritage attributes are its low profile.
- Further, I would suggest that the open spaces which exist within the Commercial Core are an important part of the heritage attributes that exist today.

Open Spaces not being Protected

- It is my submission that the open spaces which presently exist within the Commercial Core are not being protected or enhanced, save and except for the

"Court yard". The area between the Erksine Pharmacy and the Hydro building are proposed to be filled in. Presently that area is an open space which has been there since before 1950. The open area along Main Street and around the jail is proposed to be built upon, therefore that area is no longer being protected.

- The heritage character of the Commercial Core and the entire Port Dalhousie Heritage District is that of being a low profile. Clearly, that characteristic is not being protected as the proposal includes a 17 storey high rise building. Since the character of the district and Commercial Core is of a 2-3 storey height and the Port Dalhousie Heritage Plan does not anticipate anything over 3 storeys the proposal contravenes these provisions.
- The proposal only proposes to maintain a 3 storey height for a depth of 3 metres along a portion of Lock Street and a very short distance along Main Street. Immediately behind the 3 metres, the height exceeds the maximum 3 storey limit. The most significant and offensive impact of the height occurs around the historic jail. The condominium tower being proposed to be built over and around the jail clearly does not meet the test outlined in the Objectives of the Port Dalhousie Heritage District Plan.
- The heritage attributes of the District will be adversely affected by reason of the Setting and Context around the jail will be forever lost.

- The height of the condominium will cause the residential use proposed therein to dominate visually the District which it will adversely affect not only by its height but by its residential use which is contrary to the heritage character of the Commercial Core which has historically been commercial. The residential condominium, because of its height and location within the District, will dominate visually and physically and will draw attention to itself as opposed to blending into the low profile character of the existing historical heritage district.

- All Heritage Planners, in their evidence, pointed out that the tower will adversely affect the character of the district and the character of the commercial core. The proposal would have a negative impact on how the villageness and the low profile of the District are presently understood. Some Heritage Planners have even speculated that the tower would remove the potential for understanding the sense of place Port Dalhousie was designated for. Even the heritage architect, Mr. Spencer Higgins, admitted the tower was not subordinate to the District.

- In view of the Board's caution at the outset of this hearing, advising that you would not be redesigning the proposal, much of my argument will focus on the effect of the tower on the District, on the Commercial Core and, more specifically, on the destruction of the Setting and Context of the jail.

Effect of 17 Storey Tower on Jail Re: Objective of Not Having Adverse Effects on Heritage Attributes of the District and Must Have Positive Contribution to Character of Area (Character = Low Profile)

Evidence of Heritage Planners

- David Cuming - Anything higher than 3 storeys is not in keeping with the character of the area, and would have adverse effect.

- Wayne Morgan - No justification for tall buildings within the Port Dalhousie Heritage Plan. The tower does not relate to the existing 2 to 3 storey characteristic of the District. The tower is iconic, demanding to be looked at, and does not contribute to the character of the area and has adverse effect because the most important attribute is height which is the defining character of the area. The most negative effect impacts the setting and context of the jail. That setting and context around the jail has been maintained for over 140 years and is now proposed to be radically changed by a 17 storey building. The tower is completely out of scale and out of the existing context of the heritage building that is the jail.

- Robert Martindale - The tower is inappropriate as being too high. It will diminish the prominence of the jail, has adverse effect as the tower will now dominate the existing streetscape and affect the existing setting around the jail. He felt the tower engulfs and removes the jail from its context.

- Michael McClelland - Notwithstanding he avoided addressing the compliance with the guidelines, Mr. McClelland did agree that he could find little support in the Port Dalhousie Heritage District Plan for justifying a high rise development in Port Dalhousie. He agreed that the use of the tower as a residential condominium gave him concern and he agreed that the setting of the jail would be lost.

Land Use Planners

- Kevin Blozowski - (With heritage experience) The tower does not contribute to the sense of place. It is not subordinate to the jail. He feels the jail would lose its setting, the tower will diminish the significance of the jail.
- Paul Chapman - He testified he would not allow the residential condominium tower to be built on its own without the holding provision to ensure that the Regional tourist facilities, such as the hotel and theatre, would be assured to be constructed.
- Curt Benson - (As supported by Corwin Cambray) He felt that the 17 storey building was not in keeping with the Guidelines.

- Tom Smart - He relied on Spencer Higgins and Michael Kirkland in saying he felt the proposal met the general intent of the Guidelines, however, notwithstanding having said that, he also recommended that the Guidelines be amended.

Other Expert Witnesses

- Herb Stovel - (Conservationist, Conservation Architect, Heritage Architect and Expert in Heritage Policy) He felt that the tower was not subordinate to the existing fabric of the heritage district and felt the tower trivialized the jail because it caused the loss of context, therefore, the jail would lose its sense of place.

Architects and Urban Designers

- Spencer Higgins - He relied on the need to revise the Guidelines to support the proposal as did Michael McClelland – which is a clear indication of non-compliance.
- Phil Goldsmith - (Architect with expertise in Heritage Architecture) He felt the tower was too big and was inconsistent with the character of the area. He found the tower hovering over the jail to be offensive.

- Michael Kirkland - (Architect and Urbanist) He felt the tower was justified as an icon and is justified as a revitalization initiative. He made no link with the Objectives of the Guidelines.

Linking of Guidelines to objectives found in the Port Dalhousie Heritage Conservation District Plan

- The Port Dalhousie Heritage District Plan in its guidelines expands and explains how to meet the Objectives of the said Plan. These are mainly found in Sections 4 and 5 of the Port Dalhousie Heritage Conservation District Guidelines for Conservation and Change. Therefore, one must look to those provisions for guidance on determining whether Objectives of the Heritage District Plan are met.

What constitutes a heritage building and a heritage site?

- Pursuant to the Guidelines, in determining whether a property conforms with the Objectives one needs to understand what a heritage building is. The Port Dalhousie Heritage Plan (Page 165, Exhibit 5D) provides that any structure built prior to 1950 should be considered a heritage building. Throughout the Guidelines there are also references to heritage sites, therefore, I would ask the Board to extrapolate that if a heritage building means one that has existed prior to 1950, then a heritage site should include a location which has existed in that form since before 1950.

Section 4.2 of Port Dalhousie Heritage District Plan (page 165)
Alterations to Heritage Buildings and Sites

- Section 4.2 is the section which deals with the Alterations to Heritage Buildings and Sites: Guiding Principles.

- (Page 166) Section 4.2.1 deals with "features and spaces around heritage buildings and sites". This section provides that features and spaces around heritage buildings and sites are important in providing the context or setting of a heritage property and enhancing the presence of the building in the streetscape.

- This section emphasizes the importance of not only the building but also the site around the building in order to ensure that the tone of Port Dalhousie continues to be protected in the future based on the context and the setting around the heritage property in order to ensure that the presence of the building and the contribution it makes to a streetscape is not lost.

- It is my submission that a heritage site includes open spaces which have been open and vacant prior to 1950.

- If the Board accepts PDVC's proposition that only heritage buildings need to be preserved or protected basically those buildings that existed prior to 1950, then I submit, that should also apply to the open spaces which contribute to creating the context and setting and the contribution of those heritage buildings to the

streetscape that those open spaces are also required to be preserved and protected.

- I would draw the Board's attention to (Exhibit 13, at Tab 5, page 24 or 133) a reproduction of a 1929 map of the Commercial Core which shows the area west of the Austin House Hotel on Lock Street up to Main Street as substantially vacant and an area along Main Street, except for an ice house, to be substantially vacant. Further, the area along the unnamed road is vacant in its entirety except for the jail.

- Since before 1950 the open spaces around the jail, the back patio which now exists behind the Austin House Hotel and along the unnamed road and the space between the Erskine Pharmacy and the Hydro building have contributed to the historic streetscape that one has come to know Port Dalhousie for. It is my respectful submission that those open spaces constitute part of the heritage site of the Commercial Core that is required to be protected.

S. 4 – Port Dalhousie Heritage Plan

- (Exhibit 5D, page 165) Section 4.1, in its second paragraph states "Changes to more recent structures, constructed later than 1950 are considered in Section 5". Therefore it is my suggestion that the post 1950 structures and sites are still very important, as the Guidelines provide guidance on how alterations and additions to those structures should be managed. Therefore it is inappropriate to demolish any

building within the Heritage District.

Consideration of Section 5 of the Port Dalhousie Heritage Conservation District Plan (Exhibit 5D, page 183)

Design Guidelines for New Construction

- Section 5.1, more particularly the last sentence of the first paragraph, "While not prohibited by the Ontario Heritage Act the demolition of existing heritage structures and the creation of new buildings will be actively discouraged within the Port Dalhousie Heritage Conservation District". Clearly the Heritage District Plan discourages the demolition of heritage structures, however, more importantly, it discourages the creation of new buildings. It is my submission that the PDVC proposal constitutes a greater percentage of new building than conservation of heritage structures and therefore the proposal is not in keeping with this provision.

Section 5.2, Additions to Heritage Buildings and Sites

- If the Board accepts M. Noskiewicz' argument that only the Austin House Hotel and the jail are pre-1950 and maybe the Port Mansion at some point in time were the only heritage buildings, then I suggest that any part of the proposed development which is going to be attached to any of those three buildings is to be considered an addition. It is further submitted that PDVC are required to conform to the Guidelines as found in Section 5.2.1, which encourages additions to be located at the rear. In

this proposal the development is proposed to be located on the side of the Austin House Hotel along Lock Street where, there is presently and historically has been much open space which constitutes a heritage site, being the space between the Erskine Pharmacy and the Hydro building. Further, Section 5.2.1 requires that the addition be placed in an inconspicuous side of the building. Therefore, it is my suggestion that the proposed development which will fill and dominate the rest of the Lock Street frontage is not inconspicuous as it will remove the distinctiveness of the Austin House Hotel which presently exists as the tallest heritage building on the Lock Street streetscape.

- Further, Section 5.2.1 requires that an addition be limited in size and scale to compliment the existing building and neighbouring properties. It is my suggestion that the Austin House Hotel should dominate Lock Street as it does today. Everything else should be lower on its side and behind.

- Additions at the rear should always be slightly lower than the existing roof ridge line and stepped in at the sides in order not to overpower or dominate the existing heritage building and the view from the street. Clearly the Port Dalhousie Vitalization Corporation proposal fails to meet this requirement. Lock Street presently is recognized even by the PDVC experts, as being one of the two most important streets of the Commercial Core and yet their proposal fails to respect the existing streetscape and fails to conform to the requirements of Section 5.2 of the Port Dalhousie Heritage Conservation District Plan.

