Court File No: C68033

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TWO SISTERS RESORTS CORP. and SOLMAR (NIAGARA 2) INC.

Applicants

(Appellants)

And

THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE and SORE ASSOCIATION

Respondents

(Respondents in Appeal)

FACTUM OF THE RESPONDENT THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE

JULY 13, 2020

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PART I – SUMMARY OVERVIEW

1. Heritage protection in Ontario is codified in legislation: the *Ontario Heritage Act* (the "OHA"). As in this case, buildings and landscapes that are conserved through the OHA process can be many decades and even centuries old.

2. The OHA is a statutory regime that provides a specific and intentional balance in Ontario between heritage protection and the scope of protections afforded property owners, including the available remedies. This balance was correctly recognized by the Honourable Justice L.M. Walters (the "Application Judge") in her January 10, 2020 Reasons for Decision (the "Decision") which is the subject of this appeal.

3. To start the designation process under the OHA, a municipality gives notice of intention to designate ("Notice"). The Appellants' Factum refers to the Notice as a "NOID". The Town of Niagara on the Lake (the "Town") gave Notice in relation to the Randwood Lands and the Adjacent Lands (as defined in the Appellants' Factum, the "Subject Lands"). The Appellants objected. The Notice and its contents are now before the Conservation Review Board ("CRB") for a hearing under the OHA.

4. The same parties to this appeal are parties to the CRB process. The parties are currently engaged in prehearing matters. The hearing is scheduled for December 9-16, 2020. The Appellants have never suggested that the CRB process has been inordinately delayed nor that a hearing should be scheduled at an earlier date.

5. The CRB, a specialized tribunal that deals exclusively with disputes relating to the protection of heritage properties, will hear evidence, subject to cross examination,

on the contents of the Notice. It will render a report on the appropriate description of heritage attributes for inclusion in a designation by-law, if any.

6. Nevertheless, the Appellants attacked the Town direction to give Notice through an application to quash under s. 273(1) of the *Municipal Act* (the "Application"). The challenge was only to the "Impugned Instruments" (the direction to give notice and confirming by-law). The contents of the Notice- the NOIDS- are not part of the Impugned Instruments.

7. The Application to quash was based on 4 grounds of illegality:

    a. The Town failed to comply with the requirements of the OHA in passing the Impugned Instruments;

    b. The By-law does not conform with the Town's Official Plan, thereby directly contravening s. 24(1) of the *Planning Act*;

    c. The Impugned Instruments rest inextricably upon the Notices of Intention, which are impermissibly vague and overbroad; and

    d. In passing the Impugned Instruments, the Town acted outside of the fundamental principles of administrative law.[1]

8. The fourth ground was never pursued. The Application Judge rejected the other three. This appeal is limited to the third ground; namely, the allegation that the NOIDS are impermissibly vague.

9. As accurately described by the Application Judge, the OHA requires three things in a NOID: i) an adequate description of the property; ii) a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property; and, iii) a statement that a notice of objection may be

[1] Notice of Application, para. 3, Appeal Book and Compendium of Two Sisters Resorts Corp. And Solmar (Niagara 2) Inc. ("ABAC"), Tab 4, p. 36.

served which, if filed, leads to a hearing before the CRB.[2] The alleged vagueness pertains exclusively to just two of the many heritage attributes identified in the NOIDs (one of which is repeated): "the surviving elements of the Dunington-Grubb landscape" and "the mature trees and plantings". (Factum, para 22) These are descriptions of cultural heritage landscapes.

10. All of the parties retained experts in heritage conservation who provided detailed opinions on the cultural heritage landscapes on the Subject Lands. Their opinions differ on the meaning of "surviving elements of the Dunington- Grubb landscape" and "mature trees and plantings" and as to whether those descriptions are adequate for identifying the heritage attributes.[3]

11. The importance of the narrow focus of this appeal cannot be overstated. As in the Application, the Appellant invites the Court to wade into this dispute: to rule on the adequacy of the description of the heritage attributes before the expert tribunal appointed by the Legislature to evaluate these very issues has had an opportunity to fulfill its mandate. There can be no doubt that the Application Judge was correct in declining this invitation (in first instance) and concluding that the application was premature until the administrative process has run its course. With respect, there is simply no basis upon which this Court should overturn that decision.

[2] Reasons for Decision of the Honourable Justice Walters (January 10, 2020) ("Decision"), paras. 29 and 54-68; ABAC, Tab 3, p. 20-21 and 25-27.

[3] Decision, para 87, ABAC, Tab 3, pp. 29-30; Letourneau Cross examination Transcript, p. 59-64, Q. 250-266, Exhibit Book ("EB") Vol 5, pp. 2773-2778), Town Responding Compendium ("Town RC"), Tab 1, pp. 2-7.

PART II – FACTS

Cultural Heritage Landscape

13. The OHA protects buildings and landscapes. Dr. Letourneau, a heritage conservation planner and expert in cultural heritage landscapes[4], discusses the term "Cultural heritage landscape" in his September 2018 report:

> As applied to the conservation of cultural landscapes, the approach has changed from a largely curatorial method, initially sponsored by individual or philanthropic efforts to counter the effects of rapid change following the industrial Revolution. This approach was superseded by an increasing role for the state in codifying heritage values and managing cultural heritage activity, in many cases to bolster identity and boost local and national economies via tourism. The current framework within which cultural landscapes are assessed and managed in Canada relies on professional expertise and on compliance frameworks entrenched in heritage planning policy [underlining added].[5]

The Historic Rand Estate

14. The historic Rand Estate is several contiguous properties that include the Subject Lands. The Subject Lands contain structures of architectural/historic value, are associated with people and families of historical significance, including Calvin Rand (contributor to the founding of the Shaw Festival) and contain landscapes associated with the firm of Dunington-Grubb.

15. Creating a landscape was part of the Rands' vision. In 1919, they engaged the prominent landscape architectural firm Dunington-Grubb to develop an elaborate landscape plan for the estate. Howard Burlington Grubb was born in 1881 in England and began working as a landscape apprentice in 1908. Howard married a successful landscape architect, Lorrie Alfreda Dunington and the couple moved to

[4] Letourneau Cross-examination Transcript, p. 4, Q. 2, EB Vol. 5, p. 2718, Town RC, Tab 2, p. 9.
[5] Affidavit of Amy Barnes at para. 10 and Exhibit C; EB Vol. 2, p. 505 & 532-654, Town RC, Tab 3, pp. 11 & 12-134.

Canada in 1911. The couple went by Dunington-Grubb. Their practice became very successful and together they founded Sheridan Nurseries.[6]

Proposed Rand Estate Heritage Attributes to Protect

16. The Town proposes to protect the following buildings and landscapes on the Randwood Lands through a designation of each property under the OHA:

144 John Street East

The cultural heritage value or interest associated with the property is represented in following heritage attributes:

The property (as a whole):

- The concrete and stone wall which extends along John Street East and Charlotte Street;
- The red brick pillars which mark the entrance to the property;
- The mature trees and plantings and boxwood hedge; and
- The surviving elements of the Dunington-Grubb landscape.

The Devonian House or Sheets House:

- The two and a half storey frame building;
- The gable roof and three attic dormers; and
- The two-storey open porch supported by wooden paired square post.

The Coach House:

- One and half storey massing;
- The steep gable roof with decorative bargeboard trim; and
- The early windows on the ground floor north elevation and the first and second floor east elevation and south elevations.

176 John Street

The cultural heritage value or interest associated with the property is represented in following heritage attributes:

The property:

- The long central axis from John Street East;
- The Victorian wooden gazebo;
- The metal entrance gate framed with red brick pillars;
- The surviving elements of the Dunington-Grubb landscape including the formal stone path, sunken lily pond with sculpture, arched stone bridges; and
- The concrete and stone wall which extends along John Street East.

[6] Affidavit of Amy Barnes at para. 10 and Exhibit C; EB Vol. 2, p. 505 and p. 532-564, Town RC, Tab 3, pp. 11 & 12-134.

Main residence:

- The three-storey brick biding with Second Empire, Italianate and Neo-classical features with its form, scale and massing; and
- The mansard roof and enclosed brick tower. [underlining added][7]

Proposed Adjacent Lands Heritage Attributes to Protect

17. In addition, the Town similarly proposed heritage protection for buildings and landscapes on the Adjacent Lands:

200 John Street East

The cultural heritage value or interest of the property is represented in following heritage attributes:

The Property:

- The tea house and pool;
- The surviving elements of the Dunington-Grubb landscape;
- The one storey, rectangular bath pavilion;
- The extant wooden gazebo/whistlestop; and
- The wall and red pillars located at the rear of the property and on John Street East. [underlining added]

Carriage House:

- The two-storey carriage house with hipped roof;
- The asymmetrical façade with three large French style door openings on the main floor; and
- The original rectangular diamond patterned windows.

The Calvin Rand Summer House (the Guest House)

- Entire exterior of the dwelling.

588 Charlotte Street

The cultural heritage value or interest of the property is represented in following heritage attributes:

- The stone wall located along the rear of the property;
- The red brick pillars and stone wall located at the entrance on Charlotte Street;
- Main dwelling and Sheds; and
- The one storey rectangular outbuilding with hipped roof and overhanging eaves and large French doors with ornate diamond shaped windows associated with the original estate.

[7] Affidavit of Leah Wallace at para. 75 and Exhibit I; EB Vol. 1, p. 17-18 & 180-181, Town RC, Tab 4, pp. 136-137 & 138-139.

Municipal Heritage Committee (the "MHC")

18. The MHC advises the Town on heritage matters. It makes recommendations only. The Town consulted the MHC in this case.[8]

The OHA: Fair, Open and Transparent Process

19. On August 8, 2018, following a process that began in 2017, the MHC considered a staff report recommending that Notice be given to start the designation process. The staff advised:

> The Properties have been evaluated by Letourneau Heritage Consulting based on Provincial criteria. All of the Properties are considered to be of Cultural Heritage Value or Interest. Draft notices of intention to designate have been prepared in accordance requirements of the Ontario Heritage Act. It is anticipated that the key heritage attributes will be further refined once notice of intention to designate have been served, and prior to the adoption of the by-laws.[9]

20. Dr. Letourneau prepared the Notice in late July and early August. As of August 8, 2018, LHC had completed most of its research.[10] The Notice is an expression of what the Town thinks is significant.[11]

21. Ms. Barnes presented the Notice to MHC at the August 8, 2018 meeting. In Dr. Letourneau's opinion, the description of the heritage attributes of the property in the Notice does not need to be further defined or changed. In his opinion, the description of the heritage attributes in the Notice clearly convey the nature of the heritage attributes.[12]

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[8] Affidavit of Leah Wallace at para. 48, EB Vol. 1, p. 12, Town RC, Tab 5, p. 141.
[9] Affidavit of Giuseppe Paolicelli at Exhibit S; EB Vol 1, p. 378, Town RC, Tab 6, p. 143.
[10] Affidavit of Marcus Letourneau at para. 22; EB Vol 2, p. 663-664, Town RC, Tab 7, p. 145-146.
[11] Letourneau Cross-examination Transcript, p. 64-65, Q. 268, EB Vol 5, p. 2778-2779, Town RC, Tab 8, pp. 148-149.
[12] Letourneau Cross-examination Transcript, p. 27-28, Q. 107 and p. 70, Q. 292; EB Vol 5, p. 2741-2742 and 2784, Town RC, Tab 9, pp. 151-153.

22. The Applicants through their heritage consultant, Ms. Wallace, made submissions at the August 8, 2018 MHC meeting.[13] Ms. Wallace did not tell the MHC she had completed her own Evaluation two (2) months earlier. She did not advise MHC of the existence or contents of her Evaluation because she did not have instructions to do so.[14] It only came to the Town's attention four (4) months later in materials filed in response to the Town's pending Injunction action against the Applicants.[15]

23. On August 13, 2018, Council considered and approved a staff report recommending that Notice be given to start the OHA process. Staff advised:

> As detailed in Staff report MHC-18-039 to the Municipal Heritage Committee, the Rand Estate properties have been evaluated by Letourneau Heritage Consulting (LHC) and are considered to be of Cultural Heritage Value or Interest. A copy of the Staff report is attached as Appendix B. The draft Notices of Intention to Designate prepared by LHC in accordance with requirements of the Ontario Heritage Act are attached as Appendix C to this report.[16]

24. The August 13, 2018 Staff Report CDS-18-047 ("Report CDS-18-047") with the MHC recommendations approved on August 8, 2018 was in front of Council when it passed the Impugned Instruments. Report CDS-18-047 contained draft Notices as an Appendix.[17]

25. The MHC recommendations in Report CDS-18-047 form the basis of the Resolution at Items 1.2.1 to 1.2.8 that Council provide, through the Clerk, Notice of Intention to Designate and that a designation by-law be passed for each respective

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[13] Affidavit of Giuseppe Paolicelli at Exhibit S; EB Vol 1, p. 407, Town RC, Tab 10, p. 155.

