Davies Howe

LAND DEVELOPMENT ADVOCACY & LITIGATION

Mark Flowers
markf@davieshowe.com
Direct: 416.263.4513
Main: 416.977.7088
Fax: 416.977.8931
File No. 702952

October 21, 2019

By E-Mail to *townclerk@oakville.ca*

Heritage Oakville Advisory Committee
Town of Oakville
1225 Trafalgar Road
Oakville, Ontario
L6H 0H3

Attention: Vicki Tytaneck, Town Clerk

Dear Ms. Tytaneck:

Re: Erchless Estate Cultural Heritage Landscape Conservation Plan and Draft Official Plan Amendments and Zoning By-law Amendments
Heritage Oakville Advisory Committee Meeting on October 22, 2019 – Agenda Item 6.c.

Background

We are counsel to ClubLink Corporation ULC and ClubLink Holdings Limited (collectively, "ClubLink") the owners of the Glen Abbey Golf Club property at 1313 and 1333 Dorval Drive in the Town of Oakville (the "Glen Abbey property").

It has recently come to our attention that at its meeting on October 22, 2019 the Heritage Oakville Advisory Committee (the "Committee") will be considering a report from the Town's Planning Services Department dated October 8, 2019 (the "Staff Report"), which recommends that the Committee endorse a draft cultural heritage landscape conservation plan for the Erchless Estate at 8 Navy Street and 110-114 King Street, as well as draft Official Plan Amendments and Zoning By-law Amendments.

Despite the objections of ClubLink, on January 30, 2018, Town Council enacted Cultural Heritage Landscape Conservation Plan By-law 2018-019 (the "CHL By-law") and approved a Cultural Heritage Landscape Conservation Plan for the Glen Abbey property (the "Glen Abbey Conservation Plan"). At the same time, Council enacted *Ontario Heritage Act* Delegation Powers By-law 2018-020 and adopted a resolution to endorse amendments to each of the following existing Town by-laws: Site Alteration By-law 2003-021; Private Tree Protection By-law 2017-038; and Property Standards By-law 2017-007, which were subsequently enacted as By-law Nos. 2018-044, 2018-043 and 2018-042, respectively, on February 26, 2018.

In February 2018, ClubLink made an application to the Superior Court of Justice to quash all of the above by-laws and the Town's approval of the Glen Abbey Conservation Plan (collectively, the "Impugned By-laws"). ClubLink's application was heard by Justice Morgan on October 22 and 23, 2018.

Justice Morgan issued Reasons for Judgment on December 11, 2018, in which he quashed all of the Impugned By-laws. In doing so, he found that the Town had enacted the Impugned By-laws without the requisite legislative authority, that they had been enacted in bad faith, and that they were vague and undermined the rule of law. A copy of the Reasons for Judgment dated December 11, 2018 is attached for reference.

The Town appealed Justice Morgan's decision to the Ontario Court of Appeal, and the appeal was heard on May 23, 2019. The Court of Appeal has not yet issued its decision. Although the Town at one time indicated that it might seek a stay of Justice Morgan's decision pending the appeal, it ultimately chose not to do so. Thus, each of the Impugned By-laws remains quashed and not in effect.

Draft Conservation Plan for the Erchless Estate

We note that the format of the draft conservation plan for the Erchless Estate is very similar to the Glen Abbey Conservation Plan that was quashed by Justice Morgan. We also note that the draft conservation plan includes a proposed definition of the term "structure" (see page 55), with a citation to By-law 2018-044, which was one of the Impugned By-laws that was quashed. In fact, that same proposed definition of the term "structure" was also found in the CHL By-law and each of the other by-laws that were quashed by Justice Morgan.

ClubLink maintains that this proposed definition of the term "structure" was created by the Town as a deliberate attempt to support its position in ongoing litigation with ClubLink as to whether the existing golf course that was constructed on the Glen Abbey property constitutes a "structure" for the purposes of section 34 of the *Ontario Heritage Act* (the "*OHA*"). In Reasons for Judgment issued on October 25, 2018, Justice Morgan concluded as follows: "I find that the Glen Abbey Golf Course is both composed of structures and overall is a structure for the purposes of s.34 of the *OHA*". A copy of the Reasons for Judgment dated October 25, 2018 is attached for reference. The Town also appealed this decision, and a ruling from the Court of Appeal has not yet been issued.

