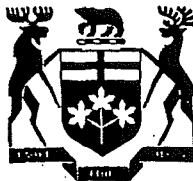


ISSUE DATE:

April 1, 2004

DECISION/ORDER NO:

0684



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

OMB TRACKING # 04-340-10 OPA 187

OMB TRACKING # - 04-341-10 Zoning Amendment

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APR 06 2004

Ron Thachuk has appealed to the Ontario Municipal Board under section 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, against Zoning By-law 03-231 of the City of Hamilton, O.M.B. File No. R030223

Ron Thachuk has appealed to the Ontario Municipal Board under section 17(24) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from a decision of the City of Hamilton to approve Proposed Amendment No. 187 to the Official Plan for the City of Hamilton to re-designate land at 398 King Street West from "H" District (Community Shopping and Commercial) to a site specific "Major Institutional" designation to permit a wellness centre with limited commercial uses in a mixed use commercial-residential building
O.M.B. File No. O030351

APPEARANCES:

Parties

City of Hamilton

Good Shepherd Non-profit Homes Inc.

Strathcona Community

M. Volterman

Counsel*/Agent

A. Zuidema*

P. Pickfield*

R. Thachuk

OFFICE OF THE CITY CLERK

APR 05 2004

REC. BY DATE
REF'D TO DATE
REF'D TO DATE
REF'D TO DATE

ACTION: _____

DECISION DELIVERED BY N. M. KATARY AND ORDER OF THE BOARD

There are two principal issues. First, whether or not a proposed use notwithstanding its lesser intensity than the potential use that is permitted as of right is appropriate for the site. Second, whether or not amending the Zoning By-law jeopardizes both the intent and the integrity of the By-law. Several sub-issues and parallel issues stem from the principal ones.

In the light of the length of the decision, the sequence of reasoning is sketched here to facilitate the journey, as a guide to the destination. A capsule description of the property is followed by a delineation of the proposal and key elements of the Amendments that are being requested. A number of preliminary matters are outlined to give a glimpse of the undercurrents. The witnesses are identified to indicate the people who have taken a keen interest in the matter. The reasoning in this decision

encompasses five major themes. First, issues such as the inability to reach a mutually satisfactory agreement, the need for the Women's Emergency Shelter, the park use expectation, and the limitations of the planning process are analysed. Second, one of the principal issues, namely, the compatibility of the proposal with existing development – both built and natural is analysed. Under this rubric seven sub-issues are examined. Third, the other principal issue, namely, whether or not amending the Zoning By-law injures both the intent and the integrity of the By-law is analysed. Fourth, the policy framework for the proposal is analysed. Fifth, the concept of sustainable development as it applies to the proposal is analysed. Finally, the disposition is delineated.

Matters Before The Board

The subject parcel of land is located on the north side of King Street West, east of Pearl Street North, and west of Ray Street North in the Strathcona Neighbourhood and is municipally known as 398 King Street West. The parcel has a frontage of approximately 103 m. along King Street West, a depth of approximately 138 m. on Ray Street North, and a depth of approximately 117 m. on Pearl Street North, with an area of approximately 1.34 ha. Currently it is a vacant parcel of land owned by the Separate School Board and the applicant, Good Shepherd Non-profit Homes Inc., has a conditional agreement on sale and purchase.

The proposal (Exhibit 7, shown on page 48) consists of redeveloping the land in phases to contain four buildings when the site is fully developed.

The first phase consists of a three-storey Women's Emergency Shelter fronting onto Pearl Street North to accommodate sixty (60) beds for two programs in one building with some shared spaces.

Although the phasing on the other three buildings is unknown at present the composition is known. Two mixed use buildings front onto King Street West and contain two storeys of commercial uses and residential apartment dwellings with the entire west building being eight storeys high while the east building is eight storeys high in the front half in Block "2" with the rear half in Block "4" being four storeys high. The west building will contain seventy-two (72) dwellings and the east building will contain sixty (60) dwellings for a total of one hundred and thirty-two (132) apartments in the two buildings facing King Street West. The two mixed use buildings have a two-storey wrap

around podium on frontages facing the streets, namely, King Street West in the south, Pearl Street North in the west, and Ray Street North in the east in addition to the sides facing the parkette between the two buildings.

The fourth building fronting onto Ray Street North is a three-storey apartment building containing twenty-four (24) apartments. In all when the site is fully developed it will contain one hundred and fifty-six (156) apartments and will be offered at market rents.

In order to execute the entire proposal the applicant needs site specific amendments to the Official Plan and the Zoning By-law of the City. The Council of the City approved the two amendments. Mr. Thachuk, who owns a property on Pearl Street North, across the street from the subject parcel and rents out the dwellings and lives approximately "one and a half miles from here to the west" has appealed the decision of the Council on behalf of residents in the relevant neighbourhood, namely, Strathcona Community.

The Official Plan Amendment is to create a Special Policy Area to permit limited commercial uses on the first and second storeys of the two mixed use buildings that front onto King Street West in the south part of the subject parcel.

The Zoning By-law Amendment is not only site specific but also "project specific" (in the memorable words of the planner for the applicant) to ensure that the proposal is executed as proposed in the site plan. Evidence was adduced to demonstrate how even minor changes to the proposed Amendment would require the invocation of the planning process. Currently, the subject parcel has two zones. The southern third (Blocks "1" and "2") fronting onto King is zoned "H" that permits Community Shopping and Commercial, etc. with a building height of eight storeys. The northern two-thirds (Blocks "3", "4", "5", and "6") is zoned "D" (Urban Protected Residential) that permits One and Two Family Dwellings, etc. with a building height of three storeys. The present By-law requires a minimum radial separation distance of 300 m. between residential care facilities.

Being project specific, the By-law amendment is a complicated document with a number of elements set forth in great detail in Attachment 1. The subject parcel is divided into six (6) blocks and the main elements of the Amendment are as follows:

Modifications to the established "H" (Community and Commercial, etc.) District is sought in Blocks "1" and "2". A change in zoning from "D" (Urban Protected Residential – One and Two Family, etc.) District to "H" (Community Shopping and Commercial, etc.) District is sought in Blocks "3" and "4". A change in zoning from "D" (Urban Protected Residential – One and Two Family, etc.) District to "DE" (Low Density Multiple Dwellings) District is sought in Blocks "5" and "6". The proposed Amendment requires a minimum radial separation distance of 120 m. between residential care facilities.