[14] Wallace Cross-examination Transcript, p.35, Q. 176-179, EB Vol 5, p. 2196, Town RC, Tab 11, p. 157.

[15] Wallace Cross-examination Transcript, p. 15, Q. 71, undertaking answer, EB Vol 5, p. 2176 and p. 2317, Town RC, Tab 12, pp. 159-160.

[16] Affidavit of Giuseppe Paolicelli at Exhibit V; EB Vol 1, p. 413, Town RC, Tab 13, p. 162

[17] Affidavit of Guiseppe Paolicelli at Exhibit S; EB Vol 1, Tab 2S, p. 374-380, Town RC, Tab 14, pp.164-170; Affidavit of Guiseppe Paolicelli at Exhibit U; EB Vol 1, Tab 2U, p. 406-409, Town RC, Tab 14, pp. 171-174; Affidavit of Guiseppe Paolicelli at Exhibit V; EB Vol 1, Tab 2V, p. 411-415 & 426-447, Town RC, Tab 14, pp. 175-179 & 180-201.

property if there is no notice of objection. The recommendations do not reference or state in accordance with the Draft Notices attached to this Report.[18]

26. Resolution #2 in the August 13, 2018 Special Council Meeting Minutes arising from Report CDS-18-047 (the "Resolution") is the first of the two Impugned Instruments being challenged. Council approves the MHC recommendations that Council provide, through the Clerk, Notices for the Subject Lands. Resolution #2 does not include the Notices.[19]

27. By-law No. 5079-18, "A By-law to confirm the proceedings at the Special Council Meeting of the Corporation of the Town of Niagara-on-the-Lake held on August 13, 2018" is the second of the two Impugned Instruments being challenged (the "By-law"). The By-law, approved at the August 13, 2018 meeting, states the following at paras. 1-2 which makes clear its purpose, the scope of its effect and the resulting authorizations and directions:

    i. *That the actions of the Council of the Municipality in respect of each motion, resolution, declaration and other action passed, taken or adopted at the meeting held on August 13, 2018 are hereby adopted and confirmed as if the same were expressly included in this By-law, including but not limited to, the motions of the Council of the Municipality adopted at the meeting which are outlined in the August 13, 2018 Council Minutes.*

    ii. *That the Lord Mayor and the proper officials of the Municipality are hereby authorized and directed to do all things necessary, including the execution of the necessary documents, to give effect to the actions of the Council of the Municipality referred to in section of this By-law*.[20]

28. At paras. 19-21 of their Factum, the Appellants are critical of the absence of the following when the Impugned Instrument were passed: "a site visit to all of the

[18] Affidavit of Guiseppe Paolicelli at Exhibit V; EB Vol 1, Tab 2V, p. 411-412, Town RC, Tab 15, pp. 203-204.
[19] Affidavit of Guiseppe Paolicelli at Exhibit W; EB Vol 1, Tab 2W, p. 449-458, Town RC, Tab 16, pp. 206-215.
[20] Affidavit of Guiseppe Paolicelli at Exhibit W; EB Vol 1, Tab 2W, p. 458, Town RC, Tab 17, p. 217; Affidavit of Guiseppe Paolicelli at Exhibit X; EB Vol 1, Tab 2X, p. 460, Town RC, Tab 17, p. 218.

Subject Properties; a report by LHC and a clear identification of heritage attributes". They also criticize the timing as to the completion of the Cultural Heritage Evaluation Report ("CHER") after the Notices were issued and the timing of the research conducted by Ms. Barnes, the principal researcher and author of the CHER.

29. There is no requirement for a site visit and there is no statutory right to a site visit until after the Notices are issued.[21] There is no requirement that the CHER be completed prior to the issuance of the Notices.

30. All of this was recognized by the Application Judge at paras. 62-64 of the Decision in rejecting the Appellant's claim of failure to comply with the OHA requirements in passing the Impugned Instruments. The Appellants do not challenge that part of the Decision. [22]

31. The Town Clerk gave Notice as directed. The Notice included, in addition to buildings, landscape heritage attributes. The giving of Notice activates the interim control prohibitions in the OHA – no alteration of the property if the alteration is likely to affect a heritage attribute.[23]

Conservation Review Board and its Process

32. After Notice was given, the Applicants objected. Their objection engaged the jurisdiction of the CRB under the OHA. The CRB is a specialized administrative tribunal charged with holding hearings.[24] The Applicants had not requested that

[21] *Ontario Heritage Act*, R.S.O. 1990, c.P.18, Section 38, Schedule "B".
[22] Decision, paras. 62-64, ABAC, Tab 3, p. 27.
[23] *Ontario Heritage Act*, R.S.O. 1990, c.P.18, Sections 30, 33, 34 and 34.1, Schedule "B".
[24] *Ontario Heritage Act*, R.S.O. 1990, c.P.18, Section 24(7), Schedule "B".

the CRB schedule a hearing at the time of the Application.[25]

33. The heritage professionals disagree on the Town's proposed heritage attributes to be protected when the property is designated. While there is some disagreement regarding the buildings, the main disagreement is in relation to the landscape heritage attributes. The Appellants' expert, Ms. Wallace, described the disagreement as a "reasonable debate of professional opinion." In Ms. Wallace's opinion, where experts disagree, the CRB resolves the dispute.[26] Dr. Letourneau agrees. And, in his opinion, until the CRB makes a decision, the municipality's position must govern.[27]

34. At para. 23-28, the Appellants' review the Landscape Heritage Attributes and acknowledge agreement amongst the four heritage consultants that some landscaping features are associated with the Dunington-Grubb landscape architecture firm but that there is disagreement about the identification, location and delineation of Dunington-Grubb's work. The Appellants then critique the evidence and opinions to date and particularly the absence of any mapping or more specific descriptions of the features.

35. The CRB will consider whether the heritage attributes described in the Notice are vague and require more specificity. It will make findings regarding the proper description of heritage attributes to be included in a designation by-law.[28]

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[25] Paolicelli Cross-examination Transcript, p. 11, Q. 38-40, undertaking answer, EB Vol 4, p. 1949, Town RC, Tab 18, p. 220.

[26] Wallace Cross-examination Transcript, p. 43-44, Q. 221, EB Vol 5, p. 2204-2205, Town RC, Tab 19, p. 222-223.

[27] Letourneau Cross-examination Transcript, p. 71-84, Q. 295-374 and p. 67-68, Q. 282-283, EB Vol 5, 2785-2798 and p. 2781-2782, Town RC, Tab 20, pp. 225-240.

[28] Wallace Cross-examination Transcript, p. 45-46, Q. 228-229 and p. 74, Q. 381, EB Vol 5, p. 2206-2207 and 2235-2236, Town RC, Tab 21, pp. 242-245; Letourneau Cross-examination Transcript, p. 26, Q. 104, EB Vol 5, p. 2740-2741, Town RC, Tab 21, pp. 246-247; Qureshi v. Mississauga (City), CRB1407 (November 12, 2015), paras 8, 10, 65-72, Sch. 4, Respondent's (Town) Book of Authority ("Town BOA"), pp. 4-5, 21-24 & 35-36.

36. Indeed, since the hearing of the application and the delivery of the Appellants' materials on this appeal, the CRB's prehearing processes have continued. The Board issued a Procedural Order on May 19th confirming, among other things, the delivery of Issues Lists from the Appellants, case management details and hearing dates- six days have been scheduled between December 9 and 16, 2020. The Issues Lists for the four properties demonstrate conclusively that the descriptions of the landscape heritage attributes will be the critical issues for the hearing.[28A]

37. Dr. Letourneau's evidence before the CRB will be that the descriptions of the landscape heritage attributes in the Notice are not vague. He opines, for example, that specificity in describing "mature trees" is difficult to achieve. Trees are living things and can change. Referring to mature trees is meant to be representative of the mature canopy character and not a reference to specific trees. It is the mature component that must be conserved.[29]

The Tree Removal at 200 John Street East

38. The Appellants' contend that their inability to understand what constitutes the identified heritage attributes started very shortly after they were given the Notice. Notwithstanding the interim control prohibition, they did not contact the Town for clarification nor have they ever applied under the OHA to alter a heritage attribute.[30] Dr. Letourneau reminds us that conservation does not mean that change cannot occur and can very well include tree removal.[31]

[28A] Two Sisters Resorts Corp. v. Town of Niagara-on-the-Lake, CRB1822 (May 19, 2020).

[29] Letourneau Cross-examination Transcript, p. 59-64, Q. 250-266, EB Vol 5, p. 2773-2778, Town RC, Tab 22, pp. 249-254.

[30] Paolicelli Cross-examination Transcript, p. 17-18, Q. 71-75, undertaking answer and p. 19, Q. 76, EB Vol 4, p. 1955-1957 and 1990, Town RC, Tab 23, pp. 256-259; *Ontario Heritage Act*, R.S.O. 1990, c.P.18, Section 33(1), Schedule "B".

[31] Letourneau Cross-Examination Transcript, p. 62, Q. 260, EB Vol 5, p. 2776, Town RC, Tab 24, p. 261.

39. With the interim control prohibition activated and with an alleged inability to understand what constituted the landscape heritage attributes, the Appellants undertook extensive tree removal at 200 John Street East in November, 2018.[32]

40. The Appellants contend in para. 29 of their Factum that, with regard to maintenance and tree removal, “these activities were carried out in accordance with approvals from the Niagara Peninsula Conservation Authority (the “NPCA”), a tree preservation plan filed with the Town for the Randwood Lands and advance written notice to the Town". These facts are misleading and do not support an inference that the Appellants’ tree cutting was appropriate.

41. To be clear, the NPCA “approval” is a Good Forestry Practices Permit under the Niagara Region’s *Tree and Forest Conservation By-law*. It was expired at the time of the tree removal and in any event only addressed how tree cutting was to occur, not if it could or where.[33] The tree preservation plan referenced by the Appellants, filed in furtherance of the development application on the Randwood Lands, does not cover 200 John Street East being part of the Adjacent Lands.[34] There is no development application on the Adjacent Lands.[35] And, finally, the advance written notice to the Town was in fact a same day “For Your Information” email.[36]

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[32] Affidavit of Giuseppe Paolicelli at para. 95(c); EB Vol 1, p. 200, Town RC, Tab 25, p. 263; Paolicelli Cross-examination Transcript, p. 24, Q. 107-111, EB Vol 4, p. 1962-1963, Town RC, Tab 25, pp. 264-265.

[33] Paolicelli Cross-examination Transcript, p. 39-40, Q. 185-187, Exhibit 1, EB Vol 4, p. 1977-1978 and 1980, Town RC, Tab 26, pp. 267-269.

[34] Paolicelli Cross-examination Transcript, p. 19-20, Q. 80, EB Vol 4, p. 1957-1958, Town RC, Tab 27, pp. 271-272.

[35] Affidavit of Giuseppe Paolicelli at para. 15; EB Vol. 1, p. 186, Town RC, Tab 28, p. 274.

[36] Paolicelli Cross-examination Transcript, p. 21, Q. 88-94, undertaking answer, EB Vol 4, p. 1959, 1991 & 2042, Town RC, Tab 29, pp. 276-278.

The Alleged Town Confusion regarding the Landscape Heritage Attributes

42. The Applicants contend in para. 32 of their Factum that Town staff, as of June 2019, were uncertain what works could or could not be done given the interim control prohibition. Again, this is a mischaracterization of the facts.

43. 200 John Street is not subject to a development approval application. Accordingly, the Town has not received an archaeological study, among others, in relation to this property. So, when asked in June 2019 whether grass cutting could occur, the Town's response was appropriate: consult your experts given concerns regarding potential equipment, soil and vibration impacts on potential archaeological resources.[37]

44. 200 John Street was also where the Applicants cut down trees after the interim control prohibitions of the OHA were activated. These actions are subject to an ongoing injunction action[38] and Provincial Offences Act charge[39] regarding alleged heritage attribute alteration. So again, the Town's follow up response (no grass cutting) was appropriate.

45. For 144 and 176 John Street (the Randwood Lands), requiring grass cutting under the Clean Yard By-law is not inconsistent with the approach taken for 200 John Street noted above. Unlike 200 John Street, the Randwood Lands are subject to a development approval application. Studies have been done including archeology. There is no injunction action or Provincial Offences Act charge pending on the Randwood Lands. The Town's approach was appropriate.