Section 5.3 – Additions and Alterations to Non-Heritage Buildings

(Exhibit 5D, Page 188)

- Section 5.3 provides "that work undertaken to non-heritage buildings should respect the overall character of the Port Dalhousie Heritage Conservation District and be sensitive to any neighbouring heritage buildings". This section requires that work to be undertaken even on non-heritage buildings should respect the overall character and be sensitive to the neighbouring heritage buildings, however, PDVC's approach is to demolish anything that is post 1950, which clearly is contrary to the Objectives of the Plan and to the Guidelines, more specifically under Section 4.1 where it requires that changes to more recent structures constructed later than 1950 are to be considered in Section 5. Therefore, it is my suggestion that any building, even non-heritage buildings like the Erskine Pharmacy and the Hydro building are still important as component buildings within the Heritage District and should not be demolished.

Section 5.7 – Design considerations in New Non-Residential construction. (Page 199, Exhibit 5D)

- General factors governing design consideration for non-residential buildings are similar to those for residences. The only difference is the matter of size. "Issues of multi-storeys, long continuous facades, setbacks, roof shapes, numerous bays and variety of materials are of key concern here." General guidance is provided in

Section 5.7. I would bring the Board's attention to the third bullet which refers to "In multi-storey buildings contrasts between street level and upper second and third storey level facades should be emphasized...".

- Here is a clear indication that the maximum height envisaged even for multi-storey buildings was 3 storeys as the reference is to the upper second and third storey recognizing that the first storey is for retail commercial uses that are street level and used for marketing and will change from time to time.
- Page 200 in Exhibit 5D, is the case study which shows an example of an addition being slightly lower on its façade to contrast and not take away from the distinctiveness of the heritage building to which the addition is being made. The example on page 200 shows the addition being stepped back and taking the same shape as the lowered sloping topography of the Port Dalhousie District as seen in the Commercial Core. The topography forms an attribute of this heritage site located in the Commercial Core and it is important to the Heritage District. The proposal fails to meet the requirements as depicted on page 200 in making sure that additions are at the rear and lower than any existing heritage buildings.
- By looking at the proposal along Lock Street as depicted in drawing A303 in Exhibit 7 at Tab 5, the top depiction shows the street front as proposed along Lock Street. There, it is quite apparent, that the additions proposed to the side of the Austin

House Hotel façade are at the same height and even higher at the corner of Main and Lock.

- Instead of the addition stepping back down behind to follow the topography, the height is increased contrary to the provisions of the Guidelines.
- The name of the Austin House Hotel does not even appear on the actual building, nor will the actual building actually contain the entrance to the Austin House Hotel as depicted by Drawing A-303 in Exhibit 7, Tab 5.
- I would urge the Board to look at Schedule A-2 of By-law No. 2006-228 (Page 579 of Exhibit 5E) or at Exhibit 120 which is the Schedule "A" which includes Hogan's Alley, and Exhibit 121 which recognizes and leaves Hogan's Alley open. Those schedules show that the only area of the entire proposal to preserve the 11 metre height is shown as Area 1 and it is of a width of 3 metres. From the west side of the Austin House Hotel for a distance of 10 metres from the corner of Main Street and then along Main Street for a distance of 10 metres from the corner to approximately mid-block. Clearly the proposal is not lower at the rear but much higher and therefore contravening the provisions of Section 5.7 of the Guidelines which were intended to uphold the character of Port Dalhousie and its Commercial Core.
- I believe there is no other conclusion to reach than the proposal by PDVC does not conform with the Guidelines as the Proponent has failed to show that there would be

no adverse affects and that there would be a positive contribution to the character of the area.

- Based on the provisions of Section 41.2(1) of the Ontario Heritage Act alone should be sufficient for this Board to refuse the appeals of PDVC on the Council's refusal to approve the site plan matter and the heritage permit applications and to allow the appeals by all parties of the Official Plan Amendment By-law No. 2006-227 and the Zoning By-law Amendment No. 2006-228.

INTERTWINING OF HERITAGE AND PLANNING POLICIES AND POTENTIAL CONFLICTS

- In reviewing the provisions of the Planning Act and considering references in Sections 2 and reviewing the provisions of the Provincial Policy Statement and the Ontario Heritage Act, it is apparent that all these provisions are sensitive to matters of heritage interest. It is my submission that there do not appear to be any conflicts between the various documents.
- However, if there are some who suggest that there are conflicts between the Planning and Heritage statutes for development in a heritage district and if the Board should be asked to rule on which statute should take precedence, it is my submission that whenever there is a conflict between statutes, those conflicts should be resolved in such a way to re-establish the desired harmony. (Higgins v. R, 2007, Carswell 2514, 2007 TCC 469. Tax Case p. 3 of 3 – refers to Paul Andre Cote's

"The Interpretation of Legislation in Canada, 2nd ed. in dealing with the presumption of coherence between statutes. - handout)

- Ontario Heritage Act, Section 68(3) provides that where there is a conflict between the Ontario Heritage Act and any other Act or regulation, the Ontario Heritage Act prevails. Similar provisions are also included in the Planning Act, however I would recommend to the Board the case of Valleyview Heritage Association Inc. et al v. Estevan (City) et al (1989, 47 MPLR, at page 24 - handout) from the Saskatchewan Court of Queens Bench, where the Court ruled that an act of greater specialty prevails over a more general act. This case held that the Heritage Act prevailed over the Municipal Act. I refer you to page 34 where there is a discussion on the construction of statutes put forth in Driedger's whereby the Court quotes from Driedger's to say the general statute is made to yield by regarding the special statute as an exception to the general. The special, whether earlier or later in time, therefore has the effect of reducing the scope of the general. In City of Ottawa and Town of Eastview, Rinfret, J. said "The principle is therefore that where there are provisions in a special act and in a general act on the same subject which are inconsistent, if the special act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject matter of the rule from the general act. In my view it must be conceded that the Urban Municipality Act, 1984, is in the nature of a general act dealing with an extremely broad area of matters relating to urban municipalities. On the other hand, the Heritage Property Act is clearly a special act restricted to the method by which properties can be designated as

heritage properties". At the bottom of page 35 of the said decision the Court rules "for these reasons I must apply the maxim generalia specialibus non derogant and hold that the provisions of the Heritage Property Act take precedence over the provisions of Section 88 of the Urban Municipality Act, 1984..." I would urge the Board that the proper interpretation would be to give precedence to the Ontario Heritage Act in the event of a conflict over the Planning Act.

- It is my respectful submission that notwithstanding the Heritage and Planning Issues may be intertwined – primacy should be given to the Heritage policies.

HERITAGE POLICIES FOUND IN PLANNING DOCUMENTS

- Need to look at the heritage provisions of the Official Plan and Secondary Plan together with matters of provincial interest found in Section 2(d) of the Planning Act.

Planning Act

- Section 2(d) of the Planning Act
- Planning Act (Exhibit 5A, Tab 1, page 5) Section 2(d) provides the Minister, the council of a municipality, a local board, a planning board and the Municipal Board in carrying out their responsibilities under this Act, shall have regard to, among other

matters, matters of provincial interest, such as d) the conservation of features of significant architectural, cultural, historical, archeological, or scientific interest.

- Section 2(p) of the Planning Act, refers to the appropriate location of growth and development.

- Planning Act, Section 3(5). Section 3 of the Planning Act, more specifically 3(5), requires that a decision of the council of a municipality ... including a municipal board in respect of the exercise of any authority that affects a planning matter, a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and b) shall conform with the provincial plans that are in effect on that day or shall not conflict with them as the case may be. Therefore this requires that the framework to be used for evaluation purposes include heritage matters and reference to the Provincial Policy Statement.

PPS

- (PPS, Section 2.6.1, Exhibit 5B, Tab 1, page 25) Section 2.6.1 of the PPS requires that "significant built heritage resources" and "significant cultural heritage landscape" shall be conserved.

- Evidence was heard from experts, that the definitions included in the Provincial

Policy Statement define cultural heritage landscape as including a heritage conservation district designated under the Ontario Heritage Act. This essentially means that it is a grouping of buildings that constitute the district and not individual buildings that this policy statement deals with.

- Essentially Section 2.6.1 requires conservation of the Port Dalhousie Heritage Conservation District. Exhibit 5B, at page 33, defines "conserved" as the identification, protection, use and/or management of cultural heritage,... in such a way that their heritage values, attributes and integrity are retained. This may be addressed through a conservation plan or a heritage impact assessment.

- Therefore, it is my submission that doing an assessment on individual buildings and then determining that, notwithstanding they form part of a significant cultural heritage landscape, they should be demolished because they have, according to Mr. Higgins, no architectural value is clearly not what was intended by the Provincial Policy Statement in Section 2.6.1.

- It is my submission that Section 2.6.1 requires the conservation of the entire Port Dalhousie Heritage District and this is further evidenced by reading the entire section which includes Section 2.6.3.

Section 2.6.3

- Section 2.6.3 and the last paragraph (Exhibit 5B, page 25) implies that no development will be allowed in a designated district.

- Section 2.6.3 provides "Development and site alteration may be permitted on adjacent lands to protected heritage property where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved. Mitigative measures and/or alternative development approaches may be required in order to conserve the heritage attributes of the protected heritage property affected by the adjacent development or site alteration."

- This essentially says the development may be allowed on properties which are adjacent to a heritage conservation district, however, the development on the adjacent land can only proceed once it has been evaluated and demonstrated that the heritage attributes of the heritage district will be conserved. The heritage attributes as defined by the PPS means the principal features, characteristics, context and appearance that contribute to the cultural heritage significance of a protected heritage property, which in this case is the 2-3 storey, low profile-village like character of the Port Dalhousie Heritage District.

- Clearly the proposed development is not adjacent to the Heritage District but rather

it is located within the boundaries of the Heritage Designated District, as the Port Dalhousie Heritage Conservation District extends to the Lake, this is not the tip of the district, as the district is much larger, therefore, clearly this section of the Provincial Policy Statement provides that this proposal should not be allowed within this District.

- The reference made in Section 2.6 to using mitigative measures also deals specifically with the mitigative measures of a development located adjacent to the heritage designated district. However, the interpretation made by Spencer Higgins, Michael Kirkland and Tom Smart to justify the location of the tower based on mitigative factors are clearly contrary and not consistent with the provisions of 2.6.3 of the Provincial Policy Statement. The reference made to mitigative factors are intended to apply within the district by a strict reading of the last paragraph found at Page 25 of Exhibit 5D, which expressly refers to mitigative measures to conserve the protected heritage property affected by the adjacent development.
- The proposed development by PDVC is not adjacent but clearly within, therefore all components of the Heritage District must be conserved.
- The fact of the tower being 17 storeys and a substantial portion of the proposal being greater than 3 storeys is contrary to the character of the district and clearly the proposal does not conserve the heritage attributes of the District being that of a low profile settlement. The proposal is much too high to be considered in keeping with

the heritage attributes of the Port Dalhousie Heritage District.

