

ISSUE DATE:

Feb. 18, 2009



PL060606

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant: 10360 Islington Avenue Inc.
Appellant: Gioseffina (Josie) Greco-Alviani & Fabio Alviani
Subject: Proposed Official Plan Amendment No. 633
Municipality: City of Vaughan
OMB Case No. PL060606
OMB File No. O070059

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Frank Greco
Appellant: Elisa Vallescura
Subject: By-law No. 167-2006
Municipality: City of Vaughan
OMB Case No. PL060606
OMB File No. R060141

IN THE MATTER OF subsection 34.1(1) of the *Ontario Heritage Act*, R.S.O. 1990, c. O. 18, as amended

Appellant: 10360 Islington Avenue Inc. and J & F Alviani
Subject: Appeal of the Decision of Council on an application to demolish or remove a building or structure, specifically pertaining to the proposed alterations to the rear portion of the existing heritage building known as the "Martin Smith House"
Property Address: 10360 & 10384 Islington Avenue
Municipality: City of Vaughan
OMB Case No. MM080059
OMB File No. MM080059

10360 Islington Avenue Inc. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Vaughan to include policies to permit a range of uses consisting of Institutional (including private school and daycare centre, retirement residence), Museum, Community Facility, Mainstreet Commercial & Residential uses, Multi-unit Residential Condominium within the existing heritage structure (Martin Smith House), as well as a range of uses consisting of a new multi-unit building ranging in height from 2-5 storeys for the purpose of either a residential condominium or a retirement residence, Institutional uses (including private school & daycare centre) & Mainstreet Commercial uses on lands located on the west side of Islington Avenue, south of Nashville Road, municipally known as 10360 & 10384 Islington Avenue in the Village of Kleinburg, City of Vaughan, designated as

“Kleinburg Core” by Official Plan Amendment No. 601, as amended by Official Plan Amendment No. 633

Approval Authority File No. OP.07.004

OMB Case No. PL080178

OMB File No. PL080178

10360 Islington Avenue Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, from Council’s refusal or neglect to enact a proposed amendment to Zoning By-law No. 1-88, as amended, of the City of Vaughan to rezone lands municipally known as 10360 & 10384 Islington Avenue in the Village of Kleinburg, City of Vaughan, from “R1 Residential Zone” and “RM2 Multiple Residential Zone” to “OS1 Open Space Conservation Zone” and “RM2 Multiple Residential Zone”, with the addition of Exceptions for the minimum lot area per unit requirement, parking requirements, parking and access requirements, permitted uses, maximum building height, setbacks, the amount of landscaped area and the landscaping strip requirements to permit a range of uses consisting of Institutional (including private school and daycare centre, retirement residence), Museum, Community Facility, Mainstreet Commercial & Residential uses, Multi-unit Residential Condominium within the existing heritage structure (Martin Smith House), as well as a range of uses consisting of a new multi-unit building ranging in height from 2-5 storeys for the purpose of either a residential condominium or a retirement residence, Institutional uses (including private school & daycare centre) & Mainstreet Commercial uses

Approval Authority File No. Z.07.031

OMB Case No. PL080179

OMB File No. PL080179

The City of Vaughan has brought a motion before the Ontario Municipal Board under Rule 63 of the Board’s Rules of Practice and Procedure, to adjourn the hearing of the appeals, scheduled to commence on April 6, 2009 for twenty (20) days, under subsections 17(36), 22(7), 34(11) and 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, as well as the appeal under subsection 34.1(1) of the *Ontario Heritage Act*, R.S.O. 1990, c. O. 18, as amended

OMB Case Nos. PL060606, PL080178, PL080179, MM080059

OMB File Nos. O070059, R060141, PL080178, PL080179, MM080059

APPEARANCES:

Parties

10360 Islington Ave. Inc.
G. Greco-Alviani
F. Alviani
F. Greco

City of Vaughan

Daniel Rea

Counsel

M. Flynn-Guglietti
A. Warman

L Townsend
C. Storto

P.M. DeMelo

DECISION DELIVERED BY M.C. DENHEZ AND ORDER OF THE BOARD

INTRODUCTION

This dispute, over application of the *Ontario Heritage Act* (OHA) to adjoining lots in a Heritage Conservation District (HCD), arises from a contested Motion to Adjourn an appeal hearing. The rationale for the adjournment is that (a) one lot must be treated differently, outside the normal HCD process, requiring distinct Council approval; and (b) jurisdiction over that approval belonged to Council (and, upon objection, to a referral process at the Conservation Review Board – CRB), not the Ontario Municipal Board (OMB).