The Master Site Plan exhibit 7, p. 48 under the *Planning Act* is not before the Board. The Master Site Plan however, constituted an integral part of evidence by all the witnesses. The Board, therefore, shall use the expression site plan throughout the decision for ease of understanding.

The Backdrop

At the commencement of the hearing, the appellant, Mr. Thachuk, stated that he was representing the views of Strathcona Community, a group of people in the relevant neighbourhood and that the group was not an incorporated body.

At the commencement of the hearing, a tenant who lives on a property that abuts the northeast corner of the subject parcel of land, Mr. Volterman, sought party status. With the consent of the other three parties, he was granted party status.

At the commencement of the hearing, the appellant, the counsel for the City and the counsel for the applicant stated that they would like to see the hearing completed in an expeditious manner. The two legal counsel also pointed out that there was a good deal of urgency in not only completing the hearing but also in receiving a decision quickly. The counsel also urged the Board to render an oral decision following the hearing with reasoning to follow.

The Board made it clear to the legal counsel that they ought not to presume any outcome merely because one component of the project, namely, the Emergency Shelter for Women, had a funding deadline. Both counsel stated that they did not necessarily expect an outcome favourable to them but only that a decision be rendered.

The Board stated that it had read the numerous documents in the three volumes of the joint document book (Exhibits 2 A, B, and C) filed by the City and the applicant and that given the complexity of the matter the Board would not render an oral decision, but would consider an expeditious decision. The Board took time to clarify that the decision would issue when it would and that the counsel ought not expect a decision by any particular date.

After opening statements by the parties, it became clear that the hearing could not be completed in the allotted time of four days. The parties stated that they would be able and willing to take extra time each day and come back for extra days. In all, the hearing took six very long weekdays and one short Saturday for arguments. At the end of the hearing, the Board thanked the four parties and the fair number of people present throughout the hearing for their cooperation in completing the hearing in an expeditious manner and would like to do the same now.

Notwithstanding the extended hours of hearing and the expeditious manner in which the witnesses gave their testimony, the Board asked every witness if she or he had any more to add in order to make certain that no witness felt compelled to shorten her or his evidence in the light of the urgency and importance of the matter. All witnesses without exception stated that they had stated everything that they wanted to state. During the evening hearing there was a good deal of repetition but the Board made sure that everyone who wanted to say something had an opportunity to do so in spite of the lateness of the hour.

At the end of opening statements, the parties requested the Board to make a site visit. At the end of the hearing on Saturday, February 7, 2004, the Board made a site visit to get an experience of place. As the Board explained at the hearing, the decision is based entirely upon the evidence that was presented at the hearing because a site visit, no matter how thorough, is no substitute for the evidence by the parties who are highly knowledgeable about the issues by virtue of their intimate association with them over a period of years.

On the morning of the second day of the hearing, after substantial cross-examination of the planner for the applicant by the appellant, the Board asked the four parties if they would like to explore the feasibility of coming to a mutually satisfactory

agreement on the dispute among themselves. With the consent of the parties, the Board took a recess. The parties called the Board back within fifteen minutes and stated that they could not agree even upon a framework for agreement (a matter to which we shall return later) and that it was best to resume the hearing immediately. The Board resumed the hearing promptly.

On the penultimate day of the hearing (February 6, 2004), the Board met with only the four parties (the two legal counsel, the appellant, and Mr. Volterman) to learn about the set of circumstances that had led to "the less than perfect" (in the words of the counsel with the City) scheduling of the hearing, the time allotted for the hearing, and the repeated requests by the two legal counsel for a decision on or before February 15, 2004. The Board learned a good deal about the situation. The Board thanks the parties for clarifying matters.

On the morning of February 10, 2004, the counsel for the City informed the Board that the funding deadline of February 15, 2004 was no more in force and that the Board could issue the decision at a time when it deemed appropriate.

During the hearing, the objectors presented the Board with some letters in opposition to the proposal. The document book by the Strathcona Community (Exhibit 11, Tabs 1 and 11) contains a number of documents filed by people objecting to the proposal. Also, the joint document book (Exhibit 2 C) contains a large number of letters by interested people. The Board has read all the documents, for and against. As stated by the Board at the hearing, the Board gives much greater weight to the evidence by the witnesses who took the time out to appear at the hearing in person. Also, as the Board clarified at the hearing, it is neither the number nor the sincerity with which an opinion is held that matters as much as relevant and reliable evidence. What matters most to a quasi-judicial body is the test set out by the great Russian writer Boris Pasternak, namely, "the irresistible power of the unarmed truth".

The following people gave evidence in opposition to the proposed amendments during the long day/evening hearing: (1) Mr. Gary Porter, a land use planner whose entire professional career is in Nova Scotia; (2) Mr. Douglas Dore, a real estate broker and a resident of the neighbourhood; (3) Mr. Ron Thachuk, the appellant who owns a property on Pearl Street North, across the street from the subject parcel and rents out

the dwellings and lives approximately "one and a half miles from here to the west"; and (4) Mr. Mark Volterman, who rents the top floor dwelling in the house that abuts the subject site at the northeast corner.

The following people gave evidence in support of the proposed amendments during the long day/evening hearing: (1) Brother Richard MacPhee, the Executive Director, Good Shepherd Centre; (2) Mr. Edward J. Fothergill, a land use planner consultant; (3) Mr. Heinz O. Schweinbenz, a registered professional engineer who specializes in transportation planning; (4) Mr. William J. E. Curran, an architect; (5) Mr. Stephen Robichaud, Manager, Growth Related Integrated Development Strategy with the City and the principal author of the planning staff report (Exhibit 2B, Tab 32) that formed one of the bases for the approval of the proposal by the City Council; and (6) Ms Lee Ann Coveyduck, a General Manager with the City who is a professional land use planner and the supervisor of Mr. Robichaud at the time of the staff report preparation.