- Wayne Morgan and Curt Benson, both heritage planners, felt that the proposal was contrary to and not consistent with the Provincial Policy Statement.

Heritage Policies found in the Regional Policy Plan

- It is the City's position that the proposal is not in keeping with the heritage policies of the Regional Policy Plan.
- Objective 7.F.1 (Exhibit 5B, Page 115) – "To preserve buildings, communities and other sites of significant historic interest and architectural interest".
- Objective 7.F.3 – "The Region will carefully review development proposals which might impair the historic or architectural character of sites and buildings evaluated as being of significant interest."
- Through the evidence of Curt Benson and supported by Corwin Cambray, the Regional staff did a careful review of the subject proposal and felt it did not preserve the significant historic interest of Port Dalhousie. Bob Martindale, another heritage planner, also felt the development did not conform to the objectives of the Regional Policy Plan.

Heritage Policies found in the City of St. Catharines Official Plan

- The City's position is that the PDVC proposal is not in keeping with the heritage policies found in the City of St. Catharines Official Plan as evidenced in the following policies:
- Section 7.10 (Exhibit 5B, Page 199) Heritage Conservation
- Section 7.10.6 – This section expresses Council's intent within a designated district "to conserve and enhance the unique heritage character of the area".
- It is my submission, that in the event this Board should find that the Port Dalhousie Heritage Conservation District Plan is not clear in its intention, that it should fall back onto this provision which clearly stipulates what the intention of a Heritage Plan should be.
- Section 7.10.7 (Exhibit 5B, Page 200) – This section requires that in receiving proposals for construction, demolition or removal of buildings and structures, or the alteration of existing buildings, the City will be guided by the applicable Heritage Conservation District Plan and the following general principles:
 - "(a) Heritage buildings, associated landscape features and archeological sites including their surroundings should be protected from any adverse effects of change;"

"(c) New additions and features should generally be no higher than the existing building and wherever possible be placed to the rear of the building or set back substantially from the principal façade;"

"(d) New construction and/or infilling should be compatible with surrounding buildings and streetscape by: being generally of the same height, width and orientation as adjacent buildings;..."

- Section 7.10.7 (Exhibit 5B, Tab 5E, page 200-201) (a), (c), (d) requires the protection of heritage buildings from adverse effects of change including retention of heritage features and location of additions to the rear of existing buildings and that they be lower not higher than the existing building.
- Clearly the PDVC proposal, because of its height and width, is not compatible with surrounding buildings and streetscape. Buildings of the Heritage District in the Commercial Core area are described as being 2 to 3 storeys in height, and now even one storey buildings such as the Erskine Pharmacy and Hydro building provide a variety of scale and interest to the existing heritage streetscape.
- The open spaces of the Commercial Core, which historically have existed before 1950, which is the open area between the Erskine Pharmacy and the Hydro building and also along a portion of most of Main Street from the corner of Lock to the unnamed road, and a large portion of the unnamed road is substantially open space today. The proposal fails to protect this open space as the proposal will construct a

solid mass building with very few openings except into the courtyard to allow a staircase to access into the courtyard, but the opening from the staircase, in the event Hogan's Alley is closed and sold to the developer, will be the only avenue to view the topography of the peninsula and that view will be very limited as it will require standing in the actual stairway to observe a potential grade which will be hidden by the massive height of the backs of the building from those buildings built along Lock Street and Main Street.

- The City's position is that the PDVC proposal does not conform to Policy 7.10.7.

Evidence heard by the Board on s.7.10.7

- Paul Chapman, under cross-examination, testified that 7.10.7 was applicable to the Commercial Core and he considered the entire site as one of infilling. When asked if the proposal was generally of the same height, his evidence was, that once the building gets over 11 or 12 metres the building runs afoul of this policy.
- Robert Martindale pointed out that this policy reflected the provisions of the Guidelines and he felt that the proposal was clearly not in keeping with this policy.
- The St. Catharines Heritage Advisory Committee expressly provided in its report that the proposal did not adhere to the policy of 7.10.7(a).

- 7.10.7(c) requires that additions should generally be no higher than the existing building and wherever possible placed in the rear.
- PDVC proposes that all construction including additions will be substantially higher than all the existing built form of Commercial Core of the Heritage District.
- The additions to the west side of the Austin House Hotel and those located behind it are much higher than the existing built form.
- By-law No. 2006-228 seeks to increase the existing height limit of 11 metres to an eventual maximum height of 62 metres. The proposal, as exhibited in Schedule "A-2" and in Exhibit 120 and 121, show the 11 metre height only being preserved for a width of 3 metres along the Lock Street side up to the corner, which climbs to 15 metres and rounds the corner then for a short distance along Main Street goes back to 11 metres for approximately half the block. Therefore, the bulk of the proposal is in excess of the existing maximum height of 11 metres.
- Clearly this does not conform to the requirement that new additions should generally be no higher than the existing.
- 7.10.7(d) requires that new construction be compatible with the surrounding buildings and streetscape and be generally of the same height, width and orientation of adjacent buildings.

- The proposal does not conform to this requirement.

- Various planning experts were of the opinion that the proposal represented either new construction or infill and in either case both are required to be compatible with the surrounding buildings and streetscape and be generally of the same height. The construction proposed west of the Austin House Hotel and all the construction proposed down Main Street to the condominium tower and the development along the unnamed road need to be generally of the same height and width as the adjacent buildings which are no higher than 11 metres. Since all buildings are generally interconnected along the Lock and Main Streets it is the City's position that none of it must be higher than the existing Austin House Hotel.

- The only area where the buildings are not attached to any existing building would be along the unnamed road only in the alternative site plan which shows the Hogan's Alley as remaining opened.

- If Hogan's Alley is closed then the buildings along the unnamed road are proposed to be connected to the Port Mansion and therefore should not be higher than the existing Port Mansion (McGrath/Union).

- The condominium as it is adjacent to the jail should not be 62 metres as this policy requires the height to be generally of the same height and width of the building to

which it is adjacent. It is my respectful submission, that any building adjacent to the jail should be lower than the jail.

Heritage Policies found in the Port Dalhousie Neighbourhood Plan (Secondary Plan) (Exhibit 5B, Tab 5G, Page 205, 210 and 221)

- The matters to be considered dealing with heritage in the Secondary Plan are the Objectives, Section 16.2, Section 16.25, Section 16.30, Section 16.86, Section 16.88, Section 16.89 and Section 16.92.
- Essentially the provisions of the above require that new construction should be sympathetic in terms of height to the existing built form.
- The City's position is that the proposal is not in keeping with any of the heritage provisions found in the Secondary Plan.
- Objectives of the Port Dalhousie Neighbourhood Plan (p. 205, Exhibit 5B). The following objectives deal with heritage matters in Port Dalhousie:
 - "3. To ensure that the character of the commercial core is maintained and protected and at the same time ensure that the commercial core does not encroach into adjacent residential area;"
 - "4. To maintain and reinforce the atmosphere and character which has developed in the commercial core;"

- "10. To provide adequate parking facilities in the Port Dalhousie commercial core;"
- "14. To conserve individual buildings of historic or architectural value;"
- "15. To protect areas of historic or architectural interest in Port Dalhousie."
- Overall, the PDVC proposal adversely affects and fails to maintain and protect the character of the Commercial Core by proposing a high rise structure that is five (5) times what the existing built form is and the proposal does not protect but rather adversely affects the character of the Commercial Core which is a low profile settlement.
 - The proposed demolition of the Erskine Pharmacy and Hydro building, the proposed demolition and reconstruction of the Port Mansion and the proposed major new construction of 4-6-8 storeys of building and 17 storeys behind and beside the smallest and oldest building in the Commercial Core, being the jail, fails to ensure the character of the commercial core is maintained or protected, fails to maintain and reinforce the atmosphere and character which has developed in the Commercial Core and fails to protect the area of historic interest in Port Dalhousie.
 - The matter of adequate parking facilities will be addressed later in the issue of compatibility, however it is the City's position that inadequate parking facilities are being provided for the theatre use which will produce the adverse affect of increasing traffic within the residential area of the Heritage District.

- Policy 16.2 "The Port Dalhousie Neighbourhood is a community with areas of historic and architectural significance. It is the policy of this Plan to conserve this character and improve the environment of Port Dalhousie through the enhancement of particular streetscape and promotion of certain building types...".

- The goal here is to conserve the character and improve the environment by enhancement of particular streetscape and promotion of certain building types. To do this one must look to the Heritage District character which is defined as being a low profile, 2 to 3 storey settlement. This provision cannot be read in isolation, it must be read in conjunction with the heritage Guidelines and the provisions of the Secondary Plan policies and policies found in the Official Plan. However, overall it is the City's position that the proposal is not in keeping with Policy 16.2.

- Policy 16.25 – "The commercial core shall be regarded as a primarily commercial core, characterized by retail and service commercial uses, located at grade with a minimum setback from the lot line and with a limited number of apartments located above."

- The residential component proposed by PDVC represents a larger area of square footage than does the commercial uses proposed. The commercial use is the land use which is characteristic of this (precinct) area of the Port Dalhousie Heritage District. Based on the evidence heard, 129,074.27 square feet are proposed for the

residential use, as opposed to a total of 109,331 square feet proposed for the commercial uses. These commercial uses comprise 38,751.34 square feet of retail and restaurant, 45,145.31 square feet for hotel and 25,403.66 square feet of theatre.

- Just because the footprint is commercial does not remove the fact that the most visible component of the entire development is the residential component. It is the highest structure of the development located within this Heritage District, which clearly does not conform based on land use, nor does it conform with the low profile characteristic of the Commercial Core. The policy found in 16.25 allows residential uses, however only in a limited way. Therefore clearly the residential component cannot be said to conform to the general commercial core policies of the Secondary Plan.

- The proposal would introduce major residential use into the core in the form of a 17 storey, 80-unit apartment building that would be the dominant feature of the skyline rather than being integrated into the prevailing 2 and 3 storey streetscape, contrary to the Plan's intent of restricting residential uses to a subordinate and ancillary role. By virtue of its height and bulk it would become a landmark feature, not only of the commercial core but of the entire community of Port Dalhousie.

Historic character of the commercial core

- In addition to the special policies dealing with the Commercial Core, the Secondary Plan provides, in Section 16.30, "In order to conserve and strengthen the special identity and character of the commercial core encouragement shall be given to the protection and enhancement of those properties, buildings and features of architectural, historic and/or landscape value which are located within the commercial core... Any new construction, particularly infill development within the commercial core should be sympathetic to the existing built environment in terms of height, mass, colour and materials."