10360 Islington Ave. Inc., G. Greco-Alviani, F. Alviani and F. Greco (the Applicants) own two adjoining properties in the City of Vaughan (the City):

- One is vacant (vacant lot), in an HCD designated in 2003 under Part V of the OHA, subject to a Heritage Conservation District Plan (HCD Plan), including architectural controls.
- The other (House property) includes the Martin Smith House, from 1852, in the same HCD. It had also been designated earlier as an individual heritage property (Section 29) in its own right, under Part IV of the OHA (double-designated).

The Applicants proposed a new construction project (the project), straddling both properties (including the rear of the House property), shaped in an “L” around the Martin Smith House. They applied for City approvals under both the *Planning Act* and the OHA. City Council, on the recommendation of staff, endorsed the principle of a “gateway” new construction project on the two lots, but not the project’s five-storey “Post-Modern” architecture. The City insisted on the architectural controls in its HCD Plan, and would not issue approvals under either statute. The Applicants appealed to the OMB under the relevant provisions of both statutes. In the Fall of 2008, the Applicants sought to

consolidate all these matters at the OMB in a single hearing; the City agreed, and the OMB Ordered consolidation in December, 2008.

Notwithstanding the above history of treating the project as a unit, both the City and the Applicants then undertook to split it on this Motion:

- First, the City argued that the new construction project should be subject to two separate regimes:
 - (a) **On the *vacant lot***, the project should be regulated by the architectural controls in the HCD Plan, under OHA **Section 42 (Part V)** for Heritage Conservation Districts (potentially appealable to the OMB).
 - (b) **On the *House property***, the fate of the project should be in the absolute discretion of Council (subject only to advice from the CRB), because, due to a technical omission at the City, this property was *not* subject to OHA **Section 42** (districts), but rather to the more subjective process of OHA **Section 33 (Part IV)**, for individually-designated properties), without potential appeal to the OMB.
- Unless that Section 33 approval was issued for that segment of the project under **(b)**, said the City, the new construction project on the House property could not be adjudicated by the OMB. Hence this Motion to Adjourn, unless and until Council issued that approval.
- The Applicants took a similarly split approach. They did not dispute **(a)**; but as for **(b)**, they argued that the segment of the new construction project on the House property was exempt from OHA approvals altogether, including the HCD Plan, because (i) Section 33 did not regulate new construction projects, and (ii) even if it did, this project was exempt because of the wording of the House property's "reasons for designation".

The OMB has carefully considered all the affidavit evidence, and the eloquent submissions of Counsel. The Motion is dismissed, but not for the reasons advanced by the Applicants. The Board wants to make it clear that the matter before it is a motion for

adjournment. Many of the observations hereinafter are *obita dicta* only for purposes of outlining a basis to appreciate the interactions of different provisions in the *Act*.

The OMB does not accept the split of the new construction project. In essence, the City is attempting to withdraw the House property from its own HCD Plan and district process, because of a technical omission of its own making. Such an outcome would be contrary to the manifest intent of the legislation, and likewise any By-law for the house property that ran contrary to the objectives of the HCD Plan. The Board also finds it preferable to treat the new construction project as a single unit, as it was presented and as it was considered by the City, within the Part V Heritage Conservation District – for pragmatic reasons, procedural reasons, and legal reasons. Those reasons are set out below.

BACKGROUND AND CONTEXT

a) The Adjacent Heritage Properties

For present purposes, the OHA has separate provisions to regulate three kinds of designated properties:

- individually-designated properties (OHA Part IV),
- those in an HCD (OHA Part V, districts), and
- those designated *both* individually under Part IV, and as part of an HCD under Part V (double-designated).

