

ONTARIO LAND TRIBUNAL

Written Argument of Save Our Rand Estate (SORE)

Solmar (Niagara 2) Inc. v. Niagara-on-the-Lake (Town)

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A. INTRODUCTION

1. SORE and the Town are fundamentally in accord. Their evidence supports the following findings:

I. Very Limited Intensification Without Access

The evidence of SORE and the Town is clear that only “very limited intensification” of the lands can be achieved unless an alternative access location can be found. Mr. Palmer states this unequivocally in witness statement.¹ In his oral evidence,² he observed that the intensification would be ‘absolutely minimal; when the sites were created, [the gravel driveway] was to allow a house; it’s a driveway, a laneway, a country lane; maybe 2 or 3 houses; I’d want to hear from the fire chief and what would be allowed from public safety’.³

Mr. Bumstead agreed with Mr. Palmer and opined:⁴

If a development plan was to be considered assuming only the existing accesses in their current form (driveways), virtually no intensification could take place on the SOLMAR lands. Multiple units would require arranged garbage pickup, emergency service access, pedestrian connectivity, municipal servicing ... all of which would require more right of way for the entrances in order to service the new units.

II. No Road in the Panhandle

The Town, SORE and the McArthurs agree that the panhandle is not an appropriate location for an access road of any kind and a road should not be permitted there.

III. The Town and SORE Applied the Proper Regulatory and Policy Approach to Heritage

SORE fully adopts the Town’s evidence and submissions on the regulatory and policy framework that applies to cultural heritage including cultural heritage landscapes. Chapter 2 of Ms. Horne’s report⁵ is an absolutely excellent review the legislative and policy

¹ Ex 3.1 p 32, Witness Statement of Mr. Palmer.

² All oral evidence cited relies on notes.

³ Oral Evidence of Mr. Palmer, August 7, 2024.

⁴ Oral evidence of Mr. Bumstead, August 1, 2024.

⁵ Ex. 1.1, pp. 123-135.

framework that applies both to the heritage permit and planning applications. Mr. McClelland and Mr. Stewart adopted Chapter 2 in their evidence before the Tribunal.

IV. A Constraints-Based Approach and Proper Application of Policies Results in Between 91 and 118 Units – Provided That an Alternative Access Location is Established

Ms. Anderson and Mr. Palmer agree that a constraints-based approach is required – meaning that a planner should start with the cultural heritage and natural heritage elements to establish a net site and these factors, together with others – should guide design. While they take slightly different approaches to density, they agree that Mr. Lowes’ approach is not appropriate. The SORE Concept supports 112-113 units and the Town’s Demonstration Plan and Mr. Palmer’s analysis supports 91-118 units. Both of these plans demonstrate that appropriate intensification can occur on the subject lands, provided an alternative access is found, and it does not have to be at the expense of cultural heritage, natural heritage, and mature trees.

V. Solmar Has Not Proven the Plan of Subdivision is Feasible

The evidence of the Town and SORE demonstrates that Solmar has not established that the Plan of Subdivision is feasible. Conditions of draft plan approval cannot be used to address feasibility.⁶

VI. Insufficient Evidence to Support Removal of the Wetland.

The Town and SORE agree that there has been insufficient study to support the proposed wetland relocation.

VII. Tree Protection Plan/Tree Management Plan is Required BEFORE Draft Approval

The Town, SORE, and the McArthurs agree that the subdivision should accommodate the trees and not the reverse as proposed by Solmar. In order to implement this, a Tree Protection Plan /Tree Management Plan (“TPP”) is required before draft approval.

⁶ Oral Evidence of Ms. Anderson, August 9, 2024.

VIII. **Remedy Sought**

Subject to paragraph 2, the Town and SORE agree on the relief sought from the Tribunal, as enumerated in the Town's oral submission.

2. There are two areas of heritage evidence where the Town and SORE are not in agreement. Based on the evidence of Mr. McClelland, Mr. Stewart, Dr. Letourneau, and Ms. Horne (in respect of the Barn and Stable complex), permits to allow demolition/relocation of the Barn and Stable complex and demolition of the Calvin Rand Summer House (Lodge) should be refused.

B. **ACCESS**

3. Solmar's plan for 196 units gaining primary access through an existing unpaved lane built to access Calvin Rand's summer house, posits that it is necessary to demolish, alter and relocate significant cultural heritage and natural heritage in order to achieve intensification. That is a fiction. It was the evidence of Ms. Anderson that appropriate intensification can be achieved while meeting provincial, regional, and local policy requirements of heritage conservation and preservation of natural heritage. But not on the summer house lane.
4. The subject lands are just over 12ha in size and have only 26m of frontage (6m on Charlotte and 20 m on John Street). While the subject lands have legal access today, that legal access does not automatically entitle the landowner to use the access for any more development than exists today. Intensification cannot be achieved on the meagre frontage available to the subject lands.

I. **The Panhandle Access is a Non-Starter**

5. Solmar proposes an access road through an area which Ms. Anderson described as extremely complex.⁷ Yet the design remains conceptual in many ways:

⁷ Oral Evidence of Ms. Anderson, August 8, 2024.

- a. A retaining wall along the western edge of the road adjacent to the Dunington-Grubb pool garden is shown on Solmar’s landscape plan for all three options;⁸ however, we learned through oral testimony that the 2m off-set does not require a retaining wall.
 - b. The landscape plans showing these options do not include grading details and we learned from Mr. Tchourkine’s testimony that the retaining wall will be below the road because, in his opinion, the Dunington-Grubb pool garden is below the proposed road.⁹ However, the grading plans and Mr. Stewart’s analysis of the pool garden demonstrate that the Dunington-Grubbs sculpted the garden and it appears to be both above and below the future proposed road.¹⁰ It is not clear if the entire proposed retaining wall will be above or below (or both) the proposed road on each alignment.¹¹
 - c. We also learned that the bioswale shown on the drawings will be removed to reduce the right of way width. We don’t know how the drainage will be accommodated.
6. Ms. Anderson summarized issues with the panhandle access. There are NINE:
- a. The panhandle has undulating topography.¹² Solmar proposes to raise the grades and to build a retaining wall structure of about 25m in length.¹³ Considerable regrading in a narrow, heavily treed and culturally important area will be required to construct the road;
 - b. The Dunington-Grubb pool garden will be severely impacted.¹⁴ It too has an undulating topography - a sculpted topography. It was Mr. Stewart’s evidence that the land was contoured by the Dunington-Grubbs to create a “garden room.”¹⁵ It is accessed from the Main Walk at the west by going up stairs and through the Tea House and then down a second set of stairs. On the east, where the road is proposed, the landscape has also been sculpted,

⁸ Ex. 2.1, pp 109, 111, 113, Landscape Plans, Witness Statement of Mr. Lowes.

⁹ Oral evidence of Mr. Tchourkine, April 24, 2024.

¹⁰ Oral Evidence of Mr. Stewart, May 9, 2024.

¹¹ Ex. 4.2, pp. 178, 185-188.

¹² Ex. 1.8 p. 74, 76.

¹³ Ex 2.1, p. 882, Reply Witness Statement of Mr. Tchourkine.

¹⁴ Oral Evidence of Mr. Stewart, May 9, 2024.