[37] Affidavit of Giuseppe Paolicelli at para. 15; EB Vol 1, p. 186, Town RC, Tab 30, p. 280.
[38] Affidavit of Giuseppe Paolicelli at para. 98; EB Vol 1, p. 200, Town RC, Tab 31, p. 282.
[39] Reply Affidavit of Giuseppe Paolicelli at para. 9; EB Vol 4, p. 1845-1846, Town RC, Tab 32, pp. 284-285.

PART III – ISSUE, LAW AND ARGUMENT

ISSUE 1: DID THE JUDGE ERR IN FINDING THE APPLICATION WAS PREMATURE?

46. The Appellants assert at para. 38 of their Factum that the Application Judge's decision declining to quash the Impugned Instruments on the basis of prematurity was an error of law to be reviewed on a standard of correctness. Yet they recognize at Issue 2 (para. 53) that a lower Court's discretionary decision may only be reversed where the Court misdirected itself, came to a decision that is so clearly wrong it amounts to an injustice or gives no or insufficient weight to relevant considerations. This is the appropriate test for <u>both</u> issues as both are inextricably linked to that exercise of discretion.

47. The Appellants ground their challenge to the Court's prematurity finding under 4 headings:

    a. Distinct Process;

    b. Limited CRB Jurisdiction;

    c. Limitation Period; and

    d. No Requirement for Section 33 Application;

<u>Distinct Process</u>

48. Contrary to the Appellants' assertion, the Court clearly understood that a referral to the CRB under s. 29 of the OHA is a distinct process from an application to quash under s. 273(1) of the *Municipal Act*. The Application Judge stated that the issue was not whether there was a prohibition on the court determining the issues raised in the application, but "whether or not the court should exercise its jurisdiction and

deal with the matters in this application." [40]

49. The fact that the Court was faced with competing "distinct processes" is hardly surprising. This merely invited the Court to apply the well-established jurisprudence that favours allowing administrative processes to be completed before engaging the jurisdiction of the courts. This is what the Application Judge did and appropriately so.[41]

50. This is particularly true in this appeal as the only remaining issue is the alleged vagueness in the description of the heritage attributes: a matter squarely within the competence of the CRB. The Court accurately recorded the Appellants' concession that there is overlap between what the CRB and the court can do with respect to the alleged vagueness in those descriptions and all parties (and the expert witnesses) acknowledged that the CRB is experienced in dealing with such matters.[42]

51. If it were enough to point to s. 273(1) as a "distinct process" to justify the intervention of the courts, then (as just one example) every zoning by-law passed by a municipality could be subject to parallel challenges under s. 273(1) of the *Municipal Act* despite the appeal provisions of the *Planning Act*.[43] This is not the law.

52. The Appellants rely on *Kelly v. Ontario* and *Villa v. APEO.* These cases do nothing more than confirm that there will be exceptional circumstances where the courts

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[40] Decision, para. 42, ABAC, Tab 3, p. 24.
[41] Y.M. v. Ontario (Motherisk Commission), [2016] O.J. No. 5938 (Div.Ct.), para 36, Town BOA, Tab 2, pp.44-45; C.B. Powell Limited v. Canada (Border Services Agency), [2011] 2 F.C.R. 332 (C.A.) , Town BOA, Tab 3.
[42] Decision, paras. 40 & 47, ABAC, Tab 3, pp. 24-25.
[43] *Planning Act,* RSO 1990, c.P.13, s. 34, Schedule "B".

will elect not to follow the general rule. These cases are not apposite the circumstances of this case. *Kelly* dealt with a constitutional challenge to the *Health Professions Procedural Code*.[44] Even there the Court reaffirmed that, absent exceptional circumstances, administrative processes should be allowed to conclude before resorting to the courts[45] especially where the administrative body is dealing with "specialized matters" (like the description of heritage attributes). *Villa* dealt with a motion to amend a statement of claim to seek punitive damages-relief not remotely available to the plaintiff in a disciplinary hearing.

Limited CRB Jurisdiction

53. Contrary to the Appellants' assertion (Factum, para 44), the fact that the CRB cannot grant the same relief as the Courts is not a basis to reverse the Application Judge's exercise of discretion. As noted by the Supreme Court in *Okwuobi c. Lester B. Pearson (Commission scholaire),* [2005] 1 S.C.R. 257 (S.C.C.), parties should exhaust their remedies from administrative tribunals, "*rather than arguing that the absence of a particular remedy requires them to circumvent the administrative process entirely*" (emphasis added).[46]

54. The Application Judge understood and weighed the advisory nature of the CRB in her exercise of discretion. She correctly noted that this was the intent of the Legislature as part of the comprehensive scheme for dealing with cultural heritage

[44] Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), paras. 35, 42-43 and 51, leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.), Town BOA, Tab 4, pp. 71-72, 74. Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.).

[45] Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), paras. 49, 52, 54 and 62; leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.), Town BOA, Tab 4, pp. 73-74, 76. Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.).

[46] Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), para. 37, leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.), para 11, Town BOA, Tab 4, pp. 71 & 76C. Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.).

resources established under the OHA.[47] As noted by the Court, the process still benefits from a full hearing before an expert tribunal[48] and a Report with findings and recommendations on the description of the heritage attributes[49]. None of this is available to the Court on this appeal.

55. The Appellants assert because the CRB cannot make a binding decision on the description of the heritage attributes, "… the Court maintains an important role in reviewing by-laws and resolutions for illegality through s. 273 of the *Municipal Act*."[50]. In fact, the Application Judge makes more or less the same point, but her approach respects the administrative process rather than circumventing it. She specifically noted that at the end of the administrative process, if the Appellants are still unhappy with the decision of Council regarding the description of the heritage attributes in the designating by-law, "…they will then have recourse to the courts."[51] This could include a challenge to the alleged vagueness of the description of the heritage attributes pursuant to s. 273 of the *Municipal Act.* However, at that point, the reviewing court will have the CRB's Report and findings, findings that will be, "…suffused with expertise, legitimate policy judgments and valuable regulatory experience."[52]

Limitation Period

56. The Appellants' position on the limitation period is wholly unmeritorious and was not raised on the Application. As noted in their relief request, the Appellants seek

[47] Decision, para 46, ABAC, Tab 3, p. 24.
[48] Decision, para 47, ABAC, Tab 3, p. 25.
[49] Decision, para 48, ABAC, Tab 3, p. 25.
[50] Decision, para 47, ABAC, Tab 3, p. 25.
[51] Decision, para 48, ABAC, Tab 3, p. 25.
[52] Y.M. v. Ontario (Motherisk Commission), [2016] O.J. No. 5938 (Div.Ct.), para 36, Town BOA, Tab 2, pp. 44-45.

an Order quashing the Impugned Instruments only in so far as they contain "impermissibly vague" descriptions of heritage attributes (Factum, para 86). If, at the end of the administrative process, the Town proceeds to pass designating by-laws for the Subject Lands, they must contain descriptions of the heritage attributes of which the NOIDS are currently mere notice[53]. Of course, the limitation period under s. 273 of the *Municipal Act* would not begin running until those designating by-laws have been passed leaving the Appellants with plenty of time to continue their challenge of the description of the heritage attributes if, as noted by the Application Judge, they are still unhappy with those descriptions.

No Requirement for Section 33 Application

57. The fact that the Appellants have never made an application to alter the heritage attributes they claim they cannot understand pursuant to s. 33 of the OHA was a relevant consideration in the exercise of the Court's discretion. It need not be a prerequisite to bringing a s. 273 application to be relevant. This illustrated the comprehensive scheme of the Act and provided further potential administrative remedies to the Appellants.

58. As noted in the Kelly decision, the courts should not be engaged:

> "*where a comprehensive scheme has been established to address matters that fall directly within the tribunal's jurisdiction. Unnecessary parallel litigation should be discouraged and deference should be afforded to the administrative process. The court should decline to exercise its jurisdiction in favour of the preferable administrative forum"*[54] .

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[53] *Ontario Heritage Act*, R.S.O. 1990, c.P.18, Section 29(14)(a)(ii), Schedule "B".

[54] *Kelly v. Ontario*, [2008] O.J. No. 1901 (S.C.J.), para. 34, leave to appeal refused at [2008 O.J. No. 3196 (Div. Ct), Town BOA, Tab 4, p. 71.

59. This is exactly what the Application Judge did in finding prematurity. In this, she was correct and there was certainly no misdirection or injustice. This alone is sufficient to dispose of the appeal.

ISSUE 2: DID THE APPLICATION JUDGE ERR IN DECLINING TO EXERCISE JURISDICTION TO HEAR THE APPLICATION?

Jurisdiction and Prematurity Discretion

60. The Appellants recognize this is a discretionary decision but assert such a decision may be reversed when:

    a. That Court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice; or

    b. The lower Court gives no or insufficient weight to relevant considerations.

The test for appellate review of the exercise of judicial discretion is to assess if the judge at first instance gave sufficient weight to relevant considerations.[55]

61. None of the issues raised by the Appellants meet the test to overturn the exercise of discretion by the Application Judge. There is simply no injustice to be found in the Decision and no misdirections. The Appellants claim the Court was in error in applying the "exceptional circumstances" test in the exercise of her discretion (Factum, paras 54-56). This test is drawn from a long and enduring line of cases that the Federal Court of Appeal summarized as follows:

> "Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court

[55] Reza v. Canada, [1994] 2 S.C.R. 394 , para 20, Town BOA, Tab 5, p. 83; Penner v. Niagara (Regional Police Service Board), [2013] S.C.R 125 , para. 27, Town BOA, Tab 6, p. 94.

> system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process: only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court."[56]

62. There can be no doubt that the administrative process is ongoing: the giving of the NOIDS, the formal objections of the Appellants and the CRB prehearing/hearing are all part of that process. There can be no doubt that this application to quash is an effort to "proceed to the court system" before that administrative process has run its course. Indeed, the Appellants' acknowledge that if they are successful, it would render the proceeding before the CRB moot (Factum, para 41). And yet, without any judicial authority, the Appellants contend that this line of cases does not apply to the exercise of the Court's discretion on an application to quash a by-law under s. 273 of the *Municipal Act.*

63. The Appellants' position is without foundation in jurisprudence, policy or reason. It would mean that while the "exceptional circumstances" test applies to, for instance, the exercise of the Court's discretion in considering a *Charter* challenge under s. 52 of the *Constitution Act, 1982* (a matter over which the Courts have obvious expertise)[57], it would not apply to an application to challenge the description of heritage attributes under the OHA.

64. The factors considered by the Court which the Appellants claim are irrelevant(Factum, para 57) are simply the circumstances the Application Judge appropriately considered to determine if there was anything exceptional to warrant

[56] Y.M. v. Ontario (Motherisk Commission), [2016] O.J. No. 5938 (Div.Ct.), para 36, Town BOA, Tab 2, pp.45-46.
[57] Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), para. 37, leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.), para 62, Town BOA, Tab 4, pp. 71 & 74. Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.).

setting aside the normal course of allowing the administrative process to unfold. The Application Judge found none and there are none.

65. Under the Jurisdiction Issue, the Appellants also raise the exercise of discretion available to the Court (Factum, paras 58-60). The Appellants recognize that if the Court had found the Impugned Instruments to be illegal, the Application Judge would have nevertheless declined to exercise her discretion to quash.[58]

66. The Appellants suggest this finding is issue specific. This is a myopic reading of the Decision.

67. The Court's general discretionary authority to quash under the *Municipal Act* is addressed at paras. 54-56 before Her Honour declines to exercise discretion on the basis of illegality at para. 67.[59] Nothing suggests the Application Judge would decline to exercise this discretion for the reasons stated with respect to one type of illegality but not the others. This finding did not bear repeating. Her Honour also refers to the CRB as the proper place to debate the description of the heritage attributes in this part of the Decision.[60] This same issue arises with respect to vagueness.

68. The Appellants refer to *RSJ Holdings Inc. v. London (City)*[61] and argue that Her Honour could not have properly declined to quash the Impugned Instruments based on the criteria in that case. Yet the Application Judge expressly referred to the case and the criteria[62] and made relevant findings to those criteria throughout the

[58] Decision, para. 56 and 67, ABAC, Tab 3, pp. 26-27.
[59] Decision, para. 54-56 and 67, ABAC, Tab 3, pp. 25-27.
[60] Decision, para. 62-63, ABAC, Tab 3, p. 27.
[61] RSJ Holdings Inc v. London (City), [2007] S.C.R. 588 , para. 39. Town BOA, Tab 7, p. 121.
[62] Decision, para 56, ABAC, Tab 3, p. 26.