- It is the City's position, as supported by Mr. Martindale's opinion, that the proposal is not sympathetic to the existing built environment in terms of height or massing. The proposal deviates significantly from the predominant 2 or 3 storey height streetscape and therefore does not conserve or strengthen the special identity and character of the Commercial Core. In particular I would point out that there has never been a continuous block wall of 4 storeys or higher buildings fronting on the unnamed road, Lock Street or Main Street. Both the 1929 Fire Insurance Map and the 1981 Air Photo included in the Spencer Higgins Heritage Assessment Report show the predominantly open nature of Main Street and the unnamed road.

Secondary Plan Heritage Policies (Exhibit 5B, Page 220)

- Section 16.88 of the Secondary Plan provides "It is the policy of this plan that consideration be given to the development of a heritage conservation district plan as set out in the Ontario Heritage Act.

- It is the City's position that the Official Plan gives the Port Dalhousie Heritage Conservation Guidelines for Conservation and Change the same primacy as does the Ontario Heritage Act.

- Therefore, if the Board should find that the fact that no separate by-law was passed, after 2005 adopting the Guidelines as the Port Dalhousie Heritage Conservation District Plan, which would have the effect of neutralizing the binding effect of the Heritage Plan, then it is the City's position that by Section 16.88 of the Official Plan, the Board should give the same precedence to the Guidelines as anticipated, and intended by the Ontario Heritage Act as that seems to be the intention of s.16.8.8 – that any Heritage District Plan should be as intended by the Ontario Heritage Act.

- Section 16.89 (Exhibit 5B, Page 221) – In the event the Board should determine the Guidelines are not a Heritage District Plan and do not attribute clear Objectives within the Guidelines, it is the City's position that Section 16.89 has established what the Objectives of any heritage plan are. In the event the Board should rule that the Guidelines are not a Heritage Plan, I urge the Board to consider using the

Objectives in Section 16.89 and invoke the provisions of Section 41.2(1) of the Ontario Heritage Act. The objectives of Section 16.89 are as follows:

"(a) Improve the environment by the elimination of congestion, decay, noise and by the retention of positive attributes of the environment such as buildings of architectural significance, pleasing scale (Erskine and Hydro) or material, public open spaces and landscape features such as trees, walkways, fences, etc..."

- The proposal does not eliminate traffic congestion. Traffic experts have testified that essentially the traffic in Port Dalhousie is what it is and little can be done to improve the situation during daytime, summer, weekends, however that traffic situation can be distinguished from the parking needs. Clearly the testimony of the traffic and parking experts have given a range of parking deficiencies generated by the theatre use ranging from 120 and 145 spaces.
- The fact that the standard as recommended by the City's Planning Services Department is 1 space for 4 seats is inadequate, will result in those looking for theatre parking driving around the Commercial Core and into the residential area which will further aggravate the already congested weekend afternoon summer situation.
- Further, this section requires the retention of positive attributes of buildings of architectural significance and of the buildings of pleasing scale. I suggest that the

Austin House Hotel is a building of architectural significance and that the Port Mansion because of it being a pre-1950 structure is both of some architectural significance and of pleasing scale and should be retained. However, clearly two buildings that are proposed to be demolished, that are not in a state of decay are the Erskine Pharmacy and the Hydro building which are of a pleasing scale and contribute to the existing streetscape and provide interest.

- Section 16.89(b) - "Maintain the character of the townscape and building groups within the area". The character of the townscape and building groups, is that of a low rise comprising of a variety of building sizes along Lock Street and Lakeport Road which will not be maintained if the proposal is approved.
- Section 16.89(c) - "Direct growth in a manner compatible with the existing scale and character of the area."
- Again, the low rise scale and low profile character of the Commercial Core which includes its open space, clearly will be juxtaposed in a negative manner against the small jail and remaining portion of the Commercial Core area, as the proposed development is not compatible with the existing scale and character of the area.
- I suggest that the evaluation, of what constitutes, "in a compatible manner", should be done in context of scale and character of the area and not in terms of architectural factors of urban design as proposed by Mr. Kirkland, the evaluation

factors enumerated by Mr. Kirkland do not form part of the policies of the Official Plan or the Secondary Plan for the City of St. Catharines.

- Section 16.89(d) – "Prevent the incursion of elements which would detract from the character of the area and to prevent unsympathetic alteration to buildings that would detract from the area's character;".

- The tower is the most obvious component of the proposal which contravenes this policy by reason of its height and mass.

- Section 16.89(e) – "Ensure that attention is given to the details of the design of new buildings so that those buildings are harmonious with the historic character of the District and.."

- Clearly the proposed reconstruction of the Port Mansion is not reflective of the historic evolution and the historic character of the District, nor is the design of the new buildings being proposed for the hotel harmonious with the height and distinctiveness of the present Austin House Hotel on Lock Street.

- Section 16.89(f) – "Ensure that the renovation and restoration of older buildings within the Heritage Conservation District carefully preserve the character and interest of original buildings."

- Again, evidence was heard with regard to ensuring the Austin House Hotel be kept as a three dimensional distinctive structure and that the Port Mansion not be reconstructed but rather that the bricks located at the lower southerly extremity of the building be repaired and replaced rather than demolish the entire building (except for the South wall) to reconstruct a façade that may never have actually existed.

- The provisions of Section 16.89 are generally reflected in the Port Dalhousie Heritage Conservation District Plan, which is required to be examined in order to more closely understand the character of the Heritage District and more particularly the Commercial Core. Again, the District character and conservation intent (page 157 of Exhibit 5D) describes the District character as a compact settlement, perched on table lands of a small peninsula that separates Lake Ontario from Martindale Pond. The character is further described on Page 158 of Exhibit 5D as being inherently associated with the fortunes of the port, canal and local industry and residents. The Commercial Core is described as being centred on Lakeport Road, Hogan's Alley and Lock Street and is distinguished by its 19th Century and early 20th Century architecture of 2 and 3 storey terraced blocks and individual hotels.

- All experts and non-experts who have testified have agreed that the character of the Commercial Core is described as low profile 2 to 3 storey, 19th century and early 20th century settlement of commercial use.

- Section 16.92 of the Secondary Plan is basically the primary Section on which PDVC rely on, for justifying the development proposal which is the subject of this hearing.

- Section 16.92 (Exhibit 5B, Page 222) – "Notwithstanding that a Heritage Conservation District Plan should be undertaken to help assure the sensitive development of old Port Dalhousie, the municipality shall support the revitalization of this historically significant area by: a) improving public lands and ensuring public facilities sympathetic to its surrounding; b) ensure sympathetic signage; c) investigating funding sources; and d) **encouraging the development of the commercial core for Regional (tourism) oriented facilities in order to enhance the economic viability of this historic area."

- The only Regional tourism oriented facilities included in the development proposal are the theatre and hotel. Perhaps some of the retail restaurant uses, depending on their actual end use if in fact it does become a culinary centre, may eventually become a Regional tourism oriented facility. However, clearly, the largest and the most controversial component of this development is the residential condominium tower.

- Clearly the residential condominium tower cannot be seen as being a Regional tourist facility. Absolutely no evidence was called to suggest that the residential condominium tower was a Regional tourist facility.

- Even though Section 16.92 uses words like "Notwithstanding the Heritage Plan", this policy does not supercede the Ontario Heritage Act provision of Section 41.2(1) which prohibits the passing of by-laws which are contrary to the Heritage Plan. No where in the Secondary Plan or Official Plan or Ontario Heritage Act or the Port Dalhousie Heritage Conservation District Plan is there any mention or reference to exceptions being made to this policy in order to allow a structure which may generate money in order to fund the potential of a Regional tourism facility. It is the City's position that clearly the Port Dalhousie Vitalization Proposal does not even fit within 16.92 of the Secondary Plan.

Role of Heritage Charters and Doctrinal Texts

- On the matter of the role and the weight to be given to the various heritage charters that were referred to by many of the witnesses, I would urge the Board to accept, for purposes of ultimate guidance, the evidence of Mr. Herb Stovel who is an expert in heritage policies and processes, a conservationist, a conservation architect and a heritage architect, and accept his position that doctrinal texts are not binding however they do represent the best practices in conservation. Mr. Stovel cautioned the importance of using those charters and doctrinal texts properly pursuant to their intended purpose. His opinion was that Mr. Higgins did not use the doctrinal texts properly. An example referred to can be found in Mr. Stovel's witness statement in Exhibit 73 (in most of the paragraphs found under Section 6.4).

- Mr. Stovel also spoke of conservation decisions being values driven. In this context Mr. Stovel said "It is generally acknowledged that heritage values are attributed by people to heritage and that such values do not exist extrinsically, only through attribution by people. This has promoted thinking that focuses on insuring that the heritage we protect reflect people's values at the community level, not just expert values."

- I would urge the Board to consider those comments and attribute more weight to the opinions proffered by the St. Catharines Heritage Advisory Committee and the Port Dalhousie Heritage Advisory Committee. Many of the members of the Port Dalhousie Heritage Advisory Committee participated in the designating process of Port Dalhousie as a heritage district. They are the ones, through their research and efforts and participation in the public process, that helped identify those features that they value as a community. The Port Dalhousie Heritage Advisory Committee and the AdHoc Committee established during the designation process, were instrumental in recognizing the character of Port Dalhousie which was valued by them, which they are now fighting to protect and preserve.

- I would urge the Board to seriously consider the four steps put forward by Mr. Stovel as being essential in determining heritage significance and required in the development of a Heritage Impact Assessment. Those four steps were, 1) defining heritage values; 2) the written synthesis of the values defined; 3) defining attributes

or elements through which the important heritage values are expressed or carried in the character defining elements; and 4) codification of a written statement of significance. Mr. Stovel feels that the Study and Guidelines fulfilled the required four (4) steps. In evaluating Spencer Higgins Heritage Impact Assessment, Mr. Stovel's opinion was that these four steps had not been followed.

- I would urge the Board to consider the opinion of Mr. Stovel that no where in the body of doctrine concerned with conservation of heritage is there a principle which states that important applicable principles may be disregarded as long as the impacts may be mitigated. I would urge the Board to consider that because Spencer Higgins, together with Michael Kirkland, in their evidence, felt that mitigation permitted them exceptions to certain policies of conservation. It appears that Mr. Stovel is an expert in heritage charters and doctrinal texts and it is my respectful submission that his evidence should bear the most weight with regard to how to perform heritage impact assessments and how the various heritage charters and doctrinal texts should be applied.