The two properties are in the Kleinburg-Nashville HCD, normally governed by the *Kleinburg-Nashville Heritage Conservation District Plan* of 2003:

- the House property, at 10384 Islington Avenue, was part of the HCD, but had *also* been individually designated in 1979 (double-designated).
- the vacant lot, at 10360 Islington Avenue, had been severed from the House property in 1999. In 2000, the City withdrew its status as part of the individually-designated property, but later included it in the HCD when the latter was designated in 2003.

The Applicant proposed work on both properties, in three formats:

- i) **Demolition:** A rear addition to the Martin Smith House would be removed.
- ii) **Heritage Alteration:** Verandas for the Martin Smith House would be restored.
- iii) **New Construction:** An L-shaped multi-residential project was proposed for the vacant lot and for the rear of the House property. The staff report called it a flat-roofed five-storey structure, which the Applicants' consultant labelled "Post-Modern".

b) The Dispute

The dispute began when the City adopted Official Plan Amendment 633 and rezoning By-law 167-2006, under appeal in File PL060606, as discussed at the first Pre-hearing Conference (PHC) among several held by the OMB (otherwise constituted). The Applicants also appealed because the City had not adopted their private rezoning for their two lots, in files PL080178 and PL080179. At a PHC in October, 2008, the OMB consolidated File PL060606 with these two site-specific appeals.

The OMB also learned that on September 12, 2008, the Applicants applied to Council for OHA approval. That application referred to demolition, alteration and new construction *on both properties collectively*, without segregating either

- (i) the lots or
- (ii) the categories of work.

A subsequent letter also lumped all work together – with no acknowledgement of any difference in regime between the two properties, or any visible expectation that the new construction project would be treated otherwise than as a unit:

We are the solicitors retained by 10360 Islington Avenue Inc. and J. & F. Alviani in matters associated with the above described Heritage Permit Application (the 'Heritage Permit Application') submitted to the City of Vaughan on September 12, 2008. The Heritage Permit Application seeks approvals for the construction of a new residential building and alterations to the rear portion of the existing heritage building ('Martin Smith House') built in 1852. Martin Smith House is located on that portion of the Site known as 10384 Islington Avenue. The 10360 Islington Avenue portion of the Site is vacant.

On November 10, 2008, Council approved the rear demolition and the heritage alterations, but not the style of the new construction. It formally approved a staff report agreeing with development (“a gateway feature into the Heritage District”), but not its architecture. The report said that the new construction project

- should correspond more closely to the Kleinburg-Nashville Heritage Conservation District Plan, Heritage Plan and Design Guidelines (staff pointed to the new Kleinburg Public School as an example to be “emulated”),
- and be less like “the institutional or commercial buildings seen elsewhere in Vaughan”.

Neither the staff report nor the Council Minutes alluded to any distinction in regime between the properties.

By letter dated November 12, 2008, the Applicants responded by appealing the City’s “refusal to approve the proposed new construction/redevelopment of the site”. Far from challenging the application or relevance (in whole or in part) of the *Kleinburg-Nashville Heritage Conservation District Plan*, the reasons set out in the notice of appeal argued instead that the project complied with the HCD Plan:

The purpose of the *Kleinburg-Nashville Heritage Conservation District Plan* was to “guide change so that it contributes to and does not detract from the district’s architectural, historical and contextual character”.... Our client’s proposal accommodates this policy.... We maintain that the proposal is sympathetic....

Nothing, in the reasons set out in the notice of appeal, hinted at any difference in regime between the two properties, or any expectation that the new construction project would be treated otherwise than as a unit, subject to the *Kleinburg-Nashville Heritage Conservation District Plan*.

The City then filed this Motion to Adjourn on November 28, 2008, arguing (apparently for the first time) that the segment of the new construction project on the *House property* was not subject to the City’s own HCD process anyway. Instead, this side of the property line was subject to a different regime for “alterations” requiring Council approval under OHA **Section 33**, and that under that same Section, objections to Council’s Decision were the domain of the CRB, not the OMB.