¹⁵ Ex 1.4, p. 330, CHER of Stewart and ERA.

with contoured landscape which both rises and falls. It has a low entry way flanked by elevated banks on either side.¹⁶ It is not known how grading will impact the road design or the Dunington-Grubb Pool Garden;

- c. The trees in the panhandle form a setting and backdrop. It was Mr. Stewart’s evidence, referencing photographs taken over many decades, that these trees create a backdrop for the Dunington-Grubb designed Sunken Lily Pond Garden, which Mr. Stewart also referred to as a “garden room” located at 176 John Street;¹⁷
- d. A portion of the elliptical drive which also frames the Dunington-Grubb Sunken Lily Pond Garden is located on the panhandle. Ms. Horne’s Report states:¹⁸

In my opinion the proposed road system would result in substantial negative impacts to the character-defining elements within the panhandle, including the arboretum-like landscape with mature trees and plantings and the original section of the elliptical driveway, and thereby diminish the cultural heritage value of the subject property. Further information in the form of an arborist report with reference to detailed engineering plans for the road construction would be required to fully assess and understand impacts;

- e. Along the John Street frontage, Mr. Stewart described the area of the panhandle at 200 John Street and the Sunken Lily Pond Garden at 176 John Street as ‘the most important from a cultural heritage landscape perspective’ and therefore the least appropriate place to locate an access road.¹⁹ Impacts of the proposed road on 176 John Street have not been evaluated nor has it been demonstrated that the heritage attributes of 176 John Street will be conserved in accordance with section 2.6.3 of the Provincial Policy Statement, 2020 (“**PPS**”);²⁰
- f. There are trees throughout the panhandle identified in Solmar’s 2020 Environmental Impact Statement (“**2020 EIS**”) which are considered maternal roosting habitat of endangered bats.²¹ Ms. Bannon indicated that the entire treed area in the panhandle may be considered

¹⁶ Ex. 4.2 pp. 152-188.

¹⁷ Ex 1.4, p. 330, CHER of Stewart and ERA.

¹⁸ Ex, 1.1, p 161, Horne Report.

¹⁹ Oral Evidence of Mr. Stewart, May 9, 2024.

²⁰ Ex 1.12, p. 1427.

²¹ Ex. 1.5, p. 43, 2020 EIS, Figure 5.

bat habitat – not simply the individual trees. Mr. Stephenson opined that there has not been sufficient study regarding the panhandle as a natural heritage corridor;²²

- g. The boundary and off-site tree issues related to Brunswick Place at 210 John Street are significant. Mr. Richard advised that **none** of three options can be accommodated without encroaching into the minimum Tree Protection Zone (“**TPZ**”) of Tree 34B and ‘severely impacting its chances of survival’²³;
 - h. An important traffic safety concern was raised by the Mr. Argue, Mr. Bumstead, and Mr. Arnott due to the proposed road’s close proximity to the McArthurs’ driveway and the need to reduce the design radius to address that small distance; and,
 - i. A traffic safety issue was also raised through the pinch point by Mr. Bumstead due to geometry – two of the options approach the pinch point on a curve – and the proposed retaining wall/screen.
7. Solmar proposes that all of these issues should be addressed through the delivery of a grading plan, TPP and heritage conservation plan, **after** the road’s location has effectively been approved through draft plan approval. The panhandle, including the pinch point, could hardly be more complex. It is impossible to imagine that all nine areas of concern could be dealt after the road’s location has been effectively approved without causing additional unknown, unevaluated and undue impacts.

II. The Proposed Intersection Is Not Safe

8. Mr. Bumstead opined that the proximity of the proposed road to the neighbouring driveway was substantially below the applicable standard of the Transportation Association of Canada (“**TAC**”). It was his evidence that TAC standards are applied to assess an intersection’s function operationally, functionally and from safety perspectives based on engineering best practices and principles and not meeting the standard could result in unwanted safety risks and/or operational challenges that would

²² Oral Evidence of Ms. Bannon and Mr. Stephenson, July 29, 2024.

²³ Oral Evidence of Mr. Richard, August 6, 2024.

not be considered within typically acceptable ranges. He concluded that ‘the panhandle is an unacceptable location for an access if the lands are to be intensified.’²⁴

9. The Tribunal heard considerable evidence on the turning radius proposed for the outbound right turn movement adjacent to the McArthurs’ driveway. Mr. Bumstead, Mr. Argue, and Mr. Arnott all recommended a 9-m radius based on standards such as TAC. Mr. Elkins proposed a 4.5 m radius.
10. Mr. Elkins testified that a reduced radius would increase safety to pedestrians by a) reducing speeds and b) reducing the length of crossing time. Mr. Bumstead and Mr. Arnott both testified that the reduced radius does not reduce speeds at stop-controlled intersections. Mr. Arnott said, with a stop sign, ‘you can’t be going any slower.’²⁵ With respect to reducing the length of crossing time, it was Mr. Bumstead’s opinion that provision of a 4.5m radius as opposed to a 9m radius ‘would save a negligible amount of additional crossing distance for a pedestrian’. He testified that the tighter radius does not offer a significantly increased safe environment for pedestrians but does result in decreased safety for all road users as a result of the need for vehicles to turn into the oncoming traffic lane under certain circumstances²⁶. Mr. Arnott said that, due to the location of the sidewalk adjacent to the estate wall, a reduced radius would have no impact on crossing distance/time.²⁷
11. The Tribunal should prefer the evidence of Messrs. Bumstead, Arnott, and Argue.

III. Feasibility of Emergency Access Has Not Been Established

12. All of the transportation witnesses and the land use planners agree that **in addition** to a primary access, an emergency access is required.
13. There are serious issues with the Charlotte Street emergency access. It is not known whether they can be resolved. Solmar did not provided a single solution and no evidence on what should be done in the event that the Charlotte Street emergency access does not work.

²⁴ Oral Evidence of Mr. Bumstead, August 1, 2024.

²⁵ Oral evidence of Mr. Arnott, August 2, 2024.

²⁶ Oral evidence of Mr. Bumstead, August 1, 2024

²⁷ Oral evidence of Mr. Arnott, August 2, 2024.

14. Mr. Arnott is of the view that the Charlotte Street emergency access can likely be worked out on a geometry basis, but that does not address the potential boundary tree and the 250 year old White Oak, which Mr. Buchanan says ‘anything and everything that can be done to protect that tree should be done.’²⁸ Maybe all of that can be worked out. We don’t know.
15. Draft Plan Condition 12(ii) is the only condition related to emergency access: the owner agrees to “obtain permanent easements of sufficient width for the purposes of emergency access over Block 101 [which is the private park], to the satisfaction of, and at no cost to the Town.”²⁹ Solmar has not provided any substantive requirement related to the provision of emergency access and has provided no alternative in the event the issues related to the Charlotte Street access cannot be resolved. Without a confirmed emergency access, the subdivision cannot be built. It cannot be draft approved. It is not be appropriate to address this through a draft plan condition.

IV. SORE Alternative Access Concepts

16. The access options provided in the SORE Concept Plan were provided to the Tribunal as possible solutions; it was the evidence of Ms. McIlroy, Mr. Stewart, Mr. Bumstead and Ms. Anderson that those accesses followed the access and circulation routes shown in the Romance Inn applications for Official Plan and Zoning By-law approved in 2011 and shown in the applications filed by Two Sisters Resorts Corp.
17. The SORE access concepts or a road through the Two Sisters Vineyard, which Mr. Lowes referred to as “Plan D”,³⁰ provide options to be considered. Further studies are required to pursue any of these options.
18. Mr. Bumstead gave evidence that if the Charlotte Street emergency access is not feasible or is otherwise unsatisfactory, a “dual carriageway” may be a solution. For emergency access, either two accesses or a carriageway is required. As noted above, the Panhandle is entirely inappropriate for a

²⁸ Oral Evidence of Mr. Buchanan, May 9, 2024.