- It is the City's position, as is supported by Mr. Stovel, that the Guidelines and Studies should be given weight of a post-2005 Ontario Heritage Act Conservation District Plan and that the Official Plan and Secondary Plan Heritage Policies trump the Heritage Doctrinal Texts.

- Spencer Higgins was qualified as an expert Heritage Conservation Architect and Urban Designer, on a number of occasions during his evidence and cross-examination he expressed different opinions than previously expressed in his written report (in comparing the Diamond proposal to the Kirkland proposal). According to Mr. Higgins, in 2006 he used the Parks Canada Standards as a primary tool for the purpose of his report. Then in 2007 he used the methods outlined in the FHBRO for his analysis. However, based on Mr. Stovel's evidence, Mr. Higgins used neither appropriately and according to Mr. Stovel, Mr. Higgins is trained in how to use the doctrinal texts however, for some reason, failed to apply them properly.

- Spencer Higgins (at Exhibit 13, Tab 5, Page 6) said that "Urban context generally is more important than architectural qualities", however he did not spend much time dealing with context, rather Mr. Higgins dealt with the architecture of the individual buildings on the subject parcel in isolation, as pointed out by Mr. Stovel.

- In cross-examination by Ms. Pepino, Spencer Higgins did admit that no where in the charters, policies or guidelines was the economic factor given as a justification for non-compliance with the best practices put forth in those heritage charters and doctrinal texts.

- Planning Land Use, documents to be considered in order to determine whether or not the Proposal is good planning include, the Planning Act, PPS, Places to Grow, Regional Policy Plan, Official Plan sections dealing with compatibility and urban design and Secondary Plan, and whether the Smart Growth principles and Region's Model Urban Design Guidelines apply.

Planning Act

- Section 2(d) and 2(p) of the Planning Act were previously dealt with in reference to the Heritage Policies. However, in the strict land use planning sense I would refer you to Section 2(n) of the Planning Act.
- Section 2(n) requires having regard to the resolution of planning conflict involving public and private interests.
- As pointed out by Wayne Morgan this conflict resolution was done through the adoption of heritage designation of Port Dalhousie and adoption of the Guidelines. Both documents recognize that any development would have to be sympathetic to the character of Port Dalhousie.

Provincial Policy Statement

- Other than Section 2.6 which deals with the Heritage and should take precedence over the general planning policies, I would refer the Board to the following Sections:
- Section 1.1.3.3 (Exhibit 5B, Page 9) requires planning authorities to identify and promote opportunities for intensification and redevelopment.

- It is my respectful submission that the St. Catharines Official Plan and the Port Dalhousie Neighbourhood Plan have not identified Port Dalhousie as an area for intensification or redevelopment but rather have identified the Central Downtown, the Queenston Area and the Hartzel Road Area for areas of intensification. All three areas are no where near Port Dalhousie.

Places to Grow

- The Places to Grow legislation, similar to the PPS Section 1.1.3.3, requires identification of areas of intensification. Again, Port Dalhousie has not been identified as such an area. In the introduction of the Places to Grow legislation (which is found at Exhibit 5B, top page 48) it provides "This plan does not replace municipal official plans, but works within the existing planning framework to provide growth management policy direction for the greater Golden Horseshoe."
- At the bottom of page 49, Exhibit 5B, the Places to Grow legislation provides that this plan addresses challenges through policy directions that support the protection and conservation of water, energy, air and cultural heritage, as well as integrated approaches to waste management.
- At page 52, the legislation provides that this plan should be read in conjunction with the applicable PPS.

- Under context, Section 2.1 (Page 53), provides "This plan envisages increasing intensification of the existing built up area, with a focus on urban growth centres, intensification corridors, major transit station areas, brownfield sites and greyfields."

- All planners who gave evidence provided and agreed that Port Dalhousie was not identified in Schedule 4 of the Places to Grow legislation as an Urban Growth Centre.

- Further, Paul Chapman confirmed that there is no policy in the Official Plan for the City of St. Catharines identifying Port Dalhousie as an Urban Growth Centre or as part of an intensification corridor or as a major transit station area or a brownfield site. It is Downtown St. Catharines which has been identified in Schedule 4 of the Places to Grow legislation as the Urban Growth Centre for this area.

Smart Growth Policies

- The Smart Growth Policies generated by The Regional Municipality of Niagara have not yet been incorporated in the Regional Policy Plan (evidence of Curt Benson).

- The Regional Smart Growth Policies have not been adopted nor incorporated into the City of St. Catharines Official Plan and therefore are not applicable as binding policy (Paul Chapman).

- Curt Benson, reinforced by Corwin Cambray, indicated that the Smart Growth Policies as applied by PDVC were taken out of context.

- Corwin Cambray provided that the Smart Growth Policies required implementation through a review and policy development, similar to what had been done in St. Catharines in the study Reclaiming Ground for the Hartzel-Merritton and Queenston Area where there had been substantial public consultation, a thorough review of policies and subsequent amendments to the Official Plan and the creation of Secondary Plan for those study areas which resulted in further zoning amendments.

This evidence was supported by Mr. Chapman and Mr. Benson.

- Corwin Cambray indicated, as did Curt Benson and Bob Martindale, that Port Dalhousie was not the proper location to consider Smart Growth.

Planning Policies found in the Regional Policy Plan

- Other than policies dealing with heritage which have previously been dealt with, other policies to be considered are:

- Section 3.2 which provides the goal of facilitating and maintaining a pattern of distinctive and identifiable urban communities by providing a variety of housing suited for each urban area and the recognition of historical features.

- Objective 4.A.6 "To ensure that within urban areas, development along the Greater Niagara Circle Route, the TransCanada Trail and the Lake Ontario Waterfront Trail maintains or enhances the scenic qualities of these driving routes and trails and protects significant natural and cultural heritage resources."

- The condominium tower would become a landmark within the close proximity of the Waterfront Trail and would dominant the view of the Commercial Core from the trail as it traverses Lakeside Park. Robert Martindale provided his opinion that the proposal would not protect the cultural landscape resource in the proximity close to the Waterfront Trail.

- Section 5.5(f) (Page 101, Exhibit 5B) Urban Area Policies -Aspect of local planning responsibilities in which the Region maintains a continuing interest, include "(f) Consideration of factors such as historic features, aesthetic values, adequate protection for public institutions, energy conservation, distribution and density of buildings which contributes to a pleasing urban character and the minimizing of conflicts between adjacent land uses."

- The proposal fails to respect the historic evolution of the Port Mansion and its landmark status within the Commercial Core and the context of the old jail as well as the Hydro building and Erskine Pharmacy.

- Planning Policies found in the Official Plan (other than Heritage Policies) - Sections 3.3, 4.24, 7.9

- The Planning Policies found in the St. Catharines Official Plan address matters of fitness and compatibility and that of urban design.

- Schedule "B" designates this area as Commercial. Therefore the inclusion of such a substantial residential component which exceeds 129,000 square feet is not in keeping with the designation of this area.

- Section 3.3, Location, Site and Form Guidelines for Residential Development (Exhibit 5B, Tab 5, Page 185, second paragraph) refers to the increased pressure to add residential units, however, it is equally important that new development be integrated into neighbourhoods in a manner that is sensitive to the existing context and maximizes compatibility. As such new development should respect and improve the physical character of the existing area. The intensification of the Commercial Core of Port Dalhousie as proposed is not being done in a sensitive manner and rather than maximizing compatibility it is actually jeopardizing the existing compatibility that exists today. The component that jeopardizes the character of the commercial core mainly deals with the height and massing of the proposal.

- Section 3.3.2.1, Locational Criteria for High and Medium Density Development
(page 186)
 - (a) High density apartments, residential development and intensification is supported in the Central Area or within residential neighbourhoods as part of gradation of densities and building forms;
 - (c) High and medium density residential development and intensification is particularly appropriate on sites adjacent to or near existing high or medium density developments.

- The proposed high density condominium development does not meet the criteria of subsection (a) in that it is not within the Central Area of the City. It is also not within a residential neighbourhood.

- The tower does not meet the criteria of subsection (c) in that it is not a site adjacent to or near existing high or medium density development, the nearest medium density development being approximately 100 metres to the south on Main Street at Simcoe Street is well away from the Commercial Core.

- Section 4.2.1 deals with the permitted commercial uses

- Section 4.2.1.2(b), Permitted Uses - Commercial (Exhibit 5B, Page 180) allows residential uses in areas designated for commercial activities provided that "amenity

space will be required exclusively for the residential component and will be functionally separated from the public areas associated with the other uses on site".

- Evidence has shown that the only amenity space provided for the residents of the condominium tower (i.e. the swimming pool) and associated facilities will be shared with the adjoining hotel rather than being functionally separate.

- Further in Section 4.2.2 (Page 189) of the Official Plan, incorporates a mixed commercial residential designation for two types of areas: Firstly, areas "which presently have a wide range of commercial and residential uses in close proximity or in the same structure. They have evolved over a long period of time and as a result a degree of compatibility has been established among the commercial and residential activities;" and Secondly, "Mixed Commercial – Residential Areas may also be areas undergoing redevelopment where a satisfactory degree of compatibility can be achieved through the location and design policies of this plan."

- In contrast with the Official Plan, the Port Dalhousie Neighbourhood Plan does not incorporate a Mixed Commercial-Residential Designation. Although it does have a "Main Street North Mixed Residential Area" designation, this area only allows existing local commercial uses and new medium density residential uses which must maintain a house form appearance (Section 16.12.2).

- Clearly the intent at the time the Plan was prepared was not to permit high density buildings anywhere in Port Dalhousie.

- The proposal does not conform to the intent of the Official Plan or the Neighbourhood Plan in that the scale of the residential uses and their very close integration with the surrounding commercial uses means that the Official Plan Amendment should have redesignated the subject property as Mixed Commercial – Residential rather than Commercial (evidence of Robert Martindale).

- Section 4.2.4 (Page 192) deals with Locational Criteria for Commercial Uses.

- Section 4.2.4.1, Commercial facilities of a regional scale, i.e. intended to serve Regional populations, are to be located adjacent a provincial or regional highway that has the capacity to handle the traffic volumes generated from such activities.

- Although Lakeport Road and Main Street are technically classified as arterial roads on the Official Plan, they are in fact two lane roads which, in the opinion of Mr. Martindale, hardly qualify as Regional highways with substantial capacity to handle Region wide traffic.

- Section 4.2.5, Design Criteria (Page 193), Exhibit 5b)

- Section 4.2.5.1 – In order to conserve and strengthen the special identity and

character of the historic commercial areas, namely the Downtown, Port Dalhousie and Merritton, the zoning by-laws are to reflect the built form in these areas to ensure that new construction within these areas will be compatible to the existing built environment in terms of height, bulk and building materials.

