

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: January 08, 2021

CASE NO(S): PL190493

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Canadian Rental Development Services Inc.
(Groupe Lepine)

Subject: Application to amend Zoning By-law No. 2008-250
- Refusal or neglect of the City of Ottawa to make
a decision

Existing Zoning: Light Industrial Zone

Proposed Zoning: Arterial Mainstreet

Purpose: To permit the development of three high-rise
towers (two 12- and one 16-storey) & five mid-rise
towers with a containing 1320 one- or two-
bedroom apartment dwellings, 2,707 sq m of retail
space fronting a publicly-accessible "Town Centre
Plaza" and associated amenities.

Property Address/Description: 3484 and 3490 Innes Road

Municipality: City of Ottawa

Municipality File No.: D02-02-19-0060

LPAT Case No.: PL190493

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LPAT Case Name: Canadian Rental Development Services Inc. v.
Ottawa (City)

Heard: November 2 to 6, 2020 by Video Hearing

APPEARANCES:**Parties**

City of Ottawa

Canadian Rental Development
Services Inc. (Groupe Lepine)**Counsel**

Timothy Marc, Tom Walker (student-at-law)

Michelle Cicchino, Michael S. Polowin

**DECISION DELIVERED BY G. BURTON AND D.S. COLBOURNE AND ORDER OF
THE TRIBUNAL**

[1] This is an Appeal by the Applicant and present owner, Canadian Rental Development Services Inc. (Groupe Lepine) (“Groupe Lepine” or “Applicant/Appellant”) of a 5.2 hectare (“ha”) site in Orléans, the eastern portion of the City of Ottawa. It is located on the south side of Innes Road, an arterial roadway designated as an Arterial Mainstreet (“AM”) and a Transit Priority Corridor, in the City of Ottawa Official Plan (“OP”). It is situated at the northeast corner of Innes Road and Lamarche Avenue in Orléans. Innes Road is designated AM on the south side only. The City had not made a decision on Groupe Lepine’s May 12, 2019 application to amend Zoning By-law No. 2008-250 within the required time period of 90 days from the date of the application. Subsection 34(11) of the *Planning Act* (the “Act”) grants the right to appeal in this circumstance.

The Proposed Development

[2] The Applicant proposes eight apartment and mixed-use buildings around the perimeter of the site, from nine to 16 storeys in height. These would contain over a thousand units of market but also affordable housing. There would be a one-storey rounded podium covering all other areas of the site, constructed over the underground parking garage. This would provide accessible parkland and recreational possibilities, to be shared between the tenants and the public.

[3] Miguel Tremblay is a Registered Professional Planner and Partner at Fotenn Consultants Inc. (“Fotenn”).

[4] His curriculum vitae is found in Exhibit 1, Document Book, Tab 2. He provided expert testimony for the Applicant/Appellant.

[5] In January of 2018, Fotenn was retained by Gib Paterson (the former owner) and Groupe Lepine to assess the opportunities to redevelop the subject lands at municipal addresses 3483 and 3490 Innes Road. Groupe Lepine’s intention was to redevelop these two blocks, Nos. 49 and 50 on a registered Plan of Subdivision. This plan covered the entire Paterson lands, including those to the east and south of the subject parcel. Most of the Participants, in the present Hearing, reside in residences in these subdivision lands, the majority of which have been built.

[6] As part of the concept planning exercise with Gib Paterson and NEUF Architects (“NEUF”), Fotenn met with City Staff several times between August 2018 and March 2019. Based on those meetings, NEUF prepared a Concept Plan for the proposed development. Fotenn produced the planning rationale to support the necessary Zoning By-law amendments (“ZBLA”).

[7] Although not the first concept plan proposed during meetings with City Staff (the earlier version was for eight buildings from six to 12 storeys), the present application was finally submitted to the City on May 21, 2019. It is now before the Tribunal in this Appeal. It still proposes eight buildings around the perimeter, but now ranging in height from nine to 16 storeys, rather than the prior maximum of 12 storeys.

[8] As seen in the Site Plan, Exhibit 1, Tab 15-19 (the Tribunal will use this version of the Building identification letters, although another was presented), Building A, on Innes Road at the corner of Lamarche Avenue to the east, is proposed to be 16 storeys. Buildings D and E would be 12 storeys, with some commercial uses, with eastern ends on Lamarche Avenue. They would face an internal pedestrian-oriented commercial

square (“Town Centre Plaza”) at ground level. The remaining five buildings are positioned at the boundaries of the site, one flanking Lamarche Avenue (Building H) at the south of the site, and another on the southern boundary of the property and curving around to the west facing Pagé Road (Building G). Buildings C, F and the west side of Building B would face the rear yards of the properties on Pagé Road to the west. These deep single family lots were developed in the 1980-90’s.

[9] Mr. Tremblay described the structures as “framing” Innes Road and Lamarche Avenue. He suggested that the terraced rectangular buildings would also frame and enclose the greenspace covering the underground parking. All parking, loading and servicing for the proposed development would be internalized, within a three-level underground parking structure to be covered with a landscaped green roof. Primary vehicular access to the garage would be via two driveways off Lamarche Avenue, south and north of the proposed 12-storey buildings. A private access road and multi-use pathway runs from Lamarche Avenue at the south end of the property, west and north around the west side of the proposed apartment buildings. This would provide three drop off/pick up spots, and access for emergency vehicles, loading and deliveries. It would terminate in an access-controlled gate at Innes Road.

[10] All buildings are set back a minimum of 20 metres (“m”) from the west property line and 18 m from the south property line.

[11] The proposed Town Centre Plaza (the at-grade, internal courtyard of Buildings D and E) would be connected to a multi-use pathway in the Lamarche Avenue right-of-way (“ROW”). Other curving pedestrian pathways, from Innes Road and from the rear of the property, connect to the central landscaped areas. These would rise to one storey in height, and would also be accessible via an elevator from the Town Centre Plaza level. The amenity areas in this landscaped courtyard would be augmented by a communal fitness facility at the western end. These central landscaped areas are proposed to be privately owned publicly accessible spaces (“POPS”).

The Required Zoning Amendments

[12] In order to accomplish the development design, the Application is to amend the By-law from the existing zoning of the parcel (essentially, a holding zone – see Michael Boughton’s evidence below) to an AM zone, with the following site-specific amendments:

1. To permit increases in building heights as shown on a site-specific schedule, whereas the permitted height is 25 m.
2. To permit a Floor Space Index (“FSI”) of 3.5, whereas the By-law permits an FSI of 2.0.
3. Require a residential parking rate of 1.0 vehicle space per dwelling unit, whereas the By-law requires 1.2 spaces.
4. Require residential visitor parking spaces at the rate of 0.1 space per dwelling unit, whereas the By-law requires 0.2 spaces.
5. Require commercial parking at a rate of 1 space per 250 square metres (“sq m”) of non-residential gross floor area, whereas the By-law requires parking to be provided at higher rates depending on the specific non-residential use.
6. To consider the site as one lot for zoning purposes, irrespective of the timing of future development applications. (This is to overcome Condition 11 of draft approval of the plan of subdivision of all of the Paterson lands – discussed below).

Consideration of the Application – The Process

[13] Following a pre-application consultation meeting with City Staff on August 2, 2018, Mr. Tremblay recorded:

Staff expressed concern with the proposed development approach and highlighted the need for a broader concept plan, positioning the Lepine lands as part of the broader context along Innes Road. This broader Concept Plan addressing all of the lands identified for “future development”, was triggered by condition 11 of the draft plan of subdivision approval. (discussed below).

[14] On March 11, 2019, Mr. Tremblay met again with City Staff to discuss the proposal and a possible OP amendment. In his recollection nothing concrete was stated about such an amendment. Also, at that meeting, mention was made of the coming settlement agreement with major developers respecting new height limits imposed by OP Amendment No. 150 (“OPA 150”). The settlement was formalized by the Tribunal’s approval of OPA 150 by its written decision of July 14, 2019.

[15] The next steps took on extra significance as events unfolded:

- The Groupe Lepine application for zoning amendments was submitted to the City on May 12, 2019.
- A discussion was held by City Staff later, on September 4, 2019 respecting whether OPA 150, Policy 3.6.3 (newly approved by the Tribunal) would apply to the evaluation of the proposal.
- However, only on October 4, 2019, was Fotenn specifically advised for the first time in the process that an OP amendment would be required (Exhibit 1, Tab 27).

[16] On October 2, 2019, the Applicant/Appellant had appealed to the Tribunal for lack of a Council decision.