The following people gave evidence in opposition to the proposed amendments at the special evening hearing: (1) Mr. Don Fairfax, the Chairperson of the Zion United Church located across the street from the site on Pearl Street; (2) Mr. Ian Warren, a graphic artist by occupation and a resident of the neighbourhood; (3) Ms Virginia Cameron, who resides across the street from the site on Ray Street; (4) Mr. Mark Strutt, an artist painter and a resident of the neighbourhood; (5) Mr. David Beland, on behalf of the Hamilton Masonic Centre whose Grand Lodge and the Scottish Rite buildings are located on the south side of King Street southeast of the subject site; (6) Mr. Lauchlan Harrison, Executive Member, Stinson Community Association; (7) Mr. James Daniels, a resident of the neighbourhood; (8) Ms Ellaline Davies, a resident of the neighbourhood; (9) Mr. David Ross, a resident of Stoney Creek, a municipality adjacent to and east of the city of Hamilton; (10) Ms Vileta Hofer and (11) Gian Hofer, both reside across the street from the site on Pearl Street; (12) Ms Christine Corsini, a resident of the neighbourhood; (13) Ms Cathy Gazzola, President, Durand Neighbourhood Association Inc; (14) Mr. Doug Feaver, a resident of the neighbourhood; and (15) Reverend Ronald Burrige, a resident of James Street North in the heart of downtown Hamilton.

The following people gave evidence in support of the proposed amendments at the special evening hearing: (1) Ms Shelly McCarthy, a resident of the neighbourhood who has worked in the social services field; (2) Ms Marion Emo, the Executive Director

of Hamilton District Health Council; (3) Ms Katherine Kalinowski, the Director of Women's Services, Good Shepherd Centres; and (4) Ms Joanne Santucci, the Executive Director of Hamilton Food Share.

Ms Nina Chappell, a heritage conservation consultant, called by the appellant made it clear that she had no position for or against the proposal. She gave evidence on the historic character of the built form in and around the subject site. Mr. Volterman, a party opposed to the proposal, called Mr. William J. Nesbitt, the curator of the National Historic Site at Dundurn Castle. Mr. Nesbitt gave evidence on the European military history associated with the subject site and took no position on the proposal. Mr. David

The remaining question is whether or not the proposal has any significant adverse impacts upon the heritage value of the past as represented in the present buildings surrounding the subject site. The focus below is on the impact on heritage value and not upon the built form of existing development, a matter that will be analysed later.

The heritage conservation consultant called by the appellant, Ms Chappell, commenced her testimony by stating that she was not involved in the project before the Board and that she had "no comments for or against the project." Using a report prepared by her (Exhibit 11, Tab 2) on the heritage character of an area called Ray-Pearl North District that includes the subject site, she described the history, the built form, and the open space characteristics of the area. She concluded her evidence-in-chief with three recommendations. First, "the late Victorian and early 20th century architectural heritage ... is coherent, authentic and historic in character; it is an irreplaceable resource and worthy of a systematic heritage assessment." Second, "... new development proposals be designed in a manner that is sensitive to, and supportive of, both the district's heritage values and its existing low-rise, human-scaled, residential character." Third, "... the blanket "H" zoning now in place for the King West corridor [that permits 8-storey buildings] be re-examined."

During cross-examination by Mr. Volterman, she stated, "The eight-storey building on George Street [one block south of the subject site] does not fit the style of buildings in the district I studied." During cross-examination by the counsel for the applicant, she stated, "The "H" zone on King West must be revisited because there is so much vacant land downtown. I understand that that is a separate matter. I agree with you that it is better to place high-density development on the main artery. This proposal is on a vacant site and there is no demolition of any existing stock and that is a good thing here."

neighbourhood. His description of the treatment of facades of the four buildings was especially instructive. Pointing to the photographs of dwellings that abut the site on Napier Street (Exhibit 25, p. 25, Nos. 49 & 50), he commented on how even the old buildings were adapting to the present "tastes" and that no built form, however old and venerated, remained the same unless there was a wilful commitment to preserving it. He did not see any compelling reasons to mirror the existing buildings in the new buildings, regardless of their form or scale.

An examination of the proposed campus-like development on a vacant site surrounded by older buildings indicates the following. The development proposed does not result in the removal of any existing buildings or structures. The sketch design/rendering of proposed four buildings (Exhibit 9) that attempt to mimic buildings across the street and adjacent to them show a high degree of sensitivity to the kind of exterior walls of existing residential dwellings that surround the site. The trees preserved in conjunction with the new trees added and the vegetative buffers all around the site set the proposed development apart. The proposed four buildings will be different of course. It is difficult to see, however, how the proposal will have any significant adverse impact upon the heritage character of existing built form surrounding the site. In assessing impacts the Board has to be conscious that there is absolutely no assurance whatsoever that a developer wanting to exercise her or his right assured by the current By-law will be any more sensitive to the heritage character of the relevant neighbourhood.

The past is not an immutable scripture. It is a continuing dialogue with the present in order to make sense out of it for the present. If the dialogue is stunted by a collage of myths, legends, and inflexible meanings, there is no hope ever of accommodating the past to the present and laying the foundations for the future.

Based upon an analysis of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon the heritage character of past and present development.

Built Form

Using a summary statement, excerpts from the Zoning By-law, and the design principles used by the architect to create the built form for the campus setting on the site

(Exhibit 11, Tab 5), the appellant stated that the proposal represented "overdensification." It was his opinion that the proposed 156 apartments together with the 60 bed Emergency Women's Shelter amounted to a great increase over what is permitted under the current zoning. The appellant was of the view that the proposed eight-storey buildings on King, the bulk of the three-storey Emergency Women's Shelter on Pearl, and the bulk of the three-storey apartment building on Ray did not fit into a neighbourhood characterized by one and a half to two and a half storey houses. His main point was that the proposed bulk, height, and configuration of buildings "will stick out like a sore thumb ... and are definitely out of character with the neighbourhood."

