

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 17, 2015

CASE NO(S): PL141340

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Douglas Cardinal Architect Inc.
Appellant: Richard Jackman
Appellant: Lindsay Lambert
Appellant: Larry McDermott; and others
Subject: Proposed Official Plan Amendment No. 143
Municipality: City of Ottawa
OMB Case No.: PL141340
OMB File No.: PL141340
OMB Case Name: Jackman v. Ottawa (City)

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Douglas Cardinal Architect Inc.
Appellant: Richard Jackman
Appellant: Lindsay Lambert
Subject: By-law No. 2014-395
Municipality: City of Ottawa
OMB Case No.: PL141340
OMB File No.: PL141341

PROCEEDING COMMENCED UNDER subsection 17(45) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Motion By: City of Ottawa
Purpose of Motion: Request for an Order Dismissing the Appeal
Appellant: Douglas Cardinal Architect Inc.
Appellant: Richard Jackman
Appellant: Lindsay Lambert
Appellant: Larry McDermott; and others
Subject: Proposed Official Plan Amendment No. 143
Municipality: City of Ottawa

OMB Case No.: PL141340
 OMB File No.: PL141340

PROCEEDING COMMENCED UNDER subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Motion By: City of Ottawa
 Purpose of Motion: Request for an Order Dismissing the Appeal
 Appellant: Douglas Cardinal Architect Inc.
 Appellant: Richard Jackman
 Appellant: Lindsay Lambert
 Appellant: Larry McDermott; and others
 Subject: By-law No. 2014-395
 Municipality: City of Ottawa
 OMB Case No.: PL141340
 OMB File No.: PL141341

Heard: August 17-19, 2015 in Ottawa, Ontario

APPEARANCES:

Parties

Counsel

City of Ottawa

T. Marc

Windmill Green Fund LPV (Windmill)

A.K. Cohen and
 J. L. Cohen

Douglas Cardinal

M. Swinwood

Lindsay Lambert

Richard Jackman

Romola Trebilcock-Thumbadoo

Larry McDermott

DECISION DELIVERED BY R. G. M. MAKUCH AND ORDER OF THE BOARD

[1] Windmill Green Fund LPV (“Windmill”) has acquired the subject lands from Domtar Corporation (“Domtar”) who had previously operated a paper mill on the site. It

is noted that prior to Windmill's acquisition of the lands, the National Capital Commission ("NCC") as a Crown agency, had entered into an agreement to purchase the subject lands from Domtar some time shortly after the closing of the mills in 2005 and 2007. The sale was never finalized as the Treasury Board approvals were not secured, leaving the lands to remain in private ownership.

[2] Windmill proposes to redevelop the site into a mixed-use community comprised of residential, retail, office, leisure and open space/park uses. The lands are located in the northwest corner of the downtown core in the "Central Area" designation under the City of Ottawa Official Plan. These are also within the "Lebreton Flats Character Area" of the Central Area Secondary Plan, which provides more specific policy direction for the different Character Areas within the "Central Area".

[3] The lands have a total site area of approximately 7.3 ha (18 acres comprise Chaudiere and Albert Islands located within the Ottawa River). These islands are considered to be brownfield sites as a result of previous industrial uses and require site remediation given the proposed change in use to a more sensitive land use as prescribed by Ministry of the Environment and Climate Change ("MOECC") regulations.

[4] Booth Street, the existing arterial roadway onto which the subject lands front, crosses both islands and provides the only road access to the subject lands. Booth Street also acts as one of five interprovincial road links between the provinces of Ontario and Québec and the Cities of Ottawa and Gatineau.

[5] Windmill has also entered into negotiations with the Federal Department of Public Works and Government Services ("PWGSC") to acquire small portions of lands on Chaudiere Island that were subject to a perpetual lease from PWGSC to Domtar.

[6] Ottawa Energy Corporation also owns a portion of Chaudiere Island where its hydro-generating facility is located. The proposal for the Chaudiere and Albert Islands is part of a larger mixed-use development proposed by Windmill for all of the former Domtar lands that would straddle the Ontario and Québec border along the Ottawa

River with the Chaudiere and Albert Islands being located within the City of Ottawa (“City”) and the mainland portion of the project being located within the “Ville de Gatineau” within the Province of Quebec. The master plan developed by Windmill for the overall development shows how the PWGSC lands if transferred to Windmill as well as the Ottawa Energy Corporation lands would be integrated into the overall development. The proposed development however is not dependent on the PWGSC lands being transferred to Windmill.

