

OLT-22-003603  
OLT-23-000494

## ONTARIO LAND TRIBUNAL

Appeals by Solmar (Niagara 2) Inc. of Official Plan Amendment, Zoning By-law  
Amendment, Plan of Subdivision and Heritage Permit Applications  
200 John Street East and 588 Charlotte Street, Town of Niagara-on-the-Lake  
OLT Lead Case Nos.: OLT-22-003603 and OLT-23-000494

## WRITTEN SUBMISSIONS OF BLAIR AND BRENDA MCARTHUR

August 21, 2024

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## Overview

1. Blair and Brenda McArthur (the “McArthurs”) own and reside at 210 John Street in the Town of Niagara-on-the-Lake. Their property, historically known as Brunswick Place, is listed on the Municipal Heritage Register, and contains a large estate residence and mature trees. Brunswick Place is historically linked to the Rand Estate, with both properties forming part of the original land grant made to the Honourable Peter Russel in 1796.<sup>1</sup>
2. Much like the former Rand Estate, Brunswick Place has retained a shared historic residential estate character defined by trees, naturalistic landscaping, formal landscape features, and large, distinctively designed houses.<sup>2</sup>
3. Beyond a shared history and character, Brunswick Place and the former Rand Estate share a property line, extending the full length of the McArthurs’ western and southern boundaries.
4. The McArthurs bring an important and unique perspective and set of interests to this hearing as the subject property’s largest neighbour, and one who is perhaps the most directly affected by the proposed subdivision.
5. The role of the McArthurs in this hearing is to make sure that Brunswick Place – as the largest neighbour, a recognized and important heritage estate in its own right, and a key part of the Character Area which includes it and the adjacent Rand Estate - is not overlooked through the planning process, and that it is not an afterthought.
6. The McArthurs sought and were granted party status to these proceedings in January of this year, following a series of proposed revisions to the plan of subdivision. In elevating the

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<sup>1</sup> Former Rand Estate and John Street East Character Study, Draft Report, November 21, 2023, Exhibit 1.4, Tab 102, p. 2271.

<sup>2</sup> *Supra*, p. 2289.

McArthurs from participants to parties, the Tribunal directed that the participation of the McArthurs in the hearing be scoped to the direct effects of the proposed subdivision on the McArthurs' property. As a result, the McArthurs focused their evidence on:

- i. potential safety and operational issues arising from deficient spacing between the proposed road and the McArthurs' driveway;
  - ii. the impact of a panhandle road on boundary and border trees; and
  - iii. the impact of the proposed removal of the existing wetland at the rear of 210 John Street.
7. For all issues beyond this scope, we adopt the concerns and submissions of SORE and the Town. Notably, the McArthurs agree that the development of the subject lands *can* be achieved in a manner that respects both the Rand Estate *and* Brunswick Place. It is our submission that the Solmar plan before the Tribunal does not do so and should not be approved.

## **Themes**

8. Prior to discussing the specific issues and the evidence that supports the McArthurs' position, it is helpful to first identify some overriding themes that emerged through thirty-three days of evidence in this hearing. We ask you to consider these themes when reviewing and deliberating on the evidence, and to notice how frequently they emerge. While these themes arise in the specific context of the McArthurs' concerns with the proposal, we submit that they are broadly applicable to all aspects of the appeal.

Theme 1: The McArthurs were an afterthought in planning and designing the proposed subdivision

9. At the outset of the hearing, we stated in our opening remarks that our role in these proceedings was to make sure that Brunswick Place is not overlooked through the planning process, and that it is not an afterthought. That concern was well placed.

10. There have been countless examples of Solmar's disregard for 210 John Street in designing and defending the proposed subdivision:

- i. they neglected to survey potential species at risk on the McArthurs' property despite being directed by the Region and the Ministry of Natural Resources and Forestry to do so<sup>3</sup>;
- ii. they failed to consider the contributions made by the McArthur estate to the cultural heritage landscape of the area, and made no attempt to understand how the proposed development might impact the cultural heritage value of Brunswick Place<sup>4</sup>;
- iii. they have proposed to remove a wetland that straddles the McArthurs' property line with no consideration of the impacts on their neighbours; and
- iv. they designed a road that abuts the McArthurs' property and threatens the removal and injury of trees owned or co-owned by the McArthurs without the McArthurs' consent.

11. The McArthurs aren't alone in being ignored through this proposal. For example, there remain issues about potential flooding at the rear of the properties on Weatherstone Court along the

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<sup>3</sup> See EIS Addendum, Ex. 1.5, Tab 124, p. 29; See also cross examination of Noel Boucher in which he admits that he did not attempt to access 210 John Street to complete the requested survey.

<sup>4</sup> See cross examination of M. Rivard in which she confirms that the CHLER and the Commemoration Plan undertakes no analysis of the cultural heritage value of 210 John Street.

One-Mile Creek Tributary<sup>5</sup> resulting from the proposed development. Tree 81, a possible boundary tree co-owned by the Town, would likely be removed to accommodate the emergency access at Charlotte street, despite objection from the Town.<sup>6</sup>

12. Throughout these proceedings it has become apparent that the design of the subdivision took no account of the potential impacts on its neighbours. Solmar's sole focus has been on maximizing the efficiency of its development without looking outward at how that development fits and interacts with its surroundings.