²⁹ Ex. 2.9(A), p.3, Revised Draft Plan Conditions.

³⁰ Oral evidence of Mr. Lowes, May 2, 2024.

7 m road, it is most definitely not appropriate for a dual carriageway which must include wider travel lanes and a median.

19. However, if Two Sisters Resorts Corp. decides it suits them to use the hotel lands, a dual carriage way through 144/176 John Street provides a possible solution. If it is determined that using the historic central access gives rise to inappropriate impacts, the Sheets access can be designed to function as a dual carriageway from John Street to the subdivision. The central access can remain closed or used as a single lane as is the case in the Romance Inn³¹. There are options to be explored; with 300m of frontage there is significantly more room to avoid and minimize impacts.

C. COMPREHENSIVE PLANNING

20. Ms. Anderson gave evidence on the importance of comprehensive planning, which she defined as:³²

A comprehensive plan establishes land use and infrastructure for the ultimate development of an area such that:

1. compatibility both within and adjacent to the area is maximized;
2. the area is planned with an integrated approach to servicing infrastructure (inclusive of transportation) for the most efficient and least impactful long term development of the area;
3. development can be appropriately phased; and,
4. there is long term certainty for all stakeholders on the long term development of the area.

21. The four properties have incredible shared history and historical connections.³³ Even setting that aside, the subject lands are proposed for substantial development and share a significant boundary with a large property to the north where future development has been approved. This is exactly where land use decisions should be considered comprehensively. Ms. Anderson provided clear evidence on this point and it was supported by the evidence of: Mr. Scheckenberger, Ms. Chisholm, Mr. Stewart and Mr. McClelland, Ms. Bannon and Mr. Stephenson, Mr. Bumstead, and Ms. McIlroy.

³¹ Ex 4.19, Romance Inn Overlay.

³² Ex 4.1, pp. 694-695, Witness Statement of Ms. Anderson

³³ This is also supported by the 2018 NOTL Estate Lots Study (the "Bray Report"), Ex. 1.4, p .23; and reinforced in the "Former Rand Estate and John Street East Character Study", March 2024, Ex 1.4, p 2405. Both were endorsed by Council and both resulted in the adoption of Official Plan policies.

22. Each of these witnesses provided expert testimony that the planning of the subject lands required a comprehensive approach regardless of who owns the adjacent property. This is supported by the legislative and policy framework; the PPS prohibits development and site alteration on adjacent lands to protected heritage property, except where it has been determined that the heritage attributes of the protected heritage property have been conserved.³⁴ Cultural heritage landscapes are about landscapes and not ownership boundaries.³⁵ Drainage is a system;³⁶ water does not care about ownership; the PPS speaks of Natural Heritage Systems,³⁷ ‘ecology is not defined by property boundaries,’³⁸ and watercourses do not stop at property boundaries and are part of system; infrastructure is to be efficient in order to serve “settlement areas”.³⁹

23. Mr. Lowes noted that there was no official plan policy requiring comprehensive planning. Ms. Anderson gave evidence that “the principle of comprehensive planning is supported by the PPS and Growth Plan through policies such as those related to wise use of land and resources, efficient development patterns, protection of the natural environment and of cultural heritage resources, promotion of green spaces and effective use of infrastructure and public service facilities.”⁴⁰ An official plan policy is not required in order to consider a development site comprehensively.

D. HISTORY OF SIGNIFICANT DISTURBANCE AND NEGLECT ON THE LANDS

24. The Tribunal heard evidence on the history of disturbance and neglect on the lands under the applicant’s ownership.

- a. Mr. Richard reviewed the 2016 Good Forestry Practice Tree Permit⁴¹ which was applied for and obtained not by Solmar, but by Two Sisters Winery for work “in preparation for

³⁴ Ex. 1.12, pp. 1427; PPS, section 2.6.3.

³⁵ Ex 1.12, p. 1238; PPS, definition of *Cultural Heritage Landscape*.

³⁶ Ex 1.12, p. 1421-1422; PPS, section 2.2.

³⁷ Ex. 1.12, pp. 1420-1422; PPS, sections 2.1 and 2.2.

³⁸ Oral Evidence of Mr. Stephenson, July 29, 2024.

³⁹ Ex. 1.12, pp. 1404-1405, 1418; PPS, Sections 1.1.3.2, 1.7.1.

⁴⁰ Ex. 4.1, p 571, Witness Statement of Ms. Anderson, Oral evidence of Ms. Anderson, August 8, 2024.

⁴¹ Ex. 4.5.

agricultural activity”.⁴² This permit had nothing to do with the vineyard and everything to do with site preparation work.

- b. The subsequent clear cutting of trees and vegetation in October/November of 2018 saw the removal of many large mature trees.⁴³ The 2020 EIS notes that the site was transformed during the course of the fieldwork, noting that “vegetation removal activities around the former residential homes was completed in fall 2018 and the majority of the property, outside small remnant woodlot areas on the east and west boundaries is relatively barren and disturbed.”⁴⁴ Tree and vegetation removals included trees identified as maternal roosting habitat for endangered bats; trees and vegetation within the Mound Garden; and the “distinctive linear hedge”⁴⁵ which formed the courtyard of the Barn and Stable.
- c. The applicant was prosecuted for these actions under the *Ontario Heritage Act*; however, the case was never heard on its merits.
- d. Ms. Bannon gave evidence of the reduction in the wetland’s area as a result of the loss of the two marsh communities.⁴⁶
- e. Mr. Richard and Ms. Bannon gave evidence of the mowing and ploughing of the understory of the woodland/wetland feature. Mr. Richard called this a ‘death sentence for a woodland.’⁴⁷
- f. It was the evidence of Solmar’s archaeologist, Ms. Slocki, that if the tree, stump and vegetation removal did take place, it was a violation of the archaeology provisions of the *Ontario Heritage Act*.⁴⁸ She said she was not concerned that artifacts were disturbed on this site because of site’s long history of farming and landscaping; however, she acknowledged it was a violation. Solmar did not seek her advice before the work was carried out.

⁴² Ex. 4.25, p. 2, February 13 2017 Correspondence re Forestry Permit.

⁴³ Ex. 6.1, Participant Statements of the Roman Family and Robert Bader.

⁴⁴ Ex. 1.5 p. 154, 2020 EIS.

⁴⁵ Ex 1.4, p. 451, Wallace HIA, 2017; Ex. 1.4, p. 1364, Letourneau CHER, September 2018.

⁴⁶ Oral Evidence of Ms. Bannon, July 29, 2024; Ex. 1.1, p. 990, Commenting letter of the NPCA, August 4, 2021, p 991.

⁴⁷ Oral Evidence of Mr. Richard, August 6, 2024.

⁴⁸ Oral Evidence of Ms. Slocki, April 19, 2024.