Mr. Daniels, a resident in the vicinity at 55 Pearl, was of the opinion that "the Good Shepherd proposal is too large and too ambitious to be assimilated into our community and will undermine the quality of life" (Exhibit 20). Ms Cameron, a resident in the vicinity at 28 Ray, was of the opinion that "the project height and design are not in keeping with the existing streetscape. The neighbourhood is a charming mixture of Victorian and pre-Confederation styles" (Exhibit 16). Mr. Warren, a resident in the Strathcona neighbourhood, was of the view that "the shelter is a worthy undertaking, however, as it stands this is a case of over-development and not development." (Exhibit 15). Mr. Fairfax of the Zion United Church stated, "... this proposed location is not suitable for the size of the proposed development." (Exhibit 13).

The professional planner from Nova Scotia called by the appellant, Mr. Porter, stated his opinions on three matters, namely, compatibility of the proposal with existing development, the reduction in separation distance proposed between residential care facilities, and the notice given to residents of the area as to public meetings on the proposed changes to the Official Plan and the Zoning by-law. His three-part evidence will be examined under appropriate issues.

Relying upon Sections A.2.6.5, A.2.1.1, A.2.1.13, A.2.1.14, and C.7.2 of the Official Plan of the City, Mr. Porter stated that the proposal did not fit well into the existing character of the built form. It was his opinion that the buildings in the vicinity to the west, north, and east of the site were all old residential dwellings that were two to three storeys in height and as such "the proposal will look different notwithstanding some architectural features that try to integrate the proposed buildings with the existing buildings."

The planner for the appellant was cross-examined at length by the counsel for Good Shepherd. In the light of the fact that the witness was giving evidence for the first time at a quasi-judicial body, the Board read back some of his opinions to him to ensure that it had taken down the notes accurately. The planner was forthright and professional and the main points made by him are reproduced under the appropriate issues. The following was his evidence on compatibility.

I reviewed the Provincial Policy Statement and the Regional Official Plan only as they are in the Staff Report (Exhibit 2B, Tab 32). I had a copy of the City Official Plan but did not read it carefully from cover to cover. I agree with you that you have to look at all relevant policies and planning is a balancing act. It is fair to say that my focus was on the Staff Report.

It is important to look at more than immediate vicinity and neighbourhood in coming to a conclusion on compatibility. You have to look at the core [of the city] and the functions of the larger community. What I am suggesting is that I would be putting different weight on the policies that I relied upon relating to compatibility because compatibility is very important. You cannot plunk a twenty storeys [high] apartment building next to a bungalow. If you do it, do it sensitively. Acknowledge that the "H" Zone on King Street permits eight storeys high buildings. I do agree that some thought has gone into making the proposal fit the vicinity here. As per policy A.2.1.14, the proposal creates higher density on King and lower density in the rear and the effort is good. Also, saving trees in the middle of the site is good.

The architect and the planners who appeared in support of the proposal disagreed fundamentally with the above people in opposition.

Using a number of exhibits, the architect for the applicant during his comprehensive and detailed evidence explained how the site plan and the built form made the proposal compatible with existing development. First, using the site plan (Exhibit 7), he described how the four buildings formed an integrated campus-like whole and how the pedestrian and vehicular circulation functioned both within the site and between the site and the immediate vicinity. Second, using approximately 85 photographs (Exhibit 25), he described the existing built form surrounding the vicinity and pointing to "worker housing" buildings individually explained why the buildings were not architecturally significant. Third, using a massing study, an aerial rendering, and a street level rendering (Exhibits 8, 9, and 10), the architect outlined the intricate design details of the proposed four buildings. Fourth, using a document prepared by him (Exhibit 2B, Tab 12), in conjunction with the previous five Exhibits, he elaborated on

how the proposal is a response to the concerns expressed by the neighbours, how the design principles were derived from such concerns, and the fine details of design improvements incorporated as a result of the interaction between the concerns of the neighbours and the design principles. Fifth, using a set of calculations and sketches (Exhibits 26 A and B), he stated how the proposal was a significantly less intensive development than what might be developed as of right under the existing By-law provisions. Sixth, using a set of large scale shadow diagrams (Exhibits 27 A through D), he described the potential impact of shadows within and in the immediate vicinity of the site and stated that the shadows cast by the proposed buildings would be either the same as or less than the development if the site was developed under the existing By-law requirements. Seventh, he briefly addressed the concerns expressed by the witnesses at the hearing and stated how they have been dealt with in the proposal before the Board. He concluded his evidence-in-chief by explaining how the proposal was compatible with the existing built form.

The architect was cross-examined rigorously and at length by both the appellant and Mr. Volterman. His opinions were not shaken.

Using the staff report prepared by him (Exhibit 2B, Tab 32), the planner with the City, Mr. Robichaud, explained in detail how the proposal was compatible with existing built form. He expressed a preference for a maximum of four-storey height for the two buildings fronting onto King, a matter that will be analysed shortly. In all other regards, he was of the opinion that the proposal fitted in well with existing development.

Using a summary document titled "Planning Report" prepared by him (Exhibit 2A, first document) in conjunction with a number of other documents, maps, and photographs, the planner for the applicant explained in detail how the proposal was compatible with existing built form.

The two planners were cross-examined rigorously and at length by both the appellant and Mr. Volterman. Their opinions were not shaken.

An analysis of the evidence on the built form indicates the following.

The existing built form in the immediate vicinity of the subject site is as follows. The uncontradicted evidence by the appellant and several other objectors is that the

buildings on King are one to three-storeys high whereas the buildings on Pearl and Ray are one and a half to two and a half storeys high. An examination of the photographs submitted by various witnesses indicates that the buildings are modest and old, situated on lots in the range of 9 to 12 m with many of the lots missing on-site parking. Also several witnesses were forthright in stating that the residential buildings provided housing for middle-income households, an opinion confirmed by Mr. Dore, a resident of the area and a real estate broker. The opinion of the architect that the buildings were not architecturally significant was not contradicted. Ms Chappel, however, saw heritage value in them "worthy of a systematic heritage assessment." To date, no systematic heritage assessment has been undertaken. All witnesses agreed that the immediate vicinity and the relevant neighbourhood had an established character.

The question, therefore, is how is the existing built form affected by the proposal?

As pointed out at the very beginning of the decision, the site is bound on three sides (west, south, and east) by streets and on the north by existing houses whose rear yards and side yards abut the site. In the words of the planner for the applicant, "it is a self-contained site that lends itself to a campus-like development."