Similar to the Glen Abbey Conservation Plan, the draft conservation plan for the Erchless Estate also improperly purports to treat the "removal" of buildings and/or structures as an "alteration" of the property in Schedules 5 and 6 (see pages 60 and 61). This is clearly contrary to the *OHA*, which deals with the demolition and/or removal of buildings and structures on properties designated under Part IV in section 34, whereas applications to alter a designated property in a manner that is likely to affect

the property's heritage attributes are separately addressed in section 33. Further, although not yet proclaimed in force, the *OHA* was recently amended to confirm that for the purposes of section 33 of the *OHA* (and other provisions) "the definition of 'alter' ... does not include to demolish or to remove ...".

Draft Official Plan Amendment

The "basis" of the draft Official Plan Amendment includes reference to Council's adoption of Official Plan Amendment 24 ("OPA 24") on January 30, 2018. OPA 24, in its entirety, remains under appeal by ClubLink to the Local Planning Appeal Tribunal ("LPAT") (LPAT Case No. PL180158), and is also the subject of an application by ClubLink to the Superior Court of Justice to quash the instrument, which is scheduled to be heard by Justice Schabas in April 2020 (Court File No. CV-19-613440). In particular, as noted in the Town's current draft amendment: "OPA 24 includes the framework to recognize special policy areas for heritage conservation districts and cultural heritage landscapes protected under the Ontario Heritage Act, which is proposed again through this OPA". [emphasis added]

Indeed, in Item Nos. 1 and 2 respectively, the draft Official Plan Amendment proposes to amend the introductory paragraph of section 26 of the Livable Oakville Plan and to insert a new section 26.6 regarding "Heritage Conservation Districts and Cultural Heritage Landscapes". These proposed amendments are identical to Item Nos. 1 and 2 in OPA 24, which remain subject to ClubLink's appeal to the LPAT and its application to the Superior Court of Justice.

In our view, the Town's proposal to re-adopt the very same policies that remain subject to both an active appeal and an application to quash by ClubLink amounts to a colourable attempt by the Town to circumvent the adjudicative process.

Further, Item No. 6 of the Town's draft amendment proposes to amend Schedule A1, Urban Structure, of OPA 15, which is also currently under appeal to the LPAT by ClubLink (LPAT Case No. PL180580).

Perhaps even more egregious than the content of the draft Official Plan Amendment is the fact that the Town did not provide direct notice to ClubLink that this draft amendment was being brought forward for consideration. Given that the draft amendment includes the same proposed policies that ClubLink currently has under appeal and subject to an application to quash, ClubLink has a clear and obvious interest in this matter. Nonetheless, the Town made no apparent effort to alert ClubLink to this proposed amendment; instead, ClubLink only became aware of it through its own review of the Committee agenda.

In ordinary circumstances, we would be shocked that a municipality would fail to notify a party of an Official Plan Amendment where its interest in the draft amendment is so apparent. Regrettably, given the Town's conduct towards ClubLink over the last several years, the Town's failure to notify ClubLink does not come as a great surprise.

The content of the draft Official Plan Amendment, combined with the Town's failure to give direct notice of it to ClubLink, represents a further example of the Town's bad faith conduct towards ClubLink in relation to the Glen Abbey property.

Conclusion

For the reasons set out above, we urge the Committee to reject the recommendations in the Staff Report. Alternatively, the Committee could defer its consideration of these matters until ClubLink's related LPAT appeals and court applications have been resolved, recognizing that there is no apparent urgency in proceeding with these matters at this time in relation to a Town-owned property.

To state the obvious, the Committee must not blindly endorse the recommendations being proposed by the Town's Planning Services Department. Rather, the Committee must exercise its own independent judgment as to the appropriateness of the draft documents that are being presented for its consideration, given the numerous concerns identified above, and recognizing that if the Committee chooses to endorse the staff recommendations it too will be implicated in the Town's conduct against ClubLink.