Decision.[63] There is no basis for the Court to interfere with the Application Judge's exercise of discretion to decline to exercise jurisdiction even if an illegality were found.

ISSUE 3: VAGUENESS

Nature of the Vagueness Argument

69. The Application Judge made two separate findings with respect to vagueness which are being challenged by the Appellants:

    a. The Notices and their contents were not imported into the Impugned Instruments and the Impugned Instruments were perfectly clear; and
    b. If the doctrine of vagueness can be applied to the Notices, the rigorous onus to establish vagueness has not been met.[64]

70. The Appellants propose a correctness standard of review on the vagueness issue. This is incorrect. The Appellants do not suggest any error regarding the legal principles but instead argue that the Court misapplied the applicable test (Factum, para 70). The evaluation of whether the specific language used to describe the heritage attributes meets the tests for an impermissibly vague "law" engage questions of mixed fact and law. The palpable and overriding error standard of review is applicable to such questions. The correctness standard only applies to "extricable errors of law".[65] No extricable errors of law have been identified by the Appellants.

Impugned Instruments are Not Vague

71. There is nothing vague, nor is there anything claimed to be vague, with respect to the Impugned Instruments themselves. The Impugned Instruments are a Council

[63] Decision, paras 34-36, 43-46, 49-51, 65, 67, 78-79, 85 and 88- 89, ABAC, Tab 3, pp. 23-25 & 27-30.
[64] Decision, paras. 85-86, ABAC, Tab 3, p. 29.
[65] Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., [2016] 2 S.C.R. 23 , paras 21 and 33-36, Town BOA, Tab 8, pp. 132 & 134.

resolution (Resolution #2) and the confirming By-law passed by the Town to start the process of designating the Subject Lands under the OHA. The Impugned Instruments do not contain the NOIDS [66]

72. The Appellants challenge the Court's finding that the NOIDS and their contents are not part of the Impugned Instruments and are neither resolutions nor by-laws - they are simply notices. But they do so not as a matter of fact, since the Court was clearly correct. Rather they base their challenge on the alleged implications of the Application Judge's findings, arguing that it creates a "loophole" that insulates NOIDs from judicial oversight. In effect, the Appellants invite the Court to "read-in" the notices to the Impugned Instruments (Factum, paras 65-67).

73. The Court should decline this invitation. This is supported by the Court's statement in *Clublink* with respect to the presumption of validity that by-laws enjoy,

> "*A by-law or resolution should not be quashed unless the presumption is overturned based on that instrument and the illegality of related instruments does not logically, in itself, rebut this presumption.*"[67]

74. It was the Appellants' choice to bring this application pursuant to s. 273 of the *Municipal Act*. As they point out, s. 273 is a "distinct process" and a "statutory avenue" (Factum, para 39). This statutory process is limited to quashing a by-law of a municipality (which is defined to include a resolution). The NOIDS in this case are neither by-laws nor resolutions and were not included in any by-law or resolution.

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[66] Affidavit of Guiseppe Paolicelli at Exhibits W and X; EB Vol 1, Tab 2, p. 455-458 and 460, Town RC, Tab 33, pp. 287-291.

[67] Clublink Corporation ULC v Oakville (Town), [2019] O.J. No. 5372 (C.A.) , para. 31 and 35-36, Town BOA, Tab 9, pp.159-160.

75. Contrary to the suggestion of the Appellants (Factum, para 67), it is by no means clear that it was the intent of the Legislature to allow challenges to the contents of notices given under the OHA via s. 273 of the *Municipal Act*. This does not create a "loophole", nor does it insulate NOIDS from oversight. The Legislature has provided several avenues for challenging the contents of NOIDs under the OHA. This includes a hearing before the CRB. Depending on the nature of the alleged deficiencies in the administrative process, there may be opportunities for judicial review. Of course, if a municipality ultimately decides to pass a designating by-law, that by-law would be subject to challenge under s. 273.

76. The Court's decision does nothing more than confirm that a landowner cannot resort to a section of the *Municipal Act* that allows challenges to municipal by laws if the landowner's complaint is not about a by-law. The Court made no error in so finding.

77. The appellants rely on *Clublink v. Town of Oakville* where the Court of Appeal upheld a Superior Court decision to quash a resolution of Council which approved a conservation plan. However, that plan was approved by resolution and could therefore be directly challenged on its own under s. 273(2) of the *Municipal Act*.[68] In this case, the contents of the Notices were not incorporated into any by-law nor approved by resolution.

[68] Clublink Corp. ULC v. Oakville (Town), [2018] OJ No 6514 , paras. 1 and 12, Town BOA, Tab 10, pp. 176 & 177, appeal allowed in part, Clublink Corporation ULC v Oakville (Town), [2019] O.J. No. 5372 (C.A.), paras. 1, 4, 16 & 32, Town BOA, Tab 9, pp. 155, 157 & 159.

Notice is Not Vague

78. The Appellants do not challenge the relevant legal considerations with respect to vagueness set out in the Decision.[69] The Appellants cite the same legal principles and cases (Factum, paras 71 & 72). The Appellants agree (Factum, para 82) that the Application Judge correctly stated the test. There is no new evidence before this Court. In short, the Appellants simply seek to re-argue the application of these principles to the facts of this case, facts that were the subject of evidence by no fewer than four cultural heritage experts.

79. If we are to apply the doctrine of vagueness to the Notice, the test for vagueness is rigorous. The Notice is impermissibly vague only if:

    a. It is not intelligible and fails to provide a basis for legal debate and reasoned analysis;
    b. It fails to sufficiently delineate any area of risk; **and**
    c. It offers "no grasp" for the courts to perform their interpretive function. (referenced as three factors)

    Laws are often, of necessity, framed in general terms to allow for flexible application and the courts must be wary of this doctrine being used to prevent or impede valid social objectives.[70] The valid social objectives of the OHA are in fact being challenged here.

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[69] Decision, paras. 81-83, ABAC, Tab 3, pp. 28-29; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, para. 42, 63 & 71, Town BOA Tab 11, pp. 204, 207 & 209; Wainfleet Wind Energy Inc. v. Wainfleet (Township), [2013] O.J. No. 1744 (S.C.J.), paras. 31 & 32, Town BOA, Tab 12, p. 224.

[70] Suncor Energy Products Inc. v. Plympton-Wyoming (Town), [2014] O.J. No.2492 (S.C.J.) , paras. 104 and 106, Town BOA, Tab 13, pp. 243-244; Wainfleet Wind Energy Inc. v. Wainfleet (Township), [2013] O.J. No. 1744 (S.C.J.), paras. 31-32, Town BOA, Tab 12, p. 224.

80. The only vagueness challenge relates to two of the heritage attribute descriptions: the "surviving elements of the Dunington-Grubb landscape" and "the mature trees and plantings."

81. The Applicant's allege that the terms are so vague a reasonably intelligent person cannot understand what is or is not covered by them. Yet in December 2018 the Applicants gave what was then a confidential undertaking to:

> "…comply with Section 33 of the Ontario Heritage Act in respect of the properties known municipally as 144 John Street East, 176 John Street East, 200 John Street East and 588 Charlotte Street. Specifically, Two Sisters and Solmar agree not to alter the properties in such a way that is likely to affect the properties' Heritage Attributes as set out in the Notices of Intention to Designate dated August 16, 2018."

The Applicants waived the confidentiality of the undertaking by including it in their Supplementary Application Record in this proceeding.[71]

82. The Court must presume that this undertaking was given by the Applicants in good faith with the intention of abiding by it. If, as the Appellants continue to allege, the Notice was so unclear that the Applicants could not understand and comply with their obligations under the OHA, then they could not understand and comply with their own undertaking, suggesting that they had no intention of (or ability to) abide by it. This is untenable.

83. The Court correctly emphasized the importance of the <u>purpose</u> of the instruments in question.[72] These were <u>notices</u>. The purpose of the NOIDS was to give notice of the heritage interests of the Town in the Subject Lands and the process for

[71] Reply Affidavit of Giuseppe Paolicelli at para 8(d), EB Vol 4, p. 1845 and 1857, Town RC, Tab 34, pp. 293-294; Paolicelli Cross-examination Transcript, p. 26, Q. 115, EB Vol 4, p. 1964, Town RC, Tab 34, p. 295.
[72] Decision, para. 86, ABAC, Tab 3, p. 29.

engaging in any debate around those interests, including what specificity is appropriate for the designation by-law. All of this can and will be addressed before the CRB.

84. The Applicants acknowledge that there is disagreement about the specific surviving elements of the Dunington-Grubb landscape and the mature trees and plantings. This is indicative of an intelligible issue with a basis for legal debate and reasoned analysis in considering the first factor. Evidence of the nature and scope of this debate amongst the experts is simply an attempt to bring this debate before the Court on appeal where it remains most appropriate to delineate its scope before the CRB.

85. The Appellants contend that unless the surviving elements of the Dunington-Grubb landscape are specifically located and delineated, they cannot “understand and comply with the obligations under the OHA" (Factum, para. 83). The Applicants have insisted on a map to delineate a landscape feature in the Notice. Their position is inconsistent with the modern approach to cultural heritage landscape protection in Ontario. The very nature of a cultural landscapes and the current framework for their assessment defies such an approach. It is the process itself, begun by the Notice, an objection and a CRB hearing, that is statutorily designed to result in appropriate heritage attribute description and protection in a designation by-law. It is important to note that the OHA does not even permit access to the site until after a Notice is issued.[73]

[73] *Ontario Heritage Act,* R. S. O. 1990, c.O.18, Section 38, Schedule “B”.

86. On the second and related factor, the Appellants argue the inability of the heritage experts to agree upon and identify the heritage attributes illustrates an inability to "delineate an area of risk". Again the "area of risk" is simply broader than desired by the Appellant. The OHA interim control prohibitions do prevent alterations to the property unless the landowner is certain the alterations will not affect heritage attributes, including surviving elements of the Dunington-Grubb landscape and mature trees and plantings. The only appropriate response to any uncertainty is to proceed expeditiously with the CRB process or apply to the Town to alter the property. This is undoubtedly an interim imposition on a landowner. But it is an imposition authorized by the OHA and justified given what is at stake: heritage attributes of cultural heritage value or interest that have been in place for decades and could be permanently lost if altered.

87. Her Honour reviewed the facts which included the extent of the expert evidence on the descriptions and made appropriate inferences from those findings. Even where a municipal by-law is reviewed on a standard of correctness, an appellate court owes the usual deference to the factual findings and inferences to be drawn from the facts as determined by an application judge.[74]

88. The principles in the case law have not been violated simply because the heritage attributes lack the desired specificity of the Appellants. The standard for the test of vagueness is exacting. The Appellants have not met the onus to establish that the

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[74] Clublink Corporation ULC v Oakville (Town), [2019] O.J. No. 5372 (C.A.), para. 39, Town BOA, Tab 9, p.160.

Impugned Instruments should be declared invalid.[75]

PART V – ORDER SOUGHT

89. The Town requests that:

a) the Appeal be dismissed in its entirety;

b) that no part of the Impugned Instruments or the Notice be quashed for any reason;

c) the Motion for Leave to Appeal the Costs Decision be denied and the Costs Appeal be dismissed in its entirety;

d) the Town's costs of this Appeal, plus any Harmonized Sales Tax pursuant to the Excise Tax Act, R.S.C. 1985, c.E-15; and

e) Such other relief as Counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS

RESPECTFULLY SUBMITTED:

July 13, 2020

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[75] Wainfleet Wind Energy Inc. v. Wainfleet (Township), [2013] O.J. No. 1744 (S.C.J.), para. 31, Town BOA, Tab 12, p.224.

Court File No: C68033

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TWO SISTERS RESORTS CORP. and SOLMAR (NIAGARA 2) INC.

Applicants
(Appellants)

And

THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE and SORE ASSOCIATION

Respondents
(Respondents in Appeal)

APPLICATION under Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194 and under Section 273 of the *Municipal Act 2001, S.O. 2001, c. 25 as amended*

CERTIFICATE

An Order pursuant to subrule 61.09(2) (original record and transcripts) is not required. I estimate that 2 ½ hours will be needed for my oral argument of the Appeal, not including reply.