[7] The subject lands have a long history of industrial uses beginning in the early 1800s. In 1828 the first of a series of bridges was constructed to connect what was then known as Bytown on the south shore to the islands and to the Province of Quebec to the north across the Ottawa River. Throughout the 1800s, the site was home to one of the most productive sawmills in the world and in the 1880s, as the sawmill industry was beginning to decline, the demand for newsprint led to the development of the wood pulp product industry on the site. In 1908-09 a dam was constructed to stabilize the control of the falls and to boost the hydroelectric capacity of the falls, which became known as the ring dam. The pulp and paper business was maintained on the site through the 1900s and into the beginning of the 21st century. The lands which form part of the proposed development have been in private ownership since those early times.

[8] In 2005, the Chaudiere Island mills were closed and in 2007 the mills located in the City of Gatineau were also closed. Industrial uses, however, continue to be permitted on the subject lands under the zoning by-law in effect prior to the current amendment. As noted earlier in this decision, the site is contaminated as confirmed by the Phase I and Phase II Environmental Site Assessment reports carried out in 2014 and would be eligible for funding from the City’s “Brownfield Redevelopment Program” if this development proceeds. This is consistent with policies 1.1.3.3 and 1.7.1 e) of the PPS.

[9] The site has not been utilized for industrial purposes since 2007 while the owners have been attempting to sell the lands. There are no other uses on the islands other

than the Hydro facility on the north end of Chaudiere Island on lands owned by Hydro Ottawa. The Hydro facility consists of two generating stations which date back to 1891 and 1900 respectively as well as four additional generating stations, one constructed by Hydro Ottawa in Ontario and three purchased from Domtar, the registered owner of the lands, in 2012. Two of these are located in Ontario while the other is located in the Province of Québec.

[10] In early 2014, Hydro Ottawa was awarded a contract to expand the Chaudiere Island facility for the construction of a new 29 MW facility. With the extension, the plant will have capacity to power approximately 58,000 homes annually in the City. The Hydro facility expansion is separate and apart from the proposed development. The Board notes that the subject lands are separated from the Chaudiere Falls by the hydro lands and that there is no direct access to the Chaudiere Falls from the Windmill lands or from anywhere on the proposed development.

[11] Windmill made an application to amend the zoning from (O1L[329]-h) to a downtown mixed-use zone for most of the lands to allow for a mixed use development and a major leisure facility zone on portions of the lands where new public parklands are proposed. It is noted that the lands zoned open space will provide public access to the Ottawa River shoreline on the islands for the first time in over 100 years.

[12] The proposal according to Windmill is to develop the lands into a sustainable, mixed-use community with retail, residential, office and commercial uses and improve the active transportation links to the cities of Ottawa and Gatineau. The proposed mixed-use development consists of 13 development blocks presumably on a plan of subdivision in Ottawa with residential, retail, office uses, community uses and a hotel. A gross floor area of approximately 92,900 square metres ("m²") is proposed including approximately 1200 residential units, 6900 m² of retail and 9500 m² of office. The proposed development will make use of certain heritage buildings and will also be oriented around historical road patterns on the islands. Building heights will range from two storeys to a maximum of 15 storeys. A total of 2955 underground parking spaces

are proposed to service that portion of the proposal of the development to be located within the City of Ottawa.

[13] There are many old buildings remaining on the site, some of which have been enlarged over time. In order to accommodate the proposed development some of the less important buildings will be demolished while the buildings with heritage significance will be preserved and incorporated into the development.

[14] The proposed development will prioritize pedestrians and cyclists over vehicles and will establish narrower streets in some instances, where pedestrians, cyclists and vehicles all operate in a shared, narrow right-of-way. The design of these narrower streets is intended to discourage driving and to encourage people to choose active transportation options.

[15] The City concurrently initiated an official plan amendment (“OPA”) to update and amend the Lebreton Flats chapter of the Central Area Secondary Plan, to define land use designations, and provide policy directions for the development of these islands.

[16] The Zoning By-law amendment provides the details as to how land may be used; where buildings and other structures can be located; and development performance standards such as lot sizes and dimensions, parking requirements, building height and setbacks from property lines.

