

## MEMO

---

**To:** Lord Mayor and Members of Council

**cc:** Bruce Zvaniga, Interim Chief Administrative Officer

**From:** Nancy Smith

**Re:** OLT Decision – 200 John Street East and 588 Charlotte Street

**Date:** October 21, 2024

---

On October 11, 2024, the Ontario Land Tribunal (“**Tribunal**”) released its Decision in the Solmar *Ontario Heritage Act* and *Planning Act* appeals (attached as “**Appendix 1**”). The following highlights the Decision’s key findings.

The Decision fully accepted the Town’s position as outlined in the Council Statement dated December 15, 2023 (attached as “**Appendix 2**”), as amended by Public Resolution to remove the Charlotte Street permission dated January 12, 2024 (attached as “**Appendix 3**”), and explained by a further Town Statement dated January 17, 2024 (attached as “**Appendix 4**”).

The Decision confirmed the following fundamental principles as advanced by the Town:

1. The Rand Estate contributes to Niagara-on-the-Lake’s sense of place, physically and culturally;
  2. Heritage protection extends to the landscape, setting and inter-relationships of attributes, not simply the attributes themselves, as contended by Solmar;
  3. Attribute demolition is a last resort. The goal of heritage conservation is to “tell the story” by the very existence of an attribute. Preservation is the goal;
  4. Ms. Horne’s conservation approach was practical and thorough. The Tribunal endorsed it and ordered that most of the character-defining elements will be preserved and rehabilitated, or relocated when warranted. The Summer House and Barn/Stable may be removed;
  5. No panhandle access; Solmar must find another access solution which may, in all likelihood, involve a shared access through 144/176 John for both a potential future hotel and the subdivision;
-

6. No wetland relocation;
7. The remaining trees are part of the cultural heritage landscape to be conserved. An interdisciplinary tree protection strategy must inform subdivision design, not the other way around as contended by Solmar;

The Tribunal has offered Solmar two (2) months to decide whether to pursue a subdivision redesign in accordance with its Decision. If it decides not to, the Tribunal will dismiss Solmar's appeals.

If Solmar decides to pursue a subdivision redesign, it must do so in consultation with the Town, SORE and the McArthurs. The Tribunal expects Solmar and the Town to communicate the timing for this path once known.

In summary, the Decision fully endorsed the Town's position on the appropriate balance of providing housing and protecting natural heritage and cultural heritage. We will report back to Council once advised of Solmar's response to the Decision.

**Ontario Land Tribunal**  
Tribunal ontarien de l'aménagement  
du territoire



**ISSUE DATE:** October 11, 2024

**CASE NO(S):** OLT-22-003603  
OLT-23-000494

**PROCEEDING COMMENCED UNDER** subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant/Appellant: Solmar (Niagara 2) Inc.  
Subject: Request to amend the Official Plan – Failure to adopt the requested amendment  
Description: To permit the development of a residential subdivision  
Reference Number: OPA-02-2020  
Property Address: 200 John Street E. and 588 Charlotte Street  
Municipality/UT: Niagara-on-the-Lake/Niagara  
OLT Case No.: OLT-22-003603  
OLT Lead Case No.: OLT-22-003603  
OLT Case Name: Solmar (Niagara 2) Inc. v. Niagara-on-the-Lake (Town)

**PROCEEDING COMMENCED UNDER** subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Subject: Application to amend the Zoning By-law – Refusal or neglect to make a decision  
Description: To permit the development of a residential subdivision  
Reference Number: ZBA-11-2020  
Property Address: 200 John Street E. and 588 Charlotte Street  
Municipality/UT: Niagara-on-the-Lake/Niagara  
OLT Case No.: OLT-22-003604  
OLT Lead Case No.: OLT-22-003603

**PROCEEDING COMMENCED UNDER** subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Subject: Proposed Plan of Subdivision– Failure of Approval  
Authority to make a decision  
Description: To permit the development of a residential  
subdivision  
Reference Number: 26T-18-20-01  
Property Address: 200 John Street E. and 588 Charlotte Street  
Municipality/UT: Niagara-on-the-Lake/Niagara  
OLT Case No.: OLT-22-003605  
OLT Lead Case No.: OLT-22-003603

**PROCEEDING COMMENCED UNDER** subsection 34.1(1) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18

Applicant/Appellant: Solmar (Niagara 2) Inc.  
Subject: Appeal of the Decision of Council on an application  
to demolish or remove a building or structure  
Description: To demolish, remove and alter the property to  
facilitate the development of the proposed  
residential subdivision  
Reference Number: HER-015-2022  
Property Address: 200 John Street E.  
Municipality/UT: Niagara-on-the-Lake/Niagara  
OLT Case No.: OLT-23-000494  
OLT Lead Case No.: OLT-23-000494  
OLT Case Name: Solmar (Niagara 2) Inc. v. Niagara-on-the-Lake  
(Town)

**PROCEEDING COMMENCED UNDER** subsection 33(9) of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18.

Applicant/Appellant: Solmar (Niagara 2) Inc.  
Subject: Appeal of the Decision of Council on an application  
for the alteration of a designated property  
Description: To demolish, remove and alter the property to  
facilitate the development of the proposed  
residential subdivision  
Reference Number: HER-015-2022  
Property Address: 200 John Street E.

Municipality/UT: Niagara-on-the-Lake/Niagara  
OLT Case No.: OLT-23-000495  
OLT Lead Case No.: OLT-23-000494

**PROCEEDING COMMENCED UNDER** subsection 33(9) of the *Ontario Heritage Act*,  
R.S.O. 1990, c. O.18.

Applicant/Appellant: Solmar (Niagara 2) Inc.  
Subject: Appeal of the Decision of Council on an application  
for the alteration of a designated property  
Description: To demolish, remove and alter the property to  
facilitate the development of the proposed  
residential subdivision  
Reference Number: HER-016-2022  
Property Address: 588 Charlotte Street  
Municipality/UT: Niagara-on-the-Lake/Niagara  
OLT Case No.: OLT-23-000496  
OLT Lead Case No.: OLT-23-000494

**PROCEEDING COMMENCED UNDER** subsection 34.1(1) of the *Ontario Heritage Act*,  
R.S.O. 1990, c. O.18.

Applicant/Appellant: Solmar (Niagara 2) Inc.  
Subject: Appeal of the Decision of Council on an application  
to demolish or remove a building or structure  
Description: To demolish, remove and alter the property to  
facilitate the development of the proposed  
residential subdivision  
Reference Number: HER-016-2022  
Property Address: 588 Charlotte Street  
Municipality/UT: Niagara-on-the-Lake/Niagara  
OLT Case No.: OLT-23-000497  
OLT Lead Case No.: OLT-23-000494

**Heard:** April 9 – May 16, 2024 and July 29 – August 14,  
2024 (34 days) by Video Hearing, and  
Written Submissions ending August 28, 2024

**APPEARANCES:****Parties**

Solmar (Niagara 2) Inc.  
("Solmar" / "Applicant" / "Appellant")

Town of Niagara-on-the-Lake  
("Town" / "NotL")

Save Our Rand Estate Inc.  
("SORE")

Blair and Brenda McArthur  
("McArthur")

**Counsel**

M. Flowers  
S. Premi  
A. Mannell

N. Smith  
M. Baker  
A. Toumanians

C. Lyons  
C. Jordan

T. Halinski  
D. Neligan

**DECISION DELIVERED BY S. TOUSAW AND W. DANIEL BEST WITH ORDER AND INTERIM ORDER OF THE TRIBUNAL**

---

**[LINK TO ORDER](#)****INTRODUCTION**

[1] Niagara-on-the-Lake is a town with much history, including the former Rand Estate that is recognized for its cultural heritage value or interest ("CHVI") through Town By-laws passed under the *Ontario Heritage Act* ("OHA").

[2] Solmar seeks the approval of alteration and demolition permits under the OHA to facilitate its draft plan of subdivision ("Subdivision") sought under the *Planning Act* ("Act"), along with an associated Official Plan Amendment ("OPA") and Zoning By-law Amendment ("ZBA") under the Act. On an appeal under the Act, the Tribunal sits in place of the Town's authority. Under the OHA, the Tribunal may dismiss an appeal or direct the Town to grant the application, with or without conditions.

[3] The Parties agree that Solmar's lands can achieve housing intensification while conserving its cultural heritage. The differences arise from the Subdivision layout and

the degree of intensification that result from the Parties' various positions on heritage conservation.

[4] At a high level, this Decision sends Solmar "back to the drawing board." More specifically, as articulated in the Order and Interim Order, this Decision:

- approves the OPA which corrects the location of the urban boundary in conformity with the Regional Municipality of Niagara Official Plan, 2014 ("ROP") and the Greenbelt Plan ("Greenbelt");
- grants in principle some, but not all, of the components of the requested heritage permits;
- provides Solmar the opportunity to pursue substantial revisions to the design of the proposed Subdivision related to the Tribunal's findings on cultural heritage, vehicular access, tree protection, and natural heritage; and
- directs alterations to the ZBA that arise from the Subdivision design changes.

[5] The OPA approval is a Final Order. All of the other directives are delivered by an Interim Order. Given the substantial efforts and expenditures of all Parties in this case, and their consensus that some form of development can proceed on the affected lands, the Tribunal will "keep this file alive" through this Interim Decision. It sets directions for next steps in the hope that the Parties can arrive at a final design reflecting this Decision and acceptable to all.

[6] This Decision addresses the need for further studies at a necessarily high level given the many inter-relationships and potential outcomes that will arise for consideration from the Parties' studies, reviews and discussions. As an example, the Tribunal's direction to retain a particular heritage attribute in situ may warrant restoration plans for a related landscape feature along with some commemoration, may affect the street and lot layout, and may affect grading, drainage, and stormwater management

("SWM").

[7] As a caveat, given the length, complexity, number of witnesses and thorough closing submissions in this case, the Tribunal cannot address every area of disagreement raised by these four capable Parties. Directions are given on the main issues based on a focussed rationale.

[8] Further, this Decision addresses multiple, highly technical, and inter-connected issues. Should the incorrect use of a title, term, number, metric, date or name be discovered, such error will not affect the overall directions contained herein.

[9] Compass directions used in this case are based on John Street East being considered to run due east-west.

#### **PURPOSE, PARTIES and PARTICIPANTS**

[10] The "site" consists of 200 John Street East ("John") and 588 Charlotte Street ("Charlotte") – (referenced as "200" and "588"). Solmar appealed the following applications to the Tribunal on the absence of the Town's approval for:

- OPA to correct the location of the site's urban boundary;
- ZBA to permit and regulate residential development;
- Draft Subdivision to create streets, lots and blocks; and
- Heritage Permits to alter or demolish certain cultural heritage attributes.

[11] The statutory Parties are: Solmar, the Applicant/Appellant; and the Town, being the municipal authority.

[12] The added Parties are: SORE, a community entity interested in the conservation



of the Rand Estate; and McArthur, owners of the residential property at 210 John ("210") abutting to the north and east of the site.