JULY 13, 2020

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SCHEDULE "A" - LIST OF AUTHORITIES

TAB	DESCRIPTION
1.	Qureshi v. Mississauga (City), CRB1407 (November 12, 2015);
2.	Y.M. v. Ontario (Motherisk Commission), [2016] O.J. No. 5938 (Div.Ct);
3.	C.B. Powell Limited v. Canada (Border Services Agency), [2011] 2 F.C.R. 332 (C.A.);
4.	Kelly v. Ontario, [2008] O.J. No. 1901 (S.C.J.), leave to appeal refused at [2008] O.J. No. 3196 (Div. Ct.);
5.	Reza v. Canada, [1994] 2 S.C.R. 394;
6.	Penner v. Niagara (Regional Police Service Board), [2013] S.C.R 125;
7.	RSJ Holdings Inc v. London (City), [2007] S.C.R. 588;
8.	Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., [2016] 2 S.C.R. 23;
9.	Clublink Corporation ULC v Oakville (Town), [2019] O.J. No. 5372 (C.A.);
10.	Clublink Corp. ULC v. Oakville (Town), [2018], O.J. No. 6514 (S.C.J.);
11.	R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606;
12.	Wainfleet Wind Energy Inc. v. Wainfleet (Township), [2013] O.J. No. 1744 (S.C.J.);
13.	Suncor Energy Products Inc. v. Plympton-Wyoming (Town), [2014] O.J. No.2492 (S.C.J.);
14.	Two Sisters Resorts Corp. v. Town of Niagara-on-the-Lake, CRB1822 (May 19, 2020).

SCHEDULE "B" – LIST OF STATUTES CITED

Ontario Heritage Act, R.S.O. 1990, c.P.18, (Excerpts):

- ***Ontario Heritage Act,* R. S.O. 1990, c.P.18, Section 24(7):**

Review Board

24 (1) The Review Board known as the Conservation Review Board is continued under the name Conservation Review Board in English and Commission des biens culturels in French, and shall consist of not fewer than five persons appointed by the Lieutenant Governor in Council. R.S.O. 1990, c. O.18, s. 24 (1); 2005, c. 6, s. 11 (1).

(2) REPEALED: 2006, c. 34, s. 37.

Chair

(3) The Lieutenant Governor in Council shall appoint one of the members of the Review Board as chair and another of the members as vice-chair. R.S.O. 1990, c. O.18, s. 24 (3).

Quorum

(4) One member of the Review Board constitutes a quorum. R.S.O. 1990, c. O.18, s. 24 (4).

Remuneration and expenses

(5) The members of the Review Board shall be paid such remuneration and expenses as the Lieutenant Governor in Council determines. R.S.O. 1990, c. O.18, s. 24 (5).

Professional assistance

(6) Subject to the approval of the Minister, the Review Board may engage persons to provide professional, technical or other assistance to the Review Board. R.S.O. 1990, c. O.18, s. 24 (6).

Hearings

(7) The Review Board shall hold such hearings and perform such other duties as are assigned to it by or under this or any other Act or regulation thereunder. R.S.O. 1990, c. O.18, s. 24 (7).

- ***Ontario Heritage Act,* R. S.O. 1990, c.P.18, Section 29(14)(a)(ii):**

29 (1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,

(a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and

(b) the designation is made in accordance with the process set out in this section. 2005, c. 6, s. 17 (1).

(14) After considering the report under subsection (12), the council, without a further hearing,

(a) shall,

(i) pass a by-law designating the property,

(ii) cause a copy of the by-law, together with a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property,

(A) to be served on the owner of the property and on the Trust, and

(B) to be registered against the property affected in the proper land registry office, and

(iii) publish notice of the by-law in a newspaper having general circulation in the municipality; or

(b) shall withdraw the notice of intention to designate the property by causing a notice of withdrawal,

(i) to be served on the owner of the property and on the Trust, and

(ii) to be published in a newspaper having general circulation in the municipality. 2002, c. 18, Sched. F, s. 2 (12); 2005, c. 6, ss. 1, 17 (5).

- ***Ontario Heritage Act,* R. S.O. 1990, c.P.18, Section 30:**

Effect of notice of designation
Permits void

30 (1) If a notice of intention to designate a property as property of cultural heritage value or interest is given under section 29, any permit that allowed for the alteration or demolition of the property and that was issued by the municipality under any Act, including a building permit, before the day the notice was served on the owner of the

property and on the Trust and published in a newspaper is void as of the day the notice of intention is given in accordance with subsection 29 (3). 2005, c. 6, s. 18.

Interim control of alteration, demolition or removal

(2) Sections 33 and 34 apply with necessary modifications to property as of the day notice of intention to designate the property is given under subsection 29 (3) as though the designation process were complete and the property had been designated under section 29. 2005, c. 6, s. 18.

- ***Ontario Heritage Act*, R. S.O. 1990, c.P.18, Section 33 & 33(1):**

Alteration of property

33 (1) No owner of property designated under section 29 shall alter the property or permit the alteration of the property if the alteration is likely to affect the property's heritage attributes, as set out in the description of the property's heritage attributes that was required to be served and registered under subsection 29 (6) or (14), as the case may be, unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the alteration. 2002, c. 18, Sched. F, s. 2 (16); 2005, c. 6, s. 21 (1).

Transition

(1.1) If property is designated under this Part as property of historic or architectural value or interest, either before the day section 29 of this Act is amended by section 2 of Schedule F to the *Government Efficiency Act, 2002* or under subsection 29 (16) of this Act after that day,

(a) subsection (1) of this section does not apply to the property;

(b) despite its amendment by subsection 2 (16) of Schedule F to the *Government Efficiency Act, 2002*, subsection (1) of this section, as it read immediately before the day subsection 2 (16) of Schedule F to the *Government Efficiency Act, 2002* came into force, continues to apply to the property. 2002, c. 18, Sched. F, s. 2 (16).

Application

(2) An application under subsection (1) shall be accompanied by a detailed plan and shall set out such information as the council may require. R.S.O. 1990, c. O.18, s. 33 (2).

Notice of receipt

(3) The council, upon receipt of an application under subsection (1) together with such information as it may require under subsection (2), shall cause a notice of receipt to be served on the applicant. R.S.O. 1990, c. O.18, s. 33 (3).

Decision of council

(4) Within 90 days after the notice of receipt is served on the applicant under subsection (3), the council, after consultation with its municipal heritage committee, if one is established,

(a) shall,

(i) consent to the application,

(ii) consent to the application on terms and conditions, or

(iii) refuse the application; and

(b) shall give notice of its decision to the owner of the property and to the Trust. 2002, c. 18, Sched. F, s. 2 (17); 2005, c. 6, s. 1.

Extension of time

(5) The applicant and the council may agree to extend the time under subsection (4) and, where the council fails to notify the applicant of its decision within ninety days after the notice of receipt is served on the applicant or within such extended time as may be agreed upon, the council shall be deemed to have consented to the application. R.S.O. 1990, c. O.18, s. 33 (5).

Application for hearing

(6) Where the council consents to an application upon certain terms and conditions or refuses the application, the owner may, within thirty days after receipt of the notice under subsection (4), apply to the council for a hearing before the Review Board. R.S.O. 1990, c. O.18, s. 33 (6).

Referral to Review Board

(7) The council shall, upon receipt of a notice under subsection (6), refer the matter to the Review Board for a hearing and report, and shall publish a notice of the hearing in a newspaper having general circulation in the municipality, at least ten days prior to the date of such hearing. R.S.O. 1990, c. O.18, s. 33 (7).

Hearing

(8) The Review Board shall as soon as is practicable hold a hearing open to the public to review the application, and the council and the owner and such other persons as the Review Board may specify are parties to the hearing. R.S.O. 1990, c. O.18, s. 33 (8).

Place for hearing

(9) A hearing under subsection (8) shall be held at such place in the municipality as the Review Board may determine. R.S.O. 1990, c. O.18, s. 33 (9).

(10) REPEALED: 2005, c. 6, s. 21 (2).

Report

(11) Within thirty days after the conclusion of a hearing under subsection (8), the Review Board shall make a report to the council setting out its findings of fact, its recommendations as to whether or not the application should be approved, and any information or knowledge used by it in reaching its recommendations, and shall send a copy of its report to the other parties to the hearing. R.S.O. 1990, c. O.18, s. 33 (11).

Failure to report

(12) Where the Review Board fails to make a report within the time limited by subsection (11), the failure does not invalidate the procedure. R.S.O. 1990, c. O.18, s. 33 (12).

Decision of council

(13) After considering the report under subsection (11), the council without a further hearing shall confirm or revise its decision under subsection (4) with such modifications as the council considers proper and shall cause notice of its decision to be served on the owner and the Trust and to the other parties to the hearing, and its decision is final. R.S.O. 1990, c. O.18, s. 33 (13); 2005, c. 6. s. 1.

Withdrawal of application

(14) The owner may withdraw an application made under subsection (6) at any time before the conclusion of a hearing into the matter by serving a notice of withdrawal on the clerk of the municipality and on the Review Board and, upon receipt of the notice of withdrawal, the Review Board shall not hold a hearing into the matter or, if a hearing into the matter is in progress, shall discontinue the hearing and the council shall act in accordance with subsection (4) as if no application had been made under subsection (6). 1996, c. 4, s. 58.

Delegation of council's consent

(15) The power to consent to alterations to property under this section may be delegated by by-law by the council of a municipality to an employee or official of the municipality if the council has established a municipal heritage committee and has consulted with the committee prior to delegating the power. 2005, c. 6, s. 21 (3).

Scope of delegation

(16) A by-law that delegates the council's power to consent to alterations to a municipal employee or official may delegate the power with respect to all alterations or with respect to such classes of alterations as are described in the by-law. 2005, c. 6, s. 21 (3).

- ***Ontario Heritage Act,* R. S.O. 1990, c.P.18, Section 34 & 34.1:**

Demolition or removal of structure

34 (1) No owner of property designated under section 29 shall demolish or remove a building or structure on the property or permit the demolition or removal of a building or structure on the property unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the demolition or removal. 2002, c. 18, Sched. F, s. 2 (18); 2005, c. 6, s. 22 (1).

Application

(1.1) An application made under subsection (1) shall be accompanied by any plans and set out any information the council may require. 2009, c. 33, Sched. 11, s. 6 (9).

Notice of receipt

(1.2) The council, on receipt of an application under subsection (1) together with any information it may require under subsection (1.1), shall serve a notice of receipt on the applicant. 2009, c. 33, Sched. 11, s. 6 (9).

Decision of council

(2) Within 90 days after the notice of receipt is served on the applicant under subsection (1.2) or within such longer period as is agreed upon by the owner and the council, the council, after consultation with its municipal heritage committee, if one is established,

(a) may,

(i) consent to the application,

(i.1) consent to the application, subject to such terms and conditions as may be specified by the council, or

(ii) refuse the application;

(b) shall give notice of its decision to the owner and to the Trust; and

(c) shall publish its decision in a newspaper having general circulation in the municipality. 2002, c. 18, Sched. F, s. 2 (18); 2005, c. 6, ss. 1, 22 (2); 2009, c. 33, Sched. 11, s. 6 (10).

3) REPEALED: 2005, c. 6, s. 22 (3).

Deemed consent

(4) If the council fails to notify the owner under clause (2) (b) within the time period mentioned in subsection (2), the council shall be deemed to have consented to the application. 2002, c. 18, Sched. F, s. 2 (18).

Transition

(5) If, on or before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, an owner of property designated under section 29 had applied to a municipality for consent to demolish or remove a building or structure on the property and no decision had been made by the council of the municipality as of that day,

(a) the council's decision shall be made in accordance with subsection (2), as amended by subsection 22 (2) of the *Ontario Heritage Amendment Act, 2005*; and

(b) subsections (5) and (7), as they read immediately before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, do not apply if the council decides to refuse the application. 2005, c. 6, s. 22 (4).

Same

(6) If, on or before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, an owner of property designated under section 29 had applied to a municipality for consent to demolish or remove a building or structure on the property and the council of the municipality had refused the application under subsection (2), then, even though 180 days had elapsed since the date of the council's decision and the owner had complied with the requirements of clause (5) (b) or (7) (b), as they read immediately before that day,

(a) subsections (5) and (7), as they read immediately before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, do not apply with respect to the refusal of the application; and

(b) the owner shall not demolish or remove the building or structure on the property. 2005, c. 6, s. 22 (4).

Same, exception

(7) Despite subsections (5) and (6), if, on the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, a situation described in subsection (6) existed and the owner of the property had not only prepared the property for the demolition or removal of a building or structure but was in the course of demolishing or removing the building or structure, then,

(a) subsections (5) and (7), as they read immediately before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, continue to apply to the refusal of the application;

(b) the owner may continue the demolition or removal of the building or structure; and

(c) sections 34.1, 34.2 and 34.3, as they read immediately before the day the *Ontario Heritage Amendment Act, 2005* received Royal Assent, continue to apply to the application. 2005, c. 6, s. 22 (4).