[17] The zoning in effect prior to the enactment of Zoning By-law No. 2014-395 for the subject lands, is a “Parks and Open Space subzone (O1L[329]-h)”, with an exception that permits light and heavy industrial uses (reflecting the previous use of the lands as a paper mill) under a holding provision. The holding provision requires a secondary planning process to be completed before the hold can be lifted so as to allow other permitted uses or to define other uses not permitted that might be determined through the secondary planning process to be appropriate. It is noted that heavy industrial use of the subject lands as they have been used previously, is permitted as of right and can continue without being subject to the lifting of the holding provisions.

[18] Notice of passing of the Official Plan and Zoning By-law amendments were sent out by the City on October 21, 2014 and appeals have been brought against the adoption of Official Plan Amendment No. 143 (“OPA 143”) and the enactment of Zoning By-law No. 2014-395 by City Council. OPA 143 designates the subject lands as “Central Area”, which will allow for mixed uses to be developed on the islands, while Zoning By-law No. 2014-395 rezones the site from “O1L[329]-h” (Parks and Open Space, Subzone L, Exception 329, under a holding zone), to “MD5[2172]S332-h” (Mixed Use Downtown, Subzone 5, Exception 2, Schedule 2172, under holding zone) and “L2” (Major Leisure Facility).

[19] The City brings a motion for an order of the Board pursuant to s. 17(45)(a) (i) and 34(25)(a)(i) of the *Planning Act* (“Act”) dismissing the appeals against OPA 143 and Zoning By-law 2014-395. The matter was before the Board on June 3, 2015 but was adjourned to August 17, 2015 following the illness of counsel for the Appellant Richard Jackman.

[20] The materials before the Board on this motion consist of the following;

- 1) The City’s Motion Record dated May 14, 2015 including:
 - a) the affidavit of John Smit sworn, May 14, 2015; and
 - b) the affidavit of John Smit, sworn June 1, 2015.
- 2) The Notice of response to Motion of Windmill, dated May 20, 2015, including:
 - a) the affidavit of Miguel Tremblay, sworn May 20, 2015; and
 - b) the affidavit of Jeff Westeinde, sworn May 20, 2015.
- 3) The Notice of Response to Motion of Douglas Cardinal, dated May 30, 2015, including:
 - a) the affidavit of Douglas Cardinal, sworn May 27, 2015;
 - b) the affidavit of Jayne Ann Chartrand, sworn May 29, 2015 ; and
 - c) the affidavit of Stacy Amikwabi, sworn May 29, 2015;
- 4) The affidavit of Douglas Cardinal, sworn June 8, 2015.

- 5) The Response of Larry McDermott dated June 1, 2015.
- 6) The Response of Romola Trebilcock-Thumbadoo, dated June 4, 2015.
- 7) The Response of Lindsay Lambert, dated May 31, 2015.
- 8) Transcript of the cross-examination of John Smit on June 10, 2015.
- 9) Transcript of the cross-examination of John Smit on June 22, 2015.
- 10) Transcript of the cross-examination of John Smit on June 30, 2015.
- 11) Transcript of the cross-examination of John Smit on July 29, 2015.
- 12) Transcript of the cross-examination of Miguel Tremblay on June 25, 2015.
- 13) Transcript of the cross-examination of Miguel Tremblay on June 30, 2015.
- 14) Transcript of the cross-examination of Miguel Tremblay on July 30, 2015.
- 15) Transcript of the cross-examination of Jeff Westeinde on July 2, 2015.
- 16) Transcript of the cross-examination of Jeff Westeinde on July 29, 2015.
- 17) Written responses of John Smit to written questions by Romola Trebilcock-Thumbadoo on June 10, 2015.
- 18) Written responses of Jeff Westeinde to written questions by Romola Trebilcock-Thumbadoo.
- 19) Written responses of Miguel Tremblay to written questions by Romola Trebilcock-Thumbadoo.
- 20) Province of Ontario Property Index Map.
- 21) Aerial Photo.
- 22) Stage 1 Archeological Assessment of Chaudiere and Albert Islands, dated February 14, 2014.

[21] The grounds for the motion are that:

- a) the appeals do not disclose a basis upon which approval of the OPA and Zoning By-law could be refused;
- b) the evidentiary record establishes consistency with the Provincial Policy Statement 2014 ("PPS"), conformity with the Official Plan and compliance with the principles of good planning;

- c) the evidentiary record establishes that consultation and engagement has occurred with First Nations with respect to the Official Plan and Zoning By-law amendments as well as the proposed development and that due consideration has been given to the interests of Aboriginal Communities;
- d) the Official Plan and Zoning By-law amendments will promote development that is in the public interest; and
- e) the Official Plan and Zoning By-law amendments will promote development that will restore access to Chaudiere Falls and Albert Island.