### Theme 2 - Design first, mitigate later

13. There are three related aspects to this theme worth exploring.
14. First is the Applicant's troubling approach to dealing with important matters as a condition of draft plan approval. The Parties agree that it is appropriate to address matters related to detailed design as a condition of draft plan approval. In that respect, it is appropriate to require through draft plan conditions a *final* grading plan, a *final* tree management plan, etc. Requiring these details through conditions of draft plan approval does not, however, excuse an applicant from the requirement to provide sufficient information to first establish that elements of the planned subdivision are feasible and satisfy relevant provincial and municipal policies.
15. For example, the Town, SORE and the McArthurs have rightly complained that a tree management plan has not been prepared by Solmar's arborist to illustrate the impact of the proposed access road on trees along the panhandle. Solmar insists that a tree management

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<sup>5</sup> Witness Statement of Sarah Kurtz, Exhibit 2.1, Tab 8, p. 187, para xi; Reply Witness Statement of Sarah Kurtz, Exhibit 2.1, Tab 9, p. 198, para 6; Witness Statement of Ron Scheckenberger, Ex. 3.1, Tab 10, p. 409 para 27; Reply Witness Statement of Ron Scheckenberger, Ex. 3.1, Tab 11, p. 428, para 18.

<sup>6</sup> Insert citation from MOH witness statement

plan is a matter to be worked out through the detailed design phase of planning, after draft plan approval has been granted by the Tribunal.

16. To date, the only arboricultural analysis on the panhandle trees by Solmar's arborist has been a series of tree inventories identifying the species, size, age and condition of the trees. Despite claims by the Applicant that the panhandle road has been designed to preserve and protect existing trees<sup>7</sup>, Solmar's arborist has not reviewed a grading plan to understand the extent of the road's impacts on trees, nor has he provided any input on the road design to influence the preservation and protection of trees. As a result, the Tribunal and the parties have no clear understanding of what the impact of the road on the panhandle trees will be, and consequently, whether the access road through the panhandle is feasible.
17. Determining these details through these proceedings is particularly important to the McArthurs as they have no ability to review or comment on any subsequent work undertaken by Solmar to clear conditions of draft plan approval.
18. The second aspect of this theme relates to the ever-evolving nature of the plans in the lead up to the hearing. The Plan of Subdivision was revised in January of this year, three months before the start of the hearing, prompting the McArthurs to seek to elevate their status from participant to party and to prepare for this hearing at the eleventh hour. The Functional Servicing Report was completed in February, and revised engineering plans were shared for the first time in Reply Witness Statements. Three road alignment alternatives for the panhandle access were shared through Solmar's witness statements, with a fourth alternative proposed through reply. It was only through Solmar's closing oral submissions that the parties and the Tribunal understood which of these alternatives is being requested for approval.

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<sup>7</sup>See, for example, the Witness Statement of Paul Lowes, Ex. 2.1, Tab 1, p. 57 at paras 9.2.3 and 9.2.4.

19. While the ongoing changes to the proposed plans may be sought to be portrayed as being flexible and responsive to the parties' concerns, the result of these changes has been a continuous shifting of the goal posts and an uncertainty as to what the ultimate plans being pursued really are.
20. The third related aspect to this theme is Solmar's apparent practice of planning the subdivision first and forcing site constraints to fit around it, rather than designing around existing site constraints and making the subdivision fit with them. A perfect example of this is the Solmar's proposal to relocate the circular mound and whistle stop walk, rather than incorporating their original location into the layout of the subdivision. While such issues go beyond the limited scope of the McArthurs' participation in this hearing, we adopt and support the Town and SORE's constraints-based approach to natural and cultural heritage preservation and subdivision design.

### Theme 3 - Separate and distinct ownership of the hotel lands is a convenient fiction

21. The final theme to keep in mind when considering the evidence relates to the separate and distinct ownership of the Subject Lands when it suits Solmar to assert it. The access road, as Solmar suggests, cannot go through 144 and 176 John, because those lands are separately owned and planned for a hotel and have nothing to do with the Subject Lands.
22. But that distinction becomes a lot more fluid when it serves Solmar or its related entities. The stormwater management outlets from the subdivision are located on 144 John Street<sup>8</sup>, as is the proposed relocated wetland<sup>9</sup>. Access to the rear of the hotel is maintained through the

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<sup>8</sup> See Site Servicing Plan (part 2) dated March 25, 2024, attached to the Reply Witness Statement of F. Tchourkine, Exhibit 2.1, tab 26, p. 877.

<sup>9</sup> See oral testimony of Noel Boucher.

subdivision to facilitate servicing of 144 and 176<sup>10</sup>. Even Two Sisters winery is already utilizing the Greenbelt lands at the eastern end of 200 John Street for growing grapes<sup>11</sup>.

23. It is a fiction to suggest that the four properties that make up the former Rand Estate are distinct and separate, and maintaining this fiction prevents the comprehensive planning of the area. Instead, Solmar insists on planning the former Rand Estate in a piecemeal fashion so that the impact of the ultimate build out of the four properties on the surrounding lands, including the McArthurs' property, cannot be fully known or understood until it may be too late to make meaningful revisions.