(8) REPEALED: 2005, c. 6, s. 22 (4).

Section Amendments with date in force (d/m/y)

Appeal to Tribunal

34.1 (1) If the council of a municipality consents to an application subject to terms and conditions under subclause 34 (2) (a) (i.1) or refuses an application under subclause 34 (2) (a) (ii), the owner of the property that was the subject of the application may appeal the council's decision to the Tribunal within 30 days of the day the owner received notice of the council's decision. 2017, c. 23, Sched. 5, s. 64.

Notice of appeal

(2) An owner of property who wishes to appeal the decision of the council of a municipality shall, within 30 days of the day the owner received notice of the council's decision, give notice of appeal to the Tribunal and to the clerk of the municipality. 2017, c. 23, Sched. 5, s. 64.

Content of notice

(3) A notice of appeal shall set out the reasons for the objection to the decision of the council of the municipality and be accompanied by the fee charged under the *Local Planning Appeal Tribunal Act, 2017*. 2017, c. 23, Sched. 5, s. 64.

Hearing

(4) Upon receiving notice of an appeal, the Tribunal shall set a time and place for hearing the appeal and give notice of the hearing to the owner of the property and to such other persons or bodies as the Tribunal may determine. 2017, c. 23, Sched. 5, s. 64.

Notice of hearing

(5) The Tribunal shall give notice of a hearing in such manner as the Tribunal determines necessary. 2017, c. 23, Sched. 5, s. 64.

Powers of Tribunal

(6) After holding a hearing, the Tribunal may order,

(a) that the appeal be dismissed; or

(b) that the municipality consent to the demolition or removal of a building or structure without terms and conditions or with such terms and conditions as the Tribunal may specify in the order. 2017, c. 23, Sched. 5, s. 64.

Decision final

(7) The decision of the Tribunal is final. 2017, c. 23, Sched. 5, s. 64.

- ***Ontario Heritage Act,* R. S.O. 1990, c.P.18, Section 38:**

Inspection

38 (1) For the purpose of carrying out this Part, any person authorized by the council of a municipality in writing may, upon producing proper identification, inspect at any reasonable time property designated or property proposed to be designated under this Part where a notice of intention to designate has been served and published under subsection 29 (3).

Obstruction of investigator

(2) No person shall obstruct a person authorized to make an investigation under this section or conceal or destroy anything relevant to the subject-matter of the investigation. R.S.O. 1990, c. O.18, s. 38.

Planning Act, RSO 1990, c.P.13, s. 34:

Zoning by-laws

34 (1) Zoning by-laws may be passed by the councils of local municipalities:

Restricting use of land

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

Restricting erecting, locating or using of buildings

2. For prohibiting the erecting, locating or using of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality

or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

Marshy lands, etc.

3. For prohibiting the erection of any class or classes of buildings or structures on land that is subject to flooding or on land with steep slopes, or that is rocky, low-lying, marshy, unstable, hazardous, subject to erosion or to natural or artificial perils.

Contaminated lands; sensitive or vulnerable areas

3.1 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures on land,

i. that is contaminated,

ii. that contains a sensitive groundwater feature or a sensitive surface water feature, or

iii. that is within an area identified as a vulnerable area in a drinking water source protection plan that has taken effect under the *Clean Water Act, 2006*.

Natural features and areas

3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,

i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,

ii. that is a significant corridor or shoreline of a lake, river or stream, or

iii. that is a significant natural corridor, feature or area.

Significant archaeological resources

3.3 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures on land that is the site of a significant archaeological resource.

Construction of buildings or structures

4. For regulating the type of construction and the height, bulk, location, size, floor area, spacing, character and use of buildings or structures to be erected or located within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy.

Minimum elevation of doors, etc.

5. For regulating the minimum elevation of doors, windows or other openings in buildings or structures or in any class or classes of buildings or structures to be

erected or located within the municipality or within any defined area or areas of the municipality.

Loading or parking facilities

6. For requiring the owners or occupants of buildings or structures to be erected or used for a purpose named in the by-law to provide and maintain loading or parking facilities on land that is not part of a highway. R.S.O. 1990, c. P.13, s. 34 (1); 1994, c. 23, s. 21 (1, 2); 1996, c. 4, s. 20 (1-3); 2006, c. 22, s. 115.

Pits and quarries

(2) The making, establishment or operation of a pit or quarry shall be deemed to be a use of land for the purposes of paragraph 1 of subsection (1). R.S.O. 1990, c. P.13, s. 34 (2).

Area, density and height

(3) The authority to regulate provided in paragraph 4 of subsection (1) includes and, despite the decision of any court, shall be deemed always to have included the authority to regulate the minimum area of the parcel of land mentioned therein and to regulate the minimum and maximum density and the minimum and maximum height of development in the municipality or in the area or areas defined in the by-law. 2006, c. 23, s. 15 (1).

City of Toronto

(3.1) Subsection (3) does not apply with respect to the City of Toronto. 2006, c. 23, s. 15 (2).

Interpretation

(4) A trailer as defined in subsection 164 (4) of the *Municipal Act, 2001* or subsection 3 (1) of the *City of Toronto Act, 2006*, as the case may be, and a mobile home as defined in subsection 46 (1) of this Act are deemed to be buildings or structures for the purpose of this section. 2006, c. 32, Sched. C, s. 47 (5).

Prohibition of use of land, etc., availability of municipal services

(5) A by-law passed under paragraph 1 or 2 of subsection (1) or a predecessor of that paragraph may prohibit the use of land or the erection or use of buildings or structures unless such municipal services as may be set out in the by-law are available to service the land, buildings or structures, as the case may be. R.S.O. 1990, c. P.13, s. 34 (5).

Loading or parking facilities – by-law provisions

(5.1) A by-law passed under paragraph 6 of subsection (1) shall include the prescribed provisions and provisions about the prescribed matters. 2016, c. 25, Sched. 4, s. 3 (1).

Certificates of occupancy

(6) A by-law passed under this section may provide for the issue of certificates of occupancy without which no change may be made in the type of use of any land covered by the by-law or of any building or structure on any such land, but no such certificate shall be refused if the proposed use is not prohibited by the by-law. R.S.O. 1990, c. P.13, s. 34 (6).

Use of maps

(7) Land within any area or areas or abutting on any highway or part of a highway may be defined by the use of maps to be attached to the by-law and the information shown on such maps shall form part of the by-law to the same extent as if included therein. R.S.O. 1990, c. P.13, s. 34 (7).

Acquisition and disposition of non-conforming lands

(8) The council may acquire any land, building or structure used or erected for a purpose that does not conform with a by-law passed under this section and any vacant land having a frontage or depth less than the minimum established for the erection of a building or structure in the defined area in which such land is situate, and the council may dispose of any of such land, building or structure or may exchange any of such land for other land within the municipality. R.S.O. 1990, c. P.13, s. 34 (8); 1996, c. 4, s. 20 (4).

Excepted lands and buildings

(9) No by-law passed under this section applies,

(a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose; or

(b) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure for which a permit has been issued under subsection 8 (1) of the *Building Code Act, 1992*, prior to the day of the passing of the by-law, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the permit has not been revoked under subsection 8 (10) of that Act. R.S.O. 1990, c. P.13, s. 34 (9); 2009, c. 33, Sched. 21, s. 10 (1).

By-law may be amended

(10) Despite any other provision of this section, any by-law passed under this section or a predecessor of this section may be amended so as to permit the extension or enlargement of any land, building or structure used for any purpose prohibited by the by-law if such land, building or structure continues to be used in the same manner and

for the same purpose as it was used on the day such by-law was passed. R.S.O. 1990, c. P.13, s. 34 (10).

Two-year period, no application for amendment

(10.0.0.1) If the council carries out the requirements of subsection 26 (9) by simultaneously repealing and replacing all the zoning by-laws in effect in the municipality, no person or public body shall submit an application for an amendment to any of the by-laws before the second anniversary of the day on which the council repeals and replaces them. 2015, c. 26, s. 26 (1).

Exception

(10.0.0.2) Subsection (10.0.0.1) does not apply in respect of an application if the council has declared by resolution that such an application is permitted, which resolution may be made in respect of a specific application, a class of applications or in respect of such applications generally. 2015, c. 26, s. 26 (2).

Consultation

(10.0.1) The council,

(a) shall permit applicants to consult with the municipality before submitting applications to amend by-laws passed under this section; and

(b) may, by by-law, require applicants to consult with the municipality as described in clause (a). 2006, c. 23, s. 15 (3).

Prescribed information

(10.1) A person or public body that applies for an amendment to a by-law passed under this section or a predecessor of this section shall provide the prescribed information and material to the council. 1996, c. 4, s. 20 (5).

Other information

(10.2) A council may require that a person or public body that applies for an amendment to a by-law passed under this section or a predecessor of this section provide any other information or material that the council considers it may need, but only if the official plan contains provisions relating to requirements under this subsection. 2006, c. 23, s. 15 (4).

Refusal and timing

(10.3) Until the council has received the information and material required under subsections (10.1) and (10.2), if any, and any fee under section 69,

(a) the council may refuse to accept or further consider the application for an amendment to the by-law; and

(b) the time period referred to in subsection (11) does not begin. 2006, c. 23, s. 15 (4).

Response re completeness of application

(10.4) Within 30 days after the person or public body that makes the application for an amendment to a by-law pays any fee under section 69, the council shall notify the person or public body that the information and material required under subsections (10.1) and (10.2), if any, have been provided, or that they have not been provided, as the case may be. 2006, c. 23, s. 15 (4).

Motion re dispute

(10.5) Within 30 days after a negative notice is given under subsection (10.4), the person or public body or the council may make a motion for directions to have the Tribunal determine,

(a) whether the information and material have in fact been provided; or

(b) whether a requirement made under subsection (10.2) is reasonable. 2017, c. 23, Sched. 5, s. 93 (1).

Same

(10.6) If the council does not give any notice under subsection (10.4), the person or public body may make a motion under subsection (10.5) at any time after the 30-day period described in subsection (10.4) has elapsed. 2006, c. 23, s. 15 (4).

Notice of particulars and public access

(10.7) Within 15 days after the council gives an affirmative notice under subsection (10.4), or within 15 days after the Tribunal advises the clerk of its affirmative decision under subsection (10.5), as the case may be, the council shall,

(a) give the prescribed persons and public bodies, in the prescribed manner, notice of the application for an amendment to a by-law, accompanied by the prescribed information; and

(b) make the information and material provided under subsections (10.1) and (10.2) available to the public. 2006, c. 23, s. 15 (4); 2017, c. 23, Sched. 5, s. 80.

Final determination

(10.8) The Tribunal's determination under subsection (10.5) is not subject to appeal or review. 2006, c. 23, s. 15 (4); 2017, c. 23, Sched. 5, s. 80.

Notice of refusal

(10.9) When a council refuses an application to amend its by-law, it shall ensure that written notice of the refusal is given in the prescribed manner, no later than 15 days after the day of the refusal,

(a) to the person or public body that made the application;

(b) to each person and public body that filed a written request to be notified of a refusal; and

(c) to any prescribed person or public body. 2015, c. 26, s. 26 (3).

Contents

(10.10) The notice under subsection (10.9) shall contain,

(a) a brief explanation of the effect, if any, that the written and oral submissions mentioned in subsection (10.11) had on the decision; and

(b) any other information that is prescribed. 2015, c. 26, s. 26 (3).

Written and oral submissions

(10.11) Clause (10.10) (a) applies to,

(a) any written submissions relating to the application that were made to the council before its decision; and

(b) any oral submissions relating to the application that were made at a public meeting. 2015, c. 26, s. 26 (3).

Appeal to L.P.A.T.

(11) Subject to subsection (11.0.0.0.1), where an application to the council for an amendment to a by-law passed under this section or a predecessor of this section is refused or the council fails to make a decision on it within 90 days after the receipt by the clerk of the application, any of the following may appeal to the Tribunal by filing with the clerk of the municipality a notice of appeal, accompanied by the fee charged under the *Local Planning Appeal Tribunal Act, 2017*:

1. The applicant.
2. The Minister. 2017, c. 23, Sched. 3, s. 10 (1); 2019, c. 9, Sched. 12, s. 6 (1).

Same, where amendment to official plan required

(11.0.0.0.1) If an amendment to a by-law passed under this section or a predecessor of this section in respect of which an application to the council is made would also require an amendment to the official plan of the local municipality and the application is made on the same day as the request to amend the official plan, an appeal to the Tribunal

under subsection (11) may be made only if the application is refused or the council fails to make a decision on it within 120 days after the receipt by the clerk of the application. 2017, c. 23, Sched. 3, s. 10 (1); 2019, c. 9, Sched. 12, s. 6 (2).