[13] Some 11 Participants filed written statements advocating for various elements of good planning, heritage conservation and environmental protection. The Participant statements are largely aligned with the positions of the Town, SORE, and/or McArthur.

[14] The Regional Municipality of Niagara ("Region") and the Niagara Peninsula Conservation Authority ("NPCA") request several conditions ("Conditions") to the Draft Subdivision, to which Solmar agrees.

## EVIDENCE

[15] The Panel heard lengthy and detailed evidence from numerous witnesses, all of whom were qualified to provide opinion evidence in their field of expertise, as displayed below. "Area of Expertise" refers to general subject areas; some witnesses were qualified more specifically in certain fields. A blank/empty cell means no witness was called or the subject was addressed by another witness. An asterisk ("\*") denotes absent witnesses whose untested witness statements remain on the record but go to weight.

Area of Expertise	Solmar	Town	SORE	McArthur
<b>Hydrogeology</b>	David Stephen Davies			
<b>Arboriculture / Ecology / Environmental</b>	Noel Boucher William Buchanan	Michael Ormston-Holloway*	David Stephenson Erin Bannon Jack Richard	Peter Kuntz
<b>Environmental Engineering</b>	Eleni Girma Beyene		Warren Croft	
<b>Cultural Heritage / Planning</b>	Leah Wallace Meaghan Rivard	Denise Horne Marcus Letourneau	Denise Horne	
<b>Cultural Heritage Landscape Architecture /</b>	Timothy McCormick	Michael Ormston-Holloway*	Brendan Stewart	

<b>Planning</b>		Carl Bray*		
<b>Cultural Heritage Architecture</b>			Michael McClelland	
<b>Heritage Structural Engineering</b>	Mark Shoalts			
<b>Archaeology</b>	Kimberley Slocki			
<b>Agrology / Agriculture</b>	Sean Colville		Hugh Fraser	
<b>Urban Design</b>	Catherine Jay		Anne McIlroy	
<b>Civil Engineering</b>	Fedor Tchourkine		Sarah Kurtz Tara Chisholm	
<b>Water Resources Engineering</b>	Koryun Shahbikian		Ron Scheckenberger	
<b>Transportation Planning / Engineering</b>	Stewart Elkins	Timothy Arnott	Greig Bumstead	David Argue
<b>Land Use Planning</b>	Paul Lowes	Ronnald Palmer	Dana Anderson	

[16] The marked Exhibits (“Ex. #”) amount to thousands of pages, including legislation, policies, guidelines, witness statements, studies, reports, photographs and maps. The witnesses and counsel directed the Tribunal to numerous specific pages of particular relevance to the issues.

## **PARTY POSITIONS**

### **Solmar**

[17] Under the Act, Solmar requests the Tribunal to:

- approve the OPA, regardless of the Tribunal’s directions on the other matters;
- approve the ZBA in principle and withhold its final Order for 30 days to enable Solmar and the Town to prepare its final content;
- grant draft plan approval of the Subdivision in principle and withhold its final

Order for 30 days to enable Solmar and the Town to finalize the Conditions;  
and

- not dismiss the appeals if the Tribunal finds the cultural heritage impacts unacceptable where the access street reaches the Pool Garden (the “pinch point”) and enable Solmar to pursue any necessary applications for the west deviation of the panhandle access, and that this Panel be seized should any appeals arise from those applications.

[18] Under the OHA, Solmar requests the Tribunal to find that the following landscape features on 200 are not “surviving elements of the DG landscape” and that consent is not required for their alteration or removal: trees and plantings in the panhandle; trees along the Wall; the Axial Walkway; the Mound Garden; trees adjacent to the Bath Pavilion; and trees within the naturalized area at the Whistle Stop. Should the Tribunal find that such features are “surviving elements of the DG landscape,” Solmar requests the Tribunal to Order the Town to consent to the proposed: removal of trees and plantings for the proposed road and sidewalk through the panhandle; altered alignment of the Axial Walkway; restoration of the Mound Garden in situ; and removal of trees in the vicinity of the Bath Pavilion and the Whistle Stop.

[19] For the proposed access road, Solmar requests the Tribunal to Order the Town to consent to the: removal of portions of the Pool Garden; and widening of the Wall opening at John, including reconstructing the brick pillars. For the broader Subdivision plan, Solmar seeks consent for the: removal of the concrete swimming pool; demolition of the Summer House and the Carriage Pavilion, with documentation and possible salvage and re-use; and relocation of the Bath Pavilion to the north area of the Pool Garden.

[20] On 588, Solmar requests the Tribunal to Order the Town to consent to the: demolition of the Barn/Stable subject to the conditions set out by Ms. Horne; demolition of the two small sheds; relocation of the Dutch Gable Shed and its adaptive re-use

associated with the pumping station; and widening of the Wall opening at Charlotte, including reconstructing the brick pillars.

## **Town**

[21] The Town requests the Tribunal to dismiss the appeals, but to withhold its dismissal Order and afford Solmar six (6) months to redesign the plan based on supporting studies. The Town asks the Tribunal to find that:

- 144 and 176 John Street East ("144/176") be evaluated as adjacent protected heritage properties under the Provincial Policy Statement, 2020 ("PPS") and the Town Official Plan, 2017 ("TOP"), and that all necessary OHA permits be obtained for all development components using 144/176;
- the panhandle not be used as a street;
- the site is a significant cultural heritage landscape ("CHL") under the PPS whether or not it was designed by Dunington-Grubb ("DG");
- the CHL protected by the PPS and the OHA designated attributes be conserved in accordance with Ms. Horne's report, including protecting the context of features and attributes;
- all remaining trees are components of the PPS protected CHL and surviving elements of the DG Landscape, and must be station surveyed and protected by the Tree Protection Zone ("TPZ") or dripline, whichever is greater, and all Subdivision elements be designed around the trees;
- the permitted density range is 14 – 18 u/ha, resulting in 91 – 118 units, with the primary built form being single and semi-detached dwellings, and townhouses are not to detract from the low density built form; and

- the wetland relocation not be permitted.

## **SORE**

[22] SORE supports the Town's requests above, except that it asks the Tribunal to refuse the demolition permits and retain in situ the Summer House on 200, and the Barn/Stable, two Small Sheds, and Dutch Gable Shed on 588.

## **McArthur**

[23] McArthur requests that a road not be permitted on the panhandle for reasons of safety, tree protection, buffering, and cultural heritage, and that the existing wetland not be reduced in size given its extension onto 210 and the effects on trees. McArthur asks the Tribunal to not allow the appeals at this time, in order to provide Solmar the opportunity to implement the Tribunal's directions arising from the positions of the Town, SORE and McArthur.

## **CONTEXTUAL FACTS**

[24] The Tribunal finds that the following contextual facts "set the stage" for the matters at issue.

[25] What is now known as the Rand Estate is located at the southeast corner of John and Charlotte in NotL. It began pre-1900 under different ownership before its purchase circa 1910 by George Rand I, a banker from Buffalo. The Rands occupied and further developed the lands as a country estate. The original Estate was bounded on three sides by a pillared, stone/brick wall ("Wall") along its north (John), west (Charlotte), and south (railway) lot lines. Rand descendants occupied portions of the Estate into the 1990s.

[26] During the mid- to late 1900s, the Rand Estate was divided over time into several parcels. On the west side are numerous dwellings along Weatherstone Court (including

[27] This hearing focusses on the two large parcels behind, or south and east of, all of the above-noted lots. 200 John has 20 metres (“m”) frontage on John via the “panhandle” and 588 Charlotte has 6 m frontage on Charlotte. Together, 200 and 588 comprise the development “site” of 12.3 hectares (“ha”), as displayed on the following image (Ex. 1.4, p. 1015).



[28] In 2022, the Town designated 200 and 588 for their CHVI under the OHA with a separate By-law for each property. The Notices of Intent to Designate (“NOID”) leading to these By-laws were issued mid-2018, which represents the commencement of their heritage protection under the OHA. Solmar had appealed the proposed designations to the (then) Conservation Review Board, but withdrew those appeals with the intention to

apply for permits under the OHA in connection with its Subdivision proposal, all of which is now before the Tribunal.

[29] In 2020, the Town designated 144 and 176 for their CHVI. The Milkhouse and Stables property fronting Weatherstone Court was designated under the OHA in 1988.

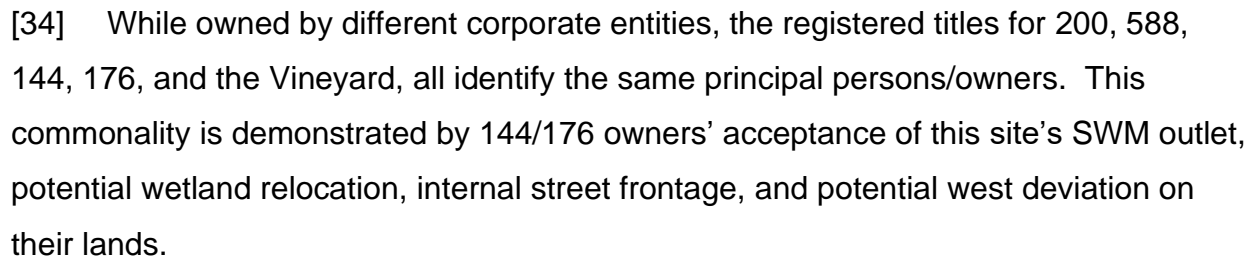
[30] All of the above-noted By-laws are in force and effect, and while the wording differs somewhat, they identify the Rand Estate's CHVI and several heritage attributes, which may be categorized generally as:

- the stone/brick wall with pillars ("Wall");
- extant (i.e., remaining) buildings and structures; and
- the surviving elements of the Dunington-Grubb landscape ("DG" / "DG landscape") associated with these respected, founding members of the Canadian Society of Landscape Architects, who also created the Sheriden Nursery.

[31] The McArthur property at 210, known as Brunswick Place, is listed on the Town's heritage registry but is not designated under the OHA.

[32] The Subdivision proposes a 3.6 ha Block 99 in the Greenbelt, being 3.1 ha of protected specialty crop lands and a 0.5 ha treed area, to be conveyed to, and merged with, Two Sisters Vineyards ("Vineyard") for its continued use as a vineyard.

[33] The net 8.7 ha development area of the site (not including Block 99) is proposed for: detached, semi-detached and townhouse units to a maximum of 196 dwellings; access via private streets and lanes in accordance with a proposed private elements condominium; open space areas including certain heritage structures and landscapes; and a SWM pond; as displayed on the following image (which also displays the panhandle road's possible "west deviation" through 176) (Ex. 2.1, p. 163).



[35] Before delving into more focussed issues, the Tribunal will address certain legal arguments related to what should be considered in this case. Several Court cases and Decisions of the Tribunal (or its predecessors) were cited by the Parties, and each Party focussed on particular sections in support of its position. The Tribunal finds that the cited cases were centred on the specifics of each individual case, and that it need not make observations thereon. Like essentially all cases, the Tribunal's findings in



Solmar's appeals arise from a unique proposal on a unique site (e.g., shape, location, features, opportunities and constraints).