- g. The “before and after photos” which were reviewed by Mr. McClelland and Mr. Stewart demonstrated significant deterioration between when Solmar purchased the property and today.⁴⁹ In her 2017 Heritage Impact Assessment (“**HIA**”), Ms. Wallace describes the Barn and Stable as being in “generally good repair.”⁵⁰ Photos taken by ERA and Mr. Stewart on their November 2023 site visit show windows smashed, paint peeling and drywall on the floor.⁵¹
- h. The Lodge and the Barn and Stable were habitable when Solmar took ownership of the subject lands. Mr. Shoalts confirmed in his testimony that, in their current condition, they are no longer so.⁵²

25. This is relevant for the following reasons:

- a. In the opinion of Mr. Richard, Mr. Stewart, and Dr. Letourneau, it means that the remaining trees must be properly protected and they should not be removed simply because they are in the way of the proposed subdivision;
- b. The weakened condition and reduced size of the wetland arising from the tree removal, mowing and plowing should be taken into your consideration when determining how it should be protected from development and sustained over the long term; and
- c. The condition of the buildings should not be a consideration in the determination of whether cultural heritage resources should be conserved.

E. SERVICING

26. Ms. Anderson drew to the Tribunal’s attention that these lands are on the edge of the urban boundary and that there has not been a coordinated review of servicing in this area. The sanitary sewer ends abruptly in Charlotte Street. 144 and 176 John Street rely on septic storage tanks and private

⁴⁹ Ex. 4.2, pp. 53-326.

⁵⁰ Ex. 1.4, p. 459.

⁵¹ Ex. 4.2, p. 311.

⁵² Oral Evidence of Mr. Shoalts, April 18, 2024.

forcemains. It is acknowledged that upgrades to sanitary service will be required to accommodate the future hotel.⁵³

27. Solmar proposes a private pump station for sanitary service. Condition 12(y) of Solmar's Revised Draft Plan Conditions states that the owner shall agree to provide securities to the Town for the required pumping station in the event of required repairs.⁵⁴
28. Ms. Chisholm gave evidence that sewage pumping stations should only be used when there are no other feasible options for gravity servicing due to their ongoing operation and maintenance requirements.⁵⁵ The Servicing Brief for the Two Sisters hotel application essentially says the same thing: "Given the long-term advantages of gravity sewer over pumping solutions related to operational costs, energy usage/costs, failure risks, etc., consideration should be given to an ultimate plan for sanitary sewage servicing for the subject property that consists of gravity sewer connecting to the subdivision sewer system."⁵⁶
29. I asked Mr. Tchourkine who said, 'it only makes sense' to coordinate sanitary sewer services with the hotel lands.⁵⁷
30. We know from the draft condition of subdivision proposed by Solmar that the Town is to assume some obligation as a letter of credit is necessary "in the event of required repairs." One way or another, if private sanitary works fail and the condominium corporation or some other party does not address it, a public agency will have to step in to remedy the issue.
31. It simply is not in the public interest to have multiple pump stations, but no efforts appear to have been made. Ms. Chisholm suggested some options.⁵⁸ It is in the public interest to explore these.
32. Mr. Scheckenberger identified seven concerns related to water resources issues:⁵⁹
 - a. Lack of a Common Modelling Platform;

⁵³ Oral Evidence of Dana Anderson, August 8, 2024; Oral Evidence of Ms. Chisholm, May 16, 2024.

⁵⁴ Ex. 2.9(A), p. 5, Revised Draft Plan Conditions.

⁵⁵ Ex 4.1, p. 439, Witness Statement of Ms. Chisholm.

⁵⁶ Ex. 1.3, p. 119.

⁵⁷ Oral evidence of Mr. Tchourkine, April 24, 2024.

⁵⁸ Oral evidence of Ms. Chisholm, May 16, 2024.

⁵⁹ Oral evidence of Mr. Scheckenberger, August 7, 2024.

- b. Absence of an Area-wide Comprehensive Assessment;
 - c. Deficient Plan for the management of the on-site One Mile Creek Tributary;
 - d. Uncertainty associated with the feasibility of proposed on-site source controls to achieve water balance (Low Impact Development (“**LID**”) Measures);
 - e. Approach to the long-term operation and maintenance of private on-site LID measures including compliance with the Niagara-on-the-Lake and MECP (Comprehensive Linear Infrastructure Environmental Compliance Approval (CLI-ECA)) requirements;
 - f. Adequacy of the John Street drainage receiver; and
 - g. Inconsistencies in the drainage areas to the on-site wetland.
33. It was Mr. Scheckenberger’s evidence that the storm water analysis is insufficient to establish the feasibility of the proposed subdivision. The Town’s water resources engineer agreed.
34. Solmar failed to adequately consider downstream erosion and flooding and failed to incorporate the hotel lands into its modelling. Mr. Scheckenberger testified that the size, configuration and location of the storm water management facilities could not be confirmed and that this could impact lot and road patterns.

F. NATURAL HERITAGE SYSTEM

I. Woodland and Wetland

35. Mr. Stephenson, Ms. Bannon, and Mr. Richard all consider the woodland and wetland to be one feature with two components. The 2020 EIS seemed to take the same approach: “There is an unevaluated wetland that straddles the Greenbelt Plan area boundary within the woodland on the western side of the Subject Lands”⁶⁰ (emphasis added). It was Ms. Bannon’s opinion that the portion in the Greenbelt is a Key Natural Heritage Feature (“**KHNF**”) and a Key Hydrologic Feature (“**KHF**”) pursuant to the Greenbelt Plan and an Environmental Protection Area under the Region’s Official Plan. Mr. Boucher was of the same opinion until the filing of reply evidence.

⁶⁰ Ex. 1.5, p. 170, 2020 EIS.

36. Mr. Boucher revised his opinion based on Mr. Davies' evidence, who conducted four measurement events over the course of one year in four wells distributed across the site in order to determine the depth to groundwater. He acknowledged that for an EIS, one year of modelling is often not considered enough to determine the level of the water table.
37. He opined that the wetland in the Greenbelt Natural Heritage System (“**Greenbelt NHS**”) does not meet the test in the section 7.3 of the Greenbelt Technical Paper to be considered a KNHF nor a KHF because the wetland does not, in his opinion, have ‘direct hydraulic connections between the wetland and an underlying aquifer (eg along fracture zones or granular soil conduits).’⁶¹ Mr. Davies stated that the water table (aquifer) was too far below the wetland to have a connection.
38. Mr. Davies acknowledged there were sandy seams within the soil which could act as conduits between the wetland and the aquifer. He confirmed he was never asked to characterize the water regime of the wetland; he agreed that a better way to confirm the hydraulic connection of a wetland was to ‘instrument’ the wetland meaning putting piezometers in and around the wetland. Mr. Croft agreed that the use of ‘piezometers within or immediately adjacent to a wetland’⁶² is a more typical way to evaluate ground and surface water interactions. Mr. Croft also observed that feature-based water balance is completed in some cases ‘which could include a component of water level monitoring on a seasonal basis, using wells or piezometers in close proximity to the feature.’⁶³ Mr. Croft opined that the data used by Mr. Davies was not sufficient to draw a conclusion regarding the connection of the wetland to the aquifer.
39. Mr. Stephenson and Ms. Bannon gave evidence that a feature-based water balance analysis was required and until this analysis is complete, it cannot not be determined whether the remnant wetland can be sustained or whether the proposed 5 m buffer is sufficient or appropriate.

⁶¹ Oral Evidence of Mr. Boucher, April 10, 2024.

⁶² Oral Evidence of Mr. Croft, May 8, 2024.