[22] The Appellants are opposed to this Motion on the following grounds:

- 1) the proposal does not conform to the PPS;
- 2) this is an outstanding constitutional question pursuant to s. 35 of the Constitution Act, the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*, which must be determined by the Board, expressed as a minimum standard by the PPS;
- 3) the issue forms on the assertion of indigenous title, as enunciated in *Tsilhqot'in v. B.C.*, s. 44 and the statement that:

The Provincial Policy Statement shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and Treaty rights in Section 35 of the *Constitution Act, 1982*.

- 4) The issues also focus on the statement that:

The Provincial Policy Statement shall be implemented in a manner that is consistent with the *Ontario Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

- 5) Indigenous history and culture have not been respected and are not incorporated into the proposed development plans;
- 6) the proposed development plan offends the United Nations Declaration on the Rights of Indigenous Peoples and the Covenant on the Elimination of Racial Discrimination;

- 7) international legal principles, declaration, Covenants, or Agreements that Canada undertakes, or as a signatory, are incorporated into domestic law based on the Supreme Court of Canada decision in *R v. Hage*;
- 8) the elements of the constitutional questions which must be decided by the Board;
- 9) the City and the proponent have not properly consulted with the proper indigenous groups, chief and band councils are restricted in their jurisdiction to the reserve, by virtue of the *Indian Act*;
- 10) the proposed development is not consistent with the PPS and does not demonstrate good planning principles;
- 11) the Official Plan and Zoning By-law amendments do not provide development that is in the public interest.

[23] They maintain that the subject lands were a sacred meeting place since time immemorial and should be preserved as open space for all in accordance with the vision enunciated by Elder William Commanda for the site.

[24] The appeals are based on First Nations issues and in particular, Algonquin interests in the lands, which are recognized as unceded Algonquin territory. The appeal by Douglas Cardinal, refers to specific policies set out in the PPS that are focused on providing for aboriginal and First Nations involvement in planning matters.

[25] The PPS is the statement of the Provincial Government's policies on land use planning issued under s. 3 of the Act, and applies province wide. All planning decisions made by municipalities must be consistent with the PPS and all municipalities in Ontario must incorporate the policy directions of the PPS into their Official Plans. They are also required to ensure that planning decisions made on planning applications are consistent with the applicable policies of the PPS.

[26] Part IV sets out the vision and provides that Ontario's rich cultural diversity is one of its distinctive and defining features and the statement reflects this diversity, which

includes the histories and cultures of Aboriginal peoples, and is based on good land use planning principles that apply in communities across Ontario. The Province through the PPS recognizes the importance of consulting with Aboriginal communities on planning matters that may affect their rights and interests.

[27] The specific PPS policies relied on by the Appellants are as follows:

Section 1.2.2

Planning authorities are encouraged to coordinate planning matters with Aboriginal communities.

Section 1.7.1

Long-term economic prosperity should be supported by;

d) encouraging a sense of place, by promoting well-designed built form and cultural planning, and by conserving features that help define character, including built heritage resources and cultural heritage landscapes;

Section 2.0

Ontario's long-term prosperity, environmental health, and social well-being depend on conserving biodiversity, protecting the health of the Great Lakes, and protecting natural heritage, water, agricultural, mineral and cultural heritage and archaeological resources for their economic, environmental and social benefits.

Section 2.1.2

The diversity and connectivity of natural features in an area, and the long-term ecological function and biodiversity of natural heritage systems, should be maintained, restored, or, where possible, improve, recognizing linkages between and among natural heritage features and areas, surface water features and groundwater features.

Section 2.1.5

Development and site alterations shall not be permitted in:

a) significant areas of natural and scientific interest;

Section 2.1.8

Development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas identified in policies 2.1.4, 2.1.5, and 2.1.6 unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions.

Section 2.6.1

Significant build heritage resources and significant cultural heritage landscapes shall be conserved.

Section 2.6.2

Development and site alteration shall not be permitted on lands containing archaeological resources or areas of archaeological potential on the significant archaeological resources have been conserved.