(11.0.0.0.2)-(11.0.0.0.5) REPEALED: 2019, c. 9, Sched. 12, s. 6 (3).

Use of dispute resolution techniques

(11.0.0.1) If an application for an amendment is refused as described in subsection (11) and a notice of appeal is filed under that subsection, the council may use mediation, conciliation or other dispute resolution techniques to attempt to resolve the dispute. 2015, c. 26, s. 26 (5).

Notice and invitation

(11.0.0.2) If the council decides to act under subsection (11.0.0.1),

(a) it shall give a notice of its intention to use dispute resolution techniques to all the appellants; and

(b) it shall give an invitation to participate in the dispute resolution process to,

(i) as many of the appellants as the council considers appropriate,

(ii) the applicant, if the applicant is not an appellant, and

(iii) any other persons or public bodies that the council considers appropriate. 2015, c. 26, s. 26 (5).

Extension of time

(11.0.0.3) When the council gives a notice under clause (11.0.0.2) (a), the 15-day period mentioned in clause (23) (b) is extended to 75 days. 2015, c. 26, s. 26 (5).

Participation voluntary

(11.0.0.4) Participation in the dispute resolution process by the persons and public bodies who receive invitations under clause (11.0.0.2) (b) is voluntary. 2015, c. 26, s. 26 (5).

Consolidated Hearings Act

(11.0.1) Despite the *Consolidated Hearings Act*, the proponent of an undertaking shall not give notice to the Hearings Registrar under subsection 3 (1) of that Act in respect of an application for an amendment to a by-law unless the council has made a decision on the application or the time period referred to in subsection (11) has expired. 2006, c. 23, s. 15 (5).

(11.0.2) REPEALED: 2017, c. 23, Sched. 3, s. 10 (2).

Time for filing certain appeals

(11.0.3) A notice of appeal under subsection (11) with respect to the refusal of an application shall be filed no later than 20 days after the day that the giving of notice under subsection (10.9) is completed. 2006, c. 23, s. 15 (5).

Restricted appeals, areas of settlement

(11.0.4) Despite subsection (11), there is no appeal in respect of all or any part of an application for an amendment to a by-law if the amendment or part of the amendment proposes to implement,

(a) an alteration to all or any part of the boundary of an area of settlement; or

(b) a new area of settlement. 2006, c. 23, s. 15 (5).

Restricted appeals, areas of employment

(11.0.5) Despite subsection (11), if the official plan contains policies dealing with the removal of land from areas of employment, there is no appeal in respect of all or any part of an application for an amendment to a by-law if the amendment or part of the amendment proposes to remove any land from an area of employment, even if other land is proposed to be added. 2006, c. 23, s. 15 (5).

No appeal re inclusionary zoning policies

(11.0.6) Despite subsection (11), there is no appeal in respect of all or any part of an application for an amendment to a by-law if the amendment or part of the amendment proposes to amend or repeal a part of the by-law that gives effect to policies described in subsection 16 (4). 2016, c. 25, Sched. 4, s. 3 (2).

No appeal re renewable energy undertakings

(11.0.7) Despite subsection (11), there is no appeal in respect of all or any part of an application for an amendment to a by-law if the amendment or part of the amendment proposes to permit a renewable energy undertaking. 2018, c. 16, s. 8 (6).

Exception re Minister

(11.0.8) Subsection (11.0.7) does not apply to an appeal by the Minister. 2018, c. 16, s. 8 (6).

Withdrawal of appeal

(11.1) If all appeals under subsection (11) are withdrawn, the Tribunal shall notify the clerk of the municipality and the decision of the council is final and binding or the council may proceed to give notice of the public meeting or pass or refuse to pass the by-law, as the case may be. 1999, c. 12, Sched. M, s. 25 (1); 2017, c. 23, Sched. 5, s. 82.

Information and public meeting; open house in certain circumstances

(12) Before passing a by-law under this section, except a by-law passed pursuant to an order of the Tribunal made under subsection (26),

(a) the council shall ensure that,

(i) sufficient information and material is made available to enable the public to understand generally the zoning proposal that is being considered by the council, and

(ii) at least one public meeting is held for the purpose of giving the public an opportunity to make representations in respect of the proposed by-law; and

(b) in the case of a by-law that is required by subsection 26 (9) or is related to a development permit system, the council shall ensure that at least one open house is held for the purpose of giving the public an opportunity to review and ask questions about the information and material made available under subclause (a) (i). 2006, c. 23, s. 15 (6); 2009, c. 33, Sched. 21, s. 10 (2); 2017, c. 23, Sched. 3, s. 10 (3).

Notice

(13) Notice of the public meeting required under subclause (12) (a) (ii) and of the open house, if any, required by clause (12) (b),

(a) shall be given to the prescribed persons and public bodies, in the prescribed manner; and

(b) shall be accompanied by the prescribed information. 2006, c. 23, s. 15 (6).

Timing of open house

(14) The open house required by clause (12) (b) shall be held no later than seven days before the public meeting required under subclause (12) (a) (ii) is held. 2006, c. 23, s. 15 (6).

Timing of public meeting

(14.1) The public meeting required under subclause (12) (a) (ii) shall be held no earlier than 20 days after the requirements for giving notice have been complied with. 2006, c. 23, s. 15 (6).

Participation in public meeting

(14.2) Every person who attends a public meeting required under subclause (12) (a) (ii) shall be given an opportunity to make representations in respect of the proposed by-law. 2006, c. 23, s. 15 (6).

Alternative measures

(14.3) If an official plan sets out alternative measures for informing and obtaining the views of the public in respect of proposed zoning by-laws, and if the measures are complied with, clause (10.7) (a) and subsections (12) to (14.2) do not apply to the proposed by-laws, but subsection (14.6) does apply. 2015, c. 26, s. 26 (6).

Same

(14.4) In the course of preparing the official plan, before including alternative measures described in subsection (14.3), the council shall consider whether it would be desirable for the measures to allow for notice of the proposed by-laws to the prescribed persons and public bodies mentioned in clause (13) (a). 2015, c. 26, s. 26 (6).

Transition

(14.4.1) For greater certainty, subsection (14.4) does not apply with respect to alternative measures that were included in an official plan before the day subsection 26 (6) of the *Smart Growth for Our Communities Act, 2015* comes into force. 2015, c. 26, s. 26 (6).

Information

(14.5) At a public meeting under subclause (12) (a) (ii), the council shall ensure that information is made available to the public regarding who is entitled to appeal under subsections (11) and (19). 2006, c. 23, s. 15 (6).

Where alternative procedures followed

(14.6) If subsection (14.3) applies, the information required under subsection (14.5) shall be made available to the public at a public meeting or in the manner set out in the official plan for informing and obtaining the views of the public in respect of proposed zoning by-laws. 2006, c. 23, s. 15 (6); 2015, c. 26, s. 26 (7).

Information to public bodies

(15) The council shall forward to such public bodies as the council considers may have an interest in the zoning proposal sufficient information to enable them to understand it generally and such information shall be forwarded not less than twenty days before passing a by-law implementing the proposal. R.S.O. 1990, c. P.13, s. 34 (15); 1994, c. 23, s. 21 (5).

Conditions

(16) If the official plan in effect in a municipality contains policies relating to zoning with conditions, the council of the municipality may, in a by-law passed under this section, permit a use of land or the erection, location or use of buildings or structures and

impose one or more prescribed conditions on the use, erection or location. 2006, c. 23, s. 15 (7).

Same

(16.1) The prescribed conditions referred to in subsection (16) may be made subject to such limitations as may be prescribed. 2006, c. 23, s. 15 (7).

Same

(16.2) When a prescribed condition is imposed under subsection (16),

(a) the municipality may require an owner of land to which the by-law applies to enter into an agreement with the municipality relating to the condition;

(b) the agreement may be registered against the land to which it applies; and

(c) the municipality may enforce the agreement against the owner and, subject to the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land. 2006, c. 23, s. 15 (7).

City of Toronto

(16.3) Subsections (16), (16.1) and (16.2) do not apply with respect to the City of Toronto. 2006, c. 23, s. 15 (8).

Further notice

(17) Where a change is made in a proposed by-law after the holding of the public meeting mentioned in subclause (12) (a) (ii), the council shall determine whether any further notice is to be given in respect of the proposed by-law and the determination of the council as to the giving of further notice is final and not subject to review in any court irrespective of the extent of the change made in the proposed by-law. R.S.O. 1990, c. P.13, s. 34 (17); 2006, c. 23, s. 15 (9).

Notice of passing of by-law

(18) If the council passes a by-law under this section, except a by-law passed pursuant to an order of the Tribunal made under subsection (11.0.2) or (26), the council shall ensure that written notice of the passing of the by-law is given in the prescribed manner, no later than 15 days after the day the by-law is passed,

(a) to the person or public body that made the application, if any;

(b) to each person and public body that filed a written request to be notified of the decision; and

(c) to any prescribed person or public body. 2015, c. 26, s. 26 (8); 2017, c. 23, Sched. 5, s. 93 (2).

Contents

(18.1) The notice under subsection (18) shall contain,

(a) a brief explanation of the effect, if any, that the written and oral submissions mentioned in subsection (18.2) had on the decision; and

(b) any other information that is prescribed. 2015, c. 26, s. 26 (8).

Written and oral submissions

(18.2) Clause (18.1) (a) applies to,

(a) any written submissions relating to the by-law that were made to the council before its decision; and

(b) any oral submissions relating to the by-law that were made at a public meeting. 2015, c. 26, s. 26 (8).

Appeal to L.P.A.T.

(19) Not later than 20 days after the day that the giving of notice as required by subsection (18) is completed, any of the following may appeal to the Tribunal by filing with the clerk of the municipality a notice of appeal setting out the objection to the by-law and the reasons in support of the objection, accompanied by the fee charged under the *Local Planning Appeal Tribunal Act, 2017*:

1. The applicant.
2. A person or public body who, before the by-law was passed, made oral submissions at a public meeting or written submissions to the council.
3. The Minister. 2006, c. 23, s. 15 (10); 2017, c. 23, Sched. 3, s. 10 (4); 2019, c. 9, Sched. 12, s. 6 (4).

Same

(19.0.1) If the appellant intends to argue that the by-law is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan, the notice of appeal must also explain how the by-law is inconsistent with, fails to conform with or conflicts with the other document. 2019, c. 9, Sched. 12, s. 6 (5).

(19.0.2) REPEALED: 2019, c. 9, Sched. 12, s. 6 (5).

No appeal re additional residential unit policies

(19.1) Despite subsection (19), there is no appeal in respect of the parts of a by-law that give effect to policies described in subsection 16 (3), including, for greater certainty, no appeal in respect of any requirement or standard relating to such policies. 2016, c. 25, Sched. 4, s. 3 (3).

Exception re Minister

(19.2) Subsection (19.1) does not apply to an appeal by the Minister. 2016, c. 25, Sched. 4, s. 3 (3).

No appeal re inclusionary zoning policies

(19.3) Despite subsection (19), there is no appeal in respect of the parts of a by-law that give effect to policies described in subsection 16 (4), including, for greater certainty, no appeal in respect of any condition, requirement or standard relating to such policies. 2016, c. 25, Sched. 4, s. 3 (4).

Matters referred to in s. 34 (1)

(19.3.1) Despite subsection (19.3), there is an appeal in respect of any matter referred to in subsection (1) even if such matter is included in the by-law as a measure or incentive in support of the policies described in subsection 16 (4). 2016, c. 25, Sched. 4, s. 3 (5); 2017, c. 23, Sched. 3, s. 10 (6).

Exception re Minister

(19.4) Subsection (19.3) does not apply to an appeal by the Minister. 2016, c. 25, Sched. 4, s. 3 (4).

No appeal re protected major transit station area – permitted uses, etc.

(19.5) Despite subsections (19) and (19.3.1), and subject to subsections (19.6) to (19.8), there is no appeal in respect of,

(a) the parts of a by-law that establish permitted uses or the minimum or maximum densities with respect to buildings and structures on lands in a protected major transit station area that is identified in accordance with subsection 16 (15) or (16); or

(b) the parts of a by-law that establish minimum or maximum heights with respect to buildings and structures on lands in a protected major transit station area that is identified in accordance with subsection 16 (15) or (16). 2017, c. 23, Sched. 3, s. 10 (7).

Same, by-law of a lower-tier municipality

(19.6) Subsection (19.5) applies to a by-law of a lower-tier municipality only if the municipality's official plan contains all of the policies described in subclauses 16 (16) (b) (i) and (ii) with respect to the protected major transit station area. 2017, c. 23, Sched. 3, s. 10 (7).