### **The Issues Relevant to the McArthurs**

24. The overarching issues of the proposed subdivision that are most pressing and relevant to the McArthurs relate to the access road at 200 John Street and the interface between the subdivision lots and the rear of Brunswick Place.

#### The Access Road

25. The McArthurs support the position of the Town and of SORE that access to the subdivision must not be provided through the narrow panhandle on 200 John Street for the following reasons.

##### (i) The proposed intersection at John Street creates an unsafe condition

26. David Argue is a professional engineer with over 30 years of experience in the field of transportation engineering, including road design and accompanying safety aspects. Notably,

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<sup>10</sup> See oral testimony of F. Tchourkine.

<sup>11</sup> See oral testimony of S. Colville.

Mr. Argue was the only transportation engineer to provide evidence at the hearing, and therefore the only transportation witness with the experience and ability to design roads.

27. Having reviewed the proposed access road design he concluded that, at its connection with John Street, the intersection design provides a deficient turning radius for vehicles turning right onto John Street and is too close to the McArthurs' western driveway. Mr. Argue's evidence was consistent with the evidence of both Mr. Bumstead and Mr. Arnott on behalf of SORE and the Town, respectively.

28. It was the evidence of Mr. Argue, along with Mr. Bumstead and Mr. Arnott, that the turning radius proposed for the intersection is deficient. Solmar has proposed a turning radius of only 4.5m for outbound right turn movements from the subject property adjacent to the McArthurs' driveway, whereas each of the other transportation witnesses has recommended a 9m radius.

29. Mr. Elkins, on behalf of Solmar, supports a 4.5m radius on the basis of his classification of the access road as a driveway as opposed to a road (notwithstanding that Mr. Elkins frequently refers to the access as a private road in his material). Mr. Elkins' recommendation is based on his opinion that the access road functions similarly to a commercial/industrial driveway as identified in the Town's Municipal Engineering Standards guideline<sup>12</sup>. Those guidelines note that the commercial/industrial driveway classification can also be applicable to apartments or multi-family dwellings where six or more separate self-contained dwelling units are proposed. The Solmar proposal contemplates nearly 200 separate self-contained dwelling units. This is obviously wholly beyond the scope of anything the Municipal Engineering Standards would have contemplated as an apartment complex or multi-family dwellings in the context of a municipality like Niagara-on-the-Lake.

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<sup>12</sup> See Paradigm Transportation Impact Study (TIS), February 2024, Exhibit 1.7, Tab 143, p. 381.

30. Mr. Argue, Mr. Bumstead and Mr. Arnott each agree that the proposed access road is not a driveway.

31. Even if it were a driveway, the proposed corner radius represents the absolute minimum recommended radius in the Municipal Engineering Standards guideline. Solmar's application of this bare minimum is flawed for a number of reasons identified by Mr. Argue and the other transportation witnesses:

- i. Mr. Elkins suggested that the reduced corner radius was consistent with the Ontario Traffic Council *Protected Intersection Guide* in promoting reduced speeds while entering the intersection in order to increase pedestrian safety. The other transportation witnesses each pointed out, however, that the proposed access road is stop controlled at the intersection with John Street, so there is no benefit to the reduced curb radius in reducing speed;
- ii. As noted by Mr. Argue in his evidence in chief, John Street is only 7.0m wide whereas typically local streets are generally 8.5m wide and collector roads are wider. In the design of roadways, where the width of the receiving road is narrowed, the turning radius should be larger to allow vehicles to safely turn onto the receiving road without interfering with oncoming traffic;
- iii. Based on Solmar's design with a 4.5m radius, only a standard passenger vehicle is able to turn right from the access road without swinging into oncoming traffic. All other design vehicles are forced to use portions of the oncoming lane to successfully navigate the turn.<sup>13</sup> According to Mr. Argue, this can interfere with traffic flow and create an unsafe condition.

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<sup>13</sup> See AutoTURN analysis in Paradigm TIS, Exhibit 1.7, Tab 143, p. 501-502.

32. Mr. Argue also took the Tribunal to Figure 8.8.2 from the Transportation Association of Canada Geometric Design Guide for Canadian Roads (the “**TAC GDG**”)<sup>14</sup> which provides that the minimum distance between a driveway and a crossroad along a collector road is 15m. The total proposed separation between the access road and the McArthurs' driveway is only 8.6m, substantially below the suggested minimum spacing.
33. The reason for the minimum separation, as explained by Mr. Argue, is to separate conflict areas for driveways and avoid dangerous decisions. Inadequate clearance can result in safety and operational problems.
34. Mr. Argue cautioned that the location of the access road as proposed by Solmar could create and unsafe road condition, an opinion that he upheld through cross examination.
35. Mr. Elkins, on behalf of Solmar, disagreed with Mr. Argue that the separation distance between the road and the McArthurs' driveway is deficient. He relied on other By-laws in the Town of Fort Erie, Town of Pelham, and Town of West Lincoln that recommend a distance of 7.5m from the edge of the driveway to the streetline of a road.<sup>15</sup> However, as noted by Mr. Argue, “streetline” is defined as the edge of the right-of-way, not the edge of the asphalt. The proposed access road would not meet the minimum separation indicated in these by-laws even if they were applicable to the subject lands.
36. Mr Elkins further asserted that the minimum distances recommended in Figure 8.8.2 of the TAC GDG do not apply, suggesting that this figure only applies to major intersections. Instead, Mr. Elkins pointed the Tribunal to chapter 8.9.7 of the TAC GDG which applies to corner clearances at minor intersections.<sup>16</sup> Mr. Elkins relies on this guideline to suggest that a 2.0m