- This Section is not being exempted by By-law No. 2006-227.

- It is my submission that to conserve the historic commercial areas would require preserving the predominant commercial uses together with the requirement to conserve and strengthen the special identity and character which is derived in Port Dalhousie by its 19th and early 20th Century architecture, 2 and 3 storey terrace block buildings. According to Planning Department records, as testified to by Mr. Martindale, at the present time there is a total of approximately 22,000 square feet of retail office and restaurant space in the Commercial Core with an unspecified amount of residential and vacant upper storey space in some of these buildings.

- In contrast, the Port Place proposes the construction of 39,235 square feet of new retail, office and restaurant space; 42,303 square feet of hotel space; 21,905 square feet of theatre space and 130,236 square feet of residential apartments. These figures were then adjusted in view of the undertaking and provisions by Mr. Kirkland of revised numbers, to reflect that the proposal had a total residential floor space of 129,074.27 square feet and the commercial, including the hotel and theatre, comprised a total of 109,300.31 square feet.

- The resulting floor area of the new development is over ten times the extent of existing commercial floor space in the block. This, I submit, is not considered infilling but major redevelopment. This substantial redevelopment project represents an area greater than 40% of the existing Commercial Core which represents not only a fundamental change to the commercial character of the area but also to the heritage character of the low profile village scale settlement, to a proposed higher urbanized and dense built form.

- Section 4.2.5.2, Proposals for commercial development shall be evaluated in terms of the following factors: "(f) compatibility and where necessary the integration potential, with adjacent land uses with respect to buffering, fencing, landscaping, storage, traffic and parking impacts and building design;" and "(g) the rehabilitation and preservation of existing buildings of historic or architectural significance".

- "Compatible" is defined in the Official Plan (Page 223) as "the capability of land uses to exist together in harmony. A number of diverse elements are involved in compatibility, such as physical development standards, pedestrian or vehicular traffic generated, volume of goods handled, environmental effects, personal preference, etc."

- It is my respectful submission that the proposed commercial residential development is incompatible with the adjacent land uses in terms of building design, in that it juxtaposes a 17 storey condominium tower along with 4-8 storeys of hotel, retail and

office space, in a City block that is entirely commercial with no structures taller than 3 storeys in height. Clearly this combination of buildings is not harmonious.

- Existing heritage resources that are being retained, such as the jail, will be superceded and engulfed by the tower. In the case of the Austin House Hotel, it will lose its distinctiveness by being incorporated into a building mass which pyramids from 3-4-6-8 storeys. Other buildings of historical importance, such as the Hydro building, Erskine's Pharmacy and the Port Mansion, are either being demolished and/or reconstructed. The only building being rehabilitated for the purpose of this policy is the Austin House Hotel which will lose its commanding presence on the streetscape of Lock Street.

- Section 7.9, Lending Shape to Built Form (Page 198)

- Section 7.9 – The fundamental (urban design) guiding principle is sensitivity to context. St. Catharines is made up of a number of distinct areas, each with their own history, character and sense of place. New development should "fit in" in terms of form and function... The following criteria are intended to apply to all forms of development. More specific policies intended exclusively for residential development are found in Section 3.

- Section 7.9.1 – Development will be designed in a manner that maximizes compatibility with the surrounding area in terms of the following matters as a basis for evaluating compatibility and for achieving design excellence. b) overall building height. g) the overall scale of the development as it relates to the surrounding area.

- The proposal does not meet this criteria of sensitivity to the context. I accept that a building does not have to be identical to its neighbours to fit in, however, in terms of visual impact I would submit that the tower would completely dominate the streetscape along Main Street as well as the view of the block from Lakeside Park which is now relatively open and very low profile.

- In addition, the tower would have the effect of inserting a barrier between Lock Street buildings and the park, in contrast to the open space linkages which are now afforded by Hogan's Alley.

- By-law No. 2006-227 does not amend nor does the proposal comply or have proper regard for Section 7.9, Lending shape to built form.

- All witnesses agreed, including Spencer Higgins, that the fundamental guiding principle in lending shape to built form is sensitivity to context, however it is my submission that the PDVC architect, Mr. Michael Kirkland, and Mr. Higgins treated it differently by focusing on building materials and setbacks only, as opposed to the

context of the entire heritage area that the Commercial Core represents within the Port Dalhousie Heritage District.

- The proposal is required to "fit in" in terms of form and function. That does not mean only in an architectural sense but means within the context of its location of being within a designated Heritage District.

- I would urge the Board to treat Mr. Higgins and Mr. Kirkland's evidence as that of architects, as they were not qualified as heritage planners and do not appear to be interpreting the policies of Section 7.9 properly.

- Notwithstanding both Mr. Higgins and Mr. Kirkland recognized the importance of Lock Street and Lakeport Road in the Commercial Core as being historically significant and having a definite streetscape, their design of the proposal from the Austin House Hotel westerly to Main Street fails to reflect the existing variety of the building sizes, forms and the openness of the streetscape.

- The interpretation made by Mr. Kirkland was, since Main Street and the unnamed road do not have an established streetscape, in his opinion then those streets can be built right up with no spaces in between the buildings. The only required space would be for the opening for the stairs to access the courtyard.

- It is my position that this is not a positive reference for future development because it fails to do so in a manner sensitive to the context of the Heritage District and the existing built form as it is found today.

- Section 7.9.1 (Page 198), which is not proposed to be amended by By-law No. 2006-227, provides that development will be designed in a manner that maximizes compatibility with the surrounding area in terms of the following matters as a basis for evaluating compatibility and for achieving design excellence. Clearly the proposal is not consistent with, nor does it conform to, this policy. This section establishes design criteria for compatibility. As a minimum these are the factors in the Land Use Planning sense against which design must be evaluated. These criteria are not intended to be replaced by architectural criteria as set out by Mr. Kirkland.

- Only after the criteria in Section 7.9.1 (a) through (i) have been considered and reflected in a design that is consistent with those criteria as a minimum, can the architectural criteria as put forth by Mr. Kirkland be applied. However the architectural criteria put forth by Mr. Kirkland to determine compatibility of design should not be mistaken for criteria to evaluate compatibility in the sense of good planning as provided in the policies of the Official Plan and Secondary Plan.

Planning Policies Found in the Port Dalhousie Neighbourhood Plan
Secondary Plan not dealing with heritage

- Most have been dealt with in the heritage related policies including Sections 16.25 and 16.30 for the Commercial Core, however, in order to evaluate good planning with regard to compatibility in the planning sense I must draw the Board's attention to the parking provisions found at Policy 16.65.1.

- Parking, 16.65.1 – Provides that "where council is satisfied that a development in the commercial core would be adversely affected by the parking requirements consideration shall be given to providing the required off-street parking within 100 metres of the subject property".

- Because the evidence indicates there will be a shortage of parking for the theatre use and that the standard recommended by the City Planning Department is not based on any traffic or parking expertise, being the parking rate suggested for the theatre use in By-law No. 2006-228 of one space for four seats, it is the City's position that the rate included in By-law No. 2006-228 is inadequate.

- It is my suggestion that in order to comply with this policy all parking including that for the theatre should be provided underground to avoid having negative impacts on the residential area, as a result of increased traffic looking for parking and circulating within the already congested Commercial Core and into the Residential Area.

- Further, I would submit that a more appropriate parking standard should be based on expert evidence and should be closer to the one (1) space per three seats – for the theatre use.

- It is the City's position that based on planning policies, in addition to heritage policies, this proposal does not represent good planning and is not in the public interest.

- The proposed development is not an appropriate fit within the context of a low profile heritage district mainly because of its height and mass.

- Nor is it compatible based on heritage policies and planning policies in terms of height and bulk (Section 4.2.5.1).

- Nor is it compatible with the adjacent land uses with respect to buffering (none), traffic and parking impacts (insufficient theatre parking within 100 metres) (Section 4.2.5.2(f) and Section 16.65.1).

- Further the proposal fails to maximize compatibility with surrounding area based on the overall building height and scale as it relates to the surrounding area (i.e. condominium tower juxtaposition against jail) (Section 7.10).

URBAN DESIGN AND ARCHITECTURE

- It is my submission that the component of good planning, which is usually defined in the urban design and architecture within a designated heritage conservation district, comes into play only after the developer has established that the proposal does fit and is compatible with the surrounding area, based on Heritage and Planning policy.

- Since in this instance we do not even have a basic Fit due to the incongruent and non-compliant height which is clearly not in keeping with the character of the surrounding area. No amount of urban design or architecture, short of reducing the building height to 11 metres, will render the proposal a good fit and make it compatible to the surrounding heritage district.

Urban Design - Region's Model Urban Design Guidelines

- PDVC have referred to the Region's-Model Urban Design Guidelines, however, those have been taken out of context and have been used inappropriately.

- Regional Planners advised the Board that those guidelines were not developed for use in evaluating heritage property or developments within heritage designated districts. The document was intended for guidance and use by those municipalities that do not have design policies within their own official plan documents. Therefore it is my submission that this document, the Region's Model Urban Design

Guidelines, should not be used.

- Paul Chapman further confirmed that the City of St. Catharines had not adopted the Region's-Model Urban Design Guidelines and that the City of St. Catharines had its own design criteria in its Official Plan.

- It is my respectful submission, that the discussion that occurred on the applicability and the purpose of the 45 degree Angular Plane test is only a minor test to suggest what a proper setback along Lock Street might be. However, I would urge the Board to recognize that the 45 degree Angular Plane test does not determine the appropriateness of a development. The bottom line is, anything over 11 metres is not acceptable based on the Guidelines and existing Zoning By-law No. 88-72 as amended.

- There are no policies either in the Guidelines, Official Plan or Secondary Plan which justify locating a high rise building of 17 storeys, which would be the highest in the City of St. Catharines, within a heritage designated area.

THE PDVC APPROACH

- I suggest, to you, that the main focus and justification relied upon by PDVC for this proposed development is Section 16.92 of the Official Plan and it is my suggestion that the PDVC Group have used this Section in isolation of other policies, in order to

justify any non-compliant element of their proposal for the sake of promoting a couple of components which may represent and eventually become Regional tourism facilities.

- Clearly the heritage issue was a secondary factor and a marketing tool used by PDVC in order to promote the interest based on the location of their development.
- The main focus of their justification was founded on architecture and urban design as the majority of their experts were in these two areas. Their experts testified on the fit based on architecture as opposed to the fit within the surrounding area based on the planning and heritage framework that actually exists.
- It is my suggestion that PDVC's reliance on the Smart Growth Policies and the Places to Grow legislation, to persuade the Board that their Proposal is justified intensification was taken out of context. Port Dalhousie is not identified in the City of St. Catharines Official Plan as an area for intensification.
- The evidence of Corwin Cambray clearly indicated that the Smart Growth Policies created by The Regional Municipality of Niagara require a complete review of policies, the creation of a Secondary Plan and public consultation. He gave examples of those areas within St. Catharines that followed that process and the areas named did not include Port Dalhousie.