Exception

(19.7) Clause (19.5) (b) does not apply in circumstances where the maximum height that is permitted with respect to a building or structure on a particular parcel of land would result in the building or structure not satisfying the minimum density that is required in respect of that parcel. 2017, c. 23, Sched. 3, s. 10 (7).

Exception re Minister

(19.8) Subsection (19.5) does not apply to an appeal by the Minister. 2017, c. 23, Sched. 3, s. 10 (7).

When giving of notice deemed completed

(20) For the purposes of subsections (11.0.3) and (19), the giving of written notice shall be deemed to be completed,

(a) where notice is given by publication in a newspaper, on the day that such publication occurs;

(a.1) where notice is given by e-mail, on the day that the sending by e-mail of all required notices is completed;

(b) where notice is given by personal service, on the day that the serving of all required notices is completed;

(c) where notice is given by mail, on the day that the mailing of all required notices is completed; and

(d) where notice is given by telephone transmission of a facsimile of the notice, on the day that the transmission of all required notices is completed. R.S.O. 1990, c. P.13, s. 34 (20); 1994, c. 23, s. 21 (9); 2015, c. 26, s. 26 (10).

Use of dispute resolution techniques

(20.1) When a notice of appeal is filed under subsection (19), the council may use mediation, conciliation or other dispute resolution techniques to attempt to resolve the dispute. 2015, c. 26, s. 26 (11).

Notice and invitation

(20.2) If the council decides to act under subsection (20.1),

(a) it shall give a notice of its intention to use dispute resolution techniques to all the appellants; and

(b) it shall give an invitation to participate in the dispute resolution process to,

(i) as many of the appellants as the council considers appropriate,

(ii) the applicant, if there is an applicant who is not an appellant, and

(iii) any other persons or public bodies that the council considers appropriate. 2015, c. 26, s. 26 (11).

Extension of time

(20.3) When the council gives a notice under clause (20.2) (a), the 15-day period mentioned in clause (23) (b) and subsections (23.2) and (23.3) is extended to 75 days. 2015, c. 26, s. 26 (11).

Participation voluntary

(20.4) Participation in the dispute resolution process by the persons and public bodies who receive invitations under clause (20.2) (b) is voluntary. 2015, c. 26, s. 26 (11).

When by-law deemed to have come into force

(21) When no notice of appeal is filed under subsection (19), the by-law shall be deemed to have come into force on the day it was passed except that where the by-law is passed under circumstances mentioned in subsection 24 (2) the by-law shall not be deemed to have come into force on the day it was passed until the amendment to the official plan comes into effect. R.S.O. 1990, c. P.13, s. 34 (21); 1994, c. 23, s. 21 (10); 1996, c. 4, s. 20 (8).

Affidavit re no appeal, etc.

(22) An affidavit or declaration of an employee of the municipality that notice was given as required by subsection (18) or that no notice of appeal was filed under subsection (19) within the time allowed for appeal shall be conclusive evidence of the facts stated therein. R.S.O. 1990, c. P.13, s. 34 (22); 1996, c. 4, s. 20 (9).

Record

(23) The clerk of a municipality who receives a notice of appeal under subsection (11) or (19) shall ensure that,

(a) a record that includes the prescribed information and material is compiled;

(b) the notice of appeal, record and fee are forwarded to the Tribunal,

(i) within 15 days after the last day for filing a notice of appeal under subsection (11.0.3) or (19), as the case may be, or

(ii) within 15 days after a notice of appeal is filed under subsection (11) with respect to the failure to make a decision; and

(c) such other information or material as the Tribunal may require in respect of the appeal is forwarded to the Tribunal. 2017, c. 23, Sched. 3, s. 10 (8).

Withdrawal of appeals

(23.1) If all appeals to the Tribunal under subsection (19) are withdrawn and the time for appealing has expired, the Tribunal shall notify the clerk of the municipality and the decision of the council is final and binding. 2017, c. 23, Sched. 5, s. 93 (3).

Exception

(23.2) Despite clause (23) (b), if all appeals under subsection (19) are withdrawn within 15 days after the last day for filing a notice of appeal, the municipality is not required to forward the materials described under clauses (23) (b) and (c) to the Tribunal. 1999, c. 12, Sched. M, s. 25 (2); 2017, c. 23, Sched. 5, s. 93 (4).

Decision final

(23.3) If all appeals to the Tribunal under subsection (19) are withdrawn within 15 days after the last day for filing a notice of appeal, the decision of the council is final and binding. 1999, c. 12, Sched. M, s. 25 (2); 2017, c. 23, Sched. 5, s. 93 (5).

Hearing and notice thereof

(24) On an appeal to the Tribunal, the Tribunal shall hold a hearing of which notice shall be given to such persons or bodies and in such manner as the Tribunal may determine. 2017, c. 23, Sched. 5, s. 93 (6).

Restriction re adding parties

(24.1) Despite subsection (24), in the case of an appeal under subsection (11) that relates to all or part of an application for an amendment to a by-law that is refused, or in the case of an appeal under subsection (19), only the following may be added as parties:

1. A person or public body who satisfies one of the conditions set out in subsection (24.2).
2. The Minister. 2006, c. 23, s. 15 (12).

Same

(24.2) The conditions mentioned in paragraph 1 of subsection (24.1) are:

1. Before the by-law was passed, the person or public body made oral submissions at a public meeting or written submissions to the council.
2. The Tribunal is of the opinion that there are re35asonable grounds to add the person or public body as a party. 2006, c. 23, s. 15 (12); 2017, c. 23, Sched. 5, s. 80.

New information and material at hearing

(24.3) This subsection applies if information and material that is presented at the hearing of an appeal described in subsection (24.1) was not provided to the municipality before the council made the decision that is the subject of the appeal. 2019, c. 9, Sched. 12, s. 6 (6).

Same

(24.4) When subsection (24.3) applies, the Tribunal may, on its own initiative or on a motion by the municipality or any party, consider whether the information and material could have materially affected the council's decision and, if the Tribunal determines that it could have done so, it shall not be admitted into evidence until subsection (24.5) has been complied with and the prescribed time period has elapsed. 2019, c. 9, Sched. 12, s. 6 (6).

Notice to council

(24.5) The Tribunal shall notify the council that it is being given an opportunity to,

(a) reconsider its decision in light of the information and material; and

(b) make a written recommendation to the Tribunal. 2019, c. 9, Sched. 12, s. 6 (6).

Council's recommendation

(24.6) The Tribunal shall have regard to the council's recommendation if it is received within the time period referred to in subsection (24.4), and may, but is not required to, do so if it is received afterwards. 2019, c. 9, Sched. 12, s. 6 (6).

***Conflict with* SPPA**

(24.7) Subsections (24.1) to (24.6) apply despite the *Statutory Powers Procedure Act*. 2019, c. 9, Sched. 12, s. 6 (7).

Dismissal without hearing

(25) Despite the *Statutory Powers Procedure Act* and subsection (24), the Tribunal may, on its own initiative or on the motion of any party, dismiss all or part of an appeal without holding a hearing if any of the following apply:

1. The Tribunal is of the opinion that,

i. the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,

ii. the appeal is not made in good faith or is frivolous or vexatious,

iii. the appeal is made only for the purpose of delay, or

iv. the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process.

2. The appellant has not provided written reasons for the appeal.
3. The appellant intends to argue a matter mentioned in subsection (19.0.1) but has not provided the explanations required by that subsection.
4. The appellant has not paid the fee charged under the *Local Planning Appeal Tribunal Act, 2017*.
5. The appellant has not responded to a request by the Tribunal for further information within the time specified by the Tribunal. 2019, c. 9, Sched. 12, s. 6 (8).

Representation

(25.1) Before dismissing all or part of an appeal, the Tribunal shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under paragraph 5 of subsection (25). 2000, c. 26, Sched. K, s. 5 (2); 2017, c. 23, Sched. 3, s. 10 (12); 2019, c. 9, Sched. 12, s. 6 (9).

Same

(25.1.1) Despite the *Statutory Powers Procedure Act* and subsection (24), the Tribunal may, on its own initiative or on the motion of the municipality or the Minister, dismiss all or part of an appeal without holding a hearing if, in the Tribunal's opinion, the application to which the appeal relates is substantially different from the application that was before council at the time of its decision. 2017, c. 23, Sched. 3, s. 10 (13).

Dismissal

(25.2) Despite the *Statutory Powers Procedure Act*, the Tribunal may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (25) or (25.1.1), as it considers appropriate. 2017, c. 23, Sched. 5, s. 93 (7).

Powers of L.P.A.T.

(26) The Tribunal may,

(a) on an appeal under subsection (11) or (19), dismiss the appeal;

(b) on an appeal under subsection (11) or (19), amend the by-law in such manner as the Tribunal may determine or direct the council of the municipality to amend the by-law in accordance with the Tribunal's order; or

(c) on an appeal under subsection (19), repeal the by-law in whole or in part or direct the council of the municipality to repeal the by-law in whole or in part in accordance with the Tribunal's order. 2019, c. 9, Sched. 12, s. 6 (10).

(26.1)-(26.13) REPEALED: 2019, c. 9, Sched. 12, s. 6 (10).

Matters of provincial interest

(27) Where an appeal is made to the Tribunal under subsection (11) or (19), the Minister, if he or she is of the opinion that a matter of provincial interest is, or is likely to be, adversely affected by the by-law, may so advise the Tribunal in writing not later than 30 days before the day fixed by the Tribunal for the hearing of the appeal and the Minister shall identify,

(a) the part or parts of the by-law by which the provincial interest is, or is likely to be, adversely affected; and

(b) the general basis for the opinion that a matter of provincial interest is, or is likely to be, adversely affected. 2017, c. 23, Sched. 3, s. 10 (15); 2019, c. 9, Sched. 12, s. 6 (11).

No hearing or notice required

(28) The Minister is not required to give notice or to hold a hearing before taking any action under subsection (27). 2004, c. 18, s. 6 (3).

No order to be made

(29) If the Tribunal has received a notice from the Minister under subsection (27) and has made a decision on the by-law, the Tribunal shall not make an order under subsection (26) in respect of the part or parts of the by-law identified in the notice. 2019, c. 9, Sched. 12, s. 6 (12).

Action of L.G. in C.

(29.1) The Lieutenant Governor in Council may confirm, vary or rescind the decision of the Tribunal in respect of the part or parts of the by-law identified in the notice and in doing so may repeal the by-law in whole or in part or amend the by-law in such a manner as the Lieutenant Governor in Council may determine. 2004, c. 18, s. 6 (3); 2017, c. 23, Sched. 5, s. 93 (8).

Coming into force

(30) If one or more appeals have been filed under subsection (19), the by-law does not come into force until all of such appeals have been withdrawn or finally disposed of, whereupon the by-law, except for those parts of it repealed or amended under subsection (26) or as are repealed or amended by the Lieutenant Governor in Council under subsection (29.1), shall be deemed to have come into force on the day it was passed. 1996, c. 4, s. 20 (13); 2004, c. 18, s. 6 (4); 2017, c. 23, Sched. 3, s. 10 (17); 2019, c. 9, Sched. 12, s. 6 (13).

Unappealed portions

(31) Despite subsection (30), before all of the appeals have been finally disposed of, the Tribunal may make an order providing that any part of the by-law not in issue in the appeal shall be deemed to have come into force on the day the by-law was passed. 1993, c. 26, s. 53 (5); 2017, c. 23, Sched. 5, s. 80.

Method

(32) The Tribunal may make an order under subsection (31) on its own initiative or on the motion of any person or public body. 1993, c. 26, s. 53 (5); 1996, c. 4, s. 20 (14); 2006, c. 23, s. 15 (18); 2017, c. 23, Sched. 5, s. 80.

Notice and hearing

(33) The Tribunal may,

(a) dispense with giving notice of a motion under subsection (32) or require the giving of such notice of the motion as it considers appropriate; and

(b) make an order under subsection (31) after holding a hearing or without holding a hearing on the motion, as it considers appropriate. 2017, c. 23, Sched. 5, s. 93 (9).

Notice

(34) Despite clause (33) (a), the Tribunal shall give notice of a motion under subsection (32) to any person or public body who filed with the Tribunal a written request to be notified if a motion is made. 2017, c. 23, Sched. 5, s. 93 (9).

TWO SISTERS RESORTS CORP. et al.	**- and -**	**THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE et al.**
Applicants (Appellants)		**Respondent (Respondents in Appeal)**

Court File No. C68033

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at
ST. CATHARINES

FACTUM OF THE RESPONDENT THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE

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