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<sup>14</sup> Witness statement of David Argue, Exhibit 5.1, Tab 1, p. 15; see also TAC GDG, Exhibit 1.17, Tab 66, p. 923

<sup>15</sup> Reply Witness Statement of S. Elkins, Ex. 2.1, Tab 31, p. 1079, para 19.

<sup>16</sup> TAC GDG, Exhibit 1.19, Tab 66, p. 927.

minimum distance is suggested for residential driveway where traffic volumes are normally low, and that Solmar has met that minimum distance through the provision of a 2.2m tangent separation that it is providing.

37. However, even if this section of the TAC guidelines is applicable, the language of this guideline suggests that Solmar's design remains deficient. The TAC GDG states: "Short tangent separations (C) are acceptable for residential land uses where driveway and roadway traffic volumes are normally low. A minimum distance (C) of 2.0m is suggested for residential driveways. The resulting minimum corner clearance is then about 11.0m: 6.0 m for the minimum corner curb radius, the 2.0 m distance (C), and a 3.0 m minimum driveway radius."<sup>17</sup>

38. Mr. Argue, in his evidence on redirect, explained that his opinion on the deficient spacing between the Solmar road and the McArthurs' driveway is not affected by Mr. Elkins' differing interpretation. He took the Tribunal to Figure 8.9.2: Driveway Spacing Guidelines – Locals and Collectors within the TAC GDG document and explained that even if this figure was used instead of the major intersection figure he had previously relied upon, the minimum separation between the Solmar road and the McArthurs' driveway would be 12-14m, which still significantly exceeds the spacing being provided by Solmar. In other words, no matter the metric employed, Solmar's design stills falls well short of the TAC guidance for intersection design.

39. The evidence suggests that even when applying the bare minimum standards of road design, Solmar's proposed intersection falls short of standards and results in a potentially unsafe road condition. The evidence of Mr. Argue, Mr. Bumstead and Mr. Arnott is clear that the panhandle

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<sup>17</sup> TAC GDG, Exhibit 1.19, Tab 66, p. 927.

is not an appropriate location for the access road to the subject property, and their evidence should be preferred over that of Mr. Elkins.

(ii) the impact of the panhandle road has not been identified, but is likely substantial

40. Following clearcutting of the site by Solmar in 2018, the panhandle at 200 John Street represents the last heavily, lushly treed area of the Subject Lands. The treed panhandle performs several different and important functions. Among other things: (i) it acts as a natural buffer between Brunswick Place and the Rand House/future hotel; (ii) it contributes to the park-like setting that forms part of the cultural heritage landscape of the Rand Estate<sup>18</sup>; and it may provide an important ecological linkage wildlife corridor connecting Paradise Grove to the significant woodlands to the south of the property<sup>19</sup>.

41. The access road through the panhandle was described by Solmar's consultants in its Urban Design Brief as *a 7-metre asphalt driveway designed to minimize the impact to the existing trees by meandering and incorporating swales as part of a rural cross-section*.<sup>20</sup> This paints a wholly inaccurate picture for a few reasons:

- i. the proposed cross section of the access road incorporates not only the 7m asphalt roadway, but also 0.5m of gravel shoulder on each side, a 1m bioswale on each side, and a 1.5m asphalt sidewalk along one side. Not counting the construction area required to construct the road, the engineered footprint of the access is 11.5m.<sup>21</sup> The engineered road will take up well over half of the width of the panhandle, which is only 20m wide;

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<sup>18</sup> Witness Statement of B. Stewart, Ex. 4.1 p. 184 para 6.16

<sup>19</sup> Witness Statement of D. Stephenson, Ex. 4.1 p. 563 paras 84-86

<sup>20</sup> Witness Statement of C. Jay, Ex. 2.1 p. 795 para 42.

<sup>21</sup> Reply Witness Statement of F. Tchourkine, Ex. 2.1 p. 881, section 7.

- ii. there is no evidence that the road has been designed to minimize the impact of any existing trees on the panhandle because Mr. Buchanon has not prepared a tree management plan informed by grading plans that identifies the trees that will be removed and those that will be protected, or that assigns tree protection zones that would inform how the impact on remaining trees will be minimized. Based on his most recent tree inventory, Mr. Buchanon identified approximately 99 trees on the panhandle north of the pinchpoint and under cross examination agreed with an estimation that over half of those will likely need to be removed to accommodate the road.

42. Fundamentally altering the landscape of the panhandle will have a clear visual impact on the McArthurs' property, but it has important cultural heritage impacts as well.