[36] Solmar argues that the reasons for an attribute's designation under the OHA will overlap with issues relevant to a permit request for alteration or demolition (*Neufer, Re, 2005 CarswellOnt 6365, para. 9*). The Town responds that the current OHA makes specific reference to the description of attributes in a designation By-law to assess the potential effects from removal. Whether these are subtle or substantial differences, the Tribunal finds that it has focussed on listed attributes, and in doing so, has necessarily weighed each protected attribute's contribution to the Rand Estate's CHVI.

[37] To Solmar's argument that applicable planning policies must be balanced with heritage considerations when evaluating an OHA permit application, the Tribunal finds, in part based on the Town and SORE's position, that the balancing is more nuanced. The PPS calls for housing intensification while also directing that cultural heritage be conserved. When an OHA permit is sought, the necessary heritage impact assessment ("HIA") need not weigh-in on the many PPS policy areas. Rather, the HIA, focussed on heritage value, becomes a key input to considerations under the PPS arising from applications under the Act. The Tribunal has applied this approach herein.

### **Heritage and Planning**

[38] The fundamental positions of the Parties relate to the scope of the Provincial Policy Statement, 2020 ("PPS") and A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2020 ("GP") on matters of cultural heritage conservation and their alignment with the OHA.

[39] The Tribunal finds on the evidence of Ms. Horne, which aligns with or was not challenged by the other heritage witnesses, that the Rand Estate contributes to NotL's sense of place, both physically – through the visual presence of the Wall and various buildings and structures, and culturally – as an intentionally designed, early country

estate, and later through Calvin Rand's role in establishing the Shaw Festival in NotL.

[40] The Parties agree that the Act, PPS and GP support residential intensification to address the need for housing while utilizing land and infrastructure efficiently. At issue are the related cultural heritage policies of the PPS as follows (emphasis added).

1.7.1 Long-term economic prosperity should be supported by:

...

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

...

2.6.1 Significant built heritage resources and significant cultural heritage landscapes shall be conserved.

...

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.

[41] The PPS definitions include:

Built heritage resource: means a building, structure, monument, installation or any manufactured or constructed part or remnant that contributes to a property's cultural heritage value or interest as identified by a community, including an Indigenous community. Built heritage resources are located on property that may be designated under Parts IV or V of the Ontario Heritage Act, or that may be included on local, provincial, federal and/or international registers.

Conserved: means the identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment that has been approved, accepted or adopted by the relevant planning authority and/or decision maker. Mitigative measures and/or alternative development approaches can be included in these plans and assessments.

Cultural heritage landscape: means a defined geographical area that may have been modified by human activity and is identified as having cultural heritage value or interest by a community, including an Indigenous community. 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. Cultural heritage landscapes may be properties that have been determined to have cultural heritage value or interest under the *Ontario Heritage Act*, or have been included on federal and/or international registers, and/or protected through official plan, zoning by-law, or other land use planning mechanisms.

Adjacent lands: means

...

d) for the purposes of policy 2.6.3, those lands contiguous to a *protected heritage property* or as otherwise defined in the municipal official plan.

[42] The GP reads similarly:

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*.

[43] Common to the foregoing policies are references to cultural heritage value or interest (“CHVI”) under the OHA. The By-laws designating 200 and 588 under the OHA include a “Statement of CHVI” that references “a larger significant cultural heritage landscape that includes all the grounds of the original estate” (Ex. 1.1, p. 1047 and p. 1052). The By-laws also list the specific heritage attributes that represent and display the properties’ CHVI.

[44] The cultural heritage experts’ Agreed Facts partly answer this question of the PPS use of the term “cultural heritage landscape.” They agree that “elements of the subject properties are parts of cultural heritage landscapes as defined in the Provincial Policy Statement (2020)” (Ex. 1.8, p. 1018). The Tribunal views this statement as agreement that cultural heritage landscapes exist on this site, even though “elements” could be read as referring to attributes. To complete the question, the Tribunal accepts the Town’s position that all heritage experts, through their oral evidence, agree that the site’s designed landscape constitutes a CHL under the PPS.

[45] While Solmar has focussed on the specific attributes to be affected by its development, the Tribunal accepts the Town and SORE’s contention that heritage protection extends to the landscape, setting and inter-relationships of attributes, which combined, comprise the CHVI protected by the PPS and GP. The Tribunal accepts the

evidence of Ms. Horne, Dr. Letourneau, Mr. Stewart and Mr. McClelland that the CHVI to be conserved includes trees and vegetation, outdoor rooms, axial lines, and the relationship, connections and views from one feature to another. These CHVIs must be thoroughly considered and addressed when evaluating heritage permit applications, and when assessing a development proposal's consistency with the PPS and conformity with the GP. The Tribunal finds that this site reflects and meets the PPS definition of "cultural heritage landscape:"

... *Cultural heritage landscapes* may be properties that have been determined to have cultural heritage value or interest under the *Ontario Heritage Act* ...

[46] The Tribunal also finds in favour of the Town and SORE on their contention that the whole can exceed the sum of its parts. The Rand Estate is protected by the four By-laws' articulation of CHVI and heritage attributes. In addition to buildings, these include the outdoor setting of certain natural features and surviving elements of the DG landscape. In addition, effects on heritage attributes can result from the proposed surroundings of those attributes, such that context and setting must also factor into heritage conservation.

[47] The Tribunal accepts Ms. Jay's evidence that the Subdivision design evolved through public and agency input, including regarding cultural heritage. However, Ms. Wallace confirmed that Solmar provided the Subdivision design and that her role was to assess and mitigate its impacts to cultural heritage, not to inform the overall Subdivision design. The Tribunal accepts Mr. McClelland's opinion that Ms. Wallace's HIA is absent a review of possible options for those heritage attributes intended to be removed or demolished. As an example observed by the Tribunal, Ms. Wallace highlighted the Bath Pavilion as her "favourite attribute" on the site, yet accepted its proposed extraction from its original, intended setting to a much closer, convenient location at the Pool Garden. As a key attribute on 200, the Tribunal finds that a thorough review of possible retention in situ is notably absent in Ms. Wallace's evidence.

[48] Two other deficiencies arise from Ms. Wallace's written evidence and testimony.

A HIA was not prepared to assess the impacts of the required SWM outlet and the proposed replacement wetland on the OHA designated property at 144. There is also a relative absence of meaningful HIAs for 144 and 176 as necessitated by PPS s. 2.6.3 to evaluate the effects of this development on adjacent protected heritage property, especially given that 144 and 176 are implicated to facilitate this site's development. This proposed Subdivision on 200 and 588 cannot proceed without SWM and a replacement wetland. Those features warrant a HIA and may require a permit under the OHA. The Tribunal agrees with the Town and SORE that such fundamental infrastructure warrants reasonable confirmation at the time of draft approval. Such assurance has not been achieved here.

[49] Solmar argues that the use of 144 may not require a OHA permit if the alteration is not likely to affect the property's heritage attributes, per OHA s. 33 and 34. However, the designation By-law for 144 includes in its list of heritage attributes that represent the CHVI: "the mature trees and plantings ..." (Ex. 1.1, p. 1037). The Tribunal cannot envision that the removal of numerous mature trees for the proposed wetland would not affect 144's heritage attributes.

[50] Solmar is correct that conservation includes mitigation and commemoration. While the PPS definition of "conserved" includes "mitigative measures," the Tribunal accepts generally, and for the Rand Estate specifically, that demolition of an attribute, with its CHVI retained only through commemoration, is a last resort. The goal or aim of heritage conservation is to retain attributes and landscapes that "tell the story" by their very existence. The Tribunal finds that preservation is the goal, against which other conservation options may be weighed on a case by case, and attribute by attribute, basis.

[51] The ROP and TOP exemplify this focus on preservation within the Region and the Town:

ROP Objective 4.G.1.7: Promote the preservation and enhancement of cultural heritage resources.

TOP 18.4(2): It shall be the policy of Council to encourage the preservation of buildings and sites having historical and/or architectural values.

[52] As offered or agreed to by several witnesses, the sustainable conservation of heritage resources over the long term requires a wholistic, viable approach that balances heritage, planning and economic factors. The Tribunal accepts Ms. Horne's practical and thorough approach to assessing heritage attributes by their "effect on the whole" cultural heritage landscape, including considerations of current condition, effects on other features, related challenges, and the weight to be assigned. As such, the Tribunal will direct that most of the character-defining elements will be preserved and rehabilitated/re-used, in situ where reasonable, or relocated where warranted, and that the Summer Pavilion and Barn/Stable may be removed.

[53] With the Tribunal's findings on the relevance of cultural heritage landscapes, it will refuse Solmar's request that certain features are not surviving elements of the DG landscape, or in the alternative, that certain trees and plantings are permitted for removal. The Tribunal finds that the setting and surroundings of listed heritage attributes are also protected as cultural heritage landscapes, even if they have not been materially proven as DG elements. This inter-connection – of the CHVI and attributes under the OHA, and the CHL under the PPS – leads to the Tribunal finding that each attribute and its CHL warrant full review when considering permit applications required to facilitate development.

[54] Each attribute is reviewed below. With the Tribunal issuing an Interim Order on these heritage appeals, it directs Solmar, in consultation with the other Parties, to conduct further studies that will result in changes to the proposed Subdivision layout and related draft Conditions. In the event that other minor heritage adjustments may result from the necessary design changes, the Tribunal will not issue a Final Decision on the heritage permits until the draft Subdivision plan is finalized. These directions will also inform Solmar's necessary commemoration plans.

#### DG Landscape

[55] All agree that the Sunken Garden centred on 176 and the Pool Garden on 200 are DG landscape elements by virtue of the known DG plans that directed and inspired their creation.

[56] While Solmar is correct that elements such as the Tea Pavilion setting or the Mound Garden are not “proven” DG elements, the Tribunal accepts Mr. Stewart’s evidence on the likelihood of DG involvement with many of the landscape elements on this site. In support of DG’s role are records of site visits, various billing periods, the selection and arrangement of planted species, purchases from Sheridan Nursery, and the presence of features on this site from known DG designs in other communities. DG themselves wrote that “plans are not always drawn out on paper” (Ex. 3.1, p. 81).

[57] Nevertheless, the Tribunal need not rely on this “probable” connection with DG, having found that several attributes, addressed separately below, will be directed for conservation in situ for other reasons. The CHL comprises outdoor rooms, with or without heritage buildings, and the views and connections between them. It is obvious on this site today, and visible on previous aerial photography, that these features were established intentionally by the Rands and warrant full consideration of retention and restoration in situ.

### Pool Garden

[58] The Pool Garden attribute, reflecting DG’s 1928 plan, includes the Tea Pavilion, Pool area and Gazebo. The Tribunal directs that it remain in situ without being crossed or flanked by a new street. This substantial heritage feature exemplifies all of the heritage attributes articulated by the numerous heritage experts: a key element of the Rand Estate; a destination outdoor room; designed by DG; connected by paths and views to the Bath Pavilion, Mound, and Axial Walkway; and largely intact. Its retention and rehabilitation will include substantial repair, rebuilding, and replanting to reflect the DG design, while commemorating the pool by suitable means.