[17] On December 3, 2019, Mr. Tremblay presented the proposed development to the Urban Design Review Panel (“UDRP”), as suggested by City Staff. The UDRP objected to the “superblock” approach they perceived in the designs; to the public realm and private spaces; the lack of porosity on the site; traffic of all types; and transitioning to adjacent uses. It “evidenced an outdated urban design approach” (Exhibit 1, Tab 30). They made many suggestions for changes, especially respecting the grade-separated amenity area, and suggested commercial uses along Innes Road rather than in the central plaza, plus an internal east-west road. Of special significance to the UDRP was the lack of height transitioning to nearby low-rise structures.

[18] On March 10, 2020, City Planning Staff submitted a Report to Council recommending refusal of the application. Due to the COVID-19 emergency, it was only on June 11, 2020 that Planning Committee of Council met to consider the application. They refused it on June 24, 2020.

Planning Evaluation

[19] Mr. Tremblay is of the opinion that the application meets the policies of the Provincial Policy Statement (“PPS”), including the 2020 update. This is required by s. 3(5) of the Act. Notably, the City’s planner, Mr. Boughton agrees with this conclusion.

[20] Mr. Tremblay is also of the opinion that the proposal meets the OP in force at the time of the application. This application for a ZBLA was filed prior to the Tribunal’s written decision approving of the settlement on the height provisions in the Plan.

[21] His review of the OP policies places the subject property in the AM designation to its depth of 300 m, with the three contiguous parcels to be considered as one. This accords with s. 2.2.2, which promotes intensification “to facilitate the transformation of automobile-oriented Arterial Mainstreets into mixed-use, transit-supportive and pedestrian-friendly Mainstreets that support the neighbourhood”.

[22] He stated that the OP permits a broad range of uses along AM, including residential and commercial as proposed. Commercial uses need not face Innes Road, and thus the two buildings D and E can face each other across the central town plaza located on Lamarche Avenue.

[23] In line with Policy 10 of s. 3.6.3 of the OP, the development frames Innes Road and Lamarche Avenue “with active residential lobbies, patios and balconies fronting both streets”. They would enclose and define the street edge with active frontages that provide direct pedestrian access. He suggested that these meet the policy goals of supporting redevelopment and infill.

[24] In terms of building height, he stated that:

the development meets the criteria for additional building height, as it provides transition, creates a community focus on a corner lot, provides community facilities that advance the vision of a Mainstreet and meets urban design criteria set out in Section 2.5.1 and 4.11 of the Official Plan.

[25] His rationale for supporting a 16-storey high-rise building and the two 12-storey buildings relies on the height policies in s. 2.2.2 of the OP. This deals with the distribution of appropriate building heights. This is accomplished for this site with the tallest buildings being closest to the Innes transit corridor, that is, the denser development located to best support this designated Transit Priority Corridor.

[26] He also is of the opinion that the development meets the majority of the Settlement policies criteria, as it is located on a Mainstreet and a designated Transit Priority Corridor. Thus it provides transition as well as a community amenity. Although these two designations are in fact parallel in this circumstance, and not intersecting as specified in the OPA 150 language (see discussion below), both of these key density-supportive elements are present here.

[27] Additionally, although not in force at the time of application, he suggested that the new OPA 150 policies supporting a maximum height of 12 storeys along AMs are helpful in assessing the appropriateness of greater height in proximity to transit.

[28] With reference to s 2.5.1, Urban Design and Compatibility, he testified that compatibility does not necessarily mean the same or similar. Instead it refers to development that “fits well” with the physical context and “works well” with the functional context.

[29] He suggested that the relevant compatibility criteria are Policies 11 and 12 of s. 4.1.1.

[30] The first deals with scale, massing and height of a development as it relates to adjoining buildings and the existing and planned context. The second requires an appropriate built form transition through incremental changes in building height (e.g. use of angular planes), strategic placement of taller buildings, sensitive massing, architectural features and building stepbacks.

[31] In dealing with these criteria, he said the development has setbacks of a minimum of 20 m from the interior side and rear lot lines. Almost all buildings are within a 45-degree angular plane, projected from shared property lines at the as-of-right height of abutting properties. Most of the other parcels beyond the common lot lines contain medium density residential uses, including a four-storey retirement home and existing and planned stacked townhouses. Two of the buildings, which abut lands zoned for low-rise residential development also incorporate significant terracing, which provides transition. From the shadow study, shadow impacts from the proposed development on adjacent properties and the public ROW are minimal.

[32] He stated that the Transportation Impact Analysis (“TIA”) was accepted fully by the responsible City Staff. The TIA shows that the development is appropriate from a

transportation and traffic perspective. Coordination of vehicular access, parking and loading will minimize pedestrian conflicts.

[33] With respect to the City's Urban Design Guidelines, Mr. Tremblay testified that they are not prescriptive. A development should merely respond to and respect the applicable guidelines. He outlined the following:

[34] In response to AM Design Guidelines 1, 11 and 37, he said the development locates the buildings close to the street edge. This would frame the majority of the frontage with building walls, while providing a deep landscaped buffer. The landscaped setback, which is slightly deeper than recommended, allows for a gentle rise and a more welcoming approach from the public realm to the interior courtyards. This would provide direct, safe, continuous and clearly defined pedestrian access from public sidewalks to building entrances. Pedestrian permeability of the entire site would be created by a north-south pedestrian connection right through the proposed courtyards.

[35] The buildings would also have direct access internally by way of the parking structure, and corridors to courtyard spaces and the Town Centre Plaza. Each building's residential lobby has direct access to the outside of the site (either to the public ROW or the private access road).

[36] The concentration of height and mass at this "gateway" location will support transit.

[37] The proposed development responds to the AM Guidelines in a number of ways, by transition to adjacent low rise through mid-rise structures (nine storeys). The building forms are appropriate, framing both public ROW's and onsite spaces (the internal courtyards and Town Centre Plaza).

[38] Buildings of this form should be a maximum of 12 storeys, or 1.5 times the width of the facing ROW, whichever is less. Even though the 16-storey Building A is

approximately 1.5 times the width of the facing ROW width, thus taller than the Guidelines, his opinion is that the additional height better frames the intersection and serves as a community landmark. Each high-rise building here has a distinct base and middle, defined by use, typology and architectural elements. The tops of the 12-storey buildings are defined by corner stepbacks above the 10th floor.

[39] As to Density and Intensification, the proposed density will help support and reinforce transit. Services are adequate at present, and numerous commercial amenities along Innes Road are available to support the development and in turn could be supported by it. Parkland dedication has already been identified elsewhere in the Plan of Subdivision process. All of the proposed landscaped POPs (courtyard and plaza) will provide ample amenity space for residents and the community.

[40] On the issue of compatibility, as raised by the Councillor, City Staff and the public, he stated that development must always be evaluated against both existing and planned context. Innes Road as a designated AM is planned to accommodate mid-rise up to nine storeys, with further potential at key nodes. The vicinity is presently developed with a wide mix of uses at lower densities than envisioned. Despite the fact that Orléans is a predominantly low-rise community with only 9% apartments, the planned context supports higher density in key locations such as the Innes Road AM.

[41] His view is that to meet the ambitious but appropriate intensification targets, in the new OP, intensification and greater density must be encouraged across the urban area, wherever it can be appropriately supported.

[42] Mr. Tremblay disputes the Staff's position on the depth and extent of the AM designation on the subject lot. This was not raised as an issue during the process, he stated, and staff throughout had no concerns about the request to apply the "One lot for Zoning purposes" provision to the entirety of the subject property. He says that their final position is not supported by the OP policies, is not consistent with previous

feedback, and would hinder development in a coordinated manner. It could potentially discourage intensification on many low-density, auto-oriented uses within AMs.

[43] In addition to the foregoing, Mr. Tremblay's major disagreement with City Staff is their very late and unjustified requirement of an Official Plan Amendment, as per their Counsel's opinion.

[44] His professional opinion is that the application represents good planning, is appropriate and is in the public interest.

Transportation and Traffic

[45] On the issue of Transportation (a major concern raised by the residents), Austin Shih, a professional engineer and senior transportation engineer provided evidence. He was retained by the Applicant to give his opinion on traffic impacts of the development. He prepared a TIA based upon the density of development proposed.

[46] He described Innes Road as a four-lane cross-section with auxiliary turn lanes at major intersections. Lamarche Avenue is currently an asphalt collector road, created during the subdivision plan process. Innes Road is a Transit Priority Corridor, though currently without transit priority measures. It is fully urbanized, with sidewalks on both sides and dedicated cycling facilities in the form of on-street bike lanes on both sides.

[47] He concluded that the proposed development could be accommodated by the transportation network, with modifications to mitigate future traffic constraints. On the full buildout of the development there is a need for: signalization of the Innes Road and Lamarche Avenue intersection, a new eastbound right turn lane, and east- and westbound left turn lanes at this intersection. With these modifications, the intersection is expected to function within City operational limits.