43. Brunswick Place is listed on the Town's heritage registry, and has been prioritized to be designated in its own right in 2025. In the Heritage Impact Assessments she prepared, Ms. Wallace acknowledged that the properties at 144-176 *and* 210 John Street are *both* considered to be of significant cultural heritage value both for the individual cultural resources on these sites and their cultural heritage landscape value. Because of this, she noted, a heritage impact assessment is required in accordance with the policies in the PPS to ensure that any significant heritage resources and cultural heritage landscapes are conserved.<sup>22</sup>

44. The PPS policy referred to by Ms. Wallace appears to be Policy 2.6.1, which states that "significant built heritage resources and significant cultural heritage landscapes shall be conserved", although Mr. Flowers did his best in his re-examination of Ms. Rivard and his

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<sup>22</sup> 2017 Heritage Impact Assessment, Exhibit 1.4, Tab 76 p. 430.

cross examination of Mr. Letourneau to suggest that 210 John Street does not meet the definition of *significant* in order to trigger this policy.

45. Mr. Letourneau, however, suggested that by virtue of its inclusion with the Rand Estate in the 2018 Estate Lots Study by Bray Heritage, Brunswick Place has been determined to contribute to the significant cultural heritage landscape such that 2.6.1 of the PPS should apply.<sup>23</sup>

46. The more recent Draft Character Study prepared for the Town further supports this, as noted by Mr. Stewart:

*“The Draft Character Study understands the importance of these relationships at the Rand Estate. Citing the PPS (2020) definition of a Cultural Heritage Landscape, which includes “...The area may include features such as buildings, structures, spaces, views, archaeological sites or natural elements that are valued together for their interrelationship, meaning or association...”, the Character Study states: “It is under the analysis of a cultural heritage landscape that the features found on the respective properties in the Study Area become interconnected and their conservation becomes interdependent” (p. 25).”<sup>24</sup>*

47. In her HIAs prepared for the subdivision, Ms. Wallace concluded that any impacts on 210 John Street will be mitigated by the buffer created by the entrance road which will continue to be heavily treed and landscaped.<sup>25</sup>

48. Mr. Stewart, one of the paneled cultural heritage witnesses put forward by SORE, disagrees, noting that “the proposed roadway will decimate the majority of the trees on this portion of

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<sup>23</sup> Oral testimony of M. Letourneau.

<sup>24</sup> Witness Statement of B. Stewart, Ex. 4.1 p. 166 para 4.3.

<sup>25</sup> 2020 Heritage Impact Assessment, Exhibit 1.4, Tab 78 p.591.

200 John Street, many of which are healthy and mature. This will have a devastating impact on the character and setting of the Main House. In the area adjacent to the Sunken Garden where the retaining walls and raised roadway is proposed, the most significant impacts will be incurred. Much of the vegetated backdrop will be lost, and the raised roadway will dominate the scene.”<sup>26</sup>

49. He went on to specifically comment on the impact on the McArthurs' property: “The proposed road through the panhandle, will also create visual impacts to 210 John Street, the listed property to the east of the Rand Estate that shares a similar park like setting of mature trees along John Street. The numerous trees proposed to be removed, and the concrete retaining walls required to raise the road above the creek, will create significant visual impacts from within the front landscape of 210 John that have not been adequately analyzed in the HIA.”<sup>27</sup>

(iii) The road at the pinchpoint will negatively impact border and boundary trees, or cultural heritage features, or both

50. One of the most concerning issues for the McArthurs is the impact of the proposed road on boundary and border trees at what we have been referring to as the “pinchpoint”. The pinchpoint refers to the lower portion of the panhandle where Solmar has proposed to squeeze the access road in the narrow space between the McArthurs' property line and the Dunnington Grub pool garden. It is impossible to fit the road through the pinchpoint without impacting either the trees along the property line or the culturally significant garden structure, or both.

51. As a reminder, the McArthurs have not provided their consent to injure or remove any of the boundary trees which they co-own with Solmar, nor of the trees located solely on the

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<sup>26</sup> Witness Statement of B. Stewart, Ex. 4.1 p. 184 para 6.16.

<sup>27</sup> Witness Statement of B. Stewart, Ex. 4.1 p. 189 para 7.9.

McArthurs' property. There is no dispute that Solmar would be legally required to obtain the McArthurs' consent.

52. Introduced for the first time through its witness statements, Solmar proposed a series of three alternatives for the alignment of the road through the pinchpoint, with offsets from the McArthurs' property line at 2m, 4m, or 6m, intervals. Locating the road closer to the McArthurs' property line will have a greater impact on the McArthurs' trees, but less of an impact on the pool garden. Locating the road further from the property line will lessen the impact on the trees, but worsen the impact on the garden. This would force the parties and the Tribunal to make a stark and unfair choice – to decide whether they assign greater value to the protection of trees or to the protection of cultural heritage resources.

53. A number of border and boundary trees are potentially impacted by the road alignment through the pinchpoint, including trees 28B, 29B, 32B, 33B, and 36B. The bellweather tree through the hearing, however, has been Tree 34B, a large specimen Shagbark Hickory tree situated along the property line with a diameter of approximately 56cm.