The Applicants responded by filing an objection to Council's Decision with the CRB. Their law firm advised the City, however, that:

It is our interpretation that Section 33 of the *Heritage Act* does not apply to our application and accordingly no request for a hearing before the Conservation Review Board is required pursuant to Section 33(6). However until the Ontario Municipal Board has ruled on this issue and out of an abundance of caution we are filing this appeal....

At the December PHC, the OMB granted an order, on consent, to consolidate the Applicants' OHA appeals at the OMB with the other *Planning Act* appeals. According to Ontario Regulation 30/02 of the *Ontario Municipal Board Act*, a consolidation is Ordered "if the Board considers that two or more matters are related to each other by common facts, issues, questions of law or for any other reason" (Section 1).

The December PHC also scheduled the City's Motion to Adjourn for January, i.e. the present proceeding. Counsel for a neighbour, Mr. Rea, who had been granted party status at an earlier PHC, supported the City's Motion.

c) Other Pre-hearing Matters

Before submissions on the Motion to Adjourn, Counsel advised the OMB of other pre-hearing developments. Another party, Lake Rivers Inc., had withdrawn. Yet another, the York Region School Board, had indicated that although it retained its party status, it would call no witnesses. The final Procedural Order, including the Issues List, was expected by February 27, 2009.

OBSERVATIONS AND FINDINGS

a) The Starting-Point: Application of District Regulations

Although some jurisprudence was brought to the OMB's attention, none dealt specifically with the questions at hand.

Superficially, the matter looks like a non-issue. The general principle, at Part V, is that throughout the HCD, all new construction is regulated, with reference to the HCD Plan – in this case, the *Kleinburg-Nashville Heritage Conservation District Plan*:

- 41.2(1)(b) Despite any other general or special Act, if a heritage conservation district plan is in effect in a municipality, the council of the municipality shall not... pass a by-law for any purpose that is contrary to the objectives set out in the plan.
- 41.2(2) In the event of a conflict between a heritage conservation district plan and a municipal by-law that affects the designated district, the plan prevails to the extent of the conflict....
- 42(1) No owner of property situated in a heritage conservation district that has been designated by a municipality under this Part shall do any of the following, unless the owner obtains a permit from the municipality to do so:
- 1) Alter, or permit the alteration of, any part of the property, other than the interior of any structure or building on the property.
 - 2) Erect, demolish or remove any building or structure on the property or permit the erection, demolition or removal of such a building or structure.
- 42(2) Despite subsection (1), the owner of a property situated in a designated heritage conservation district may, without obtaining a permit from the municipality, carry out such minor alterations or classes of alterations as are described in the heritage conservation district plan....

For good measure, OHA subsection 41(2.3) deals specifically with properties that have been double-designated (i.e., designated both individually under Section 29, and also as part of an HCD), subjecting them specifically to the HCD Plan:

- 41(2.3) ... A property that is designated by a municipality under section 29 and is included in an area designated as a heritage conservation district under this Part (V) for which a heritage conservation district plan has been adopted under section 41.1 is subject to this Part (V) and to the (HCD) plan with respect to any alterations of the property or demolition or removal of buildings or structures on the property, and is not subject to section 30 or to sections 33 to 34.4 (in Part IV, for individually-designated properties)..

By that reasoning, the district regulatory process (OHA Part V) and the HCD Plan would apply to both lots – and there would be no Motion to Adjourn, as currently presented. However, notwithstanding subsection 41(2.3), both the City and the Applicants adopted the position that the House property was *not* subject to the district process, Part V, or the HCD Plan.

b) The Caveat: Potential *Renvoi* to Part IV

The stumbling block was presumably this. Double-designated properties were subject to an HCD Plan “adopted under Section 41.1”, but was the *Kleinburg-Nashville Heritage Conservation District Plan* an eligible HCD Plan “*adopted under section 41.1*”? It was adopted in 2003, whereas Section 41.1 came into force only in 2005. The OMB saw no affidavit evidence, and heard no submissions, on whether that HCD Plan would answer that description.