⁶³ *Ibid.*

40. Mr. Scheckenberger noted that Solmar’s evidence included at least four different calculations of the existing and future catchment areas for the remnant wetland.⁶⁴ He indicated that a proper understanding of the existing and future catchments areas of the wetland was important to determine the remnant’s viability should substantial removal of the feature be permitted.⁶⁵
41. In the absence of a thorough policy analysis and the completion of a feature-based water balance, which includes reliable information on catchment area for surface drainage, it is premature to determine that the wetland can be relocated or that, if it is relocated, the remnant wetland can be sustained.

II. Bats

42. Savanta/GEI has identified two endangered bat species through its surveys: the Little Brown Bat and the Small-footed Myotis.⁶⁶ Ms. Bannon noted three additional bat species have been identified by the Province as “endangered” and this classification will take effect on January 31, 2025. Ms. Bannon advised that “**virtually all of the bat species observed on site will be considered Species at Risk.**”⁶⁷
43. The approach to the identification of bat habitat by Savanta/GEI is too narrow. Savanta considers only 3 trees in the wetland, which have been identified as maternal bat roosting trees, to be habitat. It was Ms. Bannon’s evidence that the Ministry of Environment, Conservation and Parks (the regulatory authority) may consider the woodland/wetland feature to be habitat rather than simply three trees. In addition maternal roosting trees were identified in the panhandle. It is unknown how many of those trees will have to be removed in the event a road is approved in that area. Ms. Bannon indicated that the treed area in the panhandle may be considered habitat.

⁶⁴ Ex. 1.3, p. 947, 2024 FSR, Ex. 2.1, p. 139, Reply Witness Statement of Mr. Tchourkine; Ex. 2.1, p. 958, Figure 1, Reply Witness Statement of Mr. Tchourkine, Ex. 4.1, p 974, Reply Witness Statement of Mr. Shabbikian.

⁶⁵ Oral Evidence of Mr. Scheckenberger, August 7, 2024.

⁶⁶ Ex. 1.5, p. 68, EIS Technical Brief, February 23, 2024.

⁶⁷ Oral Evidence of Ms. Bannon, July 29, 2024.

44. The *Endangered Species Act, 2007*⁶⁸ provides habitat protection to species at risk which is not limited to protection of roosts, nests or dens and the like, but includes other habitats required for survival of the species, including consideration for habitat features. Ms. Bannon opined that:⁶⁹

‘an impact assessment needs to comment on not only the number of roost trees to be removed in relation to the number of roost trees that are proposed to be retained, but also the area of habitat (i.e., treed vegetation community or feature) and associated habitats such as foraging that is proposed to be removed vs. retained. The applicant needs to comment on whether or not the removal of habitat for development will fragment the habitat and/or create habitat barriers as stated in the Bat Survey Standards Note (MECP 2022).’

45. While a permit will be required under the *Endangered Species Act, 2007* prior to any site alteration, it was Ms. Bannon’s evidence that until there is clearer delineation of habitat, it is premature to approve a draft plan. The presence of bat habitat has implications regarding the potential of features located within the Greenbelt NHS to provide habitat for endangered and threatened species, and consequently as significant features under the Region’s Official Plan.

III. Systems Based Approach and Linkages

46. Mr. Stephenson reviewed policies 2.1.1, 2.1.2, 2.14 and the definition of Natural Heritage System in the PPS. His opinion was that these policies emphasize: ‘that the ecological objective is long-term, i.e. requiring consideration for temporal considerations, changes; that there is need to take a systems-based approach to maintenance and restoration of natural heritage features; that linkages are important; and that the size of connections may vary based on context.

47. He opined that ‘ecology is not defined by property boundaries. It is important to examine what systems exist on the broader landscape (not just the features); how those systems will be impacted by the construction, operation, occupation and use of the proposed development upon completion

⁶⁸ S.O. 2007, c. 6, s. 2.1, the definition of habitat includes: “an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding, and includes places in the area [...] that are used by members of the species as dens, nests, hibernacula or other residences” (“**habitat**”).

⁶⁹ Oral Evidence of Ms. Bannon, July 29, 2024.

and in the future together with the impacts of other changes/developments expected to occur within that system'.⁷⁰

48. Mr. Stephenson noted that the mapping from the Ministry of Natural Resources and Forestry⁷¹ 'shows a considerable number of connections on the property, along the east side. It also shows abundant connectivity along the entire northern boundary (along the heritage trail), as well as to an expansive network of habitats to the north, east and south.'⁷² Specifically, Mr. Stephenson indicated that 'a review of aerial photography, in conjunction with my tour of surrounding lands, clearly shows the subject property has a fairly continuous tree canopy, including the Panhandle, that could be suitable for wildlife movement.'⁷³ No wildlife movement studies were completed.
49. Finally, he concluded that 'the analyses completed to date, in the EIS and EIS Addendum, as well as the Technical Brief are not consistent with these important components of the PPS'.⁷⁴

IV. **Watercourses**

50. Mr. Stephenson and Mr. Scheckenberger agreed that there has not been sufficient study of the One Mile Creek Tributary from an ecological and hydraulic perspective. As a "corridor" to accommodate the watercourse had not been properly located, the final location of the storm water management pond and the lots backing onto the Tributary could be subject to change. Both witnesses had concerns based on Mr. Tchourkine's oral evidence that 85% of the water supply to the Tributary would be diverted. No evaluation of the impact of this change on the Tributary or its downstream reaches has been carried out.
51. It is not appropriate to approve a subdivision which relies on such a significant diversion without determining the ecological and hydraulic impacts.

G. **TREES**

⁷⁰ Oral Evidence of Mr. Stephenson, July 29, 2024.

⁷¹ Ex. 4.2, p. 340.

⁷² Oral Evidence of Mr. Stephenson, July 29, 2024.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

52. It is noteworthy that the estates which formed the John Street frontage were all named after trees: Rowanwood, Randwood, and Woodlawn.⁷⁵ Trees contribute significantly to the character of these lands.
53. While Mr. Buchanan has experience with care of trees, he admitted that he has never prepared a TPP. By comparison, Mr. Richard has prepared over thirty. His evidence should be preferred.
54. It was Mr. Richard's evidence that Solmar has not prepared any inventory of trees in the vicinity of the Whistle Stop,⁷⁶ instead these trees were simply "grouped".⁷⁷ He noted that the description of the tree grouping in the Arborist Reports differs from the description prepared by Savanta in its 2020 EIS where the area is identified as a Fresh Moist Lowland Deciduous Forest (FOD).⁷⁸ It was his opinion that there should not be a difference and as a result, this area remains something of an arboricultural mystery. He also noted that the Town, through Mr. Ormsten-Holloway identified two trees in this area which have cultural significance. He did not offer any opinion on cultural heritage matters, but recommended that an inventory of regulated trees and a TPP be prepared before the lot and road pattern are draft approved. In this area, if the inventory and TPP are not completed prior to draft plan approval, whatever trees stand in the way of the lots and road will simply have to be removed.
55. He acknowledged that a TPP is not always required prior to draft approval but recommended five factors to consider when determining whether a TPP should be prepared in advance:
- a. Greater diversity of species or communities;
 - b. Mature trees;
 - c. Endangered species or habitat of endangered species;
 - d. Boundary and off-property tree impacts; and
 - e. Sites, determined by others to have cultural significance.