The salient built form features of the proposal as stated in the design principles and reflected in the actual design of the proposal are helpful in assessing the impact of the proposed built form upon the existing built form.

The uncontradicted evidence by the architect and the planner for the applicant is that the proposal is a significantly less intense form of development than what could be developed as of right. The planner with the City stated that the overall residential density is approximately 130 units per hectare (53 units per acre), a density consistent with medium density apartment designation. It was his opinion that in the light of the site fronting onto an arterial road with two of the mixed-use buildings being located on the arterial, the density was appropriate for the site. In examining "overdensification," to employ the terminology of the appellant, it is not sufficient to look at only the residential density. It is both necessary and sufficient to look at the intensity of development of all uses on the site as the planners and the architect did in arriving at their conclusion about the density of development.

The two three-storey high buildings, namely, the Women's Emergency Shelter fronting onto Pearl and the apartment building fronting onto Ray will have approximately the same height as the existing buildings adjacent to and across the street from them.

The existing By-law permits eight-storey buildings fronting onto King Street within the "H" District. The proposed two eight-storey buildings will extend approximately 10 m north of the existing limit of the "H" District. None of the witnesses opposed to the proposal acknowledged the existing right by stating in any form that they might either consider or accept the two proposed eight-storey buildings as long as they did not go beyond the limits of the "H" District. They just did not want any eight-storey buildings. Even a witness who was willing to compromise, Mr. Warren, stated, "A ceiling of three storeys and a reduction in the overall scope to fit within the character and concerns of the immediate neighbourhood would be a sensible and fair compromise" (Exhibit 15, p.2).

The planner with the City also preferred a maximum height of four storeys for the buildings on King because he was of the view that a four-storey height was more compatible with existing height of adjacent buildings than eight-storey high buildings. In taking this position, the planner failed to acknowledge the existing right to an eight-storey building on King. Nor did the planner recommend that the eight-storey height be limited to the land within the "H" District. During his evidence-in-chief, however, he stated, "the two-storey wrap around podium on the two buildings on King has the effect of reducing the overall height and therefore can reasonably co-exist with the neighbourhood."

The Board is persuaded by the architect's explanation that the following design features reflected in the proposal make the proposal fit well into the existing built form.

The site is designed as a campus of buildings in a park like setting connected by tree-lined walkways with gathering places. The plan also provides for a community parkette around the largest central cluster of trees and encourages public access and use via public walkways. The design employs projecting two-storey podiums of a larger footprint on the eight-storey buildings to reduce the perceived visual mass of the buildings and to avoid having taller buildings come straight down to the ground. Also, the eight-storey buildings employ a material/colour change at podium, use projecting

piers/fins/balconies to break down the scale of the buildings and complement the fit with existing adjacent buildings.

The site design minimizes surface parking and driveways all the while utilizing underground parking to maximize greenspace. The plan calls for a consideration of gates in fences from abutting houses to the north. The configuration of buildings has eight-storey buildings which front on King, that is, at the edge of the community with the three-storey buildings in the rear acting as a transition in scale into the community, thereby making the fit better. The proposal includes a seniors' wellness centre and other program space as significant community amenities.

The building design reinforces residential character through architectural features such as bays, porches, sloping roofs, trim, entrance canopies, trellises and/or canopies and/or sunshades. The design also incorporates building massing, materials, detailing, elements, roof profiles, window size and pattern, porches, etc. from the existing neighbourhood to ensure a sympathetic fit with the community.

The plan retains a maximum number of existing trees, designs around them, and adds a significant number of new trees and landscaping that function as a vegetative buffer between the existing buildings and the proposed buildings.

Based upon an analysis of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon the existing built form.

Traffic and Parking

Using a number of documents (Exhibit 11, Tab 6) including a summary statement of six pages, three pages of elegant sketches showing streetscapes, a set of photographs, and other documents in the public domain, the appellant expressed the opinion that the increased traffic generated by the proposal and the proposed reduction in the parking standard for the proposal would have adverse impacts upon existing development.

Mr. Fairfax, the Chair of the Official Board of the Zion United Church, in a prepared statement (Exhibit 13) said, "The major church congregations (Zion United, Erskine Presbyterian, and Korean United) have been using the land in question [subject

site] for parking for many years and paying for snow removal, etc. If this parking facility is no longer available to the churches and to the public, it will seriously impact on the on-street parking and traffic problems in the area."

Mr. Beland from the Hamilton Masonic Centre gave oral evidence at the hearing. At the request of the Board he filed a written statement (Exhibit 31) later during the hearing. The Centre owns almost the entire block of land bounded by King Street West in the north, Queen Street South in the east, George Street in the south, and Ray Street South in the west. To state the self-evident, the complex of buildings that forms the Masonic Centre is within convenient walking distance of the subject site to the southeast. He stated, "... the Masonic Centre, like the local churches, has utilised the Loretto Academy property [subject site] for overflow parking for many years. I stated that it was understood the lot could be developed and that parking may no longer be available." After recounting the parking problems in the vicinity of the Masonic Centre, he went on to recommend that the proposal should be made to comply with the existing parking standard without any reductions. He also recommended that there be surface parking on site, that there should be no reduction in on-street parking to accommodate the proposal, except for the purposes of driveways, and that the intensity of the proposed development be reduced.

The transportation engineer called by the applicant and the traffic engineers with the City disagreed fundamentally with the opinions expressed by the above three witnesses. Using a traffic and transportation study done by him (Exhibit 2C, Tab 41) and updated for the hearing, the traffic and parking specialist explained in considerable detail the additional volume of traffic generated by the proposal and the impact of the same on existing traffic conditions, and the rationale for reducing the parking standard for the proposal. The traffic engineers with the City have examined the results of the study by the transportation engineer for the applicant and find his conclusions to be valid (Exhibit 2B, Tab 32, pp. 23 - 26).

The transportation engineer, Mr. Schweinbenz, was cross-examined rigorously and at length by both the appellant and Mr. Volterman. His opinions were not shaken. Also, no other duly qualified and experienced professional witness contradicted his opinions.