Indeed, no lawyer suggested that the House property was governed by the Part V district process. Instead, submissions from both sides assumed that although the segment of the project on the vacant lot might be subject to Part V, the segment on the House property was not. The project would therefore be subject to two separate regimes (Part V for the vacant lot, Part IV for the House property) – as separate as if the project spanned two separate municipalities.

- Subsection 41(2.3) does not specify that *erecting buildings* on a double-designated property is subject to Part V (districts) and to the HCD Plan; and
- A different subsection, 41(2.2), applies to double-designated buildings which have *not* been “adopted under Section 41.1”.

The latter refers to a *renvoi* or relegation back to Part IV, in subsection 41(2.2), *withdrawing* some double-designated properties from Part V, to subject them instead to Sections 33-34.4 (the Part IV process for individually-designated properties), if there is no HCD Plan “adopted under section 41.1”:

- 41(2.2) A property that is designated by a municipality under section 29 (individually) and is included in an area designated as a heritage conservation district under this Part (V) is subject to section 30 and sections 33 to 34.4, and not to this Part (V), with respect to any alterations of the property or any demolition or removal of buildings or structures on the property if,
 - (a) the designation of the heritage conservation district was made before the day section 41.1 came into force (April 28, 2005), and

- (b) no heritage conservation district plan has been adopted by the council of the municipality under section 41.1 with respect to the heritage conservation district.

c) Effect of the *Renvoi*: Section 33

On the premise that the double-designated property had been withdrawn from the Part V regime, and relegated to the Part IV process, the parties then debated Section 33 in Part IV, which is a more discretionary process, outside normal OMB supervision:

- 33(1) No owner of property (individually) designated under section 29 shall alter the property... if the alteration is likely to affect the property's heritage attributes (formerly called "reasons for designation")... unless the owner applies to the council... and receives consent in writing....
- 33(4) ... The council ... shall (i) consent to the application, (ii) consent to the application on terms and conditions, or (iii) refuse the application....
- 33(6) Where the council consents to an application upon certain terms and conditions or refuses the application, the owner may apply... for a hearing before the (Conservation) Review Board.
- 33(11) ... The (Conservation) Review Board shall make a report to the council....
- 33(13) After considering the report under subsection (11), the council without a further hearing shall confirm or revise its decision under subsection (4) with such modifications as the council considers proper... and its decision is final.

The City's Motion to Adjourn argued that no OMB hearing could address new construction on the House property yet, because:

- That segment of the project still required Council approval, under the "alteration" provisions (Section 33); and
- If approval were denied by Council in its discretion, objections would not be heard by the OMB, but by the CRB – which would then report back to Council, which had the *final* say. Unless and until that Section 33 approval was issued, said the City, the new construction on the House property could not be adjudicated by the OMB. Hence this Motion to Adjourn *sine die*, i.e.,

indefinitely.

The Applicants replied that no delay was required. No OHA Council approval was necessary (for the new construction on the double-designated property) *anyway*:

- An OHA wording change in 2005, they said, meant that new construction was not a regulated “alteration”;
- And even if it were, the fact that the original “reasons for designation” listed only the *building’s* architectural merits – and not its *lands* – made OHA approval for the new construction unnecessary.

d) Observations on the Arguments

There are certain difficulties with the Applicants’ arguments. The contention that new construction is not an “alteration”, and is hence unregulated by Part IV, overlooks the wording of the *renvoi* [Subsection 41(2.2)].

Another difficulty with the Applicants’ interpretation of “alteration” is that it flies in the face not only of the OHA’s definition Section (“alter’ means to *change in any manner*”), but also of the apparent statutory intent (the OHA refers repeatedly to the “conservation, protection and preservation of the heritage of Ontario”, or words to that effect). There was no evidence of any legislative intent to exempt new construction from regulation, anywhere in an HCD. The Applicants’ semantic argument rested on the counter-intuitive notion that via 2005 amendments to the OHA, the Legislature created a system where, for properties like the House property,

- New construction on a *vacant* lot would be heritage-regulated, but new construction on the *same lot as an actual heritage building* would not.
- Indeed, the only locations in an HCD, where new construction would *not* be regulated (and which would be exempt from design guidelines in an HCD Plan), would be on the properties with the most designations – the very lots shared by some of the buildings that apparently made the HCD worth designating in the first place.