Yours truly,
DAVIES HOWE LLP

Mark R. Flowers
Professional Corporation

encls.

copy: Mayor Rob Burton and Members of Town Council
Mark Simeoni, Director, Planning Services, Town of Oakville
Client

CITATION: Clublink v Town of Oakville, 2018 ONSC 7395
COURT FILES: CV-18-591564
DATE: 20181211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED	)	*Earl Cherniak, Cynthia Kuehl, and Mark Flowers*, for the Applicants
Applicants	)	
– AND –	)	
CORPORATION OF THE TOWN OF OAKVILLE	)	*Sandra Barton, Rodney Northey, Jennifer King, and Nadia Chandra*, for the Respondent
Respondent	)	
	)	**HEARD:** October 22-23, 2018

E.M. MORGAN J.

I. The by-laws and conservation plan in context

[1] The Applicants, Clublink Corporation ULC and Clublink Holdings Limited (together, "Clublink"), the owner of the renowned Glen Abbey Golf Course, seek to quash 5 by-laws enacted by the Respondent, Corporation of the Town of Oakville (the "Town") as well as a resolution of the Town council approving a Cultural Heritage Landscape Conservation Plan for Glen Abbey (the "Conservation Plan").

[2] The by-laws and resolution in issue here all follow on the heels of the Town's By-Law 2017-138, enacted on December 20, 2017 (the "Designation By-law"), in which the Town designated the Glen Abbey property and the adjacent Greeneagle property (together, the "Golf Course" or "Glen Abbey"), as a cultural heritage property under s. 29 of the *Ontario Heritage Act*, RSO 1990, c. O.18 ("*OHA*"). Much of the background to this is set out in my judgment in a previous application between these parties, *Town of Oakville v Clublink*, 2018 ONSC 6386, and I will not repeat that background here.

[3] The impugned by-laws include the Cultural Heritage Landscape Conservation Plan By-law 2018-19 (the "CHL By-law"), which requires the preparation of a conservation plan for all protected heritage properties with a "cultural heritage landscape" in the Town. They also include the Conservation Plan and 4 related by-laws which incorporate reference to and rely on the CHL By-law: the *OHA* Delegation Powers By-law 2018-020, By-law 2018-042 to amend Oakville's Property Standards By-law 2017-007, By-law 2018-043 to amend the Private Tree Protection By-law 2017-038, and By-law 2018-044 to amend the Site Alteration By-law 2003-021 (collectively, the "Impugned By-laws").

[4] With the exception of the Conservation Plan, which is specific to Glen Abbey, all of the Impugned By-laws, including the CHL By-law which is the key to the Town's policy in respect of the cultural heritage properties, are on their face by-laws of general application. Their overall effect is to implement the cultural heritage policy for designated properties and districts within the Town. Generally speaking, the Impugned By-laws require the creation of conservation plans, set out criteria for granting the required permission for alterations of affected properties, delegate authority to Town officials and staff in respect of such decisions, and implement various rules for dealing with cultural heritage properties, properties with cultural heritage landscapes, and properties in cultural heritage districts.

[5] Clublink challenges all of the Impugned By-laws. It focuses its argument, however, on the CHL By-law and the Conservation Plan formulated pursuant thereto. These represent the most substantive impact on it, with the others being more in the nature of mechanical implementational by-laws. Counsel for Clublink therefore approaches its submissions with the view that the validity of all of the Impugned By-laws rises or falls with the validity of the CHL By-law and the Conservation Plan. Likewise, counsel for the Town has approached the defense of the Impugned By-laws by focusing primarily on the CHL By-law and the Conservation Plan. The analysis here will follow the same pattern. The CHL By-law and Conservation Plan are at the core of the case, with the validity of all of the Impugned By-laws turning on the validity of those two.

[6] Clublink submits that the Impugned By-laws are *ultra vires* the Town and are in conflict with provincial legislation that prohibits the enactment of by-laws addressing services and other things related to recreation and culture. Secondly, Clublink submits that the Town's conscious disregard of the financial consequences of the Impugned By-laws, and the singling out of Glen Abbey in the enforcement of the Impugned By-laws, reflect the Town's bad faith in enacting them. Thirdly, it is Clublink's position that enactment of by-laws aimed specifically at its property, but drafted in general rather than specific language, has resulted in them being vague and unintelligible.