An analysis of the pertinent evidence indicates the following.

Pearl Street and Ray Street abutting the site in the west and east respectively have a paved width of approximately 7.0 m and 6.1 m respectively where there are driveways proposed into the site. The paved widths are less than the current standard of 8.5 m. Both of these local streets contain on-street parking on one side of the street, and these parking stalls are occupied over a significant period of time in a day. The traffic engineer pointed out that this existing situation does cause some operational problems both for regular vehicular traffic and for emergency vehicles under some extreme situations. He stated, however, that there were "no safety concerns anywhere in the vicinity of the site."

During cross-examination, the traffic engineer pointed out that the only meaningful way to resolve this existing situation in the long-term is either by widening the pavement width or by removing parking stalls on both streets. He added, however, that neither of the possible options to improve traffic flow was realistic in the short-term and that a more feasible option was to remove some stalls near the driveway entrance on Ray Street and provide dedicated parking stalls for the stalls removed from Ray in the surface parking lot between the Women's Emergency Shelter and the apartment building at the northeast corner of the site. The planner with the City who is a General Manager agreed with this suggestion and the proposed By-law was amended to reflect this recommendation that emerged during the hearing.

On the matter of traffic generated by the proposal, the traffic engineer was categorical. He stated, "Having examined trip generation with five potential development options, I can say that in all cases the as of right development generates significantly greater traffic than the proposal."

The Board is persuaded that if the concern is with the impact of traffic by development on the site, the proposal offers a clear and better choice than any of the possible scenarios of development under the existing Zoning By-law regime.

The proposal provides fewer parking stalls than the By-law standards, and the rationale for this reduction needs close examination.

The traffic engineer stated that he derived the parking requirements for the proposal based upon both the established practice in the profession and the actual field observations for parking in uses similar to the ones proposed for the site. He was of the opinion that the current By-law requirements were too high, whereas his computations were based upon actual vehicle ownership levels in buildings similar to the ones proposed. He explained in some detail the details of the study he had undertaken and the methodology he had used to arrive at his recommendation of 99 parking spaces using a 20 percent reduction permitted in the By-law from the 124 parking spaces he had derived.

By applying the 20 percent reduction in the correct fashion as contemplated in the By-law, the City recommends a total of 111 parking spaces to be provided both below and above surface.

The Board is persuaded that given the proposed uses a reduction in the parking standard to accommodate 111 parking spaces is appropriate for the site in these particular circumstances.

The concerns raised by the representatives of the Zion United Church and the Hamilton Masonic Centre with respect to parking in the relevant neighbourhood are difficult to address through the proposal before the Board. The two institutions presently rely upon the subject site to provide overflow parking required by their respective patrons. It is difficult to see how development on the site as per the present By-law or through the proposed By-law Amendment can be confined to accommodate their needs.

The evidence by Brother Richard of the Good Shepherd Centre was that his Centre would surely look at a request by the two institutions in a sympathetic manner.

Based upon an analysis of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon existing traffic and parking conditions either on the site or in the vicinity of the site.

Natural Environment

Using a significant number of documents, photographs, and two videotapes (Exhibits 37, 38, and 40 A & B), Mr. Volterman made a lengthy presentation on the reasons for his opposition. First, he was concerned about the potential adverse impact

of the proposal on the natural environment in general and the existing mature trees in particular. Second, he was concerned about the loss of the historic heritage value of the site, a matter that has already been analysed earlier in detail. Third, at the request of the Board, after repeated pleas, he stated the direct impact upon the property where he lives – a matter that will be analysed below shortly.

The overwhelming majority of his opinions dealt with his genuine concern for the environment and how it was imperative for society to take care of it lest it lose its place in the environment. The Board assured him at the hearing and would like to do the same now by stating that his pleas for the environment were deeply moving and the Board is sensitive to all the points he made about how humanity is part of the environment and not apart from it. As stated at the hearing, notwithstanding the Board's empathy with his sincerely held views, the Board is confined by the matters before it and cannot make a decision rooted solely in the larger worldview so eloquently articulated by Mr. Volterman.

The counsel for the applicant cross-examined Mr. Volterman for approximately a minute on the proposed setback between the house where he resides and the proposed nearest building to that house, a matter that will be analysed shortly. Neither the counsel for the City nor the counsel for the applicant cross-examined him on any other aspect of his very lengthy evidence-in-chief.

Using some documents (Exhibit 11, Tab 8), the appellant expressed the opinion that the proposal would cause some adverse impacts upon the existing natural environment. He was especially concerned that the proposal would result in the removal of "many trees" on the site that might result in the diminution of "hunting ground" for Peregrine falcons, a protected species in Ontario.

During cross-examination by Mr. Volterman, Mr. Cuming, the environmental planner with the City stated, "During 1975-77, Region-wide Environmentally Sensitive Areas were identified. The subject site was not recognized because it is severely disturbed. The site simply does not have the attributes to be recognized as an Environmentally Sensitive Area."

The planner with the City stated during his evidence-in-chief that the site was not designated as an Environmentally Sensitive Area by the then Regional Municipality of

Hamilton-Wentworth and therefore the City did not refer the site to a voluntary body called the Environmentally Sensitive Area Evaluation Group for further evaluation. He also briefly explained the tree preservation plan for the site.

An analysis of the relevant evidence indicates the following.

Most of the witnesses who objected to the proposal because of its potential adverse impact upon the existing environment did not acknowledge either what could be developed as of right or the potential adverse impact of such development. They were concerned only with environmental impact of any development on site and preferred to leave the site as it is, namely, vacant, to be used as a park. Mr. Volterman was willing to "accept what I believe is right for the site, a single building in the middle similar to the Loretto Academy building that was demolished." He showed what would be acceptable to him (Exhibit 37, p. 69).

An examination of the Tree Preservation Plan (Exhibit 29, dated 2004:JA:09) in the context of reply evidence by the planner for the applicant clearly shows that all trees are within the property boundaries of the site. The uncontradicted evidence by the planner was that approximately 75 percent of the existing mature trees would be saved as part of the much-revised current site plan. The trees on King, Pearl, and Ray are to be saved except where there is a driveway access to the site from Pearl and Ray. The proposed parkette between the two buildings on King preserves the cluster of mature trees in the area while providing public access to an "environmentally and aesthetically pleasing area." The proposed site plan also contemplates not only planting new trees to replace lost trees but also to provide additional landscaped open spaces to enhance the quality of the natural environment. This is an instance where the net gain in vegetation is greater than the loss of existing vegetation.