[59] The Tribunal finds that the mere presence of a road through a portion of the Pool Garden, whether set back 2, 4 or 6 metres (“m”) from 210 for tree protection purposes, is unacceptable. Ms. Wallace for Solmar opined in chief that the road options to the east of the Pool Garden are “a serious issue” and that the west deviation is the “preferred scenario for heritage conservation.” As opined by Mr. Stewart, the proposed street through this pinch point, any distance from the 210 lot line, would reduce or eliminate this outdoor room’s structure, topography, view and function, including the safety and enjoyment of its users.

[60] The Tribunal finds that, although altered by a driveway through the Pergola in the 1990s, this outdoor room warrants full restoration and protection without a busy local road immediately beside or through it bringing regular, if not relatively constant, vehicular traffic. The Tribunal’s finding also enables the full protection of boundary Tree 34B and nearby border trees on 210.

[61] The Tribunal endorses the recommendation of Ms. Horne that the pool be commemorated with a shallow reflecting pool and subordinate, appropriately placed written/pictorial commemoration that does not detract from this entire outdoor room.

[62] The removal of the access road’s pinch point on the panhandle necessitates another access solution, whether that be the west deviation or a different access location. Those possibilities are reviewed under Primary Access below.

### Bath Pavilion

[63] The Tribunal finds that the Bath Pavilion is to be retained and conserved in situ and connected to the Pool Garden over an expanded park block to encompass both features. This same park block could extend easterly to include the wetland area located from near the Bath Pavilion to the Greenbelt boundary, as addressed later.

[64] The Tribunal prefers the evidence of Ms. Horne that the Bath Pavilion was intentionally sited away from the Pool Garden within an arboretum-like landscape. Its



secluded, folly design includes columns reflective of the Pool Garden structures. Mr. McClelland explains that a folly is an ornamental building in a garden setting, here backdropped by planted trees.

### Mound Garden

[65] The Tribunal finds in favour of Solmar's plan to retain the Mound Garden in situ and refurbish it with suitable plantings, pathways and possible seating. The size of the Mound Garden should reflect its original diameter.

[66] On the evidence of Mr. Stewart that it is "highly likely that the Mound was designed by DG," the Tribunal finds that the Mound's location, design and selected tree species constitute a node or outdoor room either designed by DG or substantially influenced by DG's practices and recommendations. Either way, the Tribunal finds that the Mound is a heritage attribute, being a surviving element of the DG landscape. As opined by Ms. Horne, its layout and tree species reflect DG elements and preferences evident on the Rand Estate and other estate properties designed by DG.

[67] If the above findings were proven incorrect or unacceptable, the Tribunal also relies on its finding that this feature is a contributing component of the CHVI of the Rand Estate and, therefore, worthy of protection and restoration to achieve consistency with the PPS. Mr. Stewart opined that the Mound's raised elevation planted with Hemlock trees, its inside circular walkway, and its perimeter of Austrian Pine, provided a visual destination when arriving at the Rand Estate by train.

[68] While recognizing the issues raised with re-using certain species, e.g., Austrian Pine, the Tribunal will not delve into such detail and will leave such determination to Solmar and the Town's tree and heritage experts. The refurbishment will also warrant attention to grading based on the surrounding elevations in the Subdivision plan.

### Whistle Stop

[69] Solmar proposes to restore and re-establish the Whistle Stop and its wooden Gazebo in situ. At issue is the extent, protection and replanting of the associated treed area.

[70] The Parties agree that the Whistle Stop is a protected heritage attribute that will be preserved and rehabilitated through Wall maintenance and the reconstruction of the Gazebo and its stone perimeter “bench.” The extent of the treed area remains at issue and is addressed later in this Decision.

[71] The Tribunal underscores the evidence of Mr. Stewart on the connections between the Whistle Stop and the Axial Walkway. Of significance is that the Wall curves to provide an opening and gate that is perpendicular to the Walk, i.e., it faces the Walk directly, not at the angle of the south Wall itself, such that it “points the way” to the Walk. Similarly, as one approaches from the north, the Wall opening welcomes your arrival. As one arrives by train (now the Heritage Trail), the opening directs you northward onto the Axial Walkway to Randwood.

[72] Contributing to the Tribunal’s findings on the Axial Walkway below, Mr. Stewart enlightened the Tribunal with the Whistle Stop exemplifying the layers of CHVI that include design, nodes, surroundings and connections. This clearly intentional connection takes one back to NotL as a summer destination associated with Buffalo and reached via rail.

#### Axial Walkway (“Walk”)

[73] The Tribunal finds that it cannot support Solmar’s Subdivision plan that proposes to re-align the Walk some 11 m to the east of its original pathway.

[74] Mr. McCormick for Solmar opines that re-establishing the Walk is a suitable, if not generous, commemoration given that rail service ceased in 1926, little of the Walk was apparent by 1950, and no evidence confirms that the Walk is a DG feature. The Subdivision will return a feature to the site as close as possible to the original feature,

as supported by the Standards and Guidelines for the Conservation of Historic Places in Canada (“S&G”).

[75] The Tribunal prefers the evidence of Ms. Horne and Mr. Stewart that the story can be better told by a Subdivision design that respects this fundamental axial alignment that visually, spatially, and functionally connects nodes. The Walk was and is a central organizing feature of the Rand Estate that historically connects it with Buffalo via rail.

[76] The Tribunal considers the Walk a fundamental element of the site’s CHVI, which, while now missing its middle section, is visibly marked by the Whistle Stop opening to the south, the Mound Garden enroute, and beside the Pool Garden to the north, leading on to Randwood. A grassed or gravel path, will, of course, disappear over time, but the Tribunal considers it to “exist” today by virtue of the elements that it connects. Those elements clearly point and direct a user to and along the Walk.

[77] The Subdivision plan requires a re-design to place the Walk in its original alignment. Consideration is warranted of Ms. McIlroy’s recommendation to widen the Walk corridor and/or set the dwellings further back to avoid a visual “canyon effect” along the Walk.

#### Wall and Pillars (“Wall”)

[78] Solmar intends to retain and refurbish the Wall, except for the requested wider openings for a primary access at John and an emergency access at Charlotte. Based on the Access findings later in this Decision, the Tribunal will not grant the request for a wider Wall opening at 200 John, and will await further access studies and the Town Fire Chief’s position for a potential emergency access at 588 Charlotte.

[79] Protection of the Wall can be achieved through the site’s necessary plans for trees, grading, drainage and building envelopes. Along the south side of the site, the section of Wall on each abutting lot should not be under private ownership. The long-

term protection and maintenance of this key attribute will be better achieved as a common element in Solmar's intended condominium plan.

### Carriage House

[80] The Tribunal directs that the Carriage House be retained in situ given its heritage qualities and strong potential for adaptive re-use.

[81] Ms. Wallace and Ms. Rivard consider the previous consent under the Act to have separated the Carriage House from Randwood, resulting in its lost context. Ms. Wallace notes it was an accessory building to Randwood and lacks heritage design and value, in part by its current condition. Mr. Shoalts opines that the necessary repairs raise valid questions of viability without a known proposed use, but also concedes that its open ground floor carries potential as a gathering space.

[82] The Tribunal prefers the opinions of Ms. Horne, Dr. Letourneau and Mr. McClelland to retain the Carriage House in situ. They emphasize its spatial and functional connection with Randwood and the many options for its re-use, including a dwelling(s), community centre, meeting space, or office. Its roof, window pattern, and door openings display the features common to the Rand Estate, including as reflected in the Dutch Gable Shed to be retained. Those features are articulated as heritage attributes of the Carriage House in the OHA designation By-law for 200.

[83] Many potential re-uses for the Carriage House are available for Solmar's consideration. Mr. McClelland's reference to the former upper apartment unit for Rand Estate workers raises the option of rental apartments on the second floor to assist the viability of perhaps a community use on the main floor. The Tribunal also notes that a rental gathering space could be well-used by a future hotel on 144/176.

[84] The Tribunal directs that the Carriage House be retained in situ and accommodated by a suitable lot design for access, views, and commemorative tree/shrub plantings.

### Summer House

[85] The Tribunal will direct the Town, via a Final Order in due course, to grant Solmar's permit to remove the Calvin Rand Summer House, subject to appropriate plans for commemoration.

[86] This finding aligns with the Town's position and the recommendation of Ms. Horne. Mr. McClelland and Mr. Stewart for SORE recommend its retention, repair and re-use as a dwelling given its association with, and reflection of, other buildings on the Rand Estate. Mr. McClelland emphasizes the Summer House's long association with the Rand Estate, from 1920 when built until the death of Calvin Rand III when 200 was sold to Solmar. However, they do acknowledge that a large expansion was completed in 1970, the presence of groundwater is problematic and has deteriorated the floor structure, it suffered a fire in the late 1990s resulting in alterations, and Calvin Rand resided in Randwood when the Shaw Festival was created.

[87] Of assistance to the Tribunal, is that the heritage witnesses acknowledge that the Summer House is not a landmark because it is not visible from the public realm. The issues and considerations noted above lead the Tribunal to find that features on the Rand Estate more directly associated with Randwood are worthy of greater protection than later additions to the site. For example, one result is the Tribunal's finding to retain the Carriage House, while allowing the Summer House to be removed and commemorated.

[88] SORE's concept plan displays a reasonable approach to retaining the Summer House. The Tribunal will simply encourage Solmar to fully consider such option, including if only the original, smaller Summer House were retained and re-used in a complementary manner with the Carriage House.

### Barn and Stables ("Barn/Stable")

[89] The grouping of buildings at the Barn/Stable on 588 includes: the original barn

with several subsequent residential alterations and extensions; and three outbuildings, one being the Dutch Gable Shed.

[90] The Tribunal finds that the Barn/Stable may be demolished. On SORE's argument that building condition should not be considered when contemplating conservation, the Tribunal finds that a series of factors, somewhat related to condition, do validly enter for consideration of the requested OHA permit: the extensive building additions added over time, not for agricultural use but for its residential function; the hydrocarbon contamination of soil beside and potentially under the structure; groundwater in the basement; and its odd "zig-zag" shape unrelated to its original purpose for housing farm animals. In addition, like the Summer House, the Barn/Stable is not a landmark, being not visible from public spaces.

[91] Again, SORE's concept plan displays how these buildings can remain in situ while enabling intensification. However, this building cluster is relatively centred on 588, consuming a sizable area for the elongated dwelling and its necessary greenspace and adjacent street. As noted earlier, under the PPS there is a balance to consider between heritage conservation and residential intensification. Here, the Tribunal finds that the balance tips towards intensification. Many features and attributes will be conserved on the Rand Estate which the Tribunal finds will preserve its CHVI, even in the absence of the Barn/Stable.

[92] Solmar is encouraged to relocate and utilize the two small sheds accessory to a greenspace or modified for a playground, but the Tribunal is prepared to direct the Town to grant the requested permit for demolition.