[48] In recognition of the residents' concerns, he stated that:

- Given the Innes Road at Lamarche Avenue improvements, the adjacent Innes Road intersections at Pagé Road to the west and the U-Haul access to the east are also expected to function within City operational limits.
- The Innes Road-Orléans Blvd. intersection to the west does not currently operate within acceptable limits. This will continue with or without the proposed development. The net change of performance at the Innes-Orléans intersection attributed to the subject site constitutes a small fraction of the total future traffic impact. For the Pagé Road and U-Haul intersections (as stated, also expected to be within City operational limits), he nevertheless presented the mitigation option of signal-timing.

[49] His opinion was that the application can be accommodated by the City transportation network.

[50] His Report was accepted by City Staff.

Architectural Design

[51] Mr. Bruno St-Jean provided evidence on the architectural design for the site. He is a senior partner and President of NEUF Architects. He is a fellow of several Architectural Institutes, and has 43 years of experience. He also practices internationally. The firm was retained in June of 2017 to investigate development potential for the subject site.

[52] He views this as a unique parcel, prime for development. Given the planning framework, he describes it as an area for intensification, with higher densities and varied development. Given the surroundings, mainly of single and semi-detached, townhouses and low-rise apartments, he sees this as an opportunity to vary the

typology and tenure with a residential rental development. “This development will answer the community’s needs and integrate within the urban fabric by creating an urban context that is more in line with the City’s vision”, given that Innes Road is not presently well defined in built form, not animated, and lacking in active transportation. This project can set the tone for future development that implements the OP criteria.

[53] Pedestrian access would be from both Innes Road and Lamarche Avenue, and vehicular access to the underground parking from two at-grade driveways from Lamarche Avenue. A private, controlled-access road on the south and western boundaries will be available for garbage trucks, contractor and maintenance vehicles and moving trucks.

[54] The whole is planned as a phased development to allow for market absorption and adjustment as the market evolves. A key principle for him is permeability on the site for surrounding neighbours. The outdoor common areas would be accessible to the public, as pathways will allow neighbours to visit the courtyards and the public plaza located on Lamarche Avenue. He stated that:

Animation of the public realm is first and foremost a consideration. At ground floor levels there are residences that have direct exterior access and private terraces assuring eyes on the street. There is a proposed Civic Plaza with generous gathering spaces lined with shops, cafes and services. A community amenity building acts as an anchor, assuring presence at all times of the day.

[55] Elimination of public streets within the project reduces the heat island effect, as does the large green roof over the parking structure. This offers public landscaped courtyards to residents and visitors.

[56] On the issue of massing, different options were considered within the maximum FSI permitted.

It was determined that a variable density with uniform heights of 9 storeys for all buildings would result in too much site coverage, lack of architectural variety, and not enough permeability of open space.

The principal rationale for the height strategy is twofold:

To create architectural variety when the buildings are viewed from both close and distant vantage points;

And to provide as much accessible landscaped area on the site as possible.

[57] He argued that the upper storeys of most buildings incorporate terraces cut out from their silhouettes, which contributes to the transition between buildings. These would lower their heights to an apparent seven floors. The greater setback from the property lines would have the nine-storey heights fit below the angular plane. This contributes to the transitioning to neighbouring properties.

CITY OF OTTAWA

[58] The City of Ottawa's planning evidence was provided by Mr. Boughton, a professional land use planner in the Development Review Branch of the Planning, Infrastructure and Economic Development Department. He is a longstanding member of the Canadian Institute of Planners ("MCIP") and a Registered Professional Planner ("RPP") of the Ontario Professional Planners Institute.

[59] When the Applicant/Appellant's application was received on May 21, 2019, the City of Ottawa staff began a review and evaluation of the requested zoning amendment and the conceptual site development plans for conformity with the "relevant" policies and design guidelines. This study continued from July to October 2019. Even before the City's initial comments were provided to him, Mr. Boughton testified, the Applicant/Appellant filed a Notice of Appeal under s. 34(11) of the Act, for failure to make a decision respecting the application within 90 days. Discussions continued, but the issues were not resolved. On June 24, 2020, Council refused the request for exemptions from Zoning By-law No. 2008-250.

[60] Mr. Boughton proceeded to describe the applicable policies and the planning context. His conclusion was that the application does not represent appropriate land use planning.

[61] The site is, as mentioned, located in the Urban Area of the City of Ottawa, in the easternmost suburb of Orléans. It lies to the east of the National Capital Commission Greenbelt. Innes Road is an arterial road, and Lamarche Avenue to the east is a collector road.

[62] 3490 Innes Road, the larger parcel (site of a former driving range), is two of the four planned mixed-use blocks within the recently registered Orléans Village residential subdivision. A small single-storey commercial office is located at 3484 Innes Road, at the corner of Pagé Rd. to the west. East of Lamarche Avenue are the other two of the four mixed-use blocks on the plan. The three properties comprising the subject site have a combined width of approximately 141 m along Innes Road, and a lot depth of approximately 325 m (ending at the north limit of the subdivision plan). The total lot area of the subject site is 5.2 ha.

[63] Mr. Boughton stressed the significant opposition to this proposal from the surrounding property owners, almost all in low-density residential dwellings. On both sides of Innes Road near the site are commercial office uses and a small retail plaza. However, to the immediate west and south is low rise development - several two-storey single detached homes, two-and-a-half-storey stacked townhouse blocks, and the four-storey Chapel Hill Retirement Residence. The rear of these dwellings and the front of the residence are located on Pagé Road. The now-registered Orléans Village subdivision, consisting of two-storey townhouses and single detached dwellings, is located directly to the south.

[64] Mr. Boughton testified that the site is designated AM in Schedule B – Urban Policy Plan of the City’s OP approved in 2003. He referred to the later relevant amendments: OPAs 150, 180 and 191. OPA 150 had been adopted on December 11, 2013 and was finally, mostly approved (as amended) by the Tribunal in its written decision of July 18, 2019.

[65] The City's Zoning By-law No. 2008-250 ("ZBL") zones Blocks 149 and 150 on the subdivision plan as Development Reserve ("DR"). This zone recognizes lands intended for future urban development, and permits only the uses currently existing until the lands are rezoned. The smaller property, at address 3484 Innes Road, is still zoned "Light Industrial" [IL2 H(14)-h], a holdover from the former zoning for the nearby lands. Mr. Boughton explained that these parcels were part of the former Orléans Industrial Park, designated Employment Area ("EA") in the City's OP. A previous study of Employment-designated lands had resulted in the enactment of an amendment to the OP, OPA 150, in December 2013. Appeals were launched to all or part of the amendment.

[66] The Ontario Municipal Board then directed an additional study of EAs.

[67] A resulting report concluded that almost the entire west half of the Orléans Industrial Park lands, including the subject site, was surplus to the City's employment land needs, and could be developed.

[68] An application was then received for Draft Plan of Subdivision Approval covering 31 ha, the western part of the former Orléans Industrial Park. The subdivision included four large mixed-use blocks along Innes Road, to be rezoned in the future.

[69] Other changes to the planning context affected the present application. A later OPA 180 altered the designation from EA to General Urban Area ("GUA"), and extended the designation of AM on the south side of Innes Road along the frontage, west to Pagé Road. Thus, the smaller parcel, 3484 Innes Road, was also included in the AM designation.

[70] By passage of site-specific OPA 191, the designation of the subdivision lands was altered from EA to GUA and AM. The present parcel on Innes Road now has this AM designation (subject to the discussion below on the depth of the designation).

[71] In May 2019, Phase 1 of the Draft Approved Plan of Subdivision was registered. One of the conditions of draft approval proved to be important later. Condition 11 required that prior to filing a ZBLA for mixed-use blocks 1, 2, 49 and 50 (the present site and the similar one to the east), a conceptual land use plan and demonstration plan for the intended mixed-use development of the whole be submitted. It read:

Prior to the filing of a zoning by-law amendment application.....for mixed-use blocks 1, 2, 49 and 50, inclusive, the land owner/developer will submit to the City for review a conceptual land use plan and demonstration plan of the future intended mixed-use development of the whole of these lands to ensure their appropriate organization. The development of such plans shall consider all applicable City design policies and guidelines. The Owner further acknowledges and agrees that the provision of high-density apartment dwellings shall be a significant component of the development plans for the four mixed-use Blocks, such that the overall residential dwelling unit mix over the entire subdivision achieves the Official Plan's housing target of a minimum of 10% apartment dwellings, which target shall be entrenched in the zoning to be applied to one or more of the mixed-use blocks,....

[72] It must be noted that Condition 11 applied to all four undeveloped mixed-use blocks, located on the south side of Innes Road and on both sides of Lamarche Avenue. These totalled approximately 10 ha. The present application involves only 5.6 ha. At the time of submission of the application, this 5.6 ha site consisted of 3484 Innes Road as a separate lot, and two future mixed-used blocks, Blocks 49 and 50, on the approved Plan of Subdivision.