⁷⁵ Oral Evidence of Mr. Stewart, May 8, 2024 (first day); Oral Evidence of Ms. Horne, May 3, 2024.

⁷⁶ Witness Statement of Mr. Richard, pp. 633-635.

⁷⁷ Oral Evidence of Mr. Richard, August 6, 2024.

⁷⁸ Oral Evidence of Mr. Richard, August 6, 2024.

56. He concluded that the subject lands have every one of these characteristics and opined that it was premature to approve the draft plan until this work has been completed.

57. Mr. Buchanan took an inconsistent approach to the determination of TPZ. In respect of two critical trees, he took the least conservative approach – the 250 year old white oak known as Tree 80 and the 100 year old Shagbark Hickory known as Tree 32B (the boundary tree in the pinch point). In the case of the white oak, Mr. Buchanan recommended a TPZ based on the dripline radius of 11.5m; his International Society of Arborist (“ISA”) calculated TPZ was 17.8m. In the case of the Tree 32B, he recommended the calculated TPZ of 3.6m vs the dripline radius of 8m. In each case, Mr. Buchanan chose the least conservative approach. It was Mr. Richard’s evidence that this was not appropriate. He also disagreed with Mr. Buchanan’s calculation of the TPZ for Tree 32B. Mr. Richard’s ISA calculated TPZ for this tree is a minimum of 7.2m.

58. Mr. Richard’s evidence should be preferred.

H. THE SUBDIVISION

59. In her Witness Statement, Ms. Anderson provided a detailed review of the *Planning Act*, the *Growth Plan*, the PPS, the Region’s Official Plan and the Town’s Official Plan in respect of the proposed official plan amendment, zoning by-law amendment and draft plan of subdivision.⁷⁹ In her testimony, Ms. Anderson reviewed section 51(24) of the *Planning Act*, and advised that the subdivision does not have appropriate regard for sections 24(a), (b), (c), (e), (f), (g), and (h).⁸⁰

I. The Bubble Diagram – Feasibility of the Lot and Road Patterns

60. Ms. Anderson reviewed, with reference to the “Bubble Diagram”,⁸¹ eight areas where required infrastructure just wouldn’t fit or where it has not yet been confirmed to fit. Ms. Anderson concluded that it has not been demonstrated that the lot and road pattern proposed are feasible.

⁷⁹ Ex. 4.1, pp 723-753, Witness Statement of Ms. Anderson.

⁸⁰ Oral Evidence of Ms. Anderson, August 9, 2024.

⁸¹ Ex. 4.27.

II. Draft Plan Conditions and the “Lost Layer”

61. It was Ms. Anderson’s evidence that conditions of subdivision approval should not be used to establish feasibility. Nor should they be used to finalize development boundaries unless there is certainty that the resulting changes to the draft plan will be minor.⁸²
62. In Ms. Anderson’s opinion, many of the draft conditions proposed require studies and critical information such as grading to be provided later. “It is not an appropriate use of conditions to determine feasibility of the wetland off-setting proposal or the adequacy of the storm water facilities, erosion and flood control measures. These matters could potentially have serious impacts on subdivision lotting and road patterns. In the case of the mound garden for example, approving the lot fabric will limit the development of a conservation plan that is a mound rather than a pit.”⁸³
63. In addition to draft plan conditions, it is intended that the subdivision will be implemented through condominium common elements and easements.
64. It was Ms. Anderson’s evidence that while the condominium plan is not before the Tribunal, ‘the ownership and maintenance of the common elements should be generally understood and the lots and blocks in relation to those elements need to work. The Tribunal must be satisfied that the proposed provision of private services represents good planning and a workable plan that can be implemented.
65. For example, it was Mr. Lowes’ evidence that the estate wall will be part of the privately owned lots. It is to be divided into multiple individual ownerships. Dr. Letourneau voiced concern regarding the conservation and maintenance in such circumstances.⁸⁴
66. Ms. Anderson cited another example: Along the heritage wall, the leads running from the rear yard catch basins to the storm sewer in the road will be privately owned but maintained by the condominium corporation. The leads will need annual flushing because they are not sufficiently

⁸² Ex. 4.1, p. 709, Witness Statement of Ms. Anderson.

⁸³ Oral Evidence of Ms. Anderson, August 9, 2024.

⁸⁴ Oral Evidence of Dr. Letourneau, July 30, 2024.

sloped based on the evidence of Ms. Chisholm. It is also the evidence of Ms. Chisholm that blanket easements or specific easements need to be clearly identified to know what restrictions will be on lots – this is also needed to provide certainty in the zoning of the lots.

67. The Tribunal must be satisfied with these arrangements in order to determine that provision of private services represents good planning and a workable plan that can be implemented. The detail on these arrangements is scant at best and insufficient to make the determination.

I. BARN STABLE COMPLEX

I. Soil and Groundwater Conditions

68. Mr. Croft on behalf of SORE and Ms. Beyene on behalf of Solmar agreed it had not been established that there was contamination beneath the Barn and Stable building and that, even if there were impacts, there were means of addressing those impacts which did not require which did not require demolition.⁸⁵

II. Barn Stable Complex Heritage Permits

69. The Barn and Stable complex is made up of 4 buildings: the Barn and Stable (or Main Dwelling), two Sheds and the Hipped Roof Shed (or one storey outbuilding). All four buildings are attributes under the *Ontario Heritage Act* designating by-law.⁸⁶

70. Ms. Horne’s report describes the farm complex as follows:⁸⁷

The farm complex supports heritage value through its design and physical value as a **rare and unique collection of buildings** with similar design features that supported an estate hobby-farm. They are physically, visually and historically connected to their surroundings, the larger Rand Estate. Each of the buildings, through their shared design features, former function as agricultural buildings and close proximity to one another, supports the understanding of the farm complex and former hobby-farm use on the Rand Estate” (emphasis added).

⁸⁵ Ex 1.8, pp. 1023-1024, Agreed Statement of Facts – Environmental.

⁸⁶ Ex. 1.1, p. 1052.

⁸⁷Ex. 1.1, p. 193, Horne Report.

71. Mr. McClelland agreed with this description and gave evidence that the buildings contain the common design features found throughout the estate on the Carriage House, the milkhouse (no longer on the subject lands) as well as the Sheds, including the deep gables, the roof vents, stucco exterior.⁸⁸ He recommends conservation in situ.

72. Ms. Horne's report recommended demolition of the Main Dwelling, retention of the 2 Sheds in situ and relocation of the Hipped Roof Shed to a community garden previously proposed within a park space on the subject lands.⁸⁹ However, this recommendation was dependent on the establishment of a community garden park area noting that the building should not be relocated unnecessarily.⁹⁰

73. I asked Ms. Horne whether her opinion regarding demolition would change if it were the case that demolition of the Barn and Stable was not required to address contamination. Her answer was yes:⁹¹

‘The Stables and barn, although there have been alterations to the legibility of portions of that structure, it does still retain heritage value for its design and physical relationship to the other buildings so the design features that connect the accessory buildings that formed the ensemble of a hobby farm buildings and it is still located on that north-south succulent circulation site and it does inform an understanding of that original hobby farm use as part of that overall country estate so I do believe that heritage value would be retained with that building as part of the farm complex.’