[93] The Tribunal finds in favour of Solmar's proposal to relocate, restore and reuse the Dutch Gable Shed accessory to onsite infrastructure for sanitary sewage. The Town will be directed to grant the necessary heritage permit via a Final Order in due course.

## Access

### Primary Access

[94] Primary vehicular access to John is a fundamental issue in this case.

[95] Solmar proposes a street through the panhandle to connect the internal Subdivision street layout with John, a Collector Road. The other Parties ask that Solmar's draft plan not be approved because this access: is substandard and not safe; negatively affects 210 (McArthur); results in unstudied heritage impacts to both 200 and 176; and McArthur has not granted consent to injure or remove boundary trees.

[96] The Tribunal accepts the opposing Parties' positions. The Tribunal will not approve the proposed draft Subdivision and will provide Solmar with an opportunity to find another access solution, which may, in all likelihood, involve a shared access to John through 144/176 for both a potential future hotel and this Subdivision.

[97] Solmar advanced a reasonable argument that the concept of "feasibility" is a general test for assessing the granting of draft plan approval, and that technical matters can be addressed through Conditions, the details of which are covered by various authorities and the Tribunal need not delve into. However, in accord with the cases cited by Solmar, the Tribunal must determine whether "the instruments represent good planning" (*Kimvar Enterprises Inc. v. Simcoe (County)*, 2007 CarswellOnt 8320, 58 O.M.B.R. 426, para. [58]). Through such consideration, the Tribunal finds here that degrees of feasibility may exist. In this case, the site's vehicular access points will necessarily involve the clearance of Conditions by the Town. However, the potential emergency access has not been confirmed as acceptable by the Town's Fire Chief, and the Town's engineering representative in this case does not approve of the main intersection at John. In such circumstance, feasibility is highly suspect and thus the Tribunal cannot find that the Subdivision represents good planning.

### *Safety*

[98] Section 51(24) of the Act requires that:

In considering a draft plan of subdivision, regard shall be had ... to the ... safety ... of the present and future inhabitants of the municipality and to ...

- (e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;

[99] For the panhandle-John intersection, Mr. Elkins for Solmar recommends a west-side 9 m curb radius for the Subdivision entrance lane, and an east-side 4.5 m curb radius for the Subdivision exit lane. He opines that 4.5 m is necessary and appropriate given the proximity of 210's driveway to the east, is safe for the exiting of vehicles travelling east, will not unduly affect 210, and aligns with various guidelines.

[100] Mr. Elkins considers the panhandle access an "apartment or multi-family driveway" under the Town's Municipal Engineering Standards guideline ("MES") based on the "Commercial/Industrial" classification of driveway stating that "it shall also include apartments or multi-family dwellings where six or more separate self-contained dwelling units are proposed." Mr. Elkins also relies on the Ontario Traffic Manual ("OTM") that recommends a 4 to 6 m radius for local streets, resulting in the common and acceptable practice of emergency and other large vehicles crossing into the oncoming lane when exiting to the right.

[101] The other transportation witnesses disagree. Mr. Argue for McArthur is a transportation engineer with extensive experience designing intersections. Mr. Argue opines that an apartment building with six or more units does not reasonably equate with a Subdivision for 196 dwellings. John has a narrow width of 7 m despite serving as a Collector Road, and narrow roads necessitate a larger radius to avoid or minimize interruptions with oncoming traffic.

[102] Mr. Argue, Mr. Bumstead and Mr. Arnott recommend that the intersection warrants an east-side 9 m radius, which cannot be accommodated given the proximity to the McArthur west driveway. Their reference to s. "3. Roads" of the Town's MES



indicates that “road classification ... shall be subject to the approval of the Town Engineer” and sets the minimum curb radius of 9 m for a local road intersecting with a Collector Road. Mr. Bumstead observes that the plan utilizes 9 m radii within the Subdivision but not at its sole exit point onto John.

[103] The Transportation Association of Canada (“TAC”) guideline calls for a centre-to-centre 15 m separation between a Collector crossroad and the nearest driveway, whereas this proposed road would leave only an 8.5 m separation. To Mr. Elkins’ opinion that the tighter radius will slow exiting vehicles and thus enhance pedestrian safety, the opposing experts advise that vehicle speed is not relevant because this access street would be a STOP intersection.

[104] The Tribunal finds that interpreting the panhandle street as a driveway is faulty for two reasons. First, the panhandle access is a street on a proposed plan of Subdivision for up to 196 lots. Such street will be owned privately by the condominium corporation, but regardless of ownership, it will appear, function and serve as a street, providing access to each lot, park, and possibly to the hotel lands where the proposed internal street abuts 144/176. The Subdivision owner/occupants will generate one vehicle every minute on the panhandle during the morning peak hour. The existing lane on the panhandle that serves the Summer House on 200 is a driveway. The Subdivision necessitates a street. The consent application in the 1990s, that created 200 as a separate lot with a driveway to John, does not mean that the panhandle is capable of servicing an entire Subdivision.

[105] Second, the Tribunal notes that the MES relied upon by Mr. Elkins for “driveway” contains a caveat: “as determined by the Works Superintendent or his designate.” Granted, this caveat precedes the sentence pertaining to apartments, but it is reasonable to presume that Town staff or its designate may also determine the applicability of this category to an apartment. Why would commercial/industrial assessments be conditioned by Town review, but not apartments within the same clause? Mr. Arnott is the Town’s designate here, and he advises that the driveway

standards are unacceptable. The Tribunal agrees that this “driveway” guideline should not be applied to this Subdivision.

[106] Solmar helpfully submitted that it is not asking the Tribunal for approval of a particular radius, but rather that the intersection be found feasible such that a final design can be established with the Town engineer. However, the Tribunal finds that while the intersection may be possible, its adequacy per the Act s. 51(24)(e) regarding “safety” has not been established to warrant draft approval.

[107] A development of this size will attract service and delivery vehicles on a regular basis that are larger than a private automobile. Many of those vehicles will necessarily cross into the oncoming lane when exiting east onto John. John is a well-used Collector Road, as evidenced by the capacity studies warranted at its intersection with the Niagara River Parkway nearby to the east.

[108] The Tribunal finds Solmar’s use of the 9 m inbound radius to further discredit the use of a 4.5 m outbound radius. The interesting, if not unacceptable, result is that outbound vehicles would cross the centre line on a Collector Road more frequently than the inbound vehicles would cross the centre line on a Local Street.

[109] The Tribunal finds, pursuant to s. 51(24)(e) of the Act, that it cannot grant draft plan approval having had regard for the safety of the Town’s present and future inhabitants related to the proposed Subdivision’s linkage with the established highway system.

### *Trees and Heritage*

[110] Related to the Pool Garden findings above, the Tribunal finds that the pinch point of the access road at the Pool Garden is not acceptable given that the necessary TPZ cannot be assured without unacceptable loss of the Pool Garden’s CHVI (i.e., shifting the street further west into the Pool Garden). Solmar proffered that the west deviation, crossing the rear corner of 176, would resolve the pinch point issues and provide a

feasible solution, subject to acquisition and necessary approvals. However, the Tribunal's findings on the panhandle street's safety issues at John apply equally to the west deviation. Without the panhandle access at John, the west deviation is not needed.

[111] The proposed panhandle street raises other natural and cultural heritage issues. The 11.5 m width of the street with sidewalk, plus the wider construction area and necessary grading, would consume more than half the panhandle's 20 m width, and require removing approximately half of the trees in the panhandle, some older than 100 years. The ecology experts agree that the site contains "potential habitat for species at risk bats" and that Solmar will "undertake additional engagement with MECP to ensure compliance with the *Endangered Species Act*" ("ESA") (Ex. 1.8, p. 1015). SORE's arborist/ecologist and planner opine that further study is warranted now to confirm whether endangered bat habitat exists that must be protected or mitigated through the subdivision design.

[112] As explained earlier in this Decision, the Tribunal finds that heritage conservation extends to and includes the CHL under the PPS, including through the OHA By-laws' descriptions of CHVI. Accordingly, the Tribunal accepts the evidence and arguments that the CHVI and CHL of 176 and 200 have not been sufficiently evaluated to warrant using the panhandle for an access street. 210 merits some consideration as well, given that it is listed on the Town's heritage registry and is recognized in the Town's 2018 Estate Lots Study. The trees in the panhandle contribute to the CHL of both this site and 176, as well as provide a natural buffer between this site and 210.

[113] Mr. Stewart explains that the Sunken Garden designed by DG, being mostly on 176, also includes elements on 200, being the extant curvilinear drive/lane and the treed landscape setting and backdrop. The oval drive/lane is said to have predated DG's design, but clearly it was considered and incorporated into the Sunken Garden. Ms. Horne perceives the lot line as artificial because the heritage landscape traverses both sides. These attributes and their park-like setting would be substantially altered by a

new street without justification through a full evaluation in advance by a HIA for these features on both 200 and 176.

[114] The Tribunal finds that Solmar's proposed access road has not been shown to adequately: conserve the Pool Garden; be feasible via the west deviation; conserve the treed CHL and potential habitat for species at risk bats; and conserve the CHVI and the CHL associated with Randwood and the Sunken Garden on 176, and the Sunken Garden elements and setting on 200.

#### *Alternative Access*

[115] The Solmar witnesses advocate for the street on the panhandle, leaving the hotel proposal to address its own access in due course. The Town, SORE and McArthur advance the proposition that other options must be studied, with the likelihood of finding a more comprehensive plan for both this Subdivision and the hotel that is more conducive to safety and natural and heritage conservation. The emphasized option is to study a shared access through 144/176 for both a hotel and this Subdivision. If Charlotte does not become the emergency access, it too could be considered through 144/176.

[116] The Tribunal accepts Mr. Lowes' opinion that access through the Greenbelt's protected specialty cropland should be avoided or be a last resort.

[117] The Tribunal accepts the McArthur argument that the properties' different ownership is a "convenient fiction." Solmar proposes, with implied acceptance by the owner of 144/176, to use off-site lands for a SWM outlet, relocated wetland, and the west deviation. In addition, the internal street network in the proposed Subdivision abuts, and enables potential access to, 144/176, and the site's Greenbelt lands are already an operating vineyard associated with the abutting Vineyard to the east. And yet, Solmar or the 144/176 owner, appears to refuse contemplating a shared access to John.

[118] The Tribunal accepts that no policy expressly requires comprehensive planning for this site with 144/176. However, given the Tribunal's findings in this Decision, a more collective planning approach appears to be the only option. The Tribunal cannot direct Solmar to study, evaluate, and return with a coordinated approach. The Tribunal will, however, allow time for Solmar's consideration and possible pursuit of more comprehensive planning. Failing such, the Tribunal will deny these appeals and close the file.

[119] A rare opportunity exists here. The remnants of the Rand Estate on 144, 176, 200 and 288 are under the control of related companies. These lands carry obvious potential for a hotel and residential development that would benefit from and conserve the CHVI for the long-term. Using just one example, the Tribunal imagines the attraction to hotel patrons, Subdivision occupants, and the public at large if the DG Sunken Garden and its full CHL were retained and re-established in the absence of an intervening lot line.