[73] Mr. Boughton outlined the process that followed. Fotenn requested a Pre-application Consultation in July 2018. This initial meeting was held on August 12, 2018, with representatives of Fotenn and Groupe Lepine, the Owner, and City Staff. On August 25, 2018, City Staff provided them with a written summary of the meeting. Included were comments and submission requirements for a site plan control application and accompanying zoning amendment application.

[74] This summary outlines City Staff's concerns with the proposed development. The proposal at that time was for eight residential and mixed-use buildings **from six to 12 storeys**, with approximately 1,231 residential units and 1,952 sq m of commercial floor

area. There would be a one-storey raised podium covering the entire area of the site, built over the three levels of parking.

[75] Next came a working session (February 2019 - termed a design charrette by Mr. Tremblay), to “discuss and draft the conceptual land use plan and demonstration plan for all four mixed-use blocks”, Mr. Boughton testified. Mr. Tremblay had stated that the purpose was to “address issues related to policies, built-form and massing, land uses, park location and vehicle access” for the specific proposal (Witness Statement, para. 27).

[76] On May 21, 2019, Fotenn filed an application to amend Zoning By-law No. 2008-250 as it applied to the 5.2 ha site, which included both 3484 and 3490 Innes Road. This requested a rezoning of the entire site from the holding zone to AM, with site-specific exceptions. An increase in the height limits would permit the now-proposed **12- to 16-storey** high-rise buildings. Several other exceptions would allow for mid-rise to high-rise apartment buildings, and retail and service commercial uses fronting on a central pedestrian plaza, on the Lamarche Avenue side.

[77] A few days later, on May 24, 2019, the City informed the Applicant/Appellant by letter that the application was incomplete. This was altered to “complete” on July 4 following the City’s receipt of the outstanding submissions listed in the previous letter.

[78] The City then began the usual public and agency notification on July 16, 2019. Many comments in opposition to the proposal were received, including a lengthy petition.

[79] Mr. Boughton outlined the disagreement that arose with the Applicant during the review and evaluation of the zoning amendment and conceptual site plan, which took place from May to October 2019. The Tribunal had issued a written decision on July 18, 2019 approving OPA 150. The question then arose whether the new section 3.6.3 (12) should apply in the evaluation of the requested zoning amendment. If so, an application

to amend the OP would also be required. The issue was not resolved during a later September 4, 2019 meeting, with legal counsels in attendance.

[80] The owner then filed an appeal under s. 34(11) of the Act on October 2, 2019, citing a failure to make a decision on the application within the statutory 90 days. Mr. Boughton pointed out that this was prior to receiving the City Staff's initial comments in response to the requested zoning amendment.

[81] A few days later, on October 4, 2019, staff's initial comments in response to the requested zoning amendment were sent to the Applicant/Appellant. The essence was that City Staff could not support the zoning amendment as submitted. The primary concerns were with:

1. conformity with the applicable OP policies respecting AMs (under newly-approved OPA 150), and,
2. compatibility with the surrounding community.

[82] City Staff's opinion was that Policy 3.6.3(12) of the City's OP (from OPA 150) and approved by the Tribunal by written Decision on July 18, 2019, **applied** to the application. It could not therefore be assessed on the wording of the former 2003 version, pre-OPA 150. The proposed zoning amendment would not conform with the revised AM policies in OPA 150, since the site does not meet its locational criteria for the consideration of high-rise buildings.

[83] Next in time came the requirement that the application be presented to the City's UDRP. The panel is an independent advisory Panel of professionals who provide an objective peer review of urban design elements. This met on December 6, 2019, and provided its comments on December 23, 2019. Mr. Boughton was in general agreement with the panel's conclusions, as outlined below.

[84] The Planning Committee's scheduled consideration of the Application was postponed due to the pandemic, until its June 11, 2020 meeting. On June 24, 2020, the Planning Committee approved the staff report and recommended refusal of the proposed amendments to Zoning By-law No. 2008-250. Mr. Boughton stated that approximately 75% of the hundreds of comments received opposed the proposed zoning amendment. City Council refused the requested amendment on June 24, 2020.

[85] In Mr. Boughton's opinion, the application is in fact consistent with the PPS 2020. Section 3 of the Act requires that decisions on planning matters "shall be consistent with" policy statements issued under the Act. Intensification goals would be met, with transit-supportive development and a range of housing options.

[86] The submission as to which version of the OP applied to the current Application was made by Timothy Marc, Counsel for the City. It should be policies in OPA 150 that subsequently came into effect with the LPAT written decision of July 18, 2019 on the Settlement Agreement.

[87] The Tribunal outlines the earlier wording for clarification. Prior to the adoption of OPA 150 in December 2013, Policy 10 of s. 3.6.3 – Mainstreets of the Plan had stated:

10. Redevelopment and infill are encouraged on Traditional and Arterial Mainstreets in order to optimize the use of land through intensification, in a building format that encloses and defines the street edge and provides direct pedestrian access to the sidewalk. Any proposal for infill or redevelopment will be evaluated in light of the objectives of this Plan.

- a. **Specific building heights are established in the zoning by-law based on a Community design plan or other Council-approved study; This Plan supports mid- rise building heights up to six storeys on Traditional Mainstreets and up to nine stories on Arterial Mainstreets, except as per Section 2.2.2, policy 12... Greater building heights may be considered in accordance with policies 8 through 14 of s. 4.11.**
- b. The proposed building height conforms with prevailing building heights or provides a transition between existing buildings;
- c. The development fosters the creation of a community focus where the proposal is on a corner lot, or at a gateway location or at a

location where there are opportunities to support transit at a transit stop or station;

- d. The development incorporates facilities, services or matters as set out in Section 5.2.1 with respect to the authorization of increases in height and density that, in the opinion of the City, significantly advance the vision for Mainstreets;
- e. Where the application of the provisions of Section 2.5.1 and Section 4.11 determine that additional height is appropriate. (emphasis added).

[88] OPA 150 had revised Policy 10, above, and added new policies, 11 and 12 of s. 3.6.3, specific to Arterial and Traditional Mainstreets, as follows:

10. Redevelopment and infill are encouraged on Traditional and Arterial Mainstreets in order to optimize the use of land through intensification, in a building format that encloses and defines the street edge with active frontages that provide direct pedestrian access to the sidewalk.”

11. On Arterial Mainstreets, unless a secondary plan states otherwise, **building heights up to 9 storeys will predominate. The tallest buildings will be located at the nodes described below. Subject to a zoning amendment, taller buildings up to a maximum of 12 storeys may be considered, where the development provides a community amenity, where it is demonstrated that the development meets the urban design and compatibility policies in Section 4.11 and where the site is located at one or more of the following nodes:**

- a. **within 400 metres walking distance of a Rapid Transit Station on Schedule D of this Plan; or;**
- b. **directly abutting an intersection of the Mainstreet with another Mainstreet or a Transit Priority Corridor on Schedule D of this Plan; or**
- c. **directly abutting a Major Urban Facility.**
(emphasis added)

The Zoning By-law may establish building heights lower than nine storeys based on site conditions, existing character and compatibility.

12. This Plan supports mid-rise building heights up to six storeys on Traditional Mainstreets, unless a secondary plan states otherwise. **Building heights greater than those specified in this Section will only be permitted through a Secondary Plan....**

[89] Mr. Boughton explained that the intent of OPA 150’s revised and added policies in s. 3.6.3 was in part to consolidate the building height criteria as they applied to AMs into one location in the Official Plan. Policy 11 reiterated that mid-rise building heights

(up to nine storeys) would be permitted on AMs, unless a Secondary Plan stated otherwise. Taller buildings up to 12 storeys could be permitted in specific locations that support the City's transit objectives.

[90] Revised Policies 10 and 12 were approved in October 2018. However, since Policy 11 was still under appeal when the subject application was made, s. 3.6.3 of the OP effectively contained no specific policy for maximum heights on AMs (only those policies in s. 2.2.2, s. 2.5.1 and s. 4.11 as might apply – see below).

[91] The final wording of revised Policy 11 resulted from a settlement between the City and the Greater Ottawa Homebuilders Association and the Building Owners and Managers Association, who had appealed OPA 150.

[92] The present Application by Fotenn was received on May 12, 2019. The Hearing on the appeals on Policy 11 took place two days later, on May 14. On May 22, the Tribunal issued an Oral Decision and Order approving the proposed settlement. The Fotenn application was deemed complete on July 4, 2019. The decision on the OPA 150 Appeals became final on July 18, 2019, with the issuance of a Memorandum of Oral Decision.