The site plan showing the final configuration of the four buildings displays a degree of sensitivity to the preservation of trees with some heritage value that has to be explicitly acknowledged. The proposed walkways from the three public streets that bracket the site in conjunction with probable gates from existing houses abutting the north boundary of the site ensure that the site shall continue to function as a pedestrian corridor so valued by so many of the witnesses who gave evidence at the hearing.

The Board is persuaded that the environmental quality that results from the proposal will continue to attract the kind of wildlife that uses the space now. One of the most unique aspects of the videotape evidence by Mr. Volterman was the comfort with which an eagle perched itself on the patio railing despite the presence of two people within approximately 3 m. (10 ft.).

One of the collateral benefits of the proposal is that it leads to a deletion of several commercial uses currently permitted in the "H" District land fronting onto King Street, thereby making the entire site more harmonious with the natural environment. The following uses will be deleted: all industrial uses, industrial painting establishment, lumber shop, other workshop, household appliance repair shop, corrections residence, pawnbroker, auctioneer's premises, carpenter's shop, painter's shop, other wearing apparel workshop, rental of bicycles or other goods, wares or merchandise, laundry dry cleaning establishment, public parking lot, and district yard of a municipal corporation. The Board notes that all of these uses may or may not materialize on the site but the opportunity to eliminate them altogether with other more environmentally friendly residential and commercial uses is not an inconsequential consideration to be disregarded.

The principal contention of some of the witnesses who appeared in opposition to the proposal was that it was unlikely to be in harmony with the existing environment. The Board views harmony in the manner indicated below after taking into account the evidence of all the witnesses, both for and against. The Board is, in particular, sensitive to the opinion of Mr. Volterman who has a genuine interest in the preservation and enhancement of the natural environment. The Board is chastened by the consciousness of the main point made in an article submitted by Mr. Volterman (Exhibit 37, p. 8) and invites all interested persons to reflect upon the message.

In the view of the Board harmony turns on the impact of the proposal on the capacity of the natural environment to absorb the impact and establish a new equilibrium without adversely impeding the integrated functioning of the ecosystem as a whole. Harmony is the combination of different elements of nature so as to form a consistent and orderly whole. It represents an agreeable aspect arising from the apt arrangement of different elements where the parts are in accord with each other. As such, harmony implies a dynamic interrelationship between elements and not a static

relationship implied in the idea of balance. Built and natural environments (human interaction with nature) are in constant interplay and hence in constant evolution, leading to ever newer harmonious equilibriums. Being in harmony, therefore, means nothing more than being capable of merging with the natural environment in such a way that the integrity of the whole is maintained. In the final analysis, the proposal should not adversely impair the capacity of the natural environment to function as a whole.

Based upon an analysis of the pertinent evidence, the Board finds that the proposal does not cause an unacceptable adverse impact upon the natural environment.

Direct Impacts Upon the Adjacent Resident

Mr. Volterman, who rents the third-floor apartment in a house that abuts the site at its northeast corner, was of the opinion that the proposal had the following direct impacts upon his enjoyment of his dwelling. He stated that the proposed buildings would cast shadows and deny him and his plants sunlight, obstruct his views, subject him to air pollution from the buildings, obstruct the present pedestrian paths on the site, and cause him mental anguish. He was also of the opinion that the setback of the proposed building from the house where he lives ought to be treated as a rear yard setback because King Street was the de facto front of the entire complex and therefore the setback ought to be 7.5 m. instead of the proposed 2.7 m. His opinions bear a closer look.

Using a set of shadow diagrams (Exhibit 27), the architect explained in detail the impact of shadow created by the proposal and the as of right development at several times during the days of June 21st and December 21st. He concluded his substantive evidence based upon a study of shadows by stating, "The proposed built form with two smaller footprint mid-rise buildings offers a reduced shadow impact over the current allowable zoning envelope which allows one larger building" (Exhibit 2C, Tab 44, p. 1).

Mr. Volterman cross-examined him at length on the shadow impact upon his apartment, his plants, and the immediate vicinity of the subject site. His opinions were

underutilized or unutilised. Infrastructure in an urban context includes but is not limited to sewer, water, roads, utilities, access to emergency services such as fire and ambulance, community facilities such as parks, playgrounds, arenas, and rinks, and close proximity to educational opportunities, cultural facilities such as theatres, social assistance nets, public transit such as buses and the like. What is important is to

The customary habit of treating public investments as somehow different from private investments subject to different laws of resource constraints is to denigrate public money. A public penny is the same as a private penny and a penny unused is not a penny saved but a penny pilfered when it comes to existing infrastructure. Maximizing returns on public investments does not mean the diminution of other factors in determining physical development. It simply means explicitly taking account of a much-ignored factor in land use decisions. Existing underutilized and unutilised infrastructure should be an integral part of the decision-making process.

In this instance, appropriate campus-like development on the site in a large city ought to be explored subject to other constraints set by other competing objectives and policies. If the proposed development does not cause unacceptable adverse impacts and does not nullify competing interests but achieves a balance and serves the public interest, then the need for and the desirability of proposed development ought to be pursued with the utmost vigour.

Part of the opposition to the proposal by residents of the area stems from a sincere conviction that they experience a disproportionate share of disadvantages, whereas the benefits are experienced by the public at large in the City of Hamilton. It is the eternal dilemma of planning where the costs are local but the benefits are global. Although in principle there is no ideal way to resolve this dilemma, in practice, however, there are several ways to deal with the dilemma. The most effective way to deal with the dilemma is to mitigate if not eliminate the adverse impacts caused by a development proposal that is in the larger public interest but may have some adverse impacts in and around the location where such a proposal is sited. In this instance, the applicant and the City of Hamilton have laboured to tailor the proposal to fit the neighbourhood. Some residents may disagree with the perfection of the fit, but they cannot question the talent, time, and effort that have gone into the tailoring. As discussed earlier, the proposal does not cause an unacceptable adverse impact. In the view of the Board, therefore, the net benefits outweigh the costs.