74. Ms. Horne also confirmed that it would alter her recommendation with respect to the Hipped Roof Shed. She said, ‘Yes, I think overall the heritage value of the heritage properties would be best conserved with those buildings remaining in situ with the existing historic relationship that they share.’⁹²

75. Dr. Letourneau's witness statement notes: “Two of the existing structures (the Stables Building and the Calvin Rand Summer House) **have condition issues that preclude retention.**” (emphasis added).⁹³ Dr. Letourneau supported demolition of what he calls the Stables Building.

⁸⁸ Ex. 4.2 p. 240.

⁸⁹ Ex 1.1, pp. 121-122, Horne Report.

⁹⁰ Ex 1.1, p. 194, 195, Horne Report.

⁹¹ Oral Evidence of Denise Horne, May 3, 2024.

⁹² Oral Evidence of Denise Horne, May 3, 2024.

⁹³ Ex 3.1, p. 82, p. 62.

76. In 2021, Dr. Letourneau filed a witness statement as part of the Cultural Review Board proceeding which indicated that he was not of the view that the Main Residence was a heritage attribute. Mr. Stewart and Mr. McClelland subsequently submitted a Cultural Heritage Evaluation Report and witness statements as part of the same proceeding. Following Dr. Letourneau's review of that material, he made the following observation in his reply witness statement:⁹⁴

The Stewart/ERA report contained a 1938 air photo that my research did not uncover. The 1938 air photo shows that significant sections of the Main Residence and Shed Two at 588 Charlotte Street were present by this date. LHC's research and analysis was based upon a later date for these structures as our air photos dated from 1934 and 1954. This 1938 air photo, which represents new and relevant information, places these structures more firmly within the period of significance for this Property. Further, while there have been significant interventions on the Main Residence, this structure still reflects the form, scale, and massing of the structure as it would have existed in 1938. Thus, based upon this information, I recommend including the Main Residence as a heritage attribute specifically referencing its form, scale, and massing.

77. When Dr. Letourneau was asked the same hypothetical question he responded that in his opinion, it was premature to demolish the Barn and Stable until this matter could be further studied.

78. SORE asks that the Tribunal to refuse the heritage permits which seek to demolish the Barn and Stable (or Main Dwelling) and two Sheds and refuse the application seeking to relocate the Hipped Roof Shed.

J. THE LODGE OR CALVIN RAND SUMMER HOUSE

79. This building is identified as a heritage attribute in the under the *Ontario Heritage Act* designating by-law.⁹⁵ Mr. McClelland gave evidence regarding the Lodge or Calvin Rand Summer House advising that this building has the longest association with the Rand family on the whole Rand Estate - from the time it was built in the 1920s until the death of Calvin Rand III when 200 John was sold to Solmar. Mr. McClelland advised that the research undertaken by his firm indicates it was used by the Rand family as a winter lodge, a guest house, a gathering space for parties and other events

⁹⁴ Ex 4.24, p. 2, Reply Witness Statement of Dr. Letourneau in the CRB Hearing.

⁹⁵ Ex 1.1, p. 1048.

and as a summer house by Calvin Rand during part of his tenure as a founder and board member of the Shaw Festival.⁹⁶

80. Accounting documents show it was designed by Harold Jewett Cook, a noteworthy architect connected to the Rand family who designed a number of projects listed on the US National Register of Historic Places.⁹⁷ The modern addition was designed by Harold Chapman, a Niagara-on-the-Lake architect who designed NOTL Town Hall, the Pillar and Post and Queens Landing.⁹⁸

81. Dr. Letournou’s evidence was that the early form and massing of the house as it related to the designed estate is no longer evident.⁹⁹ Ms. Wallace said only a ‘kernel of the original Lodge remains’.¹⁰⁰ Mr. McClelland’s did not agree. His research and evidence showed that the original building is very much in evidence¹⁰¹

82. Ms. Horne’s recommendation was that the proposed demolition be permitted “given the lack of heritage value exhibited by the dwelling in relation to the early planned estate and the difficulties in preserving the 1970’s form of the dwelling **due to its current physical condition**”¹⁰² (emphasis added).

83. Dr. Letourneau simply noted in his witness statement, as I referenced above, that “condition issues that preclude retention.”¹⁰³ On cross examination, Dr. Letourneau agreed that he would not oppose its retention pending a more thorough review of the building condition – acknowledging that demolition of a heritage attribute is a ‘last resort’.¹⁰⁴

84. As noted above, the Lodge was considered habitable when the applicant purchased the land. Mr. Shoalts advised it was no longer habitable. The current condition should not be a consideration in determining whether the building should be retained. Given the history of long association with the

⁹⁶ Oral evidence of Mr. McClelland, May 8, 2024.

⁹⁷ Some of these projects are shown in SORE’s visuals at Ex. 4.2 pp- 271-275.

⁹⁸ Ex. 4.2 p. 278.

⁹⁹ Ex. 1.4, p. 1567, Letourneau CHER 2021, Oral Evidence of Dr. Letourneau, July 30, 2024.

¹⁰⁰ Oral evidence of Ms. Wallace, April 15, 2024.

¹⁰¹ See for example, Ex. 4.2, p 278

¹⁰² Ex. 1.1, p. 186, Horne Report.

¹⁰³ Ex 3.1, p. 82.

¹⁰⁴ Oral Evidence of Dr. Letourneau, July 30, 2024.

Rand family and Mr. McClelland’s research and testimony that the original building is very much in evidence, we ask that the demolition permit for the Calvin Rand Summer House (or Lodge) be refused.

K. URBAN – AGRICULTURAL INTERFACE

85. The PPS and the Growth Plan state that prime agricultural areas shall be protected for the “long term use” for agriculture.¹⁰⁵ The PPS requires “minimizing land use conflicts” in order to enhance sustainability and viability of the agricultural system.¹⁰⁶ This is also reflected in the objectives of the *Farming Food and Protection Act*.¹⁰⁷

86. Mr. Fraser’s and Ms. Anderson’s evidence was that the SORE Concept Plan provides for better treatment of the Urban Agricultural Edge and better protection of agricultural uses now and over the long term, as required by the PPS, the Growth Plan, and the *Farming Food and Protection Act*, without impacting intensification.

L. CASE LAW

I. Balancing Public vs. Private Interest

87. The appellant cites the Supreme Court of Canada’s decision *St. Peter’s*¹⁰⁸ for the proposition that the “preservation of Ontario’s heritage”¹⁰⁹ is to be accomplished at the cost of the community at large, not at the cost of the individual property owner. The appellant’s statement is overbroad. This decision stands for the proposition that the *Ontario Heritage Act* included notice provisions which are intended to protect the owner and those provisions must be strictly observed. In this case, members of the Church attended the public meeting of Council where a decision was made to refuse the demolition permit, but it was conceded that no notice was given within the required period.

¹⁰⁵ Ex. 1.12, p. 1288; Ex. 1.12, p. 1479; Section 2.3.1 of the PPS states: Prime agricultural areas shall be protected for long-term use for agriculture. Section 1.2.1 of the Growth Plan states: Support and enhance the long-term viability and productivity of agriculture by protecting prime agricultural areas and the agri-food network.)

¹⁰⁶ Ex. 1.12, p. 1418; PPS Section 1.7.1(i).

¹⁰⁷ Ex. 1.11, p. 7.

¹⁰⁸ *St. Peter’s Evangelical Lutheran Church v. Ottawa (City)*, 1982 CarswellOnt 593.

¹⁰⁹ *Ibid*; Solmar’s Casebook, p. 316.