[93] The approved Policy respecting building heights within the Mainstreet designation became and is now referred to as Policy 12 of s. 3.6.3:

12. On Arterial Mainstreets, unless a secondary plan states otherwise, building heights up to 9 storeys may be permitted as of right but High-rise buildings may only be permitted subject to a zoning amendment and where the building will be located at one or more of the following nodes:

- a. within 400 metres walking distance of a Rapid Transit Station on Schedule D of this Plan; or
- b. directly abutting an intersection of the Mainstreet with another Mainstreet or a Transit Priority Corridor on Schedule D of this Plan; or directly abutting a Major Urban Facility;
- c. and where the development provides a community amenity and adequate transition is provided to adjacent low-rise.

The Zoning By-law may establish as-of-right building heights lower than nine storeys where site conditions, existing character and compatibility with adjacent development dictate that a lower building form is appropriate.

[94] In Mr. Boughton's opinion, based on legal advice received, the **new** OP policy 12 applied in the evaluation of the Application. It dealt with building heights in the AM designation. This meant that the proposed Groupe Lepine zoning amendments did not conform with new s. 3.6.3 (12) of the amended OP. The site does not meet any of the three criteria in new Policy 12, needed for it to be deemed a "node" where high-rise buildings could be considered:

- it is more than 1200 m (not 400 m) walking distance of the nearest planned transit station (on the future Cumberland bus rapid transit corridor);
- it is not located at the intersection with another Mainstreet or a designated transit priority corridor; and,
- there is no nearby major urban facility along Innes Road.

[95] In addition, he opined, the site development plan does not provide adequate transition in building height to adjacent low-rise residential development.

[96] In his opinion then, an application to amend the OP would be required. This would need to demonstrate that the criteria outlined in s. 2.2.2 (17) of the OP for an increase in building heights as is in the revised s. 3.6.3, can be met.

[97] He went on to address the issue of required conformity with the OP, especially respecting s. 2.2.2, 2.5.1, 3.6.3 and 4.11. Section 3.6.3 (7) states that development proposals on Mainstreets will be evaluated under s. 3.6.3 as well as these other policies.

[98] As of the date of submission of the Application for zoning amendments, May 21, 2019, the policies of the earlier version of the Plan were still in effect (i.e. without the amendments in OPA 150). Because the Tribunal has determined that this is the version that should apply to this Application and Appeal, it will cite only this version. Mr. Boughton's comments on OPA 150 are included only where appropriate.

[99] Section 2 of the former OP sets out directions for the next 20-year planning horizon (2003-2023). Growth should be directed to the designated urban area, where services, transit, walking and cycling facilities already exist or can be provided efficiently. It also addressed new development on vacant land in urban areas, with locations for compact, moderate to high density development. Redevelopment on Mainstreets is to be compatible with the existing context or planned function and contribute to the diversity of housing, employment, or services in the area. Policy 2.2.2 (10) would permit low-rise to high-rise built form if urban design and compatibility objectives are met; while (11b) requires that heights consider the context and planned function (as set out in s. 4.11). Buildings should be clustered with other buildings of similar height.

[100] Policy 2.2.2 (3)'s designated target areas for intensification are all located on the Rapid Transit and Transit Priority Network in Schedule D – Rapid Transit Network. Mainstreets are one such target area, and Innes Road here is a designated AM. These are wide, high-volume, and automobile-oriented, with single-purpose commercial uses. They are, however, to evolve over time into more transit-supportive, pedestrian-friendly streets that support the neighbouring community.

[101] Section 3.6.3 (3) stated that the AM designation as applied to deep lots can be up to 400 m. A staff report had stated that Block 150 of the subdivision plan would be "General Urban Area" (where only low-rise buildings of four storeys are permitted). Mr. Boughton stated that because of the approval of OPA 150, he now believed that the AM designation continues the entire depth of the subject site. Thus, more permissive height policies would apply throughout the site in question.

[102] The broad range of uses permitted on AMs includes retail and service commercial, office, residential and institutional uses. These may be in one or more buildings. In his opinion, (again, based on the alterations made in approved OPA 150), despite the proposed high-rise (non-conforming) buildings, the balance of the residential and commercial uses would conform with this use policy.

[103] Mr. Boughton does object to the proposed building frontages as contrary to s. 3.6.3 (10). This requires direct and visible pedestrian access to the sidewalk along Innes Road. Guideline 17 of the Urban Design Guidelines for Development along AMs also requires this. The commercial uses should be located on and be directly accessed from Innes Road rather than Lamarche Avenue, in his opinion.

[104] Section 2.5.1 of the 2003 OP addressed urban design and compatibility. Compatible development must coexist with existing development, without undue adverse impact on surrounding properties. It must 'fit well' within its physical context and 'work well' with surrounding functions. The criteria for compatibility are found in s. 4.11. In his view the fit is not good because of the impacts on adjacent properties.

[105] Section 4.11(2)(c) required adequate on-site parking to minimize spillover parking. Walking, cycling and transit use are encouraged as well, especially close to transit stations or major transit stops. Mr. Boughton pointed out that the proposed ZBLA asks for reductions in the minimum residential and non-residential parking rates. However the site is not within the vicinity of a transit station. Thus the parking reductions would be significant. A detailed parking rate analysis, based on comparable suburban developments, is needed to show that the proposed rates are appropriate for the development.

[106] Section 4.11(2)(d) created measures to minimize undesirable impacts on residential private amenity spaces nearby. In his opinion, the proposed mid-rise buildings near the south and west lot lines, Buildings F and G, could better respect the

privacy of adjacent residential units through reduced building heights and greater transitions.

[107] Similar effects are addressed in s. 4.11(2)(h), which requires minimized shadowing on adjacent properties. The Sun Study submitted indicates that the expected shadows on June 21 from proposed Building G on the properties to the south are not minimal. This could be better mitigated by a reduction in the building height.

[108] Sections 4.11 (7) and (8) of the 2003 plan addressed building height, and the designations where high-rise buildings may be considered. Sections 4.11(9) and (10) at that time provided the considerations for high-rise buildings in the AM areas. Section 4.11(11) then laid out architectural and urban design measures for proposed high-rise buildings there. Two of the design measures are sizing and relationship to surroundings.

[109] Section 4.11(11)(a) created policies for the scale, massing and height of proposals in relation to adjoining buildings and the existing and planned context. In Mr. Boughton's opinion, the proposed high-rise buildings do not meet these policies. The proposal for a 16-storey building at the corner ("imposing" and out of proportion with the street), and two 12-storey buildings on Lamarche Avenue surrounding a pedestrian plaza, do not accord with the Plan provisions. He stated that these slab buildings tower over and are out of scale and context with the nearby built environment. It is mostly low-rise residential, two to four storeys in height, including commercial and residential on the north side of Innes Road opposite the proposed development.

[110] He objects to Building B's frontage on Innes Road based on s. 4.11(11)(e), which speaks of enhancing the public realm at the street level. This policy intent is not achieved as it would be more appropriate to have a continuous active building front along Innes Road. This should be primary building entrances, including commercial storefronts, and/or street-facing residential dwelling units. An at-grade landscaped

public plaza would be appropriate in front of Building A at the corner of Innes Road and Lamarche Avenue.

[111] In his opinion, the overall design of the site featuring eight apartment buildings at the perimeter creates an undesirable superblock. These would cover almost the entire developable area of the 5.2-ha site, he testified, which is comparable in size to four Central Area blocks. This scale and density are overwhelming in the context. It is out of proportion to the surrounding built form, and provides limited connectivity at the street level. This would not comply with s. 4.11(12) of the OP, which deals with compatibility and integration of buildings of greater height or massing than the surrounding uses. There should be effective transition in built form to the low rise uses next door. While the nine-storey buildings are set back approximately 20 m from the adjacent low-rise, in his opinion the transition in height is insufficient. This standard results from the height standards for the AM **zone**, which requires that buildings within 20 m of an abutting low-density residential zone (R1 to R4) be restricted to 11 m in height (four storeys), and those 20 to 30 m from a R1 to R4 zone be less than 20 m (six storeys).

[112] In his opinion, therefore, the transition in building height is insufficient. The transition in heights is illustrated by showing 45-degree angular planes. The nine-storey buildings on the perimeter are setback 18.9 to 21.4 m from the west and south lot lines. In his opinion these setbacks do not achieve the required transitions to the surrounding low-rise structures. Policy 4.11(12) states further that transitions may vary on factors such as: the size of the development and the lower-profile area; intensity of use in the immediate area; and street widths. This 5.2 ha site is comparable in size to several Central Area city blocks, and it does not adequately address transitions to nearby low-rise.