[7] The Town submits that it is following the letter of the *OHA* and the *Municipal Act, 2001*, SO 2001, c. 25 (the "*Municipal Act*"), and is implementing a cultural heritage strategy which it is legislatively mandated to pursue. It states that Glen Abbey is one of some 30 properties that have been identified by it as having cultural heritage value, and denies that Clublink's property has been singled out for different or biased treatment. Counsel for the Town describes the Impugned By-laws as procedural only, and argues that they were enacted to implement in an orderly way a cultural heritage scheme over which the Town already has statutory authority. The Town's counsel

also points out that the designation of the Golf Course as having culture heritage value comes from provincial direction. In this, the Town relies on the Ministry of Culture, *Heritage Property Evaluation* (2014), a policy guide or took kit which includes golf courses among the types of properties that municipalities might consider in implementing a cultural heritage strategy.

[8] For greater clarification, the validity of the Designation By-law, enacted under authority of the *OHA*, is not one of the Impugned By-laws and is not itself in issue in this Application. Clublink's own re-development plan for Glen Abbey, which was submitted at roughly the same time as the Town was considering the designation of Glen Abbey under the *OHA* and which proposes transforming the Golf Course to residential housing use, is equally not at issue in this Application. The Town's response to Clublink's re-development proposal, being an Official Plan Amendment and a site-specific zoning by-law prohibiting new building on the property except for golf-related structures, is likewise not at issue here.

[9] It is the Town's position that the Impugned By-laws must be analyzed in their own right, without co-mingling them with an evaluation of the Designation By-law or the re-development proposal and the Town's responses thereto. By contrast, it is Clublink's position that the Impugned By-laws are part and parcel of an overall scheme directed at undermining its property rights, and that the cultural heritage designation and the Town's opposition to re-developing Glen Abbey for residential housing, cannot be divorced from an analysis of the Impugned By-laws implementing those measures.

[10] Both sides overstate the position. Although the Impugned By-laws are obviously front and centre, the background controversy is important for context and understanding. By way of analogy, if this were a contractual case, one would say that the general business background of a transaction cannot be permitted to shift focus away from the actual terms of the contract sought to be enforced. Simultaneously, one would say that the contentious terms of a contract cannot be interpreted in a vacuum and without an understanding of the business context of which the transaction is a part.

[11] The overarching controversy between Clublink and the Town over the future of the Glen Abbey property forms the factual background for the present dispute, but that overall controversy is not all formally before me. In order to do justice to the Town's enactment of the Impugned By-laws, I must consider them in their own right without being distracted by other measures not currently being challenged. Simultaneously, in order to do justice to Clublink's challenge to the Impugned By-laws, I must consider them in the larger factual and policy context in which they have been enacted without being diverted into a narrow and decontextualized focus on the text of the Impugned By-laws.

II. *Ultra vires*

[12] Under s. 273(1) of the *Municipal Act*, "the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality." Since "a 'by-law' includes an order or resolution" [s. 273(2)], all of the Impugned By-laws, including the Conservation Plan, are open to be challenged on this basis.

[13] The Town, like all municipalities, is a creature of the province and can exercise only those powers conferred by provincial legislation: *R v Greenbaum*, [1993] 1 SCR 674, 687-88. This principle of delegated legislative authority makes the *ultra vires* doctrine relevant to a municipal by-law or resolution. As it is put in Rogers, *The Law of Canadian Municipal Corporations* (2d ed., Scarborough: Carswell, 1971), p. 344, "Although it is said that by-laws are similar to statutes, they are still 'inferior' laws and cannot usurp the authority of or be contrary to higher law."

[14] Counsel for Clublink concedes that the Town has considerable latitude in enacting by-laws within the general framework of provincial legislation. Absent breach of a specific statutory imperative or prohibition, municipalities have long been accorded deference in the exercise of their by-law powers. Morden JA stated in *Niagara-on-the-Lake (Town) v Gross Estate* (1993), 12 OR (3d) 1, 8, (Ont CA) that, "It is not evasion to do something contrary to the policy of a statute if the conduct is not prohibited by its terms, express or implied." One must therefore look carefully at the terms of any statute to which a municipal enactment is alleged to run contrary.