#### Emergency Access

[120] On the evidence of Mr. Tchourkine and Mr. Elkins, Solmar proposes that emergency access to the site will be located at 588's frontage on Charlotte. Solmar offers no other solution at this time should the Charlotte entrance not be possible.

[121] Somewhat like 200, 588's access to a street is via a relatively narrow panhandle leading to its 8 m angled frontage on Charlotte. This location brings with it the obstacles of: necessary turning radii from the south on Charlotte; a possible boundary Tree 81 on the Town's lot line for the Heritage Trail; and the TPZ of Trees 79 and 80 where 588's panhandle widens.

[122] If the Horse Chestnut Tree 81 is a boundary tree, the Town's consent will be necessary for its injury or removal.

[123] The Town and SORE's witnesses opine that the White Oak Trees 79 and 80

warrant full protection.

[124] Mr. Buchanan for Solmar considers the possible 0.5 m intrusion into the TPZ for these trees to be acceptable, in part given their health despite the existing driveway on 588 and nearby houses on Weatherstone. Mr. Tchourkine opines that the full dripline TPZ can be achieved if the access is reduced to 5 m wide in this area, again subject to the Fire Chief's approval.

[125] Emergency access is mandated by the Ontario Building Code. Given the unknowns on the legal and functional potential of the proposed emergency access, the Tribunal directs Solmar to pursue the necessary studies and approvals to confirm its permission, including from the Town for tree protection, grading and the Fire Chief's approval. Failing such, emergency access will represent a further issue for Solmar's potential pursuit of a shared primary access.

#### Parkway Intersection

[126] The Parkway intersection refers to the intersection less than 1 km to the east of the site where four roads meet: under the authority of NotL – John Street East, Ricardo Street and Queen's Parade; and under the authority of the Niagara Parks Commission – the Niagara River Parkway. This intersection is at capacity on summer weekends.

[127] Solmar opposes the Town's proposed Conditions that would require Solmar to fully fund a study to determine necessary improvements to this intersection, and to disallow occupancy of the Subdivision until the improvements are constructed. Mr. Arnott for the Town opines that this intersection continues to function today and that approximately 75% of the traffic to be added arises from this site and the proposed hotel. He offers that the post-study, intersection improvement costs would be apportioned based on use.

[128] The Tribunal finds that the Condition sought by the Town applies to a wider source of impacts to this intersection than this site alone. The intersection is said to

experience its capacity limits on certain days of the year. Those demands come from across NotL and beyond. The Niagara River Parkway extends southerly for several kilometres to the City of Niagara Falls and on to the Town of Fort Erie further south.

[129] The Tribunal refers this issue back to Solmar and the Town to address, should the revised Subdivision be returning to the Tribunal for draft approval. The Tribunal directs that a Condition, if continued to be sought by the Town, address cost sharing for the study amongst the beneficiaries, including the road authorities and Solmar, and that reasonable portions of the Subdivision be enabled to proceed before the intersection improvements are constructed.

## **NATURAL HERITAGE**

### **Trees**

[130] As found under the cultural heritage analysis above, the remaining trees on this site, and in particular, the groupings of those trees as components or backdrops to the Rand Estate's outdoor rooms, are part of the CHL to be conserved under the PPS, and contribute to the CHVI under this site's heritage designation By-laws. The TOP s. 6.33 directs that:

... existing trees must not be unnecessarily removed and that wherever possible existing trees should be preserved and protected.

[131] The Tribunal finds that the site's remaining mature trees help define the Rand Estate as a cultural landmark in NotL and will enhance the landscape and views for the site's future residents. Impacts to those trees, and the cultural heritage outdoor rooms they create or contribute to, should be minimized, including through the assessment of a potential shared access through 144/176. A shared access, for both this site and a possible future hotel, will affect fewer trees and their CHVI, as compared to this site and a hotel each having its own main access.

[132] The Tribunal accepts the Town, SORE, and McArthur's position that a Tree Preservation Plan ("TPP"), coordinated with grading and drainage plans, is required to inform the design of the Subdivision. Areas warranting further study and related TPZs include: the panhandle and its potential endangered bat habitat; border trees on 210 adjacent to its south lot line; trees in the vicinity of the Bath Pavilion; trees within the wetland; the small woodland at the Whistle Stop; Tree 81 at Charlotte; Trees 79 and 80; and trees along the Wall. The border and boundary trees in the vicinity of the Pool Garden, including Tree 34B, warrant protection through the necessary restoration plans of the Pool Garden, including the Pergola.

### **Wetland**

[133] The site includes a treed wetland along its shared lot line with 210, from east of the Bath Pavilion to the site's east limit of proposed Block 99 in the Greenbelt. The treed wetland extends onto 210 somewhat, although its extent has not been staked. Solmar proposes to remove approximately two-thirds of the wetland, being its portion located within the built boundary, to enable four or five additional lots for detached dwellings. One-third of the wetland, being that portion located in the Greenbelt, would remain, with a 5 m buffer at the rear of the two closest lots.

[134] Subject to approval from the NPCA, a replacement wetland would be established to the west of One Mile Creek on 144. As noted earlier in this Decision, such alteration to the cultural heritage landscape would require a HIA and a possible permit under the OHA.

[135] Solmar relies on NPCA advising that no formal evaluation is required, and argues that it does not meet the Greenbelt criteria for a Key Natural Heritage Feature ("KNHF"). Mr. Lowes explains that the Greenbelt buffer of 30 m around natural features does not apply within the settlement area, as it is not in the Greenbelt, and makes the 5 m buffer sufficient.



[136] The Town, SORE, and McArthur oppose the removal and relocation of the wetland given the absence of confirmation that the removal will not negatively affect the remaining wetland and trees, both in the Greenbelt and on 210. Further, on the issue of a connection with the aquifer, they posit that Mr. Davies for Solmar acknowledges that sandy seams could provide conduits between the wetland and the aquifer. Mr. Stephenson and Ms. Bannon opine that, because conclusions were reached based on one data point 40 m from the wetland, a feature-based water balance analysis is required to assess aquifer connections, sustainability, and buffer requirements.

[137] Mr. Kuntz opined that some 16 trees, partly or entirely owned by McArthur, would be adversely affected. McArthur argues that the trees and wetland are not implementation details to leave to Conditions but are fundamental to the design of the site. Satisfying the NPCA via Conditions would exclude McArthur's involvement.

[138] The Tribunal will not draft approve Solmar's proposed Subdivision plan that relies on the removal and relocation of the site's wetland within the development area. As Ms. Bannon emphasized, "wetlands do not follow property boundaries." The Tribunal accepts the opposition Parties' evidence that it is highly likely that the wetland removal will negatively affect or alter the remaining wetland on 210 and in the Greenbelt, and the associated survival of trees. The studies have not fully evaluated drainage basin contributions and proposed withdrawals, groundwater connections, the extent and effects on 210, and tree impacts.

[139] This feature provides suitable screening to enhance the compatibility of new development abutting Brunswick Place, provides the CHL backdrop for views to the Bath Pavilion, and includes some, and possibly more, endangered bat habitat trees. The loss of these five lots from the proposed Subdivision is minimal and aligns with the overall direction to better balance this development with the CHL. The Tribunal envisions a connected greenspace, not unlike SORE's concept plan, where the wetland enhances the appearance and extent of nearby CHVI features and open space.

[140] The Tribunal finds that its direction: has regard for the Act s. 51(24)(h) “conservation of natural resources and flood control”; is consistent with PPS s. 2.1.1 “natural features and areas shall be protected for the long term” albeit not a “significant natural feature”; aligns with the adjacent Greenbelt’s protection of the Natural Heritage System; conforms with the ROP objective 2.1 to “balance urban development and the conservation of natural resources”; conforms with the TOP objective 9.2(3) “to ensure that new development ... retains to the greatest extent feasible desirable natural features”; and helps conserve the CHL of the Rand Estate.

## **Land Use Planning**

### Urban-Agriculture Edge (“UAE”)

[141] The UAE on this site is 387 m along the east side of the proposed Subdivision where Solmar proposes that approximately 24 lots will back onto the Vineyard lands on the Greenbelt. SORE contends that a fenced and landscaped walking trail along the UAE will better separate and minimize conflicts between the residential and agricultural land uses.

[142] The Tribunal finds that a trail is not necessary here to ensure the compatibility of housing next to a vineyard, as required by s. 3.1.3.5 of the Greenbelt Plan, 2017. This interface is not uncommon throughout NotL where urban residential uses abut agricultural lands, including, for example, the residential subdivision to the immediate south of this site.

[143] The Tribunal prefers the evidence of Mr. Colville, called by Solmar. He recommends that a visually permeable fence be installed along the rear lot line of the residential lots to enable the residents’ common and desired viewing of specialty cropland while preventing intentional or accidental trespass. Additional setbacks on either side of the UAE are not required given the Vineyards’ existing and expected continued use of Best Management Practices that prevent or minimize negative effects

from noise, odour, dust, light, and pesticides. Also, of benefit for this UAE, the dominant air movement, albeit not constant, is toward the south and east, being away from this residential site. Mr. Colville opposes SORE's concept for a public walking trail along the UAE because it would increase exposure and the potential for conflict and complaints by attracting the public to the UAE. Mr. Colville opines that the Solmar plan preserves specialty crop agricultural land in the Greenbelt, minimizes impacts on agriculture, and minimizes the potential for nuisance complaints.

[144] The Tribunal finds Mr. Fraser's opinions unnecessarily protective of the UAE with a board fence at the rear of the lots, the separation of uses by a treed/landscaped walkway, and then a further see-through fence along the site's lot line with the Vineyard. While this scenario further separates the dwellings from agriculture, it invites the broader public to access the UAE. In contrast, Mr. Colville's preference utilizes the full dwelling lot depths to separate the public from the UAE.

[145] In the possible redesign of this Subdivision, the Tribunal will accept Solmar's approach to the UAE. NotL is renowned for its vineyards and wineries. The Tribunal accepts that the public is aware of the area's agricultural operations, and residents' desire to view a vineyards' scenery. Consistent fencing, controlled and maintained by the condominium, will prevent trespass and reasonably protect the agricultural operations. Agreements of purchase and sale can alert potential lot purchasers of the nuisances that can occur. Dwellings will comply with the ZBA's rear yard setback, and homeowners may plant trees and shrubs if they wish additional screening.

[146] The Tribunal directs Solmar and the Town to: establish how Block 99 will merge on title with the Vineyard (i.e., Block 99 shall not remain as an individually conveyable parcel); and ensure through Subdivision Condition(s) how the UAE fence will be controlled and maintained by the condominium.

### Density

[147] The Parties disagree on the TOP's permission for density on this site. Given the Tribunal's directions in this Interim Decision, it finds that density issues are likely to be resolved in a revised draft Subdivision by such factors as the conservation in situ of CHL features and attributes, and retention of the wetland.