[113] The transition in height needs to be more gradual than the measure of 45-degree angular planes would conclude, he opined. To this end, a building form closer to that of the low-rise neighbourhood would better meet the City's urban design guidelines. Two of these: *Urban Design Guidelines for Development along Arterial Mainstreets* ("Arterial

Mainstreets Guideline”) and *Urban Design Guidelines for High-rise Buildings* illustrate appropriate built form transitions.

[114] Mr. Boughton argued that based on Guideline 9 of the *Arterial Mainstreets Guideline* that the appropriate height of buildings on the site along Innes Road would be 22.5 m, at best seven storeys. The north side of Innes Road here remains as a General Urban Area, and is now of a low-rise built form. Therefore, in his opinion, the buildings fronting on the south side of Innes Road should be only six to seven storeys, to provide for a gradual transition in height across the public street.

[115] Similarly, Guideline 14 states that there should be a transition in the scale and density of the built form to the lower density neighbourhood. This is not met, he repeated. Guideline 1.10 of the *Urban Design Guidelines for High-rise Buildings* would have high-rise buildings along the edge of a large development area be of a lower profile, to transition down to the surrounding lower-scale context. Here the tallest buildings are sited along the public streets and perimeter. Though they are farthest from the low-rise to the west and south, this does not achieve a progressive transition in built form and context.

[116] Mr. Boughton’s reasons for concluding that the proposed development does not represent good planning include (many already mentioned): It does not meet OP and Guideline compatibility requirements nor height transitions; the site design of eight residential buildings around the perimeter atop a one-storey podium creates an undesirable superblock; and there is limited connectivity at the street level throughout.

[117] Based on the legal opinion of the City’s counsel, Mr. Boughton evaluated the proposal based on the new s. 3.6.3(12) of the OP as amended in OPA 150. Thus he concluded that the proposed zoning amendment does not conform with new Policy 12. The Site does not meet the three locational criteria needed for it to be deemed a node where high-rise buildings could be considered. Thus he concludes that an application to amend the OP would be required.

[118] However, also in his opinion, the Application does not even conform to the relevant policies of s. 2.2.2, s. 2.5.1, s. 3.6.3 and s. 4.11 of the prior version of the OP of 2003. The proposed development is not appropriate nor desirable for the Innes Road AM and does not represent good planning. Therefore he recommended refusal of the proposed ZBLA application.

THE PARTICIPANTS

[119] There were at least 23 persons granted Participant status who sent the requisite statements for the Tribunal's consideration. Because of the *Tribunal's Rules of Practice and Procedure* ("Tribunal Rule") Rule No. 7.7, they could not make oral presentations, but they could attend the virtual hearing. At least 13 did so, either full time (8) or part time. Their submissions were closely considered, and weighed heavily on the Tribunal's decision here (see below).

DECISION AND ORDER

[120] Respecting the general location of higher intensity uses along this Arterial Mainstreet, the Tribunal finds that the application is consistent with the provisions of the Provincial Policy Statement that are in effect as of the date of this Decision, as s. 3(5) of the *Planning Act* requires.

[121] Notwithstanding this, the Tribunal finds that it is the Official Plan policies as they were set out in the 2003 version rather than the later approved OPA 150 that are the applicable ones on which to judge this application. It agrees with Mr. Polowin that the longstanding "*Clergy* principle" should apply to the assessment. The Official Plan as it was **prior to** July 18, 2019 is the relevant document for consideration in this matter.

[122] However, the Tribunal's finding on the *Clergy* principle will not assist Mr. Lepine in this Appeal. It finds that the proposal does not meet even the earlier version of the OP that does in its view apply to this Application, for the reasons pointed out by Mr.

Boughton. These mainly concern heights, massing, and transitions to lower scale existing uses. Should the Tribunal approve the development proposed here, it could well be duplicated or extended on the other Blocks 1 and 2 to the east on the registered Plan of Subdivision. The Tribunal considers even the subject Application to be overbuilding for the context, both planned and existing. Section 2.2.2. of the OP relied on by Mr. Tremblay respecting the design's relationship to the neighbourhood is contradicted here by the large slab structures and the raised amenity area, with little easy access by the public. The stepbacks of the buildings themselves appear at too high a level to be effective as claimed.

Other conclusions: The Participants

[123] The Chapel Hill South Community Association had forwarded their comments on the proposal to Mr. Boughton on August 13, 2019, prior to their meeting with the Councillor. At the Hearing on the Appeal, the sheer number of Participants who attended consistently and submitted detailed comments on the proposal indicated to the Tribunal that the City's opposition to the heights and site configuration is well founded. The Tribunal has read and carefully considered all of the submissions, many of which were very detailed and professional. The comments illustrate the significant interest and concern with this proposal. They do not appear to the Tribunal, in the main, to result from so-called NIMBYism.

[124] Traffic and parking were oft-expressed problems perceived. Mr. Tremblay countered that these issues were no longer of concern to the City, given that it accepted the Applicant's Transportation Impact Study. Therefore, they were not given much weight by the Tribunal. Other adverse effects created (shadowing, overlook, unit size vs. affordability, distance from transit, lack of parkland while creating an "urban heat island" via the raised garage roof, light pollution, lack of amenities nearby, slab buildings without stepbacks) were among the many issues raised by the nearest neighbours, who are mainly in low rises. The Tribunal agrees with the majority of the concerns expressed, as can be seen in the findings.

Locational requirements for high-rise developments

[125] While Policy 2.2.2 (10) of the 2003 Official Plan would permit low-rise to high-rise built form, it would only be when urban design and compatibility objectives are met. 11b) requires the issue of heights to consider the surrounding existing context and planned function, as set out in s. 4.11.

[126] This proposal meets OP Policy 2.2.2(3)'s designated target areas for intensification, as it is on an Arterial Mainstreet. Mr. Marc stated in his opening statement that rental apartments are welcome on Arterial Mainstreets, but that the Applicant/Appellant proposed too much for this site. It would not conform to the new policies in OPA 150, and an application to amend the OP as well as the zoning application is necessary. However, for the reasons below, the Tribunal would apply only the pre-150 OP version in its evaluation. As Mr. Marc pointed out, even pre-OPA 150, s. 4.11(9) was present in the OP. This would permit high-rise buildings in other than larger contexts, if all other policies were met. These include direct access to an arterial road; location close to a rapid transit station; a strategic corner lot, gateway or view; where transit is supported; and where transition profiles are already permitted. The subject site does not conform with even the earlier version, in the Tribunal's view. It is supposition only, but had the City considered the application while the former version was in force, it is likely that it would have required OP amendments even then.

[127] Similarly, the pre-150 Policy 3.6.3(10) supported up to nine stories on Arterial Mainstreet, with greater building heights possible in certain circumstances. The list is repeated here for convenience:

- a) The proposed building height conforms with prevailing building heights or provides a transition between existing buildings;

- b) The development fosters the creation of a community focus where the proposal is on a corner lot, or at a gateway location or at a location where there are opportunities to support transit at a transit stop or station;
- c) The development incorporates facilities, services or matters as set out in Section 5.2.1 with respect to the authorization of increases in height and density that, in the opinion of the City, significantly advance the vision for Mainstreets; where the application of the provisions of Section 2.5.1 and Section 4.11 determine that additional height is appropriate.

[128] This proposal, even though on an Arterial Mainstreet, would not conform with required heights even in the earlier version of the Official Plan. Nor in the Tribunal's view does the corner of Innes Road and Lamarche Avenue (where the proposed tallest building is located), although indeed a corner, constitute a "gateway location" as in clause b. above. Mr. Tremblay testified that this development would constitute a gateway or entrance to the (AM) designation in this location. This may be true, but it is too tall and large an entrance, even if the depth of 400 m now accepted as the parcel depth. The proposal may also meet the future OP intensification targets of 60%, as Mr. Tremblay stated. While a transit stop larger than a bus stop is a possibility on Innes Road, as a designated Transit Priority Corridor, a subway station here appears very remote in time. Even though this site is close to bus transit, it would be overbuilt in the current design. While it must meet the planned function as well as the existing, in the Tribunal's view it overstates the future context here, on the former OP provisions. Nor does the proposal meet the objective of allowing this Arterial Mainstreet to evolve over time into a more transit-supportive, pedestrian-friendly street that supports the neighbouring community. All commercial activity here would be centralized and internal to the site.

[129] The Appellant cannot argue that the former version of the Official Plan applies, then effectively take advantage of any wording in OPA 150. The Arterial Mainstreet designation is limited to the south of Innes Road, and there are existing low-rise

developments to the south and west. The subdivision blocks to the east of Lamarche Avenue owned by Groupe Lepine may well be permitted to develop with similar built forms, so that this parcel should be at lower density and height to suit its existing surroundings.