Section 2.6.3

Planning authorities shall not permit development and site alteration on adjacent lands protected heritage property except where the proposed development and site alteration has been evaluated and has been demonstrated that the heritage attributes of the protected heritage property will be conserved.

Section 2.6.4

Planning authorities should consider and promote archaeological management plans and cultural plans in concert of the cultural heritage and archaeological resources.

Section 2.6.5

Planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources.

Section 4.0 Implementation and Interpretation**4.2**

In accordance with section 3 of the *Planning Act*, a decision of the Council of the municipality, a local board, a planning board, the Minister of the Crown and the ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of

any authority that affects the planning matter, “shall be consistent with” this Provincial Policy Statement.

4.3

This Provincial Policy Statement shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act*, 1982.

4.6

This Provincial Policy Statement shall be implemented in a manner that is consistent with the *Ontario Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

[28] They argue that the consultation process relied on by the City was largely carried out by the proponent and as such does not satisfy the requirements of the PPS since this was an improper delegation of its responsibilities as approval authority. Not only is the duty to consult with Aboriginal peoples a requirement of the PPS but it is also enshrined in the Constitution by virtue of s. 35 and recent decisions of the Supreme Court of Canada. The duty to consult involves the “Crown’s honor” and cannot be delegated.

[29] The Appellants argue that the City did not have any awareness of who the Algonquin people are and what their history was and as a consequence failed to properly consult with them when it made the decision to amend the Official Plan and enact the subject Zoning By-law.

[30] They maintain that the subject lands are not private property given the ownership by PWGSC and the NCC of some of the lands which form part of Chaudiere and Albert Islands and are therefore held in trust by the Crown for the benefit of Aboriginal people.

[31] The Court’s decision in *Xeni Gwet’in First Nations v. British Columbia* 2014 Carswell BC (SCC) (“*Xeni Gwet’in*”) according to the Appellants imposes an obligation on the Crown to consult with aboriginal peoples before it approves developments that

will have a lasting impact on them. In this case, the consultations were carried out by the proponent, a private developer.

[32] Aboriginal title confers ownership rights similar to those associated with fee simple, including the right to decide how the land will be used, the right of enjoyment and occupancy of the land, the right to possess the land, the right to the economic benefits of the land and the right to pro-actively use and manage the land according to the decision in *Xeni Gwet'in*.

[33] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the aboriginal title holders.

FINDINGS

[34] The Board has carefully considered all of the evidence as well as the submissions of counsel and the parties and finds that the motion should succeed for the reasons that follow.

[35] It is acknowledged and recognized by the City and Windmill that the City of Ottawa occupies un-ceded Algonquin territory and the City Official Plan commits to an engagement with First Nations in particular the group known as the “Algonquins of Ontario” (“AOO”) on planning matters affecting lands that are of particular interest to the AOO. It is noted that the AOO is the group with whom the Federal Government and Provincial Government is negotiating a treaty for the settlement of a land claim over the larger territory. Windmill was advised by the City prior to the submission of its development applications that a key requirement would be for engagement with the AOO.

[36] The process for engagement followed by Windmill with the First Nations was consistent with the City's requirements as set out in its Official Plan, which, identifies the AOO as a stakeholder to be engaged with respect the planning for the future use of

Chaudiere and Albert Islands. The evidence shows that the City's Planning Department contacted the designated representative of the AOO to provide for formal engagement with that group in regard to the development applications and the City initiated OPA. The evidence also shows that extensive consultations took place with a number of well attended public meetings occurring, where public input was sought from both the public at large as well as with the Aboriginal community.

[37] The consultation that was undertaken in this case was in line with the type of consultation that is customary and contemplated under the PPS as well as under the City's Official Plan. It resulted in planning documents for a redevelopment of the lands that incorporate elements and features within the overall development that will recognize and celebrate Algonquin history and culture as well as the overall significance of the islands to the Algonquin in particular.

[38] The site has been identified by the City as a site with potential archaeological resources requiring that archaeological assessment be undertaken prior to development occurring. The OPA provides for a heritage interpretive plan to be developed which would include the historic themes of First Nations amongst others. The Stage 1 Archeological Assessment was completed to determine the potential for the presence of significant archeological resources and to make recommendations for appropriate steps to be taken to address archaeological concerns prior to development. This assessment identified areas of interest that may have escaped disturbance by later industrial development and indicates that parts of the site exhibit the potential for significant archaeological resources associated with both First Nations and Euro Canadian settlement and land uses. It recommends that a Stage 2 assessment be carried out for those areas as part of further development applications.