54. Mr. Buchanan employed the ISA formula for calculating a tree protection zone (“**TPZ**”) for tree 34B, applying the lowest possible factors to the tree to achieve a TPZ of 3.6m. Mr. Buchanan described the TPZ in his evidence as a “no-go zone”, notwithstanding that Solmar has put forth a road alignment that travels directly through it. Mr. Richard and Mr. Ormston-Holloway, for SORE and the Town respectively, employed the same formula as Mr. Buchanan, but based on the age and resiliency of the tree applied a more conservative factor to achieve a TPZ of 7.2m.

55. Mr. Kuntz, on behalf of the McArthurs, also applied a minimum TPZ of 3.6m, similar to that of Mr. Buchanan, but not for the same reasons. He instead relied on a table produced by the

City of Toronto in its Tree Protection Policy<sup>28</sup>, a resource utilized throughout the province, which determines a minimum tree protection zone (mTPZ) based solely on diameter at breast height. Mr. Kuntz said he favours this approach because it reduces subjectivity in calculating TPZs, especially where a tree's age and vigour can be used to justify a reduction of a TPZ below a minimum standard. However, Mr. Kuntz noted that an mTPZ within the table represents an absolute minimum or starting point from which arborists or a municipality can require a greater area of protection. Mr. Kuntz repeatedly emphasized in his evidence that the more space given to a tree, the more likely it is to survive.

56. Specific to tree 34B, Mr. Kuntz noted that this tree is in fair to poor condition and could not tolerate any intrusion into the mTPZ of 3.6. In fact, he suggested that a wider protection area should be afforded to tree 34B to give it its best chance for survival, and agreed that the larger TPZs of Mr. Richard and Mr. Ormston Holloway were appropriate.

57. In its oral submissions before the Tribunal, Solmar suggested that Mr. Buchanon's evidence should be preferred over that of the other three arboricultural witnesses due to his familiarity with the trees on site, having worked for both Solmar and the McArthurs at this location. Respectfully, any familiarity Mr. Buchanon has with these trees cannot overcome his lack of experience in undertaking the work necessary to support planning applications and developments. Mr. Buchanon testified that he has never prepared a Tree Management Plan. He specifically noted in his oral evidence that it was a unique scenario for him to be dealing with the planning aspects of arborist work, as opposed to dealing with mitigation and repair in the aftermath of development. In his evidence, Mr. Kuntz criticized the work of Mr. Buchanon, which consisted of multiple, different iterations of tree inventories, as representing a fractured and piecemeal approach to tree protection. He further pointed out that Mr. Buchanon's

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<sup>28</sup> Tree Protection Policy and Specifications for Construction Near Trees, City of Toronto, Ex. 5.2, p.6.

application of a subjective test of whether or not a tree is “remarkable” is inappropriate and does not conform to any standard within the industry. In Mr. Kuntz’s opinion, large specimen trees of any species are worthy of preservation, if healthy.

58. It is our submission that Mr. Buchanon’s evidence in support of the proposal should be given little weight, given the above deficiencies, and the evidence of Messrs Kuntz, Richard and Ormston-Holloway should be preferred.

*(a) 2m offset option*

59. Mr. Kuntz provided his opinion to the Tribunal that tree 34B would not survive if the road was only offset 2m from the McArthurs' property line. This contrasts with the opinion of Mr. Buchanon, who noted that although this alignment would have the most significant impact on tree 34B, it would likely survive. Mr. Kuntz opinion should be preferred. He testified that this level of intrusion into the trees mTPZ would surely destabilize the tree in the short term and kill the tree in the long term. He disagreed with the suggestion by Mr. Buchanon that there could be arboricultural interventions appropriate to save this tree, and Mr. Buchanon provided no specific information on the interventions required to preserve the tree. Further, Mr. Kuntz advised that locating a road so close to the tree would create a hazard condition and would not conform to best management practices.

*(b) 4m offset option*

60. Mr. Kuntz could also not support an alignment where the road was offset by 4m from the property line, notwithstanding that the road would be located outside the mTPZ he had assigned. Mr. Kuntz noted that locating the curb of the road 4m from the property line would not leave sufficient room to construct the road without infringing on the mTPZ, which is unacceptable. As expressed by Mr. Kuntz, one does not just stop construction at the edge of a curb. There is a necessary amount of “overdig” to construct a road which brings a likelihood

of damage to the roots and injury to a tree. It is not sufficient to simply show that the completed road will be outside of a TPZ or an mTPZ. There needs to be an understanding of the extent of the construction to fully appreciate the impact of the proposed road on the tree.

61. Again, Mr. Kuntz reiterated that it was inadvisable to have trees directly adjacent to roadside curbs, especially where their roots may have been compromised by the road's construction. He further stressed that, based on the reduced vigour of the tree, we should be giving it as much room as possible, even up to 7m or more, to allow the tree to thrive.

62. Solmar has indicated through its oral submissions that it is seeking approval of the 4m offset option from the Tribunal as its preferred alternative. It has not demonstrated through any compelling evidence, however, that there is room to construct the road with the 4m offset without infringing on the TPZ of tree 34B. The Tribunal should prefer the evidence of Mr. Kuntz, Mr. Ormston Holloway and Mr. Richard that tree 34B requires more space to thrive than the 4m offset option provides.