[130] Respecting site design, even with the minimum separation distance of 23 m between the eight high-rise buildings the site would be crowded, especially in its low-rise context. The Tribunal agrees with Mr. Boughton's assessment that there would be a general lack of variation in mass and form, as well as inadequate incremental change in building height along the perimeter of the site. The nine-storey buildings are set back approximately 20 m from the adjacent low-rise residential structures off the site. However, the transition and incremental change in building height along the perimeter seems inadequate to prevent oversight and shadowing. The Tribunal is not satisfied that the stepbacks proposed, only at the upper levels of the buildings, will suffice to make the proposal meet the desired openness and visual porosity.

[131] Guideline 1.10 of the *Urban Design Guidelines for High-rise Buildings* supports this view. In neighbourhoods, high-rise buildings along the edge of a large development area should be of a lower profile, to appropriately transition down to the surrounding lower-scale context. The proposed site development does not meet this requirement. Even though it is found in a Guideline document only, it is generally accepted good planning. Here the tallest buildings are sited along the public streets and the perimeter of the site. Even though the tallest are the farthest from the low-rise structures external to the site, this still does not achieve a progressive transition in built form and context at the south or west sides.

[132] The architecture for the site is indeed interesting. The quality of the buildings proposed may be seen in the Document Book, Tab 15, Artistic Renderings 1-6, pp. 28-33. However, when evaluated under the former OP provisions, as set out above, the proposal fails to meet even the former height policies. The Tribunal agrees with Mr. Boughton that there are too many buildings proposed for the size of the site, even if its

depth is considered to be 400 m, as under OPA 150. The other developments by Groupe Lepine offered as examples (Merivale Road and Fisher Avenue) are not in fact comparable in size or design.

[133] It is acknowledged that Condition 11 of the subdivision plan approval would require 10% high-density apartments in the development (“on any one project”, as Mr. Tremblay testified). Mr. Marc in his submissions put it that only 50 apartment units, over all four blocks, would be required to achieve Condition 11. While rental apartments are indeed desirable, the current proposal would significantly overfulfill this provision.

[134] In this proposal, there are simply too many buildings here that are too high, when the surrounding neighbourhood is already built to (at most) a four-storey height. In the Tribunal’s view, the proposed setbacks in the buildings are at too high a level to provide the height transitions the Applicant/Appellant claims. While the shadow studies do not constitute proof of significant adverse shadow effects except for midsummer, this positive factor does not outweigh the fact that nine “slab-like” structures (as Participants called them) would arise fairly close to the property lines, effectively closing in and creating overlook to the surrounding low-rise neighbourhood.

[135] Mr. St.-Jean’s conclusion that a few higher buildings assist to provide the appearance of greater open ground space may well be true. However, that ground space is not apparent here, given the sheer number of buildings. At eye level there is still a solid wall of buildings, even with a variety of heights. The only exception may be the view from Innes Road through the centre of the raised amenity space.

[136] We note again s. 2.5.1 of the 2003 Official Plan, which addressed urban design and compatibility. Compatible development must coexist with existing development, without undue adverse impact on surrounding properties. It must ‘fit well’ within its physical context and ‘work well’ with surrounding functions. The criteria for compatibility are found in s. 4.11. In the Tribunal’s view, the fit is not good because of the impacts on adjacent properties.

Public Parkland

[137] The City Staff had informed the Applicant/Appellant that at the density proposed, a municipal park is needed. The Tribunal does not consider the elevated design of the garage roof cover to provide for adequate parkland or greenspace, or sufficient public access to it, as was claimed. Mr. St.-Jean testified that the elevated central portion met the universal access code of 5% for the slope, and that the “serious amount” of earth over the garage would permit mature trees there. The “communal courtyard greenspaces” might well provide this for residents of the complex. However, a proposed one-storey rise, even with one elevator from the commercial plaza, does not appear to be adequately open and inviting to produce the effect of a standard POP. The rise would especially discourage the disabled, and the paths or multi-use pathways (“MUPs”) appear too narrow and winding to be welcoming to other than residents of the complex. Mr. Tremblay assessed the site’s “porosity” as adequate, but the Tribunal does not share that view.

Traffic

[138] The Tribunal does not accept the residents’ concerns about excess traffic to be caused by the development. Clearly, there would be increases on Innes Road and Lamarche Avenue. However, the Applicant/Appellant’s Transportation Impact Study (Exhibit 1, Vol. 2, Tab 25) was accepted by the City as satisfying its concerns. Respecting the private roadway around the site, disparaged by many, Mr. Tremblay testified that it would be “terminating in an access-controlled gate at Innes Road”. This is hardly an open invitation to increased traffic levels in the subdivision, as claimed. Mr. St.-Jean found no need for another road to traverse the site as suggested by the UDRP. This is confirmed by the City’s acceptance of the TIA.

Commercial Uses

[139] Mr. Tremblay stated that the Arterial Mainstreet designation did not require commercial uses at grade along street frontages. Thus this segment of Innes Road did not have to comply with Mr. Boughton's testimony that entrances to such uses should be located on Innes Road. Therefore the Tribunal would have accepted the location of the proposed commercial uses in the two structures facing the commercial plaza, proposed to be located on Lamarche Avenue.

Active Frontages

[140] Respecting Mr. Boughton's testimony concerning active frontages [based on OP s. 3.6.3.(10)], the Tribunal agrees with the Applicant/Appellant that sufficient pedestrian access to the sidewalk is provided via residential lobbies and by patios.

UDRP Conclusions

[141] For the reasons given, the Tribunal agrees with some of the comments of the UDRP. It must be noted that their findings were based on a different numeration of the Buildings A to G. However, the Tribunal does not agree that commercial uses must face on Innes Road. It sees no need for an internal road. Also, their recommendation for stacked townhouses at the south end is not needed if a proper height transition for apartment structures is provided.

Question of Compliance with the Zoning By-law No. 2008-250

[142] In light of the Tribunal's decision on the merits, this issue need not be addressed. The conclusions on the suitability and compatibility are reinforced by the requested significant deviations from the By-law's density, height and setback standards.

Fairness and Transparency in the Application Process

[143] The Tribunal agrees with the Applicant/Appellant that it was not made clear in many meetings with the City Staff, and especially in the “deemed complete” letter, that the City required an OPA in addition to the zoning amendments. Because OPA 150 had reduced permitted heights on Arterial Mainstreet, the City was of the opinion that the application should meet the new requirements. The City was in an anomalous position, as it received the application prior to the Tribunal’s formal approval of OPA 150.

[144] It may well be, as suggested by Mr. Boughton, that the Applicant/Appellant submitted its application specifically on May 21, 2019 since it feared that a favourable decision on the settlement with developer groups was imminent. Mr. Marc submitted in argument that Mr. Tremblay had conceded that an OPA would likely be necessary if OPA 150 were approved. The application date of May 21, 2019, was the day before May 22 Tribunal Hearing for OPA 150. This occurred, Mr. Marc stated, even though the Owner’s supporting package of materials was not yet ready to submit. He argued that Mr. Tremblay had effectively admitted in his Planning Rationale this intention to predate the approval of OPA 150.

[145] However, it appeared from Mr. Polowin’s submissions that the City effectively and continually refused to negotiate any change to the proposal (for so-called “shrink-wrap zoning”). It merely insisted that the application would be judged under the OP as amended by OPA 150. He objected to this finding and its statement in Mr. Boughton’s Report to Council as fundamentally misleading. Mr. Boughton testified, Mr. Polowin stated, that he had raised the issue of the applicable version of the OP **seven months** after the time he began to consider the question. Mr. Tremblay testified in his Witness Statement that:

On October 1, 2019, I spoke with Lee Ann Snedden after Michael Boughton notified me that City would require an Official Plan Amendment for building heights above nine (9) storeys. I advised Ms. Snedden that this position was not consistent with the discussions that I had with three (3) senior policy Staff,

including herself and that an Official Plan Amendment was not identified as a requirement in the pre-application consultation or subsequent discussions. I asked her to connect with M. Boughton and that the Department should reconsider this position in light of applicable policies at the time.

[146] Mr. Boughton testified that in his summary of the initial meeting of August 12, 2018 with the proponents, “[i]ncluded were comments and submission requirements for a site plan control application and accompanying zoning amendment application.” There was no mention, it seems, of any OP amendment in these earlier discussions either.

The *Clergy* Principle – should it be applied in this case?

[147] The Tribunal has closely considered the detailed submissions on whether the finding in *Clergy*, as it is well known, should be applied here. It concludes that it should be applied and does, on these facts. It rejects the City’s submission that the Appeal should be decided under later cases in which this “*Clergy* principle” was not followed. This finding does not affect the decision here, as the Tribunal concludes that the Application does not meet even the earlier OP policies. However, the principle will be addressed briefly so that its application may be considered in other matters to come, an “update” as it were.