[39] It is also noted that a document entitled "Below the Falls; An Ancient Cultural Landscape in the Centre of (Canada's National Capital Region) Gatineau"; relied on by the Appellant Douglas Cardinal (Exhibit 16, Affidavit of Douglas Cardinal, sworn June 8, 2015, Exhibit 2 to the affidavit) identifies the north shore of the Ottawa River between

the Chaudiere Falls and the mouth of the Gatineau River downstream as constituting an important cultural landscape and not Chaudiere and Albert Islands. It is also noted that the lands under OPA 143 and Zoning By-law No. 2014-395 are not adjacent in any way to the falls. The Hydro lands abut the falls.

[40] With respect to s. 2.6.5 of the PPS, the proposed development has had input from the AOO and the Algonquins of Kitiga Zibi and has considered the history of the lands which will be highlighted in the development. The park and open space lands proposed will highlight the long history of the site including the significant location on the Ottawa River, the Portage Trail as well as its industrial heritage. The open spaces proposed as part of the development will provide the first opportunity in almost 200 years for public access to the islands waterfronts and the dramatic views of the Chaudiere Falls.

[41] The Board is satisfied that the amendment will provide for a raising of awareness of the cultural heritage of the site and will address archaeological resources that might be identified through the archaeological assessments to be undertaken prior to any development occurring.

[42] While the City is recognized as un-ceded Algonquin territory, there is no land claim agreement in place and the Board notes that the negotiations between the Federal Government, Provincial Government and the Algonquins are focused on lands that are under federal jurisdiction/ownership and do not include lands that are privately held or owned at this time. The subject lands have been held in private ownership for over 100 years with small areas still owned by PWGSC subject to perpetual lease agreements for perpetual use by private interests.

[43] The subject lands are the last downtown waterfront area that can be redeveloped to provide for public access to the Ottawa River.

[44] The Board is satisfied based on the evidence before it that OPA 143 and Zoning By-law No. 2014-395 serve to advance the overarching policy directions set out in the

City's Official Plan. These planning documents provide for the subject lands to be redeveloped from an industrial site to a unique and dynamic mixed-use area within the "Central Area" designation supporting and strengthening its role as the economic and cultural heart of the city. OPA 143 in particular provides for capitalizing on the site's very unique attributes in a way that will reflect the its cultural heritage and celebrate the history and role of the islands in the development of Ottawa with a new mixed-use community.

[45] The approach taken by the City in adopting this OPA is consistent with the consultations that took place with the AOO.

[46] Notwithstanding that the proposed development is a private sector development, and given the significance of the lands to the Algonquin, Windmill nevertheless engaged with the Algonquin in developing their plans as part of the City's process for reviewing the Zoning By-law amendment application and in the development of OPA 143. As a result OPA 143 includes policies requiring that a heritage interpretive plan be developed that would provide amongst other things, incorporating elements/features into the project that pay tribute to the Algonquin history on the site and that acknowledge the significance of the islands to Algonquin culture.

[47] The Board is satisfied that the spirit and intent of the policies in the City Official Plan directed at working with the Algonquin on planning for public lands have been respected through the planning process for determining the future development for the islands.

[48] Zoning By-law No. 2014-395 includes a major leisure and open space zone that permits primarily open space and leisure uses. The changes in the by-law will no longer allow for the industrial use that is currently permitted as continued industrial use of the lands considered to be incompatible with the overall directions the Official Plan for development in the Central Area and would perpetuate the absence of public access to the shorelines of the islands. Currently, the subject lands are private industrial lands,

fenced off to the public, without any public park space. The proposed development includes new East and West and public parks which have areas of 3300 m² and 3700 m² respectively, as well as several additional new plazas and terraces that form part of the public realm on the development. In all the development will include a combination of public and private parks with the cumulative area of approximately 15,300 m² representing an area greater than 20% of the total lands.

[49] The zoning amendment also provides for the lands to be subject to a holding provision which would not be lifted until such time as a number of conditions are complied with including amongst others, the completion of a Phase 2 Environmental Site Assessment (ESA), the submission of environmental remediation plans as well as a Stage 2 Archaeological Assessment amongst other requirements. This demonstrates that the obligation to consult is a continuing one as the development process proceeds forward.