*(c) 6m offset option*

63. Of the three alternatives put forward in the Solmar witness statements, the 6m offset option gives tree 34B the best chance of survival (at the cost of the most significant impact on the culturally significant pool garden). Even this option, however, would not guarantee the survivability of Tree 34B, especially if the TPZs prescribed by Mr. Richard and Mr. Ormston Holloway were to be used. As stated by Mr. Kuntz, the greater the area provided from the road, the more likely the trees at the pinchpoint would thrive as more root area would be preserved.

*(d) 4th alternative Solmar alignment*

64. Following the exchange of witness statements, and introduced through reply witness statements, the Applicant has proposed a further, fourth alternative to the pinchpoint alignment in which the road swings west of the pool garden through a portion of 176 John Street, avoiding the pinchpoint altogether.

65. As acknowledged by Mr. Kuntz, the fourth alternative does not appear to impact the boundary trees and neighbouring trees on the McArthurs' property. Nevertheless, it does not resolve any of the concerns raised by the transportation witnesses with respect to road design and safety at the intersection at John street, nor does it address the significant removal of trees in the panhandle and the associated impacts previously discussed.

*(e) SORE Alternative Alignment*

66. SORE has put forward a further alternative road access alignment that locates the access to the subdivision through the 144 and 176 John Street lands, utilizing what has been referred to as the historic access, most recently utilized in the 1990s.<sup>29</sup> The SORE alternative plan would alleviate all tree preservation planning concerns for the shared and neighbouring trees on the McArthurs' property, would allow for better preservation of trees along the panhandle, and would alleviate the intersection design concerns that arise from locating the road too close to the McArthurs' driveway.

67. Solmar has dismissed the SORE alternative on the basis that it has not been studied, that it requires cooperation from the separate owner of 144 and 176 John Street, and that it would have a significant impact on the trees and heritage features of 144 and 176 John Street. What Solmar fails to acknowledge, however, is that regardless of whether a road is located in the

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<sup>29</sup> SORE Revised Concept Plan, SORE Visual Evidence Book, Ex. 4.2, Tab 2, p. 6.

panhandle, access will still need to be provided through the historic access in order to service the hotel lands (unless the owner of 144 and 176 John Street intends to rely on the panhandle access, in which case the impacts of this road have been seriously underestimated). In considering the four properties of the former Rand Estate holistically, the SORE Alternative Alignment is most likely less impactful than the ultimate build out under the Solmar plan, which would require multiple access points through both properties.

#### The Rear of the McArthurs' Property

68. In its latest iteration of its proposal, Solmar has proposed to remove a large portion of the existing wetland located along the rear of the McArthurs' property line. In doing so, Solmar is able to add up to five additional lots to its proposed subdivision.

69. The McArthurs did not provide separate evidence as to whether the wetland is a key natural heritage feature or not, but adopts the evidence of SORE's ecologist that it is.

70. Regardless of its status, the wetland straddles the McArthurs' property line, existing at least in part on both 200 and 210 John Street. Both Solmar's ecologist, Mr. Boucher, and SORE's ecologist, Ms. Bannon, agreed that although the wetland is mapped along the McArthurs' property line, a portion of the wetland exists on the McArthurs' property. Yet in staking the wetland with the NPCA, Mr. Boucher did not seek to stake the extent of the wetland on the McArthurs' property. Mr. Boucher never set foot on 210 John Street; nor did he ask for permission to. He undertook no analysis of soils and vegetation on the McArthurs' property and, despite recommending removal of most of the wetland all the way to the property line, he did not consider or assess any potential impacts on any remaining portions of the wetland on the McArthurs' property.<sup>30</sup>

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<sup>30</sup> Cross examination of N. Boucher.

71. It should be inconceivable that a natural feature that straddles a shared boundary line could be removed without consultation with one's neighbour or without consideration of the potential impacts on them, yet this is consistent with Solmar's continued treatment of the McArthurs and their property as an afterthought.
72. In inventorying boundary trees and trees within 6m of the property line at the rear of the McArthur property, Mr. Kuntz identified 18 trees that would be adversely affected by grading or other development activity at the property line<sup>31</sup>. Mr Kuntz recommends TPZ fencing, as indicated in Figure 1 of his report, to preserve the mTPZs of rear lot tree resources owned by the McArthurs.
73. In fairness to the Solmar, its consultants have also recommend TPZ fencing within their engineering drawings, and the draft Zoning By-law creates a Tree Preservation Overlay within which no buildings, structures or site grading shall be permitted.<sup>32</sup> However, although the intent of the TPZ fencing and Tree Preservation Overlay is to protect trees, including the McArthurs' trees, these efforts are wasted by Solmar's proposal to remove the existing wetland in this area of the site.
74. When asked under cross-examination how a wetland is removed, Mr. Boucher advised that, in his experience, the process of removing a wetland generally involves removal of the surface vegetation and then some grading to physically regrade the land. This specific activity is prohibited in the Tree Preservation Overlay and would be prevented by the installation of TPZ fencing, yet Solmar has proposed to proceed with the wetland removal anyway.
75. The very action of removing the wetland threatens to adversely impact up to 18 trees owned or co-owned by the McArthurs. Solmar has either has not considered this issue, or has

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<sup>31</sup> Figure 1 – Tree Inventory and Preservation Plan, Kuntz Forestry Consulting Inc, Ex. 5.1, Tab 3C p. 48.