- PDVC's reliance on Places to Grow legislation to promote intensification should not be adopted, as the evidence indicates that the Central Downtown Area of St. Catharines is the area designated as the Urban Growth Centre on Schedule 4 and clearly Port Dalhousie is not identified in the Official Plan for the City of St. Catharines as being targeted as an intensification corridor.

- It appears that an architectural concept was designed and from that point onwards all experts were advised to work back through various policies for the most part and attempt to see how the structures could be justified. In reviewing the lack of compliance with those various heritage and planning policies, I suggest to this Board that the amendments before you are substantial and by that fact alone are an indication that they are clearly not in keeping with the provisions of those heritage and planning documents.

- The PDVC approach vis à vis the Guidelines were basically to dismiss them by saying that the Guidelines did not anticipate this type of development, and of course they are right. In a historical heritage district which is characterized as being low profile, with 2 or 3 storey buildings, I suggest that no reasonable person would expect that anything but a 3 storey building would be permitted. Clearly there are no provisions for a high rise within the heritage designated district because anything higher than 3 storeys would work against preserving the village-like character of the Commercial Core, which is the primary purpose and intent of the Port Dalhousie Heritage Plan.

- Yet, PDVC's evidence is that notwithstanding the height of the tower is not in keeping with the character of the heritage district, they suggest mitigative measures, which clearly are not authorized by any policy within any heritage or planning document, to be sufficient to justify the Port Place Proposal. PDVC's disregard for the Guidelines are at their greatest when, in fact, the requirement is submitted that those Guidelines should be amended to recognize what it is that is being proposed and to ensure that no future competition would be allowed to their revitalization vision.

- Much of the time was spent by PDVC's witnesses and others in evaluating the individual buildings which constitute the components of the proposal. However, PDVC failed to look at the effect of the proposal on the entire district and within the Commercial Core as a heritage site.

- Mr. Smart's evidence referred to the need for intensification in St. Catharines due to its urban boundaries being fixed by the Greenbelt legislation, however, I would refer the Board to Section 3.3 of the Official Plan (Exhibit 5B, Page 185, the last part of the second paragraph) where it provides "...however it is equally important that new development be integrated into neighbourhoods in a manner that is sensitive to the existing context and maximizes compatibility. As such, new development should respect and improve the physical character of existing areas". It is my respectful submission that the PDVC proposal clearly is not sensitive to the existing context and fails to maximize, and is not even minimally compatible. This proposed

development does not respect nor does it improve the physical character of the existing areas.

- Rather, PDVC have relied almost exclusively on the provisions of Section 16.92 to justify their development, however, no where in the Secondary Plan or Official Plan or Port Dalhousie Heritage District Plan are there provisions to justify the high rise development proposed. I do not propose to review the provisions of Section 16.92 again, as I have done so previously, however I would point out that subsection (d), which is relied on by PDVC to encourage the development of the Commercial Core for Regional tourism oriented facilities in order to enhance the economic vitality of this historic area, only encourages Regional tourism oriented facilities and I suggest to this Board that the only Regional tourism oriented facilities proposed by PDVC are the theatre and the hotel. Clearly a residential condominium tower of 17 storeys which has adverse impacts on the heritage district cannot be seen to be a Regional tourism oriented facility.

Traffic and Parking

- The City's position - that traffic is what it is.
- Parking – suggest that the parking standard is inappropriate based on expert parking evidence heard.

- Chris Middlebro's evidence was that a theatre with 400-415 seats would result in the demand of 120 parking spaces (1 space per 3.6 seats)
- Phil Grubb's evidence was that a theatre with 400-415 seats would result in a parking demand of 145 spaces (1 space for 2.8 seats).
- Kris Jacobson indicated that the parking demand for the theatre would be between a range of 125 to 145 spaces, therefore generally representing the parking requirement of 1 space per 3 seats.
- The evidence from Paul Chapman was that the parking standard of 1 space per 4 seats was one the Planning Department took from an existing standard for the use of Places of Assembly and it may or may not be applicable to the theatre.
- After hearing all experts, I would urge the Board that in the event of approval of this development that the proper parking requirement be varied - that for the theatre, the parking requirement be 1 space for every 3 seats, and not 1 for 4 seats.
- Further, I would strongly urge the Board that in the event of approval that all theatre parking spaces be located underground. In the event that the developer is not required to provide all theatre parking underground, that the parking should be all provided in one location and that no credit should be given for any surplus spaces that may exist in the underground parking to the theatre use. This is based on the

evidence of Mr. Grubb and Mr. Jacobson, who indicated that 25 or 15 surplus spaces would not be practical to be assigned to the theatre use.

THE PROPOSED BY-LAWS NOS. 2006-227 AND 2006-228 DO NOT EXEMPT THE PROPOSAL FROM THE FOLLOWING SECTIONS, THEREFORE THE PROPOSAL CONTINUES NOT TO BE IN KEEPING WITH THE POLICIES THAT WILL CONTINUE TO APPLY.

- Official Plan Amendment No. 31, By-law No. 2006-227 and By-law No. 2006-228 do not exempt the proposal from the following provisions therefore the proposal continues to be contrary to the existing policies. Those policies are:
 1. Design criteria found in Section 4.2.5.1, 4.2.5.2(f) and (g), Section 7.1.1, 7.9, 7.9.1(a), (b), (e) and (g), and 7.10.7(a).
 2. Section 7.10.7(a) of the Official Plan is the principle that heritage buildings, associated landscape features should be protected from any adverse effects of change. This is a major policy that continues to be reflected in Priority 6 found in the Port Dalhousie Conservation Heritage District Plan.
 3. OPA 31, By-law No. 2006-227, does not amend any of the objectives being Nos. 3, 4, 10, 14 and 15 of the Official Plan (Exhibit 5B, Tab 5G, Page 205). The gist of the objectives is basically to ensure that the character of the Commercial Core is maintained and protected and to ensure that it does not encroach into the adjacent residential area. Further, it seeks to maintain and

reinforce the atmosphere and character which has developed in the Commercial Core, to conserve individual buildings of historic and architectural value and to protect areas of historic architectural interest in Port Dalhousie. These objectives have not been complied with. Further, these objectives are generally found in the existing Port Dalhousie Heritage Conservation District Plan within its Conservation Intent and Priorities.

- The provisions referred to above are not being amended by By-law Nos. 2006-227 and 2006-228. However, the notwithstanding clauses we find in By-laws Nos. 2006-227 and 2006-228 deal with policies that are included in both the Official Plan and Secondary Plan which are also included in the Guidelines and as of this date there have been no amendments to the Port Dalhousie Heritage Conservation District Plan, therefore, it is my respectful submission that this proposal, if approved, will continue to be contrary to those provisions we find in the document entitled "Port Dalhousie Heritage Conservation Guidelines for Conservation and Change".
- OPA 31, By-law No. 2006-227 (Exhibit 5E, Tab 9) amends the Official Plan by using notwithstanding clauses to effectively exempt the proposal from the following sections:
- 4.2.1.2(b) to allow a 62 metre tower, this Section deals with the usual requirement of residential amenities.

- The Guidelines continue to protect and promote the low profile character that is found in Port Dalhousie and in the Commercial Core area.

- 7.10.7(c) and (d) – Subsection (c), additions in rear and no higher than existing. This requirement is also found in the Guidelines in Section 5.2.1 and 5.2.2 (Exhibit 5D, Tab 5, Page 183 and 188). Subsection (d), new construction to be compatible generally of the same height. This height requirements is also reflected in the Port Dalhousie Heritage Plan in Section 5.3 (Page 188 and 193) and Section 5.7 (Page 199), and in the character of the Commercial Core (as described at Page 158) and in the Conservation Intent and Priorities (Page 162, 163 and 164). All these policies continue to be provided in the guidelines in the Port Dalhousie Heritage Plan and therefore continue to be applicable to this proposal.

- 16.25 – Commercial Core Retail Service. The commercial uses allow some limited residential. The Guidelines continue to be applicable, and Section 3.2 (Exhibit 5D, Page 163) in the second priority continues to encourage the current vitality of the commercial areas, being that the predominant use is commercial. Further, the Guidelines at page 158 recognize the commercial nature of the Commercial Core as it has described this area as distinct from the residential area for its commercial uses.

- 16.30 conserves the character of the Commercial Core and requires any new or infill to be sympathetic to existing height, mass, colour and material. The Port Dalhousie

Heritage Plan also expresses in its Conservation Intent (Exhibit 5D, Page 162) and in the priorities (Page 163 and 164) and the description of the commercial character (page 158) the requirement for development to be sympathetic to the existing height. These provisions continue to be applicable and binding.

- 16.28.1 – Residential to be located above or behind Commercial. The Port Dalhousie Heritage Plan in the description of the Commercial Core does not include any reference to residences (Page 158), therefore implying that the area recognized as the Commercial Core should retain its predominant commercial land use to distinguish it from the Industrial or Residential Area, which are recognized as distinct areas, within the Port Dalhousie Heritage Conservation District.

- 16.26 – Uses in the Commercial Core are predominantly retail and commercial in nature. The Port Dalhousie Heritage Plan in the description of the character of the Commercial Core (Page 158) sees this area as a distinct commercial use area. Also under Section 3.2 of the Port Dalhousie Heritage Plan (Page 163), in the second priority, it seeks to encourage the current vitality of the commercial areas and promotes the contemporary commercial adaptive reuse. Therefore, by adding a residential component and a higher element than 3 storeys the Official Plan Amendment in By-law No. 2006-227 continues to be contrary to the policies found in the Heritage Plan for Port Dalhousie.

- 16.65.1 – PDVC proposes to exempt its proposal from this policy pursuant to Exhibit 289. This provision deals with the requirement of off-site parking to be permitted within 100 metres of the subject site. The Port Dalhousie Heritage Plan does not make specific reference to parking, however, because additional traffic will result from the insufficient nearby parking for the theatre there will be an adverse impact on the residents and the residential area of the Port Dalhousie Heritage District.

- Zoning By-law No. 2006-228 (Exhibit 5E, Tab 10, Page 573) amends existing Zoning By-law No. 88-72 (Exhibit 5E, Tab 6) by proposing to change certain provisions which directly affect the heritage character of Port Dalhousie in the following manner:
 1. Permitted uses – a theatre and a residential building. The theatre may be viewed as a potentially commercial venture, however, clearly the residential use is not one that would otherwise have been permitted in a commercial area, at least not at this size, as clearly the 80 unit condominium cannot be perceived as being "limited residential above a primarily commercial building".