[148] With the OPA approved herein, the Subdivision area is mostly designated as Low Density Residential, with a small area of Medium Density Residential on 588 towards Charlotte. With both Low Density and Medium Density designations, the site itself reflects the intentions of the TOP s. 3.4 and s. 5.3 for a mix of housing:

5.3 ... While a majority of the lands are designated for low density residential development, medium density development is also a permitted form of housing in the low density residential designation. In addition to low density residential uses such as single detached, semi-detached and duplex dwellings medium density residential dwellings such as townhouses, apartments, nursing homes are permitted subject to specific design and locational criteria as provided in residential policies of the Official Plan.

[149] The TOP s. 9.4(4) sets general density limits for low density and medium density housing:

9.4(4) ... Generally low density residential developments will not exceed 6 units per acre (14 units per hectare) residential net density and medium density residential developments will not exceed 12 units per acre (30 units per hectare) residential net density unless accompanied by a detailed site and area analysis demonstrating that there will be minimal impact on surrounding neighbourhoods and development and which will be subject to a public review process. ...

[150] With Solmar's intended cap of 196 dwelling units based on the permitted cap of 30 units per net ha, Mr. Lowes explains that more than half of the units will be low density single and semi-detached dwellings, and the rest will be medium density townhouses. In addition, a substantial 21% of the site would be open space / parkland for public use.

[151] While the Town and SORE's witnesses opine that the resulting density is higher than permitted by the TOP, the Tribunal foresees that its directions herein will reduce the total number of units (e.g., conserving attributes in situ; Axial Walkway alignment; wetland retention; lot sizes to enable drainage and green gardens). The Tribunal finds

considerable flexibility in the TOP policies to enable a desirable mix of single, semi-detached, and townhouse dwellings on this site. The Tribunal anticipates approving the revised density, when known, provided that, in accordance with Solmar's intentions, low density uses comprise more than half of all units. The resulting density of the necessarily revised Subdivision can be capped by a ZBA provision.

[152] At the broader policy level, there is no dispute that this site can provide needed and desirable housing. The Subdivision layout warrants further work, as set out in this Decision, to achieve full consistency and conformity with applicable policies and to achieve sufficient regard for the criteria of the Act s. 51(24).

[153] As opined by Mr. Palmer for the Town, this site "should optimize, not maximize" the efficient use of land by balancing housing with cultural and natural heritage.

#### Infrastructure

[154] The Tribunal finds that SWM envelopes the range of infrastructure issues that warrant further study. While it is common and accepted to address final plans through Subdivision Conditions, the complications of this site warrant more assurance that the inter-connected issues are resolved through the Subdivision design. Those issues include heritage conservation, tree protection, stormwater catchment area, wetland retention, water balance, run-off reduction efforts, grading, drainage, and receiving stream capacity.

[155] Solutions to these issues will necessitate changes to the street and lotting pattern, and may also affect the design of the sanitary sewage connections. The opportunity afforded to Solmar to redesign the Subdivision, along with related ZBA provisions, can resolve these infrastructure matters with the Town such that the feasibility is confirmed, leaving final design and implementation to the revised Subdivision Conditions.

## CONCLUSION

[156] This site, as designated for residential development in the TOP and through the OPA approved herein, can be developed to add quality housing in NotL. However, as explained throughout this Decision, Solmar must resolve many fundamental matters before a draft Subdivision plan will be considered for approval. Such fundamentals include:

- a HIA for this adjacent site's effects on the CHVI of 144/176;
- a HIA and possible heritage permits for this site's development components on 144/176;
- ascertaining solutions for primary and emergency access; and
- a full-site and boundary/border TPP with its cross-implications for grading, drainage and SWM.

[157] In its present form, Solmar's proposed draft Subdivision and its effects on the Rand Estate's CHVI do not represent good planning in the public interest. The draft Subdivision is found to require substantial revisions to enable achieving:

- regard for s. 2 of the Act, including:
  - (a) the protection of ecological systems, including natural areas, features and functions;
  - (d) the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest;
  - (f) the adequate provision and efficient use of communication, transportation, sewage and water services and waste management systems;
  - (h) the orderly development of safe and healthy communities;
  - (o) the protection of public health and safety;
  - (r) the promotion of built form that,
    - (i) is well-designed,
    - (ii) encourages a sense of place, and
    - (iii) provides for public spaces that are of high quality, safe, accessible, attractive and vibrant;
- regard for s. 51(24) of the Act, including:

- (a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2;
  - (b) whether the proposed subdivision is premature or in the public interest;
  - (d) the suitability of the land for the purposes for which it is to be subdivided;
  - (e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;
  - (f) the dimensions and shapes of the proposed lots;
  - (g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;
  - (h) conservation of natural resources and flood control;
  - (i) the adequacy of utilities and municipal services;
- consistency with the PPS (and conformity with related policies in the GP), including:
  - 1.1.1 Healthy, liveable and safe communities are sustained by:
    - c) avoiding development and land use patterns which may cause environmental or public health and safety concerns;
    - g) ensuring that necessary *infrastructure* and *public service facilities* are or will be available to meet current and projected needs;
    - h) promoting development and land use patterns that conserve biodiversity;
  - 1.5.1 Healthy, active communities should be promoted by:
    - a) planning public streets, spaces and facilities to be safe, meet the needs of pedestrians, foster social interaction and facilitate *active transportation* and community connectivity;
  - 1.6.7.1 *Transportation systems* should be provided which are safe, energy efficient, facilitate the movement of people and goods, and are appropriate to address projected needs.
  - 2.1.1 Natural features and areas shall be protected for the long term.
  - 2.2.1 Planning authorities shall protect, improve or restore the *quality and quantity of water* by:
    - d) identifying water resource systems consisting of *ground water features, hydrologic functions, natural heritage features and areas*, and *surface water features* including shoreline areas, which are necessary for the ecological and hydrological integrity of the *watershed*;

- 2.6.1 *Significant built heritage resources and significant cultural heritage landscapes shall be conserved.*
- 2.6.2 *Development and site alteration shall not be permitted on lands containing archaeological resources or areas of archaeological potential unless significant archaeological resources have been conserved.*
- 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*.

- conformity with the 2014 ROP and the 2017 TOP, including the referenced sections in this Decision, and those sections addressed by the planning witnesses, which reflect and build on the Act and OHA directives listed above.

[158] As articulated by Ms. Anderson for SORE, a more comprehensive approach to planning for this site will maximize compatibility and good urban design within and beyond the site on matters of servicing, natural heritage, and cultural heritage.

[159] The Tribunal requests Solmar to advise the Tribunal of its willingness to pursue the studies and revisions directed by this Decision.

## MOTIONS

[160] During this lengthy Hearing, three procedural objections were addressed that warrant a brief record here.

### Day 19

[161] On Day 19 of the Hearing, SORE called Mr. Croft, P.Eng., whom the Tribunal qualified to provide opinion evidence in matters of environmental site assessment and site remediation. Solmar objected to SORE's intention to have Mr. Croft respond to the hydrogeology evidence of Mr. Davies.

[162] The Tribunal found as follows. Mr. Croft will be permitted to address



hydrogeology given his experience reviewing and assessing such reports, and SORE's inability to respond to extensive flood modelling addressed in Mr. Davies' reply witness statement. The Tribunal will consider the weight to be given such evidence and that counsel may address same in final arguments if they wish. The Expert's Duty of a witness enables the Tribunal to hear from a witness on matters of relevance to the case. No undue prejudice would result from hearing this evidence. Solmar may, of course, cross-examine the witness on this subject, and Solmar was invited to re-call Mr. Davies in Reply evidence if Solmar wished.

## **Day 32**

[163] On Day 32, SORE moved to disallow Solmar's calling of Ms. Beyene and Mr. Davies to provide evidence in Reply. Solmar was aware of, and had prepared for, only the objection to Ms. Beyene, but not for Mr. Davies. On the principle of procedural fairness, the Tribunal directed that the Motion re: Mr. Davies would be heard the next day.

[164] The Tribunal granted SORE's Motion to disallow the re-calling of Ms. Beyene. The matter involved the potential offering of new evidence regarding the extent of soil contamination beside or under the Barn/Stable. Having considered the helpful submissions of counsel, the Tribunal found as follows.

[165] The Tribunal has the discretion to allow or not allow evidence to be admitted in a hearing per *the Statutory Powers Procedure Act* s. 15(1), and subject to OLTA s. 12(2), the considerations of a fair, just and expeditious resolution. When considering due process, the Tribunal accepts the general applicability of the court judgement in *Stewart v. Kingsway General Insurance Co.*, 2000 CarswellOnt 2105, 14 C.P.C (5<sup>th</sup>) 128, 2000, regarding the principles that parties must reasonably know the case they have to meet, and whether a party could have reasonably anticipated the need for certain evidence. The Agreed Facts of Ms. Beyene and Mr. Croft confirm that "the horizontal extent of impact has not been defined" and Mr. Croft's filed witness statement includes reference

to this issue. No reply witness statement was filed by Ms. Beyene. This issue arises from SORE's question put to Ms. Horne and Dr. Letourneau on their heritage opinion should no contamination be located beneath the Barn/Stable.

[166] In not permitting the introduction of new evidence from Ms. Beyene, the Tribunal found as follows. Solmar knew, or ought to have known, that the extent of contamination below the Barn/Stable remained a question and may be relevant to the matters of heritage conservation. Solmar could have, but did not, address this question, if not when Ms. Beyene's original field work was conducted, at least when the matter was addressed in the Agreed Facts and in Mr. Croft's witness statement. It is procedurally unfair to proffer the results of a new study late in the Hearing through Reply evidence for which the other Parties have insufficient time to evaluate or the ability to proffer evidence. The matter of insufficient time leaves the Tribunal to find that sur-reply is not a sufficient remedy. Such matters warrant full peer review. The Tribunal finds that it is not in the public interest to pursue possible rulings based on untested technical evidence related to groundwater/soil contamination. If any consolation to Solmar, Mr. Croft opined that environmental contamination doesn't necessarily lead to demolition, such that this question remains open with or without additional evidence.

### **Day 33**

[167] On Day 33, the Tribunal denied SORE's Motion and ruled to allow oral Reply evidence from Mr. Davies, citing the following reasons.

[168] The Tribunal considered the fair hearing and public interest principles articulated by the Parties. While somewhat similar to Day 32's Motion issue, one difference is that Mr. Davies will provide oral Reply evidence without referring to new information collected. Mr. Croft for SORE was authorized to speak to hydrology given that Mr. Davies for Solmar had filed only a Reply witness statement, with the inability for a written response from SORE. Like the previous Ruling on Day 19 allowing Mr. Croft's

evidence, the Panel will be somewhat lenient on allowing oral evidence such that all pertinent information is received. This issue was essentially bumped forward due to being initiated through a Reply witness statement of Solmar, warranting oral evidence from SORE, and now Solmar's response via oral evidence in Reply. The other Parties may address issues in cross-examination, and all Parties may address this matter through final submissions.