<sup>32</sup> Draft Zoning By-law, Ex 1.1. Tab 14, p. 90.

exhibited no regard for the consequences of removing the wetland because it allows for additional units to be squeezed into the proposed development.

## **Conclusion**

76. Subsection 51(24) of the *Planning Act* sets out the criteria that this Tribunal shall have regard for in considering a draft plan of subdivision. Among these criteria is whether the proposed subdivision is premature or in the public interest.<sup>33</sup>

77. The collective evidence of the Town, SORE and the McArthurs is that Solmar has not demonstrated that the proposed subdivision is feasible. This is particularly the case, from the McArthurs' perspective, with respect to the access road and the proposed wetland removal as well as resultant impact on the trees. These are not mere implementation details that can be determined through conditions of draft plan approval; they are fundamental issues that must be resolved to determine the appropriate level of intensification and overall design for the subject property. They are also matters which have direct and consequential impacts on the McArthurs and Brunswick Place.

78. In fairness, Solmar is not proposing to settle the location of the access road through a condition of draft plan approval. However, it is proposing to only provide a tree management plan and a final grading plan for the panhandle as a condition of draft plan approval, so that the parties and the Tribunal would fully understand the impact of the road on the panhandle and the surrounding lands only after the location of the road has been approved. This is cold comfort to the McArthurs, who would have no ability to participate, review or comment on such plans through the condition clearing process.

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<sup>33</sup> *Planning Act*, R.S.O. 1990, c.P.13, as amended, at ss. 51(24)(b).

79. Similarly, the feasibility of relocating the wetland is not proposed to be established until after draft plan approval. Should the Niagara Peninsula Conservation Authority determine that the wetland cannot be relocated, the plan of subdivision would have to be redesigned. The evidence at this hearing suggests that the process of removing and relocating the wetland could adversely impact 18 trees owned or co-owned by the McArthurs. Surely, such a detail should be resolved before the draft plan is approved - and before the McArthurs are removed from the determination process.

80. In support of its proposal to reserve key details to conditions of draft plan approval, Solmar relies on Member Sills' decision in *1278804 Ontario Inc. v. Frontenac* in which she recognizes that such things as the mechanics of water and sewer servicing, stormwater management and lot grading are not within the jurisdiction of the board and are appropriate details to be provided in technical reports as a condition of draft plan approval.<sup>34</sup> However, in our submission the key line at para 173 of that decision is the statement that, "In order to grant Draft Plan Approval the Tribunal must first be satisfied that the development plan being proposed is in accordance with the provincial and local land use planning policies."<sup>35</sup>

81. For the reasons set out above, we submit that Solmar's evidence has failed to satisfy an objective observer that the proposed subdivision plan satisfies provincial and local planning policies, or that it represents good planning in the public interest. Approval of the plan of subdivision, therefore, is premature.

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<sup>34</sup> Book of Authorities of Solmar (Niagara 2) Inc. (Oral Submissions), Tab 3, *278804 Ontario Inc. v. Frontenac (County)*, 2018 CarswellOnt 19527 at paras 174 and 186.

<sup>35</sup> *Supra* at para 173.

## Relief Requested

82. The McArthurs have not participated in this lengthy hearing in order to stonewall development of the subject lands. These lands can support intensification, but planning for this development should be done in a manner that respects and protects neighbouring lands, and natural and cultural heritage. The McArthurs support the suggested findings and requested relief advanced by both the Town and SORE, and encourage the Tribunal to provide an opportunity for Solmar to implement these findings in a future redesign that all parties could support.
83. Support for this relief can be found in *Losani Homes (1998) Ltd. v. Grimsby (Town)*, a case relied on by Solmar in its oral submissions. It is instructive to consider that decision in the context of the relief requested by the Town and SORE, and supported by the McArthurs, that the Tribunal not approve Solmar's plan, as proposed, but rather provide directions to guide a redesign of the proposal in accordance with the Tribunal's findings. In the *Losani* decision, the Tribunal followed this same approach. In arriving at an appropriate balancing of planning and heritage preservation issues, the panel denied the request to demolish one heritage home and all except the façade of another (finding that "demolition should be a last resort"), which would have been required to accommodate the appellant's preferred design for a mid-rise mixed use building. Instead, the Tribunal directed revisions to the plans to satisfy a set of parameters which it listed in its decision, including the preservation of both heritage homes.<sup>36</sup>
84. A similar approach in this case is warranted in order to ensure the best planning outcomes for the future of the former Rand Estate lands.

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<sup>36</sup> Book of Authorities of Solmar (Niagara 2) Inc. (Oral Submissions), Tab 12, *Losani Homes (1998) Ltd. v. Grimsby (Town)*, 2022 CarswellOnt 12641, pp. 335, 343 and 344, paras. 42, 83-85 and 90-92