[15] That said, an assessment of the legality of a by-law thus entails an analysis of not only its form but its substance. And while the test for *ultra vires* in the municipal context has become increasingly stringent over time, it has always been the case that a city council cannot act contrary to its statutory mandate by cloaking an overreaching by-law in what might otherwise seem to be acceptable language:

> A by-law which is ostensibly within the authority of a council to enact may be set aside or declared invalid if its real purpose and attempt is to accomplish by indirect means an object which is beyond its authority... Hence, the court must always 'in examining a by-law, see that it is passed for the purpose allowed by a statute and that such purpose is not resorted to as a pretext to cover an evasion of a clear statutory duty'.
>
> *Barrick Gold Corporation v Ontario*, 2000 CanLII 16929, at para 59 (Ont CA), citing Rogers, at p. 1021.

[16] Counsel for the Town submits that there is ample legislative authority for the CHL By-law and Conservation Plan. They rely on the general by-law making powers and spheres of jurisdiction contained in s. 8(3) of the *Municipal Act*, and make the point that the Town may enact specific by-laws under this general grant of authority: *Galganov v Russell (Township)*, 2012 ONCA 409, at para 27. The Town also relies on s. 11(3)5 of the *Municipal Act*, which authorizes Town council to enact by-laws in respect of "culture, parks, recreation, and heritage".

[17] Counsel for Clublink takes issue with this interpretation of the Town's authority. They submit that the Town's jurisdiction is statutorily limited in an important way. Specifically, s. 11(8) of the *Municipal Act*, provides:

> (8) The power of a municipality to pass a by-law under subsection (3) under the following spheres of jurisdiction does not, except as otherwise provided, include the power to pass a by-law respecting *services or things* provided by any person, other than the municipality

or a municipal service board of the municipality, of the type authorized by that sphere [emphasis added]:

1. Public utilities.
2. Waste management.
3. Highways, including parking and traffic on highways.
4. Transportation systems, other than highways.
5. Culture, parks, recreation and heritage.
6. Parking, except on highways

[18] It is Clublink's position that the Impugned By-laws require it to provide a service in relation to "culture, parks, recreation and heritage". The Conservation Plan, for example, defines the cultural heritage of Glen Abbey in relation to the services it provides. Article 2.3 of the Conservation Plan is entitled "Description of heritage attributes". It borrows its description from the Designation By-law which preceded it and provides a blueprint for its implementation. The Conservation Plan provides not only that physical features of Glen Abbey be preserved, but that services provided on the Golf Course continue indefinitely into the future.

[19] Those services – the business of running a golf course with all of its recreational facilities serviced, game-ready, and available for use – fall within the Conservation Plan's identification of the property's heritage attributes. Indeed, Clublink contends that the continued provision of services lies at the very core of the Conservation Plan's requirements for Glen Abbey, and that this focus on the service business of running the Golf Course, as opposed to the preservation of physical aspects of the property, is patent in the terms of the Conservation Plan.

[20] The Conservation Plan declares that it is implementing those provisions of the *OHA* that, for a designated property, "prohibit any alteration of a heritage property that is likely to affect its heritage attributes". The services included within Glen Abbey's heritage attributes, as described in the Conservation Plan, are:

- The historic use and ongoing ability of the property to be used for championship, tournament and recreational golf;
- The historic use and ongoing ability to host championship and other major tournaments, such as the Canadian Open;
- The close and ongoing association of the course with the Jack Nicklaus design and his firm Nicklaus Design…

[21] These features are termed essential to the "Contextual value" of the Glen Abbey property, as set out in art. 2.1 of the Conservation Plan:

> The Property is a landmark within the Town of Oakville. The quality of the golf course, and its connection to the Canadian Open, have been important in defining the character of this community and giving it a distinct place within the larger Toronto metropolitan area, and beyond…

> The Property retains a high level of authenticity and integrity, continuing to host tournament, championship and recreational golf...