Despite the eloquent arguments by Counsel for the Applicants about loose language in Part V, the OMB was not satisfied that such a reading, so remote from the plain meaning of the definition section, could be justified, in light of the apparent intent of the legislation.

The Board was similarly unconvinced by the Applicants' argument that since Section 33 only regulates alterations "likely to affect the reason for the designation" (or "heritage attributes", as they are now called), no Section 33 approval was necessary, because the House property's "reasons for designation" failed to mention *land* or *views*. She cited the OMB Decision in ***Sweeny Holdings Inc. v. Toronto (City)***, [2004] WL 3569030, dealing with an Official Plan Amendment for a central Toronto project next to a designated heritage property. The latter's owner, a Mr. Wine, objected that views would be negatively affected. After a site visit, a video and numerous references to photos and illustrations, the OMB Member disagreed: "Views from and to the Wine site will not be adversely affected"; but the Member then added that the property's "reasons for designation" included no "reference to the preservation of view lines, either from or to the Wine site. The proposal does not jeopardize the heritage significance of the Wine site". Counsel for the Applicants deduced that where the "reasons for designation" or "heritage attributes" focus on a building and not its grounds or view lines, then new construction separate from the building cannot be "likely to affect the reason for designation", and is hence exempt from Section 33.

The OMB disagrees. The *Sweeny Case* did *not* say that new construction is exempt from OHA approval, when lands or view lines have not been specified among "heritage attributes" or "reasons for designation". *Sweeny* was not even an OHA case. Indeed, the thrust of the Decision is the opposite, since the Member went to manifest effort to *verify* whether view lines were affected, even in the *absence* of any reference to same in the "reasons for designation". It is trite to observe that the visual impact of Ontario's heritage is "affected", if the view thereof has been significantly obscured or distorted. The absence of view lines and lands, from the list of "heritage attributes" or "reasons for designation", is not determinative.

e) Returning to the Premise: Splitting the New Construction Project

The largest difficulty, however, is with the City's premise, apparently accepted by the Applicants, that the project can be split into a Part IV segment and a Part V

segment, i.e., that new construction on the vacant lot is governed by the district process and the HCD Plan, but that new construction on the House property is instead at the discretion of Council under Section 33. That split makes little sense pragmatically, procedurally or legally.

Pragmatically, it is manifestly undesirable to draw a line through a building, with one set of standards applying on one side, and different standards applying on the other. Such a confused outcome is to be avoided.

Procedurally, this new construction project has been consistently and firmly treated as a unit,

- by the Applicants, when they submitted their OHA application on September 12, 2008,
- and by the City, in its staff report,
- and in Council's Decision of November 10, 2008.

Neither party gave the slightest hint to the contrary at the time. For good measure, the OMB consolidated these matters, at the parties' request. It is unseemly, at least, for the parties now to reverse position at this late date, and to suggest that the evaluation of this project should instead be approached in such a disjointed fashion.

That leaves the largest question, namely whether as a matter of law, these two adjoining properties *must* be regulated separately because of the wording of the OHA. Granted, there are development situations where two sets of standards do apply to a single project, e.g., projects which straddle a municipal boundary. But if Part V and the HCD Plan were usually intended to apply *throughout* the HCD, then what legal rationale justifies an exception here, via the relegation of this double-designated property to a different Part of the Act, subject to different rules and procedures?