The Port Dalhousie Heritage Plan does not envisage a residential component of this size within the Commercial Core.

2. The residential component of a maximum of 80 units up to 17 storeys to a maximum of 62 metres clearly is contrary to the height of the existing By-law No. 88-72 as amended, which is 11 metres, and continues to be contrary to the objectives of the Heritage Plan for Port Dalhousie, which describes the area as being a low profile, 2 to 3 storeys. (This description is found in Exhibit 5D, Page 158). Clearly the residential use with this density and height is contrary to the character of the Commercial Core which is seen as a low profile and predominantly commercial use area.
- The areas of non-compliance i.e. permitted uses, height limit, lot coverage, setbacks, amenity space and setback from the environmental protection area continue to be contrary to the Secondary Plan provisions. Section 16.31, provides "the present zoning by-law will be amended to ensure that the standards are compatible with the built form in the commercial core". The built form of the Commercial Core is low profile and is adequately described in the Port Dalhousie Heritage Plan. Since more than 40% of the Commercial Core is comprised by the area of the proposed development, I submit that to allow the amendment to By-law No. 88-72, as proposed by By-law No. 2006-228, will forever change the existing character of the Commercial Core of Port Dalhousie as studied and designated as a Heritage Conservation District. The character and history of the Port Dalhousie area were the primary reasons for its designation.

- It is the City's position, that not only has PDVC failed to clearly demonstrate that the proposed changes will have no adverse effect, but I submit to you that all heritage planners who have testified before this Board, with the exception of Michael McClelland, have demonstrated that the proposal will have adverse effects upon the heritage attributes of the District. The only positive contribution, PDVC was able to propose was the possibility of this development becoming a revitalization initiative in the economic sense, however, no evidence was advanced by PDVC's experts to show what positive contributions would be made to the character of the area.

CONDITIONS REQUESTED IN THE EVENT OF APPROVAL

- In the event this Board should approve the development proposal before it, it is my respectful request that the following conditions should be attached and included in any Order.

Parking

- That Zoning By-law No. 2006-228 be amended by revising the parking requirement for the theatre use, which is found under Section 3(ii)(e) from "one (1) parking space for every 4 seats" to "parking for the theatre shall be provided at a rate of one (1) parking space for every 3 seats of seating capacity. That the minimum parking requirement shall be provided on-site by way of underground parking," since it is not feasible to provide anywhere else within 100 metres of the site.

Easement for Public Access

- That Section 3(ii)(h) be amended to read, "All privately owned open space uses, namely the outdoor plaza and public observation terrace and the area around and over the jail shall be accessible to the public by easement".

Order to be withheld until the following occurs:

- That the final Board Order should be withheld:
 - until Council deals with whether or not it will stop up and close and sell Hogan's Alley to PDVC,
 - or alternatively whether the alternative plan will be proceeded with,
 - until an alternate parking proposal satisfactory to the City for theatre parking has been finalized,
 - until the site plan agreement is executed and registered,
 - until all public easements for Hogan's Court, public observation terraces, the area around and above the jail are secured,

- until all heritage easements are finalized and the necessary securities are provided. Heritage easements should include securities to cover potential damages for underpinning to subject property and adjacent properties as suggested by Spencer Higgins. The heritage easement must provide details of the mortar on the jail and all curing provisions and posting of necessary securities. Further, that the heritage easements pertaining to the Austin House Hotel include a provision for the signage for the Austin House Hotel to be provided on the actual said building and shall be required not to have black granite on the Austin House Hotel as suggested by Spencer Higgins;
- that a theatre trust be set up to ensure the operation of the theatre as suggested by Michael McClelland. Michael McClelland further suggested that all public benefits, such as the public access and improvement of public space, be secured as well as ensuring the quality of design and material and operation of the theatre and the hotel,
- that during construction full-time archeological monitoring shall be required and a notification to the Ministry of Culture in the event of any archeological resources being discovered pursuant to the Ministry of Culture's letter dated April 28, 2008, and filed as Exhibit 175,
- that any cost of improvement to the Lakeside Park parking lot for theatre parking, if not entirely provided underground, be fully paid by PDVC together with the cost

- of operating a water taxi if alternative parking is found on the east side of the harbour,
- that the final Order to be issued by the OMB be withheld until all required servicing agreements and encroachment agreements dealing with landscape features or circular driveways, awnings, balconies or any protrusions around the site be finalized,
 - that a condition be added stipulating that as a minimum, all buildings of the proposal shall be constructed in such a way as to achieve the highest possible LEED rating (as agreed to by Paul Chapman as being a good suggestion),
 - that the wording suggested with regard to ensuring the interior completion of hotel and theatre be completed prior to lifting of the additional holding be included pursuant to the suggested wording found in Exhibit 287 for revisions to By-law No. 2006-228.

CONCLUSION

- I would strongly urge the Board to find that, based on the evidence called, the proposal is clearly contrary to the Objectives found in the Port Dalhousie Heritage Conservation District Plan. Therefore, all by-laws before this Board and those required for the implementation of a site plan and heritage permit under the Ontario

Heritage Act are also contrary to the Heritage Conservation District Plan and therefore pursuant to Section 41.2(1)(b) those by-laws should not have been passed. It is my respectful submission that this Board is required to consider Section 41.2(1)(b) of the Ontario Heritage Act and give it the most weight.

- The main test for purposes of evaluating this proposal as to whether or not it represents good planning within a heritage designated district and is in the public interest are:

1. Under the Ontario Heritage Act, Section 41.2(1)(b) – Are the proposed by-laws before this Board contrary to the Objectives of the Heritage plan?
2. The test under the Port Dalhousie Heritage Conservation District Plan found in the priorities, are that physical change and development are to be managed in a way that component buildings, streets, beach and open spaces are either protected or enhanced; and that new development and construction requires that PDVC should clearly have demonstrated that the development will have no adverse effects upon the heritage attributes of the district and will positively contribute to the character of the area. It is the City's position that clearly that onus has not been met and that the proposal is contrary to the Objectives of the Port Dalhousie Heritage Plan.

- The PDVC proposal is not good planning based on heritage documents, nor is it good planning based on planning document policies. Not only is this proposal not consistent with the Provincial Policy Statement, it also conflicts with the PPS policies. It is not in keeping with provisions of the Regional Policy Plan or provisions of the Official Plan or the Port Dalhousie Neighbourhood Secondary Plan, nor is it in keeping with the character of the existing built form expressed in By-law No. 88-72.

- The requirement to maintain the existing character of the Port Dalhousie Heritage District is repeated and provided in all the planning policies considered.

- I would ask the Board to consider whether the highest building in all of the City of St. Catharines should be located in the Port Dalhousie Historical Heritage Conservation Area, within the low rise area that this Commercial Core is characterized as. The Port Dalhousie Vitalization Corporation's development comprises slightly less than half of the existing Commercial Core area within the Heritage District and it is my respectful submission that to allow this proposal will forever change the character of Port Dalhousie. Clearly this is not good planning. I would further submit that, even if this proposal was not located within a historical heritage conservation designated

district that it would not represent good planning because of the lack of buffering, consideration of gradation and its density and because its height are clearly not compatible with the adjacent residential area.

In support of the City's position, I would refer the Board to the recent OMB decision – issued August 14/08 – by D. R. Granger and C. Hefferon (File PL070655) in the matter of Queenscorp (Lakeshore) Inc. v. City of Mississauga.

Notwithstanding the subject lands of that matter, were not located within a Heritage Conservation District – the revised proposal was for a 247-unit apartment building with a 9 storey (with a 6 and 3 storey setback) and a 17 storey tower which was proposed to be located outside an urban growth centre.

In that case, the Board dealt with issues similar to those dealt with in considering the PDVC proposal. - Did the proposal have full regard for the Growth Plan? - Does it properly conform to the intent of the Growth Plan given the context of the subject lands? - Does the subject proposal have appropriate regard to matters of provincial interest of s.2 of the Planning Act, and is the proposal consistent with matters of provincial interest set forth in the PPS pursuant to s.3 of the Planning Act? - Does the proposal comply with and maintain the intent of all the relevant and applicable policies of the Official Plans? - Does the proposal represent good land use planning and is it in the public interest?

The policies considered in the Queenscorp case are similar to those dealt with in the PDVC hearing. In the Queenscorp decision the Board, at p. 3, states:

"The Board has considered all the evidence presented, and having regard for matters of Provincial interest as required by Section 2 of the Planning Act as well as the decision of City Council as required by Section 2.1 of the Planning Act. The Board finds the Proposal and resulting proposed amendments to the OP and By-law are not consistent with the Provincial Policy Statement (PPS) as required by subsection 3(5) of the Planning Act and do not conform to the Growth Plan for the Greater Golden Horseshoe (GP) as required by subsection 3(5) of the Planning Act. The Proposal does not conform to the OP, especially in addressing policy 5.3.2. which sets out the criteria to be met with respect to site specific OP amendments. The Proposal by the Applicant far exceeds the existing height and density permissions recently reviewed through the City's new OP approval and GP conformity processes as implemented through City OP Amendment No. 58. For all of these reasons, the Board finds that the Proposal does not represent good planning, and is not in the overall public interest of the community at this time."

Therefore effectively finding that tall buildings should be located near urban growth centres, areas that have been set aside by planners as reflected in Official Planning documents – usually along major arterial roads and city centres and transit hubs.

That case was decided strictly on planning matters and still the Board saw the

inappropriateness of the tall structures. Therefore, it is my submission that even without the heritage context, the Port Place development should not be approved. However, in light of the subject lands being located within a Heritage Conservation District– then clearly it should NOT be allowed to proceed.

- The PDVC proposal:
 - is not consistent with the Provincial Policy Statement (s.2.6) as it is required to be pursuant to s.3(5) of the Planning Act,
 - is contrary to the Objectives of the Port Dalhousie Heritage Conservation District Plan, pursuant to s.41.2(1) OHA,
 - does not conform to the City's Official Plan and Port Dalhousie Neighbourhood Plan (Secondary Plan),and for these reasons I urge the Board to find that the proposal does not represent good planning and is not in the overall public interest of the community.

- Therefore, based on all the evidence heard by this Board I would urge the Board to allow all appeals against Official Plan Amendment No. 31, being By-law No. 2006-227 and By-law No. 2006-228, and request that the Board repeal those by-laws. Further I request that the appeals by PDVC of the site plan matter and the heritage permit applications be refused and that the City of St. Catharines Council decisions be upheld with regard to the Site Plan and Heritage Permit matter.