[50] The intent of the City for this area is to celebrate the industrial, aboriginal, and natural heritage and to establish a link between the downtowns of Ottawa and Gatineau.

[51] It is noted that the zoning on the portion of the overall development located within the city of Gatineau was approved in the fall of 2014 and has been in full force and effect in January 5, 2015.

[52] With respect to the Douglas Cardinal appeals against OPA 143 and Zoning By-law No. 2014-395 related to PPS policy 1.7.1 (d), the Board notes that the proponent submitted a Cultural Heritage Impact Statement (CHIS), which identified the subject lands as having cultural heritage value derived from its association with First Nations, the early settlement of Ottawa, and the role that industry on the site played in the City's industrial history as a resource town in the wood pulp and paper sectors as well as hydroelectric power. A number of on-site buildings and site attributes have been identified as heritage resources and will be undergoing designation under the *Ontario Heritage Act*.

[53] With respect to policy 2.1.5 which does not permit site alteration for areas designated as Areas of Natural and Scientific Interest (“ANSI”), the evidence shows that the ANSI has been confirmed to be located on Victoria Island and not on Chaudiere or Albert Islands. Furthermore the evidence shows that the Environmental Impact Statement (“EIS”) concluded that the proposed development will have no impact on the designated ANSI as the geological feature located on Victoria Island was not found anywhere on Chaudiere or Albert Islands.

[54] With respect to policy 2.6.4 which requires municipalities to consider and promote archaeological management plans and cultural plans in conserving cultural heritage and archaeological resources, policy 1.11.8 of OPA 143 requires that a heritage interpretive plan be developed which would include any archaeological resources that may be identified through the archaeological assessments to be undertaken.

[55] The appeal by Romola Trebilcock-Thumbadoo against the adoption of OPA 143 is premised largely on the question of title to the lands, lack of engagement with First Nations in the planning process and that the lands should be developed to advance the vision of the late Elder William Commanda.

[56] Municipalities in Ontario are vested with the authority under the Act to adopt Official Plans and to enact Zoning By-laws, tools that are not tied to ownership of lands but rather are directed to managing and regulating growth and change the municipality needs to be in the public interest after giving consideration to the balancing of economic, social and environmental considerations.

[57] The evidence shows that an extensive consultation process was undertaken by both the City and proponent and that the concerns of First Nations particularly the Algonquin have been adequately considered in the adoption of OPA 143 and the enactment of Zoning By-law No. 2014-395. The overall development will incorporate elements/features that will celebrate and recognize Algonquin history and culture.

[58] The appeal by Larry McDermott against the adoption of OPA 143 alleges that the City did not adequately take into consideration the obligations set out in s. 5.6 of the City's Official Plan for the obligations under s. 35 of the *Constitution Act, 1982*. The Board finds as noted above that the City has carried out its obligations to consult with First Nations under the PPS as well as under its own Official Plan.

[59] The Richard Jackman appeal against the enactment of Zoning By-law No. 2014-395 is premised on the zoning being changed from a Parks and Open Space zone to a Mixed-Use zone. The current "OS1" zone however allows a variety of uses including light and heavy industrial uses and such uses can continue without the need for any planning approvals. It is also noted that specific lands along the river are proposed to be developed as parkland and are being zoned to allow for park type uses providing public access to the river for public enjoyment. This is not possible under the current by-law with the lands remaining as industrial lands.

[60] The Lindsay Lambert appeal against Zoning By-law No. 2014-395 refers to the lands as being considered a significant historical district where First Nations have a significant and particular interest and that any redevelopment of the islands should be focused on transforming them to a national park system in line with the vision of the late Elder William Commanda. He also alleges a lack of proper consultation with the public and that expressions of opposition were not fully considered. He also raises issues of title to the lands and jurisdiction over such as unceded Algonquin territory. The Board notes that not getting what one wants does not necessarily equate to a lack of consultation. The obligation to have consultations cannot be understood to be a veto on a proposal for development. The Board fails to see how the consultations that took place in the lead up to the adoption of the official plan and zoning by-law amendments could be considered to be inadequate as it was not provided with any basis upon which it could reach that conclusion.

[61] The Appellants claim that the AOO does not have the authority to speak on behalf of aboriginal people, and that their authority is limited to matters on the reserves.