88. The full relevant passage is:¹¹⁰

The *Ontario Heritage Act* was enacted to provide for the conservation, protection and preservation of the heritage of Ontario. There is no doubt that the Act provides for and the Legislature intended that municipalities, acting under the provisions of the Act, should have wide powers to interfere with individual property rights. It is equally evident, however, that the Legislature recognized that the preservation of Ontario's heritage should be accomplished at the cost of the community at large, not at the cost of the individual property owner, and certainly not in total disregard of the property owner's rights. It provided a **procedure** to govern the exercise of the municipal powers, but at the same time **to protect the property owner** within the scope of the Act and in accordance with its terms" (emphasis added).

89. The Court observed that "virtually all argument in this Court centred on the construction and effect"

of section 34 of the *Ontario Heritage Act* which provided that a designated property could not be demolished without the consent of council and if no decision was made by council (and notice given to the owner) within 90 days of the permit application, Council was "deemed" to have approved.

The protection of the individual property rights referred to in the decision is the procedural protection provided by the *Act*; it was and is not a stand-alone property right that the Legislature or Court was bound to protect. The "community at large" obligation refers to the statutory requirement in the *Act* at the time that council commence expropriation proceedings if a demolition permit was refused.¹¹¹

The statute required the community at large (comprised of the taxpayers of the municipality) to participate in the conservation through the acquisition by the municipality. This decision does not assist the Tribunal in determining the matter before it.

90. The *Ontario Heritage Act* was subsequently amended in 2005 and the Court has noted that the amendments granted "expanded power" to the municipality to refuse outright a demolition permit – rather than merely delay it. The obligation to expropriate was removed. The Court held that this expanded power was "counterbalanced" with the owner's binding right to appeal a demolition permit

¹¹⁰ *Ibid.*

¹¹¹ *Ontario Heritage Act*, S.O. 1974, c. 122, section 36 [*Ontario Heritage Act*].

refusal to the Ontario Municipal Board (now OLT).¹¹² Again, it is this procedural protection which provides for the balancing of heritage conservation and private property protection.

91. The role of the private interest has been noted in the Tribunal's decision in *Birchgrove Estates Inc. v. Oakville (Town)*:¹¹³

In this balancing effort, planning recognizes the complex, though often subtle, interplay of public preference and private judgement. This interplay is also recognized, and repeated, in various charters, standards, guidelines and tool kits that have been developed to provide assistance to decision makers. Although the specific language varies a bit, the similarity of intention is clear: heritage conservation is a multi-disciplinary process and, where the heritage property or structure is intended to remain in private ownership, then the needs, challenges, and limitations of the owner form fair and legitimate consideration in the final decision. This comes into particularly sharp focus in instances where the public preference is for substantial investment in renovation, restoration and re-use and where most, if not all, of the financing for this work is expected to come from that private interest.

92. This case should be distinguished on its facts. The applicant proposed to move two heritage structures “in order to preserve them and facilitate the development proposal and the issue for the first phase of the hearing was whether it would be more appropriate to relocate the heritage buildings a short distance away from their present location or whether leaving them in situ would provide a better opportunity to preserve them.”¹¹⁴ Only applications for demolition could be appealed to the Tribunal under the *Ontario Heritage Act* at the time. Relocation was being proposed through a demolition application.

93. It is submitted that the “needs, challenges and limitations” of the owner should be a modest consideration, at best, and only in circumstances where alterations are required **in order to** conserve as in the *Birchgrove* case. The Tribunal does not review detailed economic analyses when determining the balance of provincial interests. The Tribunal does not investigate whether the remaining land will be more or less valuable if heritage is conserved; the Tribunal is disinterested in land cost which is a factor in owner profit. These are not appropriate considerations.

¹¹² *Clublink Corporation ULC v. Oakville (Town)*, 2019 CarswellOnt 17136, Solmar's casebook, p. 265

¹¹³ 2007 CarswellOnt 760; Solmar's casebook, p. 300.

¹¹⁴ *Ibid.* Headnote

94. Further, financial hardship, if any, arising from the cost of restoring buildings is not grounds to support demolition -- especially in this case, where the owner's conduct has resulted in deteriorated building conditions.

II. Balancing Provincial Interests

95. It is always the task of the Tribunal to balance provincial interests. In the *Birchgrove* decision, the Tribunal has found that “no section of the PPS overrides others, the Board’s decision must be consistent with the Provincial Policy Statement [...] The challenge before the Board is to determine if the provincial goal of intensification can be achieved while meeting the provincial goal of heritage conservation.”¹¹⁵

96. Citing the *Birchgrove* decision, the Tribunal further elaborated on this point:¹¹⁶

The PPS and Growth Plan provides **directive language that heritage resources shall be conserved**. This is **mandatory language**, and even with the balancing inherent in reading those documents as a whole, ‘shall conserve’ is a baseline that an application cannot fall below (see: PPS Policy 2.6.1, ‘Significant built heritage resources and significant cultural heritage landscapes shall be conserved’; PPS Policy 2.6.3, ‘Planning authorities shall not permit development and site alteration on adjacent lands to protected heritage property except where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved’; Growth Plan Policy 4.2.7.1, ‘Cultural Heritage Resources will be conserved in order to foster a sense of place and benefit communities, particularly in strategic growth areas. (emphasis added)

97. To this list of policies, we add section 4.1 of the Growth Plan:¹¹⁷

The Greater Golden Horseshoe contains important “cultural heritage resources that contribute to a sense of identity, support a vibrant tourism industry, and attract investment based on cultural amenities. Accommodating growth can put pressure on these resources through development and site alteration. **It is necessary to plan in a way that protects and maximizes the benefits of these resources that make our communities unique and attractive places to live**” (emphasis added).

¹¹⁵ *Ibid.*

¹¹⁶ [2575867 Ontario Inc. v. Toronto \(City\)](#), 2021 LNONLT 333.

¹¹⁷ Ex 1.12, p. 1321-1322.

98. The Tribunal is not required to make a finding that the heritage policies of the PPS and Growth Plan are directive or mandatory. Both the Town's Demonstration Plan and the SORE Concept demonstrate that heritage and intensification are not a zero sum game on these lands. Both can be achieved.
99. It was Ms. Anderson's evidence that 'In Niagara-on-the Lake, heritage is a key defining element of the community. In relation to that context, you must do everything you can to conserve heritage. A plan that generally conforms is not sufficient in the context of Niagara-on-the-Lake. The conservation of heritage given the area and site's significance, requires the maximization of conservation if possible. The Solmar Plan, in my opinion, does not maximize conservation. It does not reflect the right balance of Provincial objectives. The SORE plan illustrates an alternative that can achieve maximized heritage conservation with development and achieves the best conformity with the Growth Plan.'¹¹⁸

M. REQUESTED RELIEF

100. SORE supports the Town's request for relief but requests one change: SORE requests a finding that *Ontario Heritage Act* designated properties shall be conserved in accordance with the Horne Report, except that the permits related to the Calvin Rand Summer House, the 'Main Dwelling and Sheds and one storey rectangular outbuilding with hipped roof and overhanging eaves and large French doors with ornate diamond shaped windows associated with the original estate'¹¹⁹ be refused.

¹¹⁸ Oral Evidence of Dana Anderson, May 8, 2024.

¹¹⁹ The heritage attributes constituting the Barn and Stable, two Sheds and the Hipped Roof Shed as described in the designating by-law, Ex. 1.1 p. 1052.