[148] This principle was established by the Ontario Municipal Board in the decision in *Clergy Property Ltd. v. Mississauga (City)* 34 O.M.B.R. 277, affirmed (unreported) Jan 28, 1998, Ont. C. A. In *Clergy*, the Board determined that where the date of an application for planning amendments preceded the date of OP revisions (there, policies for distancing of residential uses from the then Pearson Airport), it should be the policies in force at the date of the application that governed. This adds certainty and fairness to the planning process (p. 280). It cited many concurring Board decisions, concluding on p. 283: “...it is good law to adjudicate an application within the confines of the policies prevailing at the date of the application.” Some of the Board decisions cited were based on similar facts to those here, where later plan amendments had been passed, yet final approvals followed an application.

[149] The Applicants/Appellants here relied on the *Clergy* principle to request that this proposal to be adjudged on the earlier 2003 version of the OP, prior to approval of OPA 150. As Mr. Polowin submitted, “[i]t is an annunciation of a principle of natural justice and procedural fairness.” (Argument, para. 30, Nov. 4, 2020).

[150] *Clergy* protects the development rights acquired by an owner: *Greenspace Alliance of Canada’s Capital v. Ottawa (City)*, 2006 CarswellOnt 1106 (OMB), para. 7.

7 The appellants also contend that these applications should be evaluated against the planning instruments in effect at the time of the application by KNL in April 2003 and that the Board should apply what is referred to as the "Clergy" principle (*Clergy Properties Ltd. v. Mississauga (City)* (1996), 34 O.M.B.R. 277 (O.M.B.)) in this case. The Board does not agree, the principle set out in the *Clergy* case, is only applicable in cases where more restrictive planning policies were put into place by a municipality following an application for development approvals, in order to protect the development rights acquired by a landowner. The relevant planning policies (2003 City of Ottawa Official Plan) adopted and approved by the City since the making of the development applications by KNL in April 2003 cannot be said to be more restrictive and therefore, the "Clergy" principle does not apply.

[151] Similarly, an application cannot be defeated by a later-enacted standard: *James Dick Construction Ltd. v. Caledon (Town)* 2003 CarswellOnt 6221, para. 34 (“*James Dick*”).

34 In this respect, Mr. Fairbrother notes that in *Dumart*, the Board asserted that where the new policies involved a "significant new imposition" it would not be fair to apply the new policies to an existing application. This is an extension of what could be called the "*Ka/mom*" principle⁴ which says that an applicant cannot be put to a standard imposed after the date of the application which would have the effect of defeating the application. This principle protects proponents from policy changes that are meant simply to frustrate an application retroactively.

[152] However, where a compelling public interest, a significant elapse of time since the application, or the owner participates in future policy changes and by implication, postpones consideration of its application, later-enacted provisions have been held to govern.

[153] In Mr. Polowin’s submission, none of these factors apply to this Application.

[154] Decisions from Mr. Polowin were: *James Dick Construction Ltd. v. Caledon (Town)*, 2003 CarswellOnt 6221 (OMB); *Calloway Real Estate Investment Trust Inc., Re*, 2012 CarswellOnt 11604 (OMB); *Avonwood Shopping Centres Ltd. v. Stratford (City)*, 2010 CarswellOnt 3673 (OMB); and *Dumart v. Woolwich (Township)*, 1997 CarswellOnt 5706 (OMB).

[155] In *James Dick*, the overriding factor for rejecting *Clergy* was the participation of the applicant in altering the application over a 20-year period. In *Dumart*, the fact of lasting adverse impacts, both planning and environmental, mitigated against the application of *Clergy* on grounds of a compelling public interest. Such fact situations may be somewhat similar to the present, but do not outweigh the Applicant's interests here, in the Tribunal's view.

[156] The City and many of the Participants in the Hearing advocated that the more stringent locational and height policies in the later enactment (OPA 150 *et seq.*) must govern. Mr. Marc for the City submitted the decisions that qualified and differed from the conclusion in *Clergy*. Where there is a compelling public interest NOT to follow *Clergy*, it should not govern, Mr. Marc stated. He relied on *James Dick* and *Dumart*, as well as other cases seen in his submission.

[157] In the fact situation here, there was no timely notice that the City would apply the OPA 150 height provisions. The policy regime, as Mr. Polowin stated, should not be a moving target. He relies on *Jones, Re*, 2014 CarswellOnt 12482 to argue that where an application preceded an OP approval and the municipality assured the applicant that the existing planning provisions would apply, the Tribunal had agreed. While not the facts here, in the Tribunal's view the Applicant/Appellant was entitled to submit its application at any time, and also to have the City consider it within the existing municipal legislation and guidelines rather than prospective ones, even if these had been passed but not approved. In other words, *Clergy* applies here, even given newer-adopted height standards. Even if the Tribunal were convinced by the evidence that the proposed development was desirable in this context (and it is not), the Applicant/Appellant was

entitled to have the pre-OPA 150 apply to its evaluation. It does, however, conclude that amendments to even the prior OP version were required for this application to be approved.

[158] In the Tribunal's view, nothing turns on the fact that a protective appeal was filed prior to the owner's receipt of the City Staff's initial comments on the requested zoning amendment. The application was deemed complete by City Staff on July 4, 2019, even after the City was aware of the approval of OPA 150. Surely fairness would dictate that the Applicant/Appellant be given notice at the time that the application for zoning amendments was made that an OPA would be required, or it should not have been deemed complete. This is an additional reason that the new policies in OPA 150 should not have been applied in evaluating this application, even given the cases that qualified *Clergy* on public policy grounds.

[159] The Tribunal concludes that *Clergy* is still good law. It should be applied in this instance because of the City's lack of notice to the Applicant/Appellant that it would require or might be seeking an OP Amendment when the zoning application was received and evaluated. Thus this Application and Appeal will be determined under the earlier version of the OP, in force until OPA 150 was formally approved by the Tribunal in its written decision of July 18, 2019. The reasons are set out above.

[160] Mr. Marc also referred to ss. (1) of s. 2.1 of the Act. This states:

Approval authorities and Tribunal to have regard to certain matters

2.1 (1) When an approval authority or the Tribunal makes a decision under this Act that relates to a planning matter, it shall have regard to,

- (a) any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter; and
- (b) any information and material that the municipal council or approval authority considered in making the decision described in clause (a). 2015, c. 26, s. 13; 2017, c. 23, Sched. 3, s. 2 (1); 2019, c. 9, Sched. 12, s. 1 (1).

Same, Tribunal

(2) When the Tribunal makes a decision under this Act that relates to a planning matter that is appealed because of the failure of a municipal council or approval authority to make a decision, the Tribunal shall have regard to any information and material that the municipal council or approval authority received in relation to the matter. 2019, c. 9, Sched. 12, s. 1 (2).

Same

(3) For greater certainty, references to information and material in subsections (1) and (2) include, without limitation, written and oral submissions from the public relating to the planning matter. 2015, c. 26, s. 13

[161] It is instructive to see that this section goes on [subsection (3)] to require consideration of all written submissions of the public. Such submissions have been considered here.

[162] Mr. Marc's conclusion on s. 2.1 was that (even absent *Clergy*) subsection 2.1 (1) means that Council's later OPA 150 should carry the day. It should apply to any evaluation of this application, and not be the earlier version of the Plan. However, the Tribunal does not interpret this language as meaning strict adherence to new enactments, and that they should prevail over earlier language. The directive language here is "shall have regard to", i.e. consider carefully. It would have been expressed directly here if it had been the intention that later enactments prevail in all cases over earlier (even acknowledging the usual rules of statutory interpretation that later enactments are intended to replace earlier). In the instant case, approval of the later height restrictions and conditions followed the date of the application. Deliberately timed or not, the application preceded the approval of OPA 150.

[163] Therefore it seems that the later demand for an OP Amendment to the 150 version was not a fair one when made. OP Amendments to the 2003 version were needed. This is especially so as it was not communicated at all in the conversations from the "working session" of February 2019 or subsequent conversations March 6 and 11, 2019 with City Staff, nor even in the "deemed complete" letter of July 4, 2019. It is understandable from the City's perspective that it would want the later policies to

govern, but such was not the case. It was unfair to have issued a letter effectively stating that there were no further applications or materials required, if the real opinion was that an OP amendment was also needed to effect the proposal. Nor do we understand how the Councillor's meeting with the public on August 21, 2019 could be fair to the Applicant/Appellant when it was not even present (the reason given was that the requisite public meeting would be held after the submission was revised.) Only after September 4, 2019 (approximately) did Mr. Tremblay hear that the City now required an OP Amendment.

[164] The Tribunal Orders the appeal is dismissed

"G. Burton"

G. BURTON
MEMBER

"D.S. Colbourne"

D.S. COLBOURNE
MEMBER

If there is an attachment referred to in this document,
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Local Planning Appeal Tribunal

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