[22] In argument, counsel for the Town stress the physical features of the property, and not its use, as comprising its defining, cultural heritage elements. However, it is obvious from the Conservation Plan that the central heritage value of Glen Abbey is its ongoing use as a high quality golf course. Its design and vistas are in support of that service provided by the owner of the property, not the other way around. It is the service business of the Golf Course – "continuing to host tournament, championship and recreational golf" – that is preserved under the Conservation Plan. Although this business is certainly wed to the physical features of the property, it is the running an ongoing, live recreational facility that the essence of the attributes Conservation Plan addresses.

[23] Article 1 of the Conservation Plan introduces its purpose: to "[provide] guidance to the landowner and the Town and provides information to all persons interested in the conservation of this significant heritage resource." In addition, the Plan "is intended to provide a clear and efficient process to assess proposed alterations and ensure that proposed alterations meet applicable heritage requirements." This purpose – identifying and preserving the property's heritage requirements – was articulated in keeping with the "Scope of Work" document produced as an addendum to the September 26, 2017 meeting of the Heritage Oakville Advisory Committee which formulated the parameters of the Conservation Plan. That document expressly stated that the purpose of the Conservation Plan was to "address how Glen Abbey can be managed and used as a golf course for championship and recreational play".

[24] Accordingly, the heritage requirements in the Conservation Plan are geared toward ensuring that any alterations preserve the ability of the Golf Course to host tournament and recreational play. If Clublink were to exit the service business of providing a golfing facility, and transform itself into a wilderness management company that simply preserves the property's aesthetic vistas, the terms of the Conservation Plan, and therefore the CHL By-law that authorized its enactment, would be breached. As stated in art. 2.1 set out above, it is the "ongoing use" that renders the Golf Course in compliance with the Conservation Plan.

[25] Counsel for Clublink also submits that by requiring alterations to Glen Abbey to be done in accordance with the Conservation Plan, the CHL By-law and the Conservation Plan effectively legislate not only for services but for "things provided by [Clublink]" in respect of "Culture, parks, recreation and heritage". As indicated above, a Town enactment to this effect runs contrary to the terms of section 11(8)5 of the *Municipal Act*.

[26] In *Galganov*, *supra*, the Court of Appeal explored the meaning of a "thing" as used in s. 11 of the *Municipal Act*. In that case, the municipality enacted a by-law implementing a bilingualism policy which, among other things, regulated language use on commercial signs. Weiler JA, for a unanimous Court, found signage to be well within the applicable definition of a "thing" [at para 30]:

> The word 'thing' is defined as a material or non-material entity, idea, action, etc., that is or may be brought about or perceived': see *Canadian Oxford Dictionary*, 2d

ed., *sub verbo* 'thing'. The enactment of the By-law respecting commercial exterior signs is an action taken by the Township relating to a material entity (signs) or a non-material entity or idea (well-being of persons). I would reject Brisson's argument that the By-law is not in relation to a 'thing'.

[27] The Conservation Plan contains two Schedules of items to which the Town's regulatory powers apply, which require the Town's consent in order to be altered. These Schedules identify "Category B Alterations", which require the approval of Town staff in order for Clublink to alter them in any way, and "Category C Alterations", which require the approval of Town council for alteration. The two categories are itemized in Schedules 5 and 6 of the Conservation Plan:

Category B Alterations

1. Addition/removal/replacement of, or other changes to permanent hard landscaping features, as follows:

a. parking lots,
b. patios,
c. in ground planters,
d. fences,
e. gates,
f. walls,
g. trellises,
h. arbours,
i. gazebos.

2. Addition/removal/replacement of, or other changes to, permanent signage...

Category C Alterations

1. Construction or removal of a new permanent building or structure that is greater than 15 square metres (or 161 square feet);

2. Addition or partial removal of a permanent building or structure, that has a total footprint, including all open porches and spaces, that is greater than 15 square metres (or 161 square feet).;

3. Addition or removal of:

a. more than four trees;
b. water bodies or water courses, including water hazards;
c. bunkers, mounds, berms, greens, fairways, roughs, tees and practice facilities, except of the addition/removal of a single bunker, mound or berm which is a Category B alteration;
d. a hole;

e. an internal road...