As the Board noted above, the AOO is the group recognized by the Federal Government and Provincial Government to negotiate with in respect of the outstanding comprehensive land claim over the larger territory.

[62] The Board finds that the appeals, while well intended, consist of mere apprehensions raised by the Appellants that are not worthy of the adjudicative process of the Board and do not merit a full hearing. The Appellants have had a full opportunity to elaborate on the grounds in support of their appeals and have not demonstrated that these merit a full hearing of the Board. Appellants have an obligation at the time of filing their appeals to retain the necessary experts to support these. This was not done, the only affidavit material provided were affidavits deposed by the Appellant, Douglas Cardinal, who cannot proffer professional opinion evidence in this case by reason of his being a party as an Appellant and cannot proffer unbiased and impartial opinions to the Board.

[63] The Board is satisfied that OPA 143 and Zoning By-law No. 2014-395 are consistent with the applicable land use policies in the PPS and are fully in conformity with the current City Official Plan as well as the pending OPA 150 currently under appeal to this Board. These documents help fulfill the vision of the Central Area Secondary Plan for the Lebreton Flats Character Area.

[64] The seminal decision of the Board with respect to motions to dismiss appeals pursuant to s. 17(45)(a)(i) and 34(25)(a)(i) of the Act is *East Beach Community Assn. v. Toronto (City)* [1996] O.M.B.D. No. 1890, 1996 CarswellOnt 5740, where the Board found that these provisions allow the Board to examine whether there has been disclosure of planning grounds that warrant a hearing.

The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons. This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious consideration of the circumstances of each case. This does not allow the Board to make a hasty conclusion as to the merit of an issue. Nor does it mean that every appellant should draft the appeal with punctilious care and arm itself with iron-clad reason for fear of being struck down. What these particular provisions allow the Board to

do is seek out whether there is authenticity in the reasons stated, whether there are issues that should affect a decision in a hearing and whether the issues are worthy of the adjudicative process.

[65] The Board in that case took into consideration the notices of appeal and the supporting evidence and found that the notices of appeal contain concerns that were clearly inaccurate. It found that planning language had been deployed and in others that planning issues had been raised but that concerns raised individually and collectively were not such that tests were met. The Board found that it was not good enough in respect of certain issues to simply raise apprehensions and say that further experts' studies were required to constitute apparent planning grounds with the hope that once a hearing is convened, more real issues could be introduced for adjudication.

[66] The issue as to title to the lands is not one for the Board to determine and is not relevant with respect to the planning considerations that the Board must address its mind to. City Council performs a public interest function when making decisions respecting the designation or re-zoning of lands within its jurisdiction.

[67] In the present case, that is precisely what the Appellants have done, they have simply raised apprehensions as to title to the lands which is not a land use planning issue on which the Board can adjudicate, as well as non-consistency with the PPS respecting the duty to consult by the Crown. The Appellants claim that there was a lack of consultation by the City with First Nations, is not worthy of the adjudicative process of this Board given the wealth of evidence as to the consultations that were undertaken by the City and proponent with the general public as well as First Nations prior to the adoption of OPA 143 and the enactment of Zoning By-law No. 2014-395.

[68] It is incumbent upon appellants to demonstrate that the issues raised in their notices of appeal merit a full adjudication by the Board at a hearing. The Appellants have failed to do so in this case.

[69] The Board is satisfied based on the evidence before it that OPA 143 and Zoning By-law No. 2014-395 are consistent with the PPS and are in conformity with the City's

Official Plan. The development proposed is in the public interest and it is noted that a considerable amount of money will be spent on decontamination the site and that a substantial amount of land will be devoted to parks and open space and will allow public views of the Chaudiere Falls from this vantage point for the first time in over a century. Furthermore the Board is satisfied the City and the proponent have both consulted and engaged with the First Nations and that their aboriginal history and culture will be respected and incorporated into the proposed development plans.

[70] The consultations that took place have considered all of the issues raised by the Appellants with respect to the official plan and zoning by-law amendments and the Board notes again that consultations with the aboriginal communities will continue as part of the development process. The consultations that have taken place to date have involved both the City and proponent under the City's Official Plan, which was approved by the Province. The AOO has been engaged in the process from the beginning and the Appellants have failed that they have raised legitimate land use planning grounds upon which the Board could rely to allow their appeals.

[71] Accordingly, the appeals are hereby dismissed.

"R. G. M. Makuch"

R. G. M. MAKUCH
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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