As mentioned earlier, the only apparent reason that the House property is *not* subject to Part V, like its neighbours, is supposedly because

- Subsection 41(2.3) says that double-designated properties are subject to

Part V where there is an HCD Plan “adopted under Section 41.1”,

- Whereas under subsection 41(2.2), double-designated properties are subject to Part IV where there is no HCD Plan “adopted under Section 41.1”,

In this case, there is indeed an HCD Plan; but it predates Section 41.1. There was no evidence of an update to equate it with an HCD Plan “adopted under Section 41.1”. That technical omission, by the City, lies at the root of this split approach of dealing with the House property under Part IV – a regime separate from, and substantively unlike, the adjacent vacant lot (and the rest of the HCD around it).

The OMB disagrees with this split approach, for several reasons dealing with both statutory intent and specific wording.

As for statutory intent, the legislation clearly evolved. Ever since the OHA took effect in 1975, it contained separate Parts for individually-designated properties and for districts; but initially, processes were rudimentary. For decades, there was no requirement for HCD Plans in districts. Some municipalities drafted methodical planning documents for their districts, on their own initiative; others did not.

It is a truism that a decision-making process, based upon transparent principles in well-articulated documents, is preferable to one lacking such direction. It was in 2005 that HCD Plans became an OHA requirement; but at the same time as the Province was preparing those 2005 amendments, some municipalities like Vaughan were already adopting documents like the *Kleinburg-Nashville Heritage Conservation District Plan*.

In reading the legislation in a purposive manner, the clear and understandable scheme of the 2005 amendments was that wherever there was a proper HCD Plan to give guidance to a district, that HCD Plan would apply.

There was a difficulty, however, where a district had already been designated (sometimes decades ago), but had no HCD Plan yet:

- There, double-designated properties would have no HCD Plan to provide methodical guidance to the decision-making process.
- These were the cases where the OHA then relegated those properties to the

Part IV process, where they could at least resort to the listed “heritage attributes” or “reasons for designation” for direction.

That arrangement was clearly intended as the exception, and not the rule; and in the normal course, exceptions are interpreted restrictively.

In this case, clearly unanticipated by the legislation, a municipality *did* have an HCD Plan in effect, but proposed to ignore it for *renvoi* purposes, because there was no evidence of an update to declare it as being “adopted under Section 41.1”. (To be clear: the OMB is not finding that there *was* no update, but that it was shown no *evidence* of same on this Motion.) Because of that omission, the OMB is being invited to inflict pragmatic and procedural convolutions on all involved. On a purposive reading, the OMB discerns nothing in the legislation that would have intended such a result.

Perhaps more importantly, the supposed split is legally pointless, because technically, the approach pursued by the City and the Applicants does *not* have the predicted effect of withdrawing the House property from the ambit of Part V and the HCD Plan. That is because of the following OHA provisions:

- 41.2(1)(b) ...If a heritage conservation district plan is in effect in a municipality, the council of the municipality shall not... pass a by-law for any purpose that is contrary to the objectives set out in the plan.
- 41.2(2) In the event of a conflict between a heritage conservation district plan and a municipal by-law that affects the designated district, the plan prevails to the extent of the conflict....

The wording is important. Neither provision specifies that the HCD Plan must have been “adopted under Section 41.1”, to be binding on by-laws. This means that the *Kleinburg-Nashville Heritage Conservation District Plan* is still binding on any By-laws “that affect the designated district”, whether the HCD Plan was updated or not.

There is nothing in the OHA which restricts the *Kleinburg-Nashville Heritage Conservation District Plan* from governing any By-law pertaining to the House property.

Some in the City may prefer that the portion on the project, on the House property, be relegated to the Section 33 process, because of a technical omission of the City’s own making. The OMB does not share that view: such an outcome would be contrary to the manifest intent of the legislation. For pragmatic purposes and for

procedural purposes, and most importantly for legal reasons, the OMB also finds it far preferable to treat the new construction project as a unit – as it was presented, and as it was considered by the City – within the Part V Heritage Conservation District. The OMB proposes to continue treating it accordingly. It is also impossible to deny the HCD remains in effect and applicable to the area in question, which includes the subject properties.

CONCLUSION

The Motion to Adjourn is dismissed.

It is so Ordered.

“M.C. Denhez”

M.C. DENHEZ
MEMBER