[28] It takes no special mastery of analogy to see that parking lots, patios, gates, fences, gazebos, bunkers, etc. are analogous to signage. If, according to the Court of Appeal, signage is identifiable as a "thing" addressed in a language by-law, then parking lots, gates, and bunkers, must be "things" addressed in a golf course Conservation Plan. In fact, if it were not already obvious that the Conservation Plan regulates "things" in respect of culture and recreation, it expressly requires Town approval of all additions, removals, replacements, or any other changes to "permanent signage" at Glen Abbey. Thus, when the subtitle of the CHL By-law proclaims itself "A by-law to govern cultural heritage landscape conservation plans within the Town of Oakville and to delegate certain powers to designated officials", the reference is to the Town's governance of, among other things, the very "thing" – signage – that the Court of Appeal says is beyond the boundaries of municipal authority.

[29] Counsel for Clublink states in their written submissions that in enacting the CHL By-law and fashioning the Conservation Plan for Glen Abbey, the Town "seeks to accomplish indirectly what it cannot do directly: using a heritage designation to compel a particular use of the Glen Abbey property." Given the type of "services" and "things" which these instruments purport to govern, it is difficult not to agree with that conclusion. There is nothing of cultural heritage value in a tee, green, fairway, hole, bunker, etc. if these "things" are divorced from the "service" of providing a usable golf course. Jack Nicklaus installed 18 holes in the Glen Abbey property not to aerate the grasslands, but to be used by golfers in playing their game. Under the CHL By-law and the accompanying Conservation Plan, it is the game and the attendant golfing services that are preserved.

[30] I note in passing that the Conservation Plan sets out the procedures to be followed in applying for heritage review in respect of a proposed alteration of the property. Further, the Conservation Plan provides that Category C Alterations, which are set out above and for which Town council's approval is required, include the removal of all or part of a building or structure. In the words of article 5 of the Conservation Plan, the purpose of these procedures is "to ensure compliance with section 33 of the *Ontario Heritage Act*."

[31] Counsel for Clublink submits that this amounts to a contradiction of section 34 of the *OHA*, which provides that applications for the removal or demolition of a building or structure on a designated property are to proceed under section 34 of the *OHA*. The previous application between the Town and Clublink discussed in my judgment at 2018 ONSC 6386 was concerned with the distinction between these two procedural routes. I found, at para 45, that "Clublink has the right to make an application to the Town under s. 34(1) of the *OHA* for demolition and/or removal of buildings on the Property and of the other structures of which the Golf Course is comprised."

[32] The current test for a by-law being found *ultra vires* a provincial statute is modeled on the Supreme Court's approach to federal-provincial legislative conflict. The test was prominently articulated Betz J. in *Montréal (City) v Arcade Amusements Inc.*, [1985] 1 SCR 368, 404: "otherwise valid provincial statutes which are *directly contrary* to federal statutes are rendered inoperative by that conflict. Only the same type of conflict with provincial statutes can make by-laws inoperative" [emphasis in the original]. The British Columbia Court of Appeal later put the

test succinctly: "A true and outright conflict can only be said to arise when one enactment compels what the other forbids.": *British Columbia Lottery Corp. v Vancouver (City)* (1999), 169 DLR (4th) 141, 47-8. This "impossibility of dual compliance" test was reiterated by the Supreme Court in *14957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241, at para 46, which confirmed that the municipal law test of *ultra vires* based on contradiction is a stringent one.

[33] In the present case, the question is whether "the by-law 'negates the operating effect' of the provincial law: *Superior Propane Inc. v York (City)* (1995), 23 OR (3d) 161 (Ont CA). In my view, it cannot be said that the Conservation Plan's establishment of procedures for an application under s. 33 of the *OHA* is a form of compelled violation of s. 34 of the *OHA*. The two sections provide alternative routes; and although the Conservation Plan is incomplete in omitting s. 34, it does not exactly compel a violation of s. 34 of the *OHA*.

[34] As I indicated in my previous judgment, "Clublink has the right to make an application to the Town under s. 34(1) of the *OHA* for demolition and/or removal of buildings on Property and of the other structures of which the Golf Course is comprised": 2018 