The Greenspace Associates for the Loretto Academy in their document titled Preliminary Overview contained in the document book by the Strathcona Community (Exhibit 11, Tab 2) cite a definition of sustainable by Musco Martin that is helpful in assessing the proposal. "The word sustainable ... A community must be supported

from below – by its inhabitants, present and future. ..." The Board invites the present inhabitants to acknowledge a role for future inhabitants by giving them a chance to support the Strathcona Community and make it even more sustainable than it already is.

Disposition

Based upon an analysis of all of the evidence, the Board finds that the proposed uses are appropriate for the site and that the associated Amendments to the Zoning By-law and the Official Plan represent planning that is good.

Accordingly, the Board allows the appeal in part,

Amends the Official Plan as indicated at the hearing, and

Amends the Zoning By-law as shown in Attachment 1.

Expects the applicant to follow through on the undertaking given at the hearing that the site shall be developed generally along the lines shown in the Master Site Plan (Exhibit 7, p. 48).

Expects the applicant to follow through on the undertaking given at the hearing that every reasonable effort shall be made to acknowledge the heritage value of the site in an appropriate manner including but not limited to the legacy of aboriginal peoples, European military activity, James Mills, and the Loretto Academy.

Expects the City and the applicant to agree upon a Site Plan that is generally in accordance with the Master Site Plan (Exhibit 7, p. 48).

The Board so Orders.

"N. M. Katary"

N. M. KATARY
MEMBER

NAPIER STREET

PL030896

LEGEND

- EXISTING TREES TO REMAIN
- EXISTING TREES TO BE REMOVED
- NEW TREES TO BE ADDED
- BUILDING TO BE DEMOLISHED
- PROPERTY LINE

RAY STREET NORTH

ENTRANCE

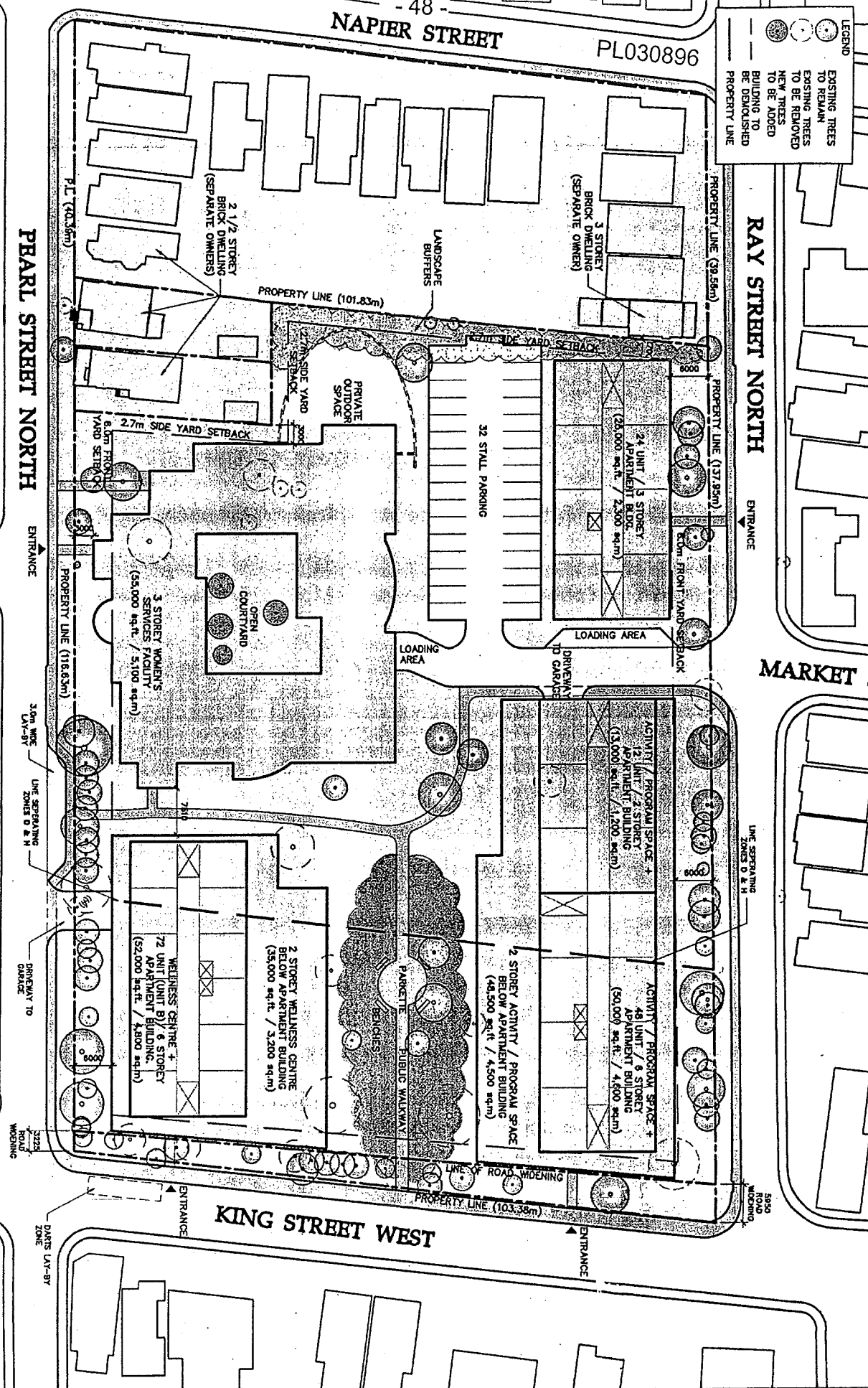
MARKET

PEARL STREET NORTH

ENTRANCE

KING STREET WEST

GOOD SHEPHERD CENTRE



APARTMENTS & SERVICES FACILITY

GROUND FLOOR

EXISTING HOUSES

GRASS

ASPHALT

BIDWALKS

REVISOR
MASTER
PLAN
1:600
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