## **FINAL ORDER**

[169] **THE TRIBUNAL ORDERS** that the appeal is allowed, in part, and the Official Plan for the Town of Niagara-on-the-Lake is amended as set out in **Attachment 1** to this Order.

## **INTERIM ORDER**

[170] **THE TRIBUNAL ORDERS** as follows:

- Solmar (Niagara 2) Inc. ("Solmar") is directed to advise the other Parties and the Tribunal within two (2) months of the issuance of this Interim Decision of whether it intends to pursue the studies and revisions to its proposed development in accordance with the Tribunal's findings and directions in this Decision.
- If Solmar advises that it will not proceed as directed, the Tribunal will issue a Final Order dismissing the appeals.
- If Solmar advises that it will proceed as directed, Solmar is instructed to do so in consultation with the Town of Niagara-on-the-Lake ("Town"), Save Our Rand Estate Inc. and Blair and Brenda McArthur. Solmar and the Town are directed to advise the Tribunal on progress, remaining steps, and estimated time to completion, within 12 months of the issuance of this Interim Decision.

[171] The Panel will remain seized on these appeals, and may be contacted through the Case Coordinator should procedural issues arise.

*“S. Tousaw”*

S. TOUSAW  
Vice-Chair

*“W. Daniel Best”*

W. DANIEL BEST  
Member

**Ontario Land Tribunal**

Website: [olt.gov.on.ca](http://olt.gov.on.ca) Telephone: 416-212-6349 Toll Free: 1-866-448-2248

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal (“Tribunal”). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.

**ATTACHMENT 1**

---

117

**DRAFT**  
**THE CORPORATION**  
**OF THE**  
**TOWN OF NIAGARA-ON-THE-LAKE**  
**NO. XX-24**  
**OFFICIAL PLAN AMENDMENT**  
**200 JOHN STREET EAST**

The Council of the Corporation of the Town of Niagara-on-the-Lake, in accordance with the provisions of Section 17 of the Planning Act, hereby enacts as follows:

1. Amendment **No. XX** of the Town of Niagara-on-the-Lake Official Plan, consisting of the attached explanatory text is hereby adopted.
2. This By-law shall come into force and take effect on the day of the final passing thereof.

Enacted and passed this \_\_\_\_ day of \_\_\_\_\_, 2024.

\_\_\_\_\_  
**LORD MAYOR**

\_\_\_\_\_  
**TOWN CLERK**

Certified that the above is a true copy of By-law **No. XX** as enacted and passed by the Council of the Town of Niagara-on-the-Lake.

\_\_\_\_\_  
**TOWN OF NIAGARA-ON-THE-LAKE**

**PART A – THE PREAMBLE –**

This part does not constitute part of this Amendment.

**PART B – THE AMENDMENT –**

This part consists of text and schedule, which constitutes Official Plan Amendment No. XX to the Town of Niagara-on-the-Lake Official Plan, approved on \_\_\_\_\_, 2024.

---

**PART A – THE PREAMBLE**

The preamble does not constitute part of this Amendment.

**Purpose**

The purpose of this Amendment is to re-designate approximately 1.52 ha (3.76 ac) of land generally located on the south side of John Street East at the eastern boundary of the Old Town Settlement Area, from Agricultural to Low Density Residential. The lands to be re-designated form a portion of a larger property municipally addressed as 200 John Street East.

**Basis**

The basis of this Amendment is as follows:

1. There is a discrepancy in the way the urban area boundary of the Old Town Settlement Area is delineated in the vicinity of 200 John Street East between Schedule B and Schedule I-1 of the Official Plan. Schedule I-1 shows the correct delineation of the urban area boundary across the subject site, as this matches the urban area boundary delineated in the Niagara Region Official Plan.
2. Since the land use designations on Schedule B of the Official Plan do not accurately follow the correct urban area boundary across 200 John Street East, a sliver of this property that is technically located within the urban area boundary is currently designated as Agricultural. As such, an Official Plan Amendment is required to address this technical matter, and to re-designate this sliver of the 200 John Street East from Agricultural to Low Density Residential, consistent with the existing designation that applies to the portion of the property that is shown as being within the urban area boundary on Schedule B.

**PART B – THE AMENDMENT**

All of this part of the document entitled "Part B – The Amendment" consisting of the following text and map changes constitutes Amendment No. XX to the Official Plan of the Town of Niagara-on-the-Lake.

**Details of the Amendment**

1. That Schedule "B" Land Use Plan – Niagara / Old Town is amended by Schedule "1" attached hereto and forming part of this amendment, identifying the location of the lands to be redesignated from "Agricultural" to "Low Density Residential" and being included within the Urban Area Boundary.





**SCHEDULE 1 ATTACHED TO OFFICIAL PLAN AMENDMENT  
NO. XX BEING AN AMENDMENT TO SCHEDULE "B" OF THE  
OFFICIAL PLAN OF THE TOWN OF NIAGARA-ON-THE-LAKE**

\_\_\_\_\_  
LORD MAYOR

\_\_\_\_\_  
TOWN CLERK

## Appendix 2

WHEREAS determining its position before the Ontario Land Tribunal (“**OLT**”) on the Solmar *Planning Act* and *Ontario Heritage Act* (“**OHA**”) appeals requires a careful balancing of provincial, regional and town interests and policies;

WHEREAS the Town adopts a constraints-based approach to determining development;

WHEREAS the starting point for determining the appropriate policy balance, in this case, is the following site constraints:

- natural heritage features
- cultural heritage attributes (buildings and landscapes) as per OHA designation by-laws
- stormwater management including grading
- access – existing physical driveways only at Charlotte and John (“**Site Constraints**”);

WHEREAS the Solmar lands are urban and serviced (sanitary and water) to accommodate housing;

WHEREAS the Site Constraints and specifically using the existing driveway accesses only would yield less than 10 residential units;

WHEREAS proper road access is feasible through 144/176 John Street access (“**Historical John Street Access**”) and would yield an optimal level of intensification;

WHEREAS Solmar is unwilling to secure the Historical John Street Access from its related corporation;

WHEREAS the Town is willing to grant an easement over a portion of its lands at Charlotte Street to facilitate an appropriate road access, if requested by Solmar;

WHEREAS the Town sees the Charlotte Street access, if requested by Solmar, as an opportunity to celebrate and improve the existing Heritage Trail at this location (“**Gateway Feature**”);

WHEREAS the Town commits to a public process to determine the design for this Gateway Feature;

THEREFORE, at OLT Hearing OLT–22–003603, the Town’s position is to oppose any development that does not respect the foregoing principles. Without limiting any of them, the Town supports development that:

1. Conserves cultural heritage as per the OHA April 12, 2023 Report by Densie Horne “**Horne Report**”;
2. Ensures cultural heritage conservation before final plan approval;
3. Provides a stormwater block that is adequately sized without using adjacent lands;
4. Provides a Functional Servicing Report that establishes the feasibility of servicing;
5. Protects the wetland to the satisfaction of the NPCA and the Town;
6. Protects boundary trees;
7. Caps the unit count at 135 units;
8. Includes a publicly accessible park at the Charlotte Street access (if this access is requested by Solmar) that incorporates the Heritage Trail; and
9. Imposes draft plan conditions to the satisfaction of the Town.

## Appendix 3

### **Niagara-on-the-Lake Council Meeting – January 12, 2024**

That Council rise at 4:42 p.m. from a Closed meeting under the Municipal Act S.O. 2001 for matters Section 239 (2)(f) advice that is subject to solicitor/client privilege, including communications necessary for that purpose, specifically regarding 144 and 176 John St East, 200 John Street East and 588 Charlotte Street and that staff proceed as directed in Closed session.

All those in favour show of hands. That unanimous.

And the second motion is moved by Councillor O'Conner, seconded by Councillor Cheropita, that the Town withdraws consent for access over Town owned lands to Solmar Properties at Charlotte Street and that a public statement thereon be prepared by Town staff regarding Randwood Estates property development to be released on January 17.

All those in favour. Passed



# Town Statement - Niagara-on-the-Lake Update Re: Rand Estate

January 17, 2024

The purpose of this statement is to provide public insight into the challenge that the Town Council has faced in determining its position on matters related to the appeals by Solmar of Zoning By-law Amendment, Plan of Subdivision and Heritage Planning Applications related to 200 John Street East and 588 Charlotte Street (“the Rand Estate”).

The Ontario Land Tribunal (OLT) hearing on the Rand Estate is scheduled for an eight-week period starting on March 25, 2024. The list of issues for the OLT to consider is lengthy. Legal and expert witness costs will be significant.

In a planning case that has not been appealed to the OLT, the Town conducts public open meetings where it carefully considers and balances provincial, regional and Town interests to determine its position.

In this case, where the matter has been appealed to the OLT, the law requires settlement talks to occur confidentially to balance those same interests. In these situations, all litigants must feel free to fully explore compromise. If a settlement is not reached, revealing discussions would undermine litigants' positions at a contested hearing. The Town has acted appropriately.

We use cookies to help improve our website for you. [Learn](#)

Close

Between September and December of 2023, Solmar, SORE and the Town met often to talk about settling matters prior to the hearing. A settlement of one or more issues would reduce hearing time and costs. The meetings were, as required by law, confidential. Settlement has not been achieved. Consequently, Solmar, SORE and the Town cannot reveal anything that was discussed in the settlement meetings.

On December 15, 2023, the Town released a public statement outlining the position it would take for the hearing. That position was the result of adopting a “constraints-based” approach to determine the appropriate balance between natural heritage features, cultural heritage attributes, stormwater management and access to the existing public road network. At times, the choice is between two or more undesirable alternatives, as illustrated by the matter of the road access location.

The Town confirmed that the Historical John Street access was feasible but Solmar has not offered it as available from their related corporation. In supporting cultural heritage conservation per the **Horne Report (April 12, 2023)**, the Town confirmed that it opposed Solmar’s request for the Panhandle access. To remove the Panhandle as an access option, the Town consented to the use of Town-owned land at the existing Charlotte Street access to the Rand Estate. This would achieve cultural heritage conservation in the Panhandle area of the subdivision. In addition, it would reduce hearing time and costs.

On January 12, 2024, following a further balancing of provincial, regional and Town interests, the Town chose to withdraw its consent to use Town-owned land at Charlotte Street. The Town understands that removing the Charlotte Street access option will increase OLT hearing time and costs and that Solmar will pursue access through the Panhandle, which would impact

The Town will continue to work with Solmar and SORE prior to the hearing to reduce issues and streamline the evidence required to properly adjudicate all issues remaining in dispute. The Town will continue to be guided by prevailing provincial legislation in doing so.

**For additional information, please refer to the attached documents:**

- Horne Report (April 12, 2023)
- Horne Presentation (April 24, 2023)

*For immediate alerts, follow the Town of Niagara-on-the-Lake on Facebook, Twitter, and Instagram.*

---

The Corporation of the Town of Niagara-on-the-Lake

info@notl.com | 905-468-3266

**Document(s): Town Statement - Niagara-on-the-Lake Update Regarding Rand Estate**