

ISSUE DATE:

FEB. 20, 2007

DECISION/ORDER NO:

0449



PL060214

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Russell Hill Investments Limited has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Toronto to redesignate land at the west side of Russell Hill Road, south of St. Clair Avenue West and west of Avenue Road, known municipally as 70 - 200 Russell Hill Road from "Low Density Residence Area" to a site-specific designation to permit a proposed apartment building containing a maximum of 22 dwelling units

(Approval Authority File No. 05 104781 STE 22 OZ)
OMB File No. O060051

Russell Hill Investments Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 438-86 of the City of Toronto to rezone lands respecting 70 - 200 Russell Hill Road from "Residential District (R1)" to a site-specific zone to permit a proposed apartment building containing a maximum of 22 dwelling units

OMB File No. Z060030

Russell Hill Investments Limited has referred to the Ontario Municipal Board under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, determination and settlement of details of a site plan for lands composed of 70 - 200 Russell Hill Road, in the City of Toronto

OMB File No. M060020

APPEARANCES:

Parties

Russell Hill Investments Limited

City of Toronto

Counsel

A. Brown

G. Whicher

DECISION OF SUSAN B. CAMPBELL AND ORDER OF THE BOARD

Russell Hill Investments Limited (the "Appellant") has appealed to the Board the refusal or neglect of Council of the City of Toronto (the "City") to enact a proposed amendment to the City's Official Plan (the "in force OP") and the refusal or neglect of Council to enact a proposed zoning by-law amendment (the "ZBLA"). The Appellant has also referred to the Board the determination of the details of a site plan. These appeals are in respect of 70-200 Russell Hill Rd., lands currently designated "Low

Density Residence Area” and zoned “Residential District (R1)”. The proposed amendments would designate and zone the lands such as to permit, on a site specific basis, an apartment building containing a maximum of 22 units.

The Board does not have before it, at this time, appeals under the *Ontario Heritage Act* or the Ravine Protection By-law or the Tree By-law.

The Site:

The subject property, located on the west side of Russell Hill Rd. is known municipally as 70, 166 and 200 Russell Hill Rd. Currently, on the 5,160 sq m site is a large house, with an accessory garage, swimming pool and landscaped areas. The property is located either in or adjacent to the Nordheimer Ravine and is extensively treed with mature trees. The house is designated pursuant to the *Heritage Act*, although it was not designated at the time the redevelopment applications were filed with the City. It is acknowledged by Counsel for the Appellant that the property is subject to the Ravine Protection and Tree By-laws of the City. While the Toronto Region Conservation Authority (the “TRCA”) was not a party to this hearing, the TRCA is taking the position that the property is subject to Ontario Regulation 166/06, The Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation (“O.Reg. 166/06”). If the land is subject to this regulation, a permit from the TRCA would be required for any development on the property.

The Proposal:

The Appellant proposes to demolish the existing house and construct two condominium apartment buildings, containing a total of 22 units. The north building is proposed to be four storeys and the south building five storeys. The buildings would be connected by a one storey link. Ten units are to be located in the north building and twelve in the south building. The proposed density is 1.34 times coverage. Parking is to be in an underground lot.

The Appellant has addressed the natural heritage of the site through the preparation of a Natural Heritage Impact Study (“NHIS”) and attendant documents.

The Immediate Neighbourhood:

Having heard from witnesses for both parties and a number of neighbour/participants, the Board concludes that this exceptionally attractive residential neighbourhood contains a variety of house forms. In reviewing the lots on Russell Hill Rd. and in the immediate area, the Board notes that the lots are anything but uniform in size. Further, while single family houses predominate, they are not the only house form in the immediate area. As a result of “interesting” planning decisions made between forty and fifty years ago, there are three multi-storey apartment buildings located on the east side of Russell Hill Rd., one directly across from the subject property. More significantly, from the Board’s perspective, are the recent redevelopments in the area. A multi-unit residential condominium building is located at 210 Russell Hill Rd., two lots to the north of the subject property. Row townhouses are located at 99-111 Russell Hill Rd., to the south of the subject property and at 250 Russell Hill Rd., to the north of the subject property. Around the corner from the subject property, at 63-71 Clarendon Ave. are row townhouses.

The Board accepts the evidence of Peter Walker, the Appellant’s land use planner, contained in his planning report (Exhibit #20), supported by photographs in the Appellant’s Document Book (Exhibit #2) that “the neighbourhood does not present any discernible pattern in terms of setback relationships between houses and Russell Hill Road: some dwellings sit close to the street and others are setback significantly from the street”. The neighbourhood is not a “cookie-cutter” subdivision; it is an extremely attractive, extensive, urban enclave of residences.

The most striking feature of the neighbourhood, however, is not manmade. Rather it is the vital, well-treed ravine feature running through the neighbourhood which must be protected through an appropriate application of the relevant planning documents. As evidenced by a City publication entitled “Bring Back the Don” (Exhibit #1, TAB 18) the TRCA and the Task Force to Bring Back the Don are working to rehabilitate the Nordheimer Ravine. Water is again collecting in pools in the ravine and native species of plants are being reintroduced. Of particular relevance to this hearing is the Forest Slope Remediation program proposed.

The “Bring Back the Don” publication notes that “one of the issues of Toronto ravines, especially those close to neighbourhood streets, is the encroachment of non-native trees. In particular, Norway maple is a problem species in ravines... (they) allow very little light to pass through. The result is bare soil and very little habitat”. Therefore

the TRCA and the Task Force instituted a pilot project in consultation with property owners on the top part of the ravine slope. "All of the non-native trees were cut down to allow sun to reach the forest floor....since the project began, the impact on the slope has been significant. A strong and diverse under storey is growing...It is hoped that this will eventually approximate the original woodland habitat".

It is in this context that the Board must consider these appeals.

The Built Heritage Issue:

Although Counsel for the Appellant took the position that as no application for a demolition permit was before the Board, the heritage issue was not relevant to this hearing, the Board determined that it was relevant. The City is mandated by Part 5 of the in force OP to preserve the built heritage of the City. Section 5.1 provides "it is a policy of Council to encourage the preservation and conservation of those sites, buildings and structures...which have been evaluated and identified as being of architectural and/or historical importance". Section 5.4 provides "it is a policy of Council to designate property to be of historic or architectural value or interest and take all necessary steps to ensure the preservation and conservation of all buildings, structures and other significant features of the property".

The existing building on the subject property is designated pursuant to the *Heritage Act* and has, therefore been "evaluated and identified as being of architectural and/or historical importance". In the normal course such a designation would be given a considerable degree of deference by this panel of the Board. However, it is clear to the Board, from a review of the relevant evidence, that this designation did not occur in the normal course, and therefore the Board must consider the designation and its relevance to this hearing carefully.

Consultation between the Appellant and City staff on this proposal began in 2004. The formal applications were submitted to the City on January 25, 2005. City Council in May 2005 (Exhibit #1, TAB 9) resolved that "following consultation with the Toronto Preservation Board, City Council gives notice of its intention to designate the property at 200 Russell Hill Rd. (Frederick J. Capon House) under Part IV of the *Ontario Heritage Act*". One would assume that this intention to designate was based, on the very least, upon the work of properly qualified City heritage staff, or, in fact, on the recommendation of the Toronto Preservation Board, the body mandated to make

recommendations on such matters. It was not. Also contained in Exhibit #1, TAB 9 is a memorandum from the Toronto Preservation Board, dated June 10, 2005 to the Toronto and East York Community Council recommending “to City Council that it not state its intention to designate the property at 200 Russell Hill Road (Frederick Capon House) under Part IV of the *Ontario Heritage Act*” (emphasis added). The Toronto Preservation Board went on to recommend that if Council does intend to proceed with the designation, “a consultant be retained by the City Solicitor to develop the Reasons for Designation”.

The recommendation of the Toronto Preservation Board was premised on a consideration of a report from the Director, Policy and Research, City Planning Division dated May 25, 2005 (Exhibit #1, TAB 9). This report, with admirable candour and professionalism, sets out the troubling history of the attempt to designate the property. In March 2005 staff “was asked to evaluate the property to see if the structure warranted designation. Staff concluded that it did not meet the criteria for designation in this neighbourhood”. Staff went on to note that the ward councillor introduced the motion to designate “on behalf of his constituents who have expressed concern that the building is threatened by the development proposed for the site...The proposed designation...would enable City Council to refuse an application for demolition”. Staff concluded that the property, “although interesting architecturally does not warrant individual designation in this neighbourhood...As staff cannot support the designation Council will require the services of a consultant to prepare the Reasons for Designation required as part of the designation process”.

The Board must emphasise the weight that it gives to the work of specially qualified individuals with an expertise in built heritage and to the recommendation of a body like the Toronto Preservation Board which is mandated by the City to protect the City’s built heritage. Having said that, the Board acknowledges that City Council has the final responsibility at the municipal level to protect the City’s heritage fabric. However, in protecting the heritage fabric, City Council must act in good faith. It must not utilize the *Heritage Act* to frustrate otherwise legitimate development proposals.

City Council, after receiving the recommendation of both professional heritage staff and the Toronto Preservation Board that the property not be designated, determined that it should be. It is apparent to the Board, from a review of Exhibit #1, TAB 9 that Council, without receiving the advice of any outside consultant on the matter,

determined to designate the property. The Toronto City Council Decision Document of July 19, 20, 21 and 26, 2005 shows that Council, after considering the May 25, 2005 staff report and a Fiscal Impact Statement from the Deputy City Manager, confirmed its intention to designate. Therefore, the Board finds that at the time Council confirmed its intention to designate the property it had before it no information or evidence upon which such a designation could be based. At the hearing of this matter, the Board was so troubled by this questionable action that it confirmed with Michael McClelland, the heritage witness called by the City, that he was retained subsequent to the designation. He was not retained by the City until September 2005; he was retained to "speak to the appropriateness of the designation in connection with an upcoming Conservation Review Board hearing". The Board also confirmed with Mr. McClelland that he was not the outside consultant which staff and the Toronto Preservation Board recommended be retained to develop Reasons for Designation. He testified that City staff ultimately prepared the Reasons for Designation.

The subject property was designated by By-law 14-2006 on February 2, 2006. Schedule A contains the reasons for designation (Exhibit #1, TAB 10).

It was the evidence of Mr. McClelland and it is noted in a staff report dated August 11, 2006 that Ontario Regulation 10/66 ("O.Reg. 10/06") passed on January 25, 2006 was in some way relevant to this hearing. O.Reg. 10/06 (Exhibit # 45) sets out criteria for designation under the *Heritage Act*. However, the Board notes section 2 of the regulation which provides that the regulation "does not apply in respect of a property if notice of intention to designate it was given under subsection 29(1.1) of the Act on or before January 24, 2006". The notice of intention to designate the subject property was given on May 17, 18 and 19, 2005. Therefore O. Reg. 10/06 does not apply to the subject property. The Board further finds that even if the regulation did apply, it was not something that should have materially affected staff's opinion on the designation. The City had designation criteria in place at the time that staff originally considered the designation (Exhibit # 46). The Board finds, and even Mr. McClelland acknowledged, that the City criteria are very similar to the criteria set out in the regulation. If the property should not have been designated under existing City criteria, it should not be designated under the regulation criteria.

Having reviewed the circumstances surrounding the designation of the subject property, the Board finds that the City has demonstrated bad faith. The Board does not

use these words without due consideration, but can think of no other way to describe this designation process. The City's professional heritage staff recommended against designation even though they knew the house was threatened with demolition. Any suggestion made by Mr. McClelland or Counsel for the City, that the recommendation was made because the staff preferred a heritage district designation does not bear scrutiny. If a valuable heritage resource is under threat of imminent destruction, responsible heritage staff are not going to recommend against individual designation in the hope that a heritage district designation is going to ride to the rescue. The Board has carefully reviewed the staff recommendation of May 25, 2005 against designation and no mention is made of a potential heritage district designation.

The Board finds, and the City's heritage witness acknowledged, that before a designation is done, there must be a genuine basis for the designation. Technically, it may be argued that when the ultimate designation was done on February 2, 2006, by by-law, the Reasons for Designation, and therefore the basis for the designation, were in place. However, the document trail detailing Council resolutions, demonstrates that Council intended to designate the property without having an iota of evidence that there were reasons to designate. All Council had received was the recommendation of its own heritage staff and the Toronto Preservation Board that "the house does not meet the criteria for designation in this neighbourhood". Council's decision to proceed with a Notice of Intention to Designate in the absence of a genuine basis for designation, demonstrates bad faith. It shows this Board that City Council was prepared to use the provisions of the *Heritage Act* to defeat a development proposal despite the fact that the only expert opinion they had before them was that the property "although interesting architecturally, does not warrant individual designation in this neighbourhood". The Board finds that this is an improper use of the *Heritage Act* which it will not countenance.

The Board gives little weight to the evidence of Mr. McClelland, not because it questions his expertise or bona fides, but due to the bad faith that the City has demonstrated on the issue of the preservation of the built heritage on the site. If the City wants to be given deference by this Board on the issue of heritage preservation it must come to this Board with clean hands.

The Board finds that section 5.1 of the in force OP is not relevant to this development proposal as the property was subject to a Notice of Intention to Designate

without the requisite evaluation and identification as being of architectural and/or historical importance. At the time that Council expressed its intention to designate, not only had the property not been evaluated as being of architectural and/or historical importance, but the property had been found by City heritage staff and the Toronto Preservation Board not to meet the criteria for designation.

The Policy Context:

Peter Walker was qualified by the Board to provide expert land use planning evidence on behalf of the Appellant. Mr. Walker described the physical context of the neighbourhood, which the Board finds, as stated above, contains a variety of house forms and is characterized by its proximity to the Nordheimer Ravine. Mr. Walker testified, and the Board accepts, that the subject property, incorporating three municipal addresses is substantially larger than other lots in the neighbourhood. In Mr. Walker's opinion, due to the variety of house forms "this is clearly not a single-detached neighbourhood".

Mr. Walker reviewed the policy context relevant to the proposal, referring to Exhibit #2, the Appellant's document Book and Exhibit #20, his Planning Report, dated September 2005. The Provincial Policy Statement, 1997 (the "PPS") applies to the applications. Particularly relevant to the proposal, in Mr. Walker's opinion, is part 1.1 of the PPS, Developing Strong Communities. Section 1.1.1(a) provides "cost effective development patterns will be prompted. Urban areas will be the focus of growth". The PPS encourages development at densities which efficiently use land, resources, infrastructure and public service facilities; which avoid the need for unnecessary and/or uneconomical expansion of infrastructure; and which support the use of public transit (section 1.2(b)). Development standards are to minimize land consumption and reduce servicing costs (section 1.2(d)) and "opportunities for redevelopment, intensification and revitalization in areas that have sufficient existing or planned infrastructure" are encouraged (section 1.2(e)).

The Housing Policy, Part 1.2 encourages "all forms of residential intensification in parts of built up areas that have sufficient existing or planned infrastructure to create a potential supply of new housing units available from residential intensification".

Mr. Walker reviewed Part 2.3, Natural Heritage. Natural heritage features and areas are to be protected from incompatible development. Development and site

alteration may be permitted in a variety of “significant” natural heritage features like woodland valleys and wildlife habitat if “it has been demonstrated that there will be no negative impacts on the natural features or the ecological functions for which the area is identified”. Mr. Walker reviewed the definitions of “significant”, “valleylands”, wildlife habitat” and “woodlots” found in the PPS and opined that the subject property is not located in any of these areas when one considers OP designations. The subject property is not designated as a ravine or natural heritage area in the planning documents.

It was therefore Mr. Walker’s opinion that “the proposal satisfies the policies of the PPS, particularly with respect to redevelopment and intensifying residential uses in built up areas with existing infrastructure. The proposal reinforces the provision of a range of housing in an area that is within proximity to the existing public transit network. Overall the proposal presents an opportunity to more efficiently and effectively use land, infrastructure and public service facilities”.

Mr. Walker reviewed the provisions of MetroPlan, particularly Part 2.3, Metropolitan Green Space System. The system is identified on Map 5 (Exhibit 32, TAB 37, page 385A), and in Mr. Walker’s opinion the subject, while abutting the system, is not located in the system. He reached this conclusion after having regard to Map 5, in conjunction with Map 1 – Generalized Land Use, June 1998 from the in force OP, and Appendix A, Nordheimer Ravine Map, also contained in the in force OP. While Map 5 does not contain sufficient detail to make a determination about the location of the subject property, the other two maps show, Mr. Walker opines, and the Board finds, that while the subject property is adjacent to the ravine, the Environmentally Significant Area and the Metropolitan Green Space System, it is not located within those areas. Therefore the Board accepts Mr. Walker’s evidence that MetroPlan policies concerning the green space system do not apply to this application, except for those policies concerning private developments abutting the system. This means that the City, in accordance with policy 6.1 may require a proponent of private development abutting the system to demonstrate that the proposed development will protect and maintain the ecological functions, natural features or the physical extent of significant natural areas. Further, policy 6.5 encourages initiatives by adjacent landowners to undertake plantings as a buffer between the green space system and the development.

Mr. Walker reviewed portions of both the in force OP and the New OP in reaching his opinion on the appropriateness of the proposed development. Map 1 of the in force OP shows that the subject property is designated Low Density Residence Area, not Environmentally Significant Area. In his Planning Report Mr. Walker surveys Parts 1, 2,3,6,7 and 12 of the OP. These parts speak to the structure and quality of the City, the environment, physical form and amenity, housing, community services and facilities and residence areas. He reiterated, through his review of section 2.36, Designation of Ravines in Appendix A, his opinion that the subject property is not designated on the relevant map as being part of the Nordheimer Ravine. It is adjacent to the ravine; therefore section 2.48, Development Adjacent to Ravines, is relevant. Council shall, in appropriate cases, require the submission of an environmental impact study, addressing environmental effects on the ravine; encourage only that development which has minimal adverse impacts; and encourage a buffer zone of at least 10 adjacent to the ravine within which development is discouraged.

Having regard to the relevant policies, Mr. Walker concluded in his Planning Report that the proposal satisfies “the intent of the in force OP with respect to residential intensification objectives, physical form and amenity and housing”. Having regard to the policies which encourage development that reduces urban sprawl, utilizes existing infrastructure and lessens reliance on the automobile, Mr. Walker opined “this form of residential intensification...meets the Plans criteria and objectives for urban growth and development”.

In considering the OP’s objective of improving the pattern of natural features, Mr. Walker opined “the proposed development will improve the quality of the ravine feature abutting the site, as well as provide outlook of the open space to new residents”. Mr. Walker testified that the proposed buildings will “enhance the view of the ravine from the street while also providing a sense of enclosure to the ravine feature”.

With respect to policies encouraging new development to provide both indoor and outdoor amenity space, Mr. Walker indicated that each of the proposed 22 units will have outdoor amenity space through the provision of balconies and terraces.

In Mr. Walker’s opinion the proposed built form of “two mansion-like buildings will improve and enhance the quality of the streetscape. The existing built form of one large residence on one uncharacteristically large lot is not consistent with the general

residential pattern along Russell Hill Road”. Further, “the buildings will respect the existing residential proportions along the street: the two buildings will be of a form and massing that is characteristic of large Forest Hill mansions that currently exist in the area; the buildings will be of high quality material and design; the buildings will be located parallel to the street; and the siting of the buildings will be appropriate given the diversity of setbacks that currently define the area”. On the crucial issue of potential negative impacts on neighbours and pedestrians, Mr. Walker was of the opinion there is no negative shadow impact.

Mr. Walker testified, that having regard to the existing physical character of the neighbourhood, which contains a variety of house forms, the proposal will “fit harmoniously”. The proposed built form, of high quality design and materials is “a desirable building form and type that will retain and enhance the natural heritage features of the adjacent ravine”. Furthermore, “the siting, frontage and setbacks...are desirable and appropriate in terms of minimizing any negative impacts on the natural features of the site, mitigating any adverse shadow and privacy impacts on neighbouring landowners, and enhancing the residential character along the street”.

While the New OP is not the operative document for these applications, Mr. Walker reviewed it as “its policies provide directions in terms of the current land use objectives of the City”. Mr. Walker reviewed the policies dealing with Shaping the City, The Built Environment, Housing, Neighbourhood, Toronto’s Green Space System, Parks and Open Spaces and The Natural Environment.

Mr. Walker pointed out that on Map 16 – Land Use Plan, June 2005 (Exhibit 32, TAB 39, page 414) the subject property is designated Neighbourhood, not Natural Area, Parks, or Other Open Spaces Area. It is near a Natural Area and therefore one must consider that the New OP provides “we must be careful to assess the impacts of new development near the natural heritage system”. Proposals for development may need to be accompanied by a study assessing impacts on the natural environment. Policy 12 provides that in such a study the consequences of a proposed development on a variety of natural heritage features must be assessed. Mr. Walker testified that having reviewed all the work done on environmental impact in this case, “he has not seen anything that suggests that there is a negative environmental impact on the natural heritage lands to the west” of the site.

In reviewing all the relevant provisions of the New OP, Mr. Walker concluded, that, as with the in force OP, the development proposal assists the City in realizing its stated objectives.

Mr. Walker's final opinion as provided to the Board is that the proposal satisfies the intent of the in force OP and constitutes good planning. The proposal fits into the character of the evolving neighbourhood without adversely impacting the adjacent ravine. He recommend that the Board allow the appeals and approve the OPA found in Exhibit #2, TAB 45, and the ZBLA, Exhibit #2, TAB 46 and settle the details of the Site Plan, Exhibit #19. Further, he recommends the Site Plan Agreement, Exhibit #2, TAB 47. Finally, he noted that even if the Board approves the proposal, the Appellant will have to comply with the provisions of the Ravine Protection and Tree By-laws.

Michael Mestyan was qualified by the Board to provide expert land use planning evidence on behalf of the City. Exhibit #48 is Mr. Mestyan's witness statement which provides a good summary of his evidence and opinion on the proposal. It is Mr. Mestyan's opinion that "the amendments proposed by the applicant to the Official Plan and Zoning By-law to permit the proposed buildings on the lot are not in compliance with the applicable policies, are not appropriate for the site and surrounding neighbourhood, and do not represent good planning". Mr. Mestyan testified that City staff has been consistently concerned about the proposal, in particular its encroachment into the natural heritage area, since they saw the Appellant's initial proposal. Concerns were exacerbated as the project evolved, with the height, unit count and density increasing. Mr. Mestyan prepared the Refusal Report, dated September 29, 2005, which recommended that Council refuse the applications.

Mr. Mestyan was of the opinion that the proposal does not meet the requirements of the PPS. The PPS specifically seeks to protect the province's "environmental health" and the environment. Policy 2.3.1 provides "natural heritage features and areas will be protected from incompatible development". "Natural heritage features and areas" are defined to include "significant woodlands, valleylands and wildlife habitats". It is Mr. Mestyan's opinion "based on the evidence (he) heard, taking into account that this is urban Toronto, and based on designations of the site in MetroPlan, both OPs and Ravine By-law, (that) this site contains Natural Features and Areas within (the) meaning of (the) PPS". As such, the City is to protect the area against incompatible development.

Mr. Mestyan is of the opinion that with respect to MetroPlan, the subject site is within the Metro Green Space System as set out on Map 5. The site is within a "Valley and Stream Corridor" as defined in MetroPlan, in his opinion. He comes to this conclusion as he believes the site is a ravine pursuant to the Ravine Protection By-law and TRCA mapping. Therefore it is a "significant natural area" and part of the "Valley and Stream Corridor". Under cross-examination, Mr. Mestyan had regard to the Nordheimer Ravine mapping prepared specifically for the in force OP. He confirmed that the subject property is not within the boundaries of the Nordheimer Ravine. He also confirmed that when the Committee of Adjustment considered the consent which, in part, created the subject lot, the property was not considered to be part of the ravine.

As Mr. Mestyan believes that the subject property is part of the ravine, it was his opinion that the sections of MetroPlan mandating the protection of ecological functions, natural features and the physical extent of Significant Natural Areas apply. Having reviewed all the evidence presented, he does not believe that such protection is afforded in this development proposal.

Mr. Mestyan is of the opinion that the proposed development is contrary to many policies of both the in force and New OPs. After having reviewed the evidence of the TRCA, and the City's natural environment witnesses, Mr. Mestyan concluded that the proposal "will not sustain, but will impair the natural environment". Therefore section 1.3, Environmental Objectives, of the in force OP is not met. That section provides "Council regards the natural environment as an endowment to be protected, conserved and enhanced for future generations and, accordingly, undertakes to play a lead role in matters of environmental protection and remediation, resource conservation and pollution reduction". Policy 2.3 provides "it is a policy of Council to protect and enhance Natural Areas, Environmentally Significant Areas and Ravines". Policy 2.30 provides for the protection, preservation and maintenance of Natural Areas. In his witness statement Mr. Mestyan states "this site abuts a natural Area and Ravine as defined in the OP". This statement, the Board finds, is inconsistent with his opinion that the subject property is within a protected green space, ravine or natural area.

Policy 2.48 addresses sites adjacent to ravines, natural areas and environmentally significant areas. Council shall, in appropriate circumstances, require the submission of an environmental impact study addressing impacts, with development applications. Council is to encourage only that development which "has minimal

adverse environmental impacts and is sensitive to the environmental qualities of the adjacent ravine". Mr. Mestyan concludes that the subject proposal does not comply with these OP requirements.

Mr. Mestyan is also of the opinion that "taking down a heritage structure and replacing it with two large structures is not appropriate planning". He reviewed sections 1.4, 1.8, 3.13 and 3.14 of the in force OP. Council is to build on "past planning achievements by continuing to preserve, protect and strengthen...stable, low-rise residential neighbourhoods; natural areas, including ravines...and structures of historical and architectural merit". Policy 1.8 aims to achieve balanced growth and Council supports residential intensification, where appropriate. In Mr. Mestyan's opinion, appropriate intensification for the site would be the conversion of the existing house to a multi-unit dwelling. The site is not on a main street and the "proposed development is not compatible with the surrounding neighbourhood".

Mr. Mestyan, on issues of built form, height, setbacks, siting and density as dealt with in policies 3.13 and 3.14 adopted the evidence of Mr. Parakh, the City's urban planner/architect, which will be considered below. In Mr. Mestyan's opinion, at proposed heights, the buildings would "dwarf" neighbouring houses. Issues of privacy and overlook arise especially for the neighbour to the north. The density at 1.34 times coverage is 2.5 times greater than the average for Russell Hill Rd. The proposal does not provide an appropriate transition from existing development.

Mr. Mestyan concluded that the proposal "represents an overdevelopment of the site, it does not attempt to respect the lower scale of the neighbourhood, and does not meet the intent of the former Official Plan...the proposal does not represent good planning".

Having regard to the New OP, Mr. Mestyan also has concerns about the proposal. Growth is directed to Centres, Avenues, Employment Districts and Downtown. The subject is not located in any of these areas. In his opinion the proposal, while suited to a major Street or Avenue, is not appropriately located on Russell Hill Rd.

Mr. Mestyan addressed policies dealing with the natural Environment, using Map 9 of the New OP (Exhibit #22) and two aerial photographs prepared by the City (Exhibit #21). He testified that the aerial photographs show the extent of the OP Natural

Heritage System in the area of the subject property. Aerial photograph #1 shows that almost the entire site is located within the Natural Heritage System. Under cross-examination, Mr. Mestyan confirmed that Exhibit #21 was prepared by “overlaying” and “zooming in” on Map 9. Counsel for the Appellant drew Mr. Mestyan’s attention to the New OP (Exhibit #2, page 458) which states that Map 9 is not a statutory map. Further, Map 9 contains notes which say “boundaries are schematic” and “not to scale”. Counsel questioned how, with those caveats to Map 9, the Natural Heritage System depicted on Exhibit #21 could possibly be accurate. Mr. Mestyan could not answer this question. The Board can give no weight to Exhibit #21 and its depiction of the Natural Heritage system, as it is based on a non-statutory, schematic, not to scale, map.

Having reviewed all the applicable policy documents, Mr. Mestyan recommended that the Board not approve the proposal as it does not represent good planning.

The Board heard from a third professional planner, Steven Heuchert, employed by the TRCA. The Board must note that it is puzzled by the role that the TRCA took in this hearing. The TRCA often appears before this Board as a party, discharging its responsibilities with respect to the protection of the watershed under its jurisdiction. However, at this hearing, the TRCA sought only participant status and was not represented by counsel. Despite requesting only participant status, the TRCA proffered two expert witnesses, a planner and an ecologist, and presented extensive documentary evidence. The material referred to by the TRCA witnesses was not provided in advance of the hearing to the Appellant. It strikes the Board that the TRCA, while taking a back seat during the course of public agency review, has appeared, late in the game. Regardless of why this happened, for example, that the City did not forward relevant studies and reports to the TRCA, in a timely fashion, or that the reports were lost on their way to the TRCA, the Board is left with questions about the integrity of the process. This is particularly unfortunate as the role of the TRCA is so significant in protecting the City’s natural heritage resources.

Mr. Heuchert was qualified by the Board to provide expert land use planning testimony on behalf of the TRCA. Exhibit #28, the TRCA’s document brief, contains Mr. Heuchert’s participant statement. In his opinion “the subject property is inappropriate for the proposed intensification as the construction impacts and additional permanent urban intrusion into the valley corridor will result in irreversible harm to the natural heritage system”. Mr., Heuchert testified that the proposed development is inconsistent

with policies encouraging the protection and enhancement of natural heritage, found in the PPS, MetroPlan and the TRCA Valley and Stream Corridor Management Program.

Mr. Heuchert testified that TRCA staff met on the site with representatives of the Appellant on December 13, 2004. The Appellant was informed that while the property was within a TRCA "Area of Interest", it was not regulated under the TRCA's Fill Regulation. Mr. Heuchert testified that the Appellant was told the property was entirely within the "valley system" and that the TRCA wanted to reduce new development from further encroaching into this system. The Appellant was told that the TRCA would comment during the planning process. Mr. Heuchert testified that the TRCA "did not comment on the application as a satisfactory Natural Heritage Impact Study was not provided". With all due respect, the Board must comment that such a position is ridiculous. One would imagine that if a NHIS is inadequate, that is more reason for the TRCA to provide comments.

It was Mr. Heuchert's opinion that the subject property is now subject to Ontario Regulation 166/06, the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation ("O.Reg. 166/06"). He testified that this regulation includes detailed mapping which identifies the subject property as being located below the top of bank of a valley corridor, and, therefore, entirely within a "regulated area". Therefore a permit from the TRCA would be required before the proposed development could go forward. Mr. Heuchert testified that he would not support the issuance of such a permit.

Under cross-examination, Mr. Heuchert confirmed that the interpretation of the new regulation and whether it applies to the subject property is a legal matter, and that there is a legal process through which a permit application must go. That process does not involve this Board.

James Parakh was qualified by the Board to provide expert urban design and architecture evidence on behalf of the City. He examined the proposal with a particular focus on whether the proposed buildings meet the City's objectives for a stable, low-rise residential area. While he agreed with Mr. Walker that the street and the neighbourhood are "eclectic", he testified that the house form buildings form a "cohesive street wall". There are common architectural details like bay windows, dormers and front porches. Even the new, three-unit building to the north of the subject property

incorporates these elements. In his opinion, the proposed buildings do not fit this context.

Mr. Parakh reviewed the Built Form policies of the in force OP in some detail, with specific emphasis on height, siting, massing, setbacks and densities. New buildings are to “harmonize with neighbouring developments” (Policy 3.13). There is to be an “appropriate degree of continuity” through siting and massing of buildings (Policy 3.14). Mr. Parakh reviewed the plans for the proposed buildings and testified that they are “far taller” than neighbouring houses; they read as one unacceptably long building; their foot prints are too large; and they are not parallel to the street. In his opinion, the proposed built form does not comply with the design focused provisions of the OP.

Mr. Parakh had regard to the Urban Design Handbook (Exhibit #27). While he agrees that the proposed buildings meet guidelines concerning location on the street and entrances, he believes that the proposal does not relate to the domestic scale of the street. In coming to this conclusion, he was speaking to the 2-3 storey houses, not the 5 storey apartment buildings located across the street. In his opinion the proposal is “not responsive to the prevailing pattern” of development on the street.

In considering the urban design issue, Mr. Parakh also had regard to the provisions of the New OP. The vision of the New OP is, in his opinion, consistent with that of the in force OP. Low-rise residential neighbourhoods are to be protected from inappropriate development. Mr. Parakh concluded that the project is not in keeping with the neighbourhood, it is not in keeping with relevant urban design guidelines, and it does not represent good urban design.

The Natural Heritage:

Paul Ferris was qualified by the Board to provide landscape architecture/design and natural heritage opinion evidence on behalf of the Appellant. The Board was satisfied that Mr. Ferris has specific expertise in urban forestry and arboricultural matters, with experience in dealing with tree preservation and natural landscapes in an urban context.

Mr. Ferris prepared the Ravine Stewardship Plan (Exhibit #7) and the Planting Plan (Exhibit #8) for the proposed development and gave evidence on the Existing Tree Management Plan (Exhibit #6) and the Tree Inventory (Exhibit #15). He was one of the

consultants involved in preparing as Natural Heritage Impact Study (“NHIS”) of the site (Exhibit #2, TAB 28).

Mr. Ferris testified that he was retained by the Appellant in October 2004 to review the site and assist with the development of a site plan. He testified that the placement of the proposed buildings on the site was dictated by the desire to maintain the existing treed area on the lot and deal with the slope of the site. The proposed buildings are to be situated, he testified, to occupy the already developed or landscaped portion of the site (existing house, garage, swimming pool, driveway, paved areas, landscaped areas and retaining wall). Further, the buildings were sited to minimize the impact on the treed areas of the site. With respect to the rear property line, abutting the Nordheimer Ravine, Mr. Ferris testified that the proposed buildings are situated further from that line and the ravine than the existing house and garage. In his opinion a 10 m setback is not required for the proposed buildings as the existing structures are already closer than 10 m.

Representatives of the Appellant, including Mr. Ferris, met on site with City staff, including Urban Forestry Staff and TRCA staff. City staff indicated that as the property is subject to the Ravine Protection By-law, all trees with a circumference over 10 cm had to be inventoried. An inventory and arborist plan were produced, and subsequently updated. In addition a tree preservation plan and tree enhancement plan were submitted to the City. In February 2005, the City indicated that it wanted an NHIS to be prepared by the Appellant and that the Appellant’s consultants would be provided with guidelines on the preparation of such a study. In April the guidelines were provided.

The Appellant submitted a Ravine Enhancement Plan (Exhibit #2, TAB 24) and subsequently submitted the NHIS (Exhibit #2, TAB 28). Mr. Ferris testified that the NHIS was prepared following the City’s guidelines and after a previous NHIS (Exhibit #2, TAB 26) was rejected by the City as being inadequate. The Draft Guidelines for the Preparation of a Natural Heritage Impact Study is found in the NHIS.

Mr. Ferris testified that, while the final NHIS was submitted in September 2005, no comments were received on the study from the City until August 2006, immediately prior to the commencement of this hearing. He testified that he found this to be unusual as he is accustomed to working with City forestry and ravine staff. He usually receives comments or feedback, which allow parties to work on outstanding issues.

Mr. Ferris reviewed the material with respect to tree inventory, tree management and proposed tree removal. Referring to the Existing Tree Management Plan, he testified that trees would be removed to accommodate the proposed development. However, trees would also be removed because they are hazardous or in decline, or are an invasive species. He testified that it is good tree management practice to “edit” the trees. In reviewing the Tree Inventory, Mr. Ferris testified that of the 146 trees on the property, 81 are to be preserved. Of the total number to be removed, 12 are dead or hazardous, 4 will be transplanted, 19 are “invasives” like Norway maple, 10 are other non-native or exotic, and 20 are native trees. Of the native trees to be removed, 3 are in good condition, 13 are in fair condition and 4 are in poor condition.

Mr. Ferris testified that it is his understanding that the City is generally supportive of the removal of invasive species like the Norway maple. These species are aggressive, shutting out native species and denying sunlight to the understorey. The City’s publication on the Nordheimer Ravine (Exhibit #2, TAB 30) in referring to the management plan for certain sites in the ravine “recommends continued stewardship to control non-native species and a continued partnership with adjacent property owners to restore the nearby ravine slopes”. The publication goes on to state “one of the issues of Toronto ravines...is the encroachment by non-native trees. In particular, Norway maple is a problem species...it has a dense canopy of leaves...The result is bare soil and very little habitat”.

Mr. Ferris testified that the other non-native species to be removed are “exotics” which are part of the landscaping of the existing house. He emphasised that of the 20 native trees to be removed, only 3 of them are in good condition.

Mr. Ferris testified about the plans which would be implemented during and after construction to protect the trees. The tree protection measures have been submitted to City staff. Mr. Ferris noted that as the site is subject to the Ravine Protection and Tree By-laws, the protection measures would have to be reviewed in detail by City staff during the permit process.

Mr. Ferris reviewed the NHIS with the Board. The study concluded as follows:

1. Natural heritage resources on the subject property are limited to a remnant forest community associated with the ravine slopes. The forest supports a number of mature trees that are estimated to be in excess of one hundred years in age, as well as a diverse assemblage of trees,

shrubs, and native wildflowers. These in turn offer breeding and foraging habitat for generalist wildlife species and seasonal migrants.

2. The forested ravine slopes also serve important ecological functions to the Taddle Creek ravine system by contributing to forest habitat, species diversity and linkage improvements and buffering to the adjacent residential areas.

In the NHIS, the consultants determined that “natural vegetation communities on the subject property are limited to a remnant forest associated with the ravine slopes...Impacts to natural heritage resources can occur during and following construction and have both direct and indirect effects on vegetation and wildlife habitats...The extent of these impacts on the natural environment can be mitigated through implementation of appropriate protective and compensatory measures”. The study noted that the site is utilized by typical urban wildlife species like racoons, skunks, squirrels and foxes. Of particular interest is the fact that a red-tailed hawk was confirmed to be breeding on the site in tree 9714 (a tree not intended to be removed although it is in poor condition). The site contributes to the “area’s function as a wildlife movement corridor and staging area for migrant and neotropical bird species”.

As required by the City’s Draft Guidelines, the NHIS considered impact elimination/reduction, and improvements to the natural heritage system. The study concluded that there will be no ravine slope stability concerns as the existing swimming pool and retaining wall on the slope will be removed and the new buildings constructed on tableland. Impacts on natural vegetation communities are to be reduced by “working within the footprint of the proposed development. Tree preservation hoarding will be of primary importance to ensure that the natural vegetation communities are adequately protected from impacts”. The Board notes that this crucial issue can be addressed further during any consideration of the permits required by the Ravine Protection and Tree By-laws.

With respect to wildlife resources and species of concern, the NHIS concludes “impacts to local wildlife populations can be reduced by phasing construction so as not to coincide with sensitive periods in the life cycles of resident species”. The Board finds that if this proposal is to go forward, consideration will have to be given to the breeding red-tailed hawks, in the timing of construction.

The NHIS determined that “there are a number of opportunities for improvements to the ravine natural heritage system. Removal of trees...will provide areas to replant with native species...removal of (Norway maple) will create a number of openings that will accommodate new plantings. The area on the south edge of the existing woodland...is currently manicured open space with turf...This area presents further opportunity for south slope naturalization through planting of trees, shrubs and herbaceous plants”. The study indicates that to deal with “restoration works” and the “biological constraints” of the site a “detailed implementation schedule will be drafted”. The study sets out a series of “general management prescriptions”, including removal of hard landscaping features, transplanting of native species along the ravine, removal of invasive and exotic species, protection of native trees, and the “development of a care and monitoring program for the respective works, suitable to the developer and the City”.

Mr. Ferris concluded that the proposed development can and will enhance the existing woodlot on the subject property. The removal of the invasive species is particularly important as is the detailed plan to introduce native species. He noted that the proposed buildings are “residences in the woods”; no clear cutting of trees will take place. There will be no walkouts or trails encroaching on the natural areas. In his opinion the development is appropriate for the site.

Under cross-examination Mr. Ferris maintained his position that the “remnant forest line” as he set out on Exhibit #6 is accurate. He did not agree with the City that the line should be pulled back to the north, thereby including an extra triangular area within the remnant forest. He did not agree that the triangle area “has a rich assortment of trees.” He testified that the predominant species in the triangle is the invasive Norway maple. He testified that the line of the remnant forest was set based on the predominance of invasive species in the triangle area. He also testified that prior to the hearing, as he had not received any feedback from City staff on the NHIS, he did not know what the City’s version of the forest was and he could not provide more information as it was not requested.

With respect to the guidelines on the NHIS provided by the City, Mr. Ferris testified that when he contacted the staff member to whom he was referred to obtain the guidelines, that staff member knew nothing about any such guidelines. Two months later he was provided with “Draft Guidelines” dated April 2005. Subsequently, after the

NHIS was filed with the City, he received no comments from staff until days before the hearing commenced.

Lori Cook, Coordinator, Planning Ecology, testified on behalf of the TRCA, providing ecology evidence. Her participant statement is part of Exhibit #28. In her opinion, the development proposal falls into two categories: the redevelopment where the existing house stands and the development of a new structure on the valley wall. She has no objections to the redevelopment on the northern portion of the site so long as "appropriate mitigation measures are put in place". However, in her opinion, the development on the southern portion of the property "will result in immediate and long term negative impacts to the valley and natural heritage system".

The Nordheimer Ravine, Ms Cook testified "supports a number of important ecological functions and communities". The valley walls support a "mature hardwood deciduous forest". Ms Cook reviewed the Appellant's NHIS and agreed with several of its conclusions about what is found on the site in terms of natural heritage features. However, in her opinion, the NHIS "grossly underestimates the size and limits of the (woodland) feature" and she is concerned about the "report's cursory mention of development impacts".

Ms Cook reviewed the PPS and the responsibility planning authorities have to designate significant valleys which are to be protected. She is of the opinion that the subject property is part of such a "significant valley" and therefore there should be no development on the site. Further, it is her opinion that the site is a "significant wildlife habitat".

In Ms Cook's opinion, having reviewed the woodland on the site, and having regard to the natural heritage function it performs, the proposed development would result in loss of valley function, loss of an older-growth woodland, loss and impacts on rare species and communities, loss of connectivity of habitat, loss of buffering, spread of invasive species, root damage, dumping of yard waste, increased uncontrolled access to the valley and potential interruption of groundwater functions caused by the underground garage.

Under cross-examination Ms Cook testified that she had not seen the NHIS before August 2006. She was not involved in the TRCA's site inspection, which took place

over one year previously. To her knowledge, the TRCA had not provided any comments on the Appellant's proposal in advance of this hearing.

Ruthanne Henry, an Urban Forestry Planner with the City gave opinion evidence on behalf of the City. Ms Henry is a landscape architect, but not a forester or arborist. The Board qualified her as a landscape architect with responsibility for reviewing Ravine Protection By-law permit applications and ravine management projects. Her evidence is contained in Exhibit #53, Ravine Evidence Outline.

Ms Henry was involved in site meetings with the Appellant's consultants. At a December 13, 2004 meeting on the site, she and Norman DeFraeye, on behalf of the City told the consultants that "the south portion and west boundary of the park (sic) should be prioritised for preservation as well as good quality native trees". After the formal application was submitted in January 2005, comments were given indicating a need for a detailed inventory of the forest and an assessment of natural heritage impacts.

In March and April staff "were drafting guidelines" for the NHIS. She testified that at "all meetings staff were clear regarding the requirement that the south portion of the site and west edge were to be preservation priorities for the site". She referred to a memo, dated August 17, 2005 which set out the concerns of Urban Forestry Services about the site. She understood that this was sent to the Appellant. Counsel for the Appellant submitted that this memo was never provided to the Appellants. The memo included comments on the necessity of protecting the ravine feature. Any OPA or ZBLA could be supported by Urban Forestry only if development were restricted to areas of existing development and/or "areas where natural forest conditions or good condition native indigenous species of trees are not present and these features are adequately protect by appropriate setbacks from the proposed construction zone". The report set out the extent of the natural forest, from Urban Forestry's perspective (Exhibit #55, page 3). Further, the report sets out, in detail, which trees Urban Forestry felt should not be removed. The Board notes from a comparison of Exhibit #55 to Exhibit #15, the majority of the trees identified by Urban Forestry are not slated for removal. The fact that this detailed, significant memo, on an issue central to these applications and this hearing, was apparently not provided to the Appellant in a timely fashion is troubling to this Board and will be commented on below.

Ms Henry testified that the City has been consistent throughout the review of these applications about its areas of concern. The City has remained clear about the woodland area to be protected. After the Appellant submitted the NHIS, Ms Henry continued to have the belief that the NHIS did not address issues adequately.

Ms Henry has been involved with reviewing the ravine protection and tree permit applications filed by the Appellant in July 2006. Although those applications are not currently before the Board, Ms Henry reviewed the Ravine Protection By-law, demonstrating that the subject property is a ravine for the purposes of the By-law. The fact that the Appellant has filed the requisite permit applications, demonstrates to the Board's satisfaction that, regardless of what the Board may decide in this hearing, the subject proposal cannot go forward without meeting the requirements of the Ravine Protection and Tree By-laws.

Ms Henry does not accept the line setting out the forested area developed by the Appellant's consultants. There is, in her opinion, a "contiguous canopy feature and understorey characteristic" extending beyond the Appellant's line. There is a high quality forest with an excellent variety of plant species. The protection zones set out for certain retained trees are insufficient, in her opinion, and will result in the decline of the trees.

Ms Henry testified that if the project is approved, the City would require time to finalize site plan conditions to allow for satisfactory tree protection. She confirmed, under cross-examination, that such conditions could be part of a ravine stewardship plan to be finalized as part of the ravine permit application.

Under cross-examination, Ms Henry confirmed that she did not send the much discussed August 17, 2005 memo to the Appellant, relying on the planner to do so. However she also confirmed that she told planning staff, after receipt of the Appellant's material, not to send out plans marked with areas of concern. Again, the Board is troubled by this admission, as it is troubled by Ms Henry's attempt, especially under cross-examination, to become an advocate, rather than an expert witness. When this behaviour is considered in conjunction with the bad faith demonstrated by the City with respect to the designation under the *Heritage Act*, and the last-minute appearance of the TRCA at this hearing, the Board finds that the integrity of the process in this case must be questioned.

Dale Leadbeater was qualified by the Board as a biologist with an expertise in environmental impact assessment, and testified on behalf of the City. Exhibit #61 is her evidence outline. Ms Leadbeater was retained by the City in August 2006 for the purposes of this hearing. While not a planner, Ms Leadbeater set a “policy framework” for her impact assessment, reviewing the PPS, the Ops and the Ravine Protection By-law. She used the maps in the OP and testified that if a property is in or near a natural area “your radar goes up”.

She reviewed the NHIS prepared by the Appellant’s consultants and condemned it for lacking a policy context, failing to have proper regard to impact and failing to address appropriate mitigation of impact. In her opinion, there is not “conductivity” between the report and its conclusions.

Ms Leadbeater believes that the NHIS is incorrect in saying that the property contains a ravine slope. In her opinion, the subject property is “entirely within the ravine feature and therefore contravenes the policy of the former MetroPlan, old (OP), ravine by-law as well as policies of the TRCA”. She believes that the vegetation has not been considered and any enhancement of the natural feature is lacking. With respect to mitigation she noted that the removal of the trees outside breeding season is not mitigation, “it is not in compliance with the *Migratory Birds Convention Act*”. The Board pointed out to Ms Leadbeater that the red-tailed hawk, to which this comment was addressed, is not a migratory bird and not subject to the Act. She agreed.

Ms Leadbeater then analyzed key features and functions of the site. Of particular note are the following: this is an older growth forest containing native species; there is an 18% slope giving rise to erosion concerns; the red-tailed hawk is breeding on the site; the white oak and witch hazel habitat is not common in the city; and there is remnant spring ephemeral ground flora. Ms Leadbeater seemed to disagree with the City’s stated position on the Norway maple; that is an invasive species which should be replaced with native species. She includes the Norway maple as an indicator of the forest feature which should be retained.

Ms Leadbeater testified that the impact of the proposed development would be significant, even during its construction. She is of the opinion that the older trees will not tolerate the changes. The proposed construction hoardings are not adequate.

Ms Leadbeater concluded “each of the impacts created to the environment on and surrounding the subject lands are relatively small in nature, but underestimated by the NHIS”. She is of the opinion “that this development, within this planning context, produces environmental impact(s) that cannot be entirely mitigated elsewhere”.

Under cross-examination Ms Leadbeater confirmed that while she gave evidence on the planning documents, she is not qualified to opine on whether the subject property is in or adjacent to a ravine for the purposes of the in force OP. She testified that the City planners told her that it is in the ravine. While she raised questions in her evidence about slope stability, stormwater management and the stewardship of the ravine, she has not reviewed the engineering reports or the ravine stewardship plan prepared by the Appellant’s consultants.

Opposition of the Participants:

A number of participants testified in opposition to the proposed development. They included individuals who live in the vicinity of the property, a representative of the Task Force to Bring Back the Don and an individual who works in the ravine stewardship program. The participants were especially concerned about the potential impact of the proposal on the natural environment of the ravine, the loss of the designated heritage house and the size and extent of the proposed buildings. Concerns were expressed about the amount of traffic that the proposal would bring to Russell Hill Rd. and the change such a development would mean for the neighbourhood. While a number of the participants stated that they were not against development, they felt that the proposal is excessive. The proposal is especially threatening to the neighbour immediately to the north of the subject property. Mr. Campbell testified that his privacy will be lost if the proposal goes ahead. His house is close to the property line and his living room, family room and master bedroom are oriented to the south, toward the subject property. He is concerned about the potential loss of trees on the lot line as their root systems will be damaged during construction. He testified about the existence of a family of red-tailed hawks which returns to the subject property to nest every year.

Board’s Findings:

As stated above, the Board finds that the subject property is situated in a well-established, attractive neighbourhood, blessed by its proximity to a significant natural heritage feature, the ravine and its location in the centre of a vibrant urban area. The

neighbourhood is not a standard subdivision, characterized by houses of similar size, on lots of similar size. Rather, the neighbourhood includes older single family houses, more recent townhouse developments, three apartment buildings, including one immediately opposite the subject property, and a relatively new multi-unit building two lots to the north of the property. While the apartment buildings were described as “anomalous” during the hearing, the fact is they have existed in the neighbourhood for almost fifty years. Of more significance to this Board's determination of what informs an understanding of this neighbourhood, are the more recent townhouse and multi-unit developments which have come to the area. While the neighbourhood is well-established, it is also seeing some transformation through reinvestment in house forms other than single family.

Of great consequence to the Board's consideration of this proposal is the natural heritage feature, the ravine, in which the City says the property is located, and which the Appellant says is adjacent to the property. The Board's determination of whether the property is located in or adjacent to the ravine is dictated by the relevant planning documents, namely MetroPlan, the in force OP and, to a lesser extent, the New OP. Neither emotion nor public opinion set out the extent of the ravine, for planning purposes. Both parties agree that the proposed development is subject to the Ravine Protection By-law and the Tree By-law. However this fact is not determinative of the issue of whether, for the purpose of the planning documents, the subject property is located in the ravine. If the Board determines that the OPA and ZBLA appeals should be allowed, the proposal will remain subject to those by-laws.

Having reviewed the evidence of all planning witnesses, and the policy documents, in detail, the Board must conclude, as it has set out above, that the subject property is adjacent to, but not in the Nordheimer Ravine. While there was much discussion during this hearing about the maps contained in planning documents, the Board finds that Appendix A, the Nordheimer Ravine Map, found in the in force OP sets out clearly and unambiguously, the extent of the ravine, for the purposes of the OP. The ravine runs to the rear property line of the subject property. While the ravine line includes parts of lots on Ardworld Gate and Glen Edyth Drive, it excludes the subject property. The Board has no choice but to conclude that this mapping was done with intent and proper information by the City.

As the subject property is not located in the ravine, the Board must find, as set out above, that the property is not located in the Metropolitan Green Space System. MetroPlan policies with respect to the green space system apply only to the extent that the subject proposal abuts the system. Further, having reviewed the evidence of the planners and Map 1 – Generalized Land Use, 1998 of the in force OP, the Board finds that the subject property is designated Low Density Residence Area, not Environmentally Significant Area. Therefore the Board finds that section 2.48 of the OP is relevant to the subject proposal. Having reviewed the evidence, including Map 16 – Land Use Plan, June 2005 of the New OP, the Board finds that the subject property is designated Neighbourhood, not Natural Area, or Parks, or Other Open Space. If this proposal were subject to the New OP, which it is not, it would be governed by policies affecting “new development near the Natural Heritage System”. Policy 12 sets out what should be included in an NHIS, if one is required by the City.

Section 2.48 of the in force OP provides that Council recognizes the potential for significant impact upon a ravine of development adjacent to a ravine. An NHIS may be requested as it was in this case. The Board finds, in having regard to section 2.48, that new development should proceed, adjacent to a ravine, only if it “has minimal adverse environmental impacts and is sensitive to the environmental qualities of the adjacent ravine”. This section of the OP, and what flows from it is determinative of the issue of the protection of the natural heritage resource, the ravine, for the purposes of this hearing.

Witnesses for the TRCA testified that the proposed development is subject to O. Reg. 166/06 and its detailed mapping of a “regulated area”. The Board finds that the evidence of the TRCA, and, in fact its involvement as a participant in this hearing, was informed by the opinion that the proposal is subject to the regulation. It is not for this Board, now, or at any time, to determine whether a regulation passed in 2006, applies to an application filed in 2004. If this project is approved and the TRCA continues to take the position it does, presumably the fill permit process under the regulation will go forward. However the Board gives little weight to the evidence of either the TRCA’s planner or ecologist. Their evidence was premised on an interpretation of the regulation and on a belief that the subject property is located in the ravine or on a valley wall. For the reasons stated above, the Board cannot find that the property is so located.

Presumably if the TRCA is put to the consideration of granting a permit under O. Reg. 166/06, the evidence of TRCA witnesses will be relevant to the TRCA's disposition of the matter. The fact that the TRCA did not remain involved in the consultation process on these applications, provided little direction during the process, and appeared at the "eleventh hour" as a participant, not a fully engaged party, in this hearing causes the Board to question its interest in protecting the ravine from the depredations of development. If a natural heritage feature is deserving of the TRCA's attention, it is deserving of that attention earlier, rather than later in the process. For the public review process to work effectively and efficiently, public agencies like the TRCA must provide comment on applications in a timely fashion.

Having determined that the subject property is adjacent to the Nordheimer Ravine, and that section 2.48 of the in force OP is relevant to the applications, the Board must determine, if based on the evidence, the proposed development would have a minimal adverse environmental impact and is sensitive to the environmental qualities of the adjacent ravine. Of particular relevance to a determination of this issue is the NHIS prepared by the Appellant's consultants at the behest of the City, together with the Ravine Stewardship Plan, the Planting Plan, the Existing Tree Management Plan and the Tree Inventory. The NHIS was prepared following what appear to be ad hoc City guidelines

It was the evidence of Mr. Ferris, the Appellant's landscape architect, that after the final NHIS was filed with the City in September 2005, no comments were received on the document until immediately prior to the commencement of this hearing. The Board must reiterate the comments it made on the TRCA's participation in this matter; if a natural heritage resource is significant, if it deserves protection, the City must participate in the consultation process in a timely manner. No one gains anything if the Appellant is left in the dark about the City's reservations about a seminal issue until the eve of a hearing. Mr. Ferris testified that the City's forestry and ravine staff usually provide comments on reports, facilitating discussions on solving problems.

In this case, the City chose not to provide feedback on the final NHIS until the eve of the hearing. The Board should not in hearings on substantive issues like the protection of the natural heritage, have to focus on process and what a particular process might mean. In this case, rather than being able to review the evidence on relevant matters like the policy regime and the protection of the adjacent ravine, the

Board is forced to address processes like the bad faith built heritage designation, discussed above and the consultation or lack thereof on the NHIS and the extent of the forest feature on the site. The Board is forced to draw negative inferences when it reviews something like the built heritage designation process or hears evidence from City staff that she told her colleague not to share the details of the City mapping of the extent of the forest, with the Appellant.

Hearings before this Board do not involve a *lis inter partes*; the public interest must be served. The Board must emphasize that such an interest is best served by a timely exchange of information between parties. When the Board is forced to focus unduly on process, it raises doubts in the mind of the Board about *bona fides* and the weight that should be given to certain evidence.

Having reviewed the evidence of all relevant witnesses and the NHIS in detail, the Board finds that while the subject property is not located in the ravine for the purposes of the planning documents, it is characterized by the existence of a “remnant forest community associated with the ravine slopes” (NHIS). The Board finds that mature trees, including native and non-native species are found on the site, together with a wide variety of smaller trees, shrubs and native wildflowers. There is no doubt that the “remnant forest” is the “breeding and foraging habitat for generalist wildlife species and seasonal migrants” (NHIS). Ms Cook, on behalf of the TRCA testified that the subject site “supports a number of important ecological functions and communities” associated with a “mature hardwood deciduous forest”. The Board accepts this evidence. Therefore, the Board, in applying section 2.48 of the OP must determine whether the proposed development would have a minimal adverse impact and is sensitive to the qualities of the adjacent ravine.

With respect to the impact on the natural heritage, the Board finds that much comes down to Exhibit #6 and the two lines drawn representing, first, the Appellant’s extent of the remnant forest on the site and, second, the City’s line. While the City may dispute the appropriateness of the development north of this line for other reasons, it is the land to the south of the line about which it is concerned for natural heritage reasons. Having reviewed the extensive evidence provided by both parties about the nature of the vegetation in what can be described as the triangle between the two remnant forest lines, the Board prefers the evidence of Mr. Ferris. As is evidenced by Exhibit #2, TAB 28 and Exhibits #6, 7, 8 and 15, the Appellant’s consultants have thoroughly reviewed

and inventoried the trees and vegetation on the entire site, including the triangle. Considering the evidence of the witnesses and the documents produced, including the excerpt from the City's website entitled Nordheimer Ravine (Exhibit #1, TAB 18) the board is satisfied that the Appellants proposed construction will result in the removal of a number of Norway maples, which everyone except Ms Leadbeater agreed is a "problem species in ravines", together with other invasive species. Exhibit #15, the Tree Inventory which sets out which trees are to be removed, species and condition, is significant to the Board's determination and was not seriously challenged by the City. While some mature native species, in good condition, are to be removed, the Board finds that the majority of the removal plan focuses either on invasive species like the Norway maple, exotics like the yew and native species which are in fair, poor or hazard condition. A number of native species in good condition are to be moved to other locations, presumably on the site.

Mr. Ferris acknowledged that tree protection both during and after construction is a major issue in this project. The Board notes that during the Ravine Protection By-law and Tree By-law permit application process, this issue will remain crucial.

The Board is satisfied that through the NHIS and other work, the Appellant has appreciated and identified the significance of the natural heritage of the site, adjacent to a ravine. It has identified mitigation measures to the satisfaction of the Board, on the OPA and ZBLA applications currently before it. It may be that on the permit applications more is required. The Board cannot make such a determination at this juncture.

With respect to the built heritage on the site, the Board has set out its findings above. The designation of the existing house was not done in good faith. There was no genuine basis for the designation at the time it was done. Therefore section 5.1 of the in force OP is not relevant to this development proposal.

Finally the Board must consider whether, in the light of its above findings on the natural and built heritage issues, the proposal otherwise meets the objectives of the policy documents.

With respect to the PPS, the Board has regard to part 1.1 which provides "cost effective development patterns will be promoted. Urban areas will be the focus of growth". Development is to be encouraged at densities which efficiently use land, resources and infrastructure. Unnecessary and costly expansion of infrastructure is to

be avoided. Intensification and revitalization in areas well-supported by infrastructure like transit are encouraged. The Board finds that there can be no doubt that the subject property is located in a neighbourhood well-served by existing infrastructure and public services. Growth can come to this neighbourhood.

Part 2.3 of the PPS provides that natural heritage features and areas are to be protected from incompatible development. For the reasons set out above, the Board finds that the subject is located adjacent to a valuable natural heritage feature, the Nordheimer Ravine. The subject property is not located in any of the significant valleylands, wildlife habitat or woodlands for the purposes of the PPS. The Board finds, having regard to the Appellant's NHIS and companion documents that the proposal has regard for the ravine feature and suitable mitigation measures will be taken.

With respect to MetroPlan, the Board finds, for the reasons set out above, that the subject is not part of the Metropolitan Green Space System. Policies with respect to that system do not apply to this proposal, except to the extent that the subject property abuts the system. The Board finds that the ecological functions and natural features of the Nordheimer Ravine will not be impaired by the proposed development.

Having regard to the in force OP, the Board finds, for the reasons set out above, that the subject property is not part of an Environmentally Significant Area. The map in Appendix A to the OP clearly shows that the property is not part of the Nordheimer Ravine.

The Board has reviewed the in force OP policies with respect to physical structure and urban quality (1.4); central core and neighbourhoods (1.5); balanced growth, the environment (2.1-2.79); built form (3.13-3.18); heritage policies (5.1-5.5); housing (6.1); residential intensification (6.4) and low density residence areas (12.5). The Board finds, for the reasons set out above, that while the subject property is located in a low density residence area, the area is characterized by a variety of housing forms. There are single family houses, row townhouses, condominium buildings and apartment buildings in the immediate vicinity of the subject property. While buildings of the height and scale of those proposed might not be appropriate in a neighbourhood of single family homes, the Board finds that they are compatible with this specific neighbourhood. Neighbours may believe that they live in a homogeneous, single family neighbourhood, but they do not.

The Board is persuaded by the evidence of Mr. Walker that the proposed form of residential intensification meets the OP's objectives with respect to urban growth and development. The proposed buildings do not abrogate low density residence area policies concerning pattern of streets, lot size, frontage and depth, as these patterns are variable in this neighbourhood. The height, scale and character of the proposed buildings fit what can accurately be described as the heterogeneous residential character of the neighbourhood. Many residences in this neighbourhood are of generous proportion, exhibiting high quality design. The Board finds that the proposed buildings fit this pattern.

The Board recognizes the opposition of neighbours to this proposal. Their concerns are sincere and the Board acknowledges that the proposed development constitutes a marked change for the subject property. However, the Board cannot stop change if the change is in accord with the relevant planning documents. Although the New OP does not govern this proposal, the Board has considered its provisions to get a sense of whether the proposal meets current land use objectives of the City. Again, the Board finds that the change attendant upon the approval of this project is the type of urban change envisioned by the New OP.

The Board finds that the proposal satisfies the objectives of the PPS, MetroPlan, the in force OP and the New OP. As such, the proposal constitutes good planning as it fits the varied residential pattern of the neighbourhood and it can be developed in a manner not adversely impacting the adjacent ravine. The Board allows the appeals and approves the OPA found in Exhibit #2, TAB 45 (Attachment #1) and the ZBLA found in Exhibit #2, TAB 46 (Attachment #2). The Board withholds final determination of the details of the site plan, pending a consideration by the City, and if necessary, this Board, of the permits which are required under the Ravine Protection and Tree By-laws. This panel of the Board will remain seized of the site plan issue and will be seized of any appeals under either of the By-laws. As the existing house on the subject property is designated under the *Heritage Act*, this panel of the Board will be seized of any appeals under that Act.

This is the Order of the Board.

"Susan B. Campbell"

SUSAN B. CAMPBELL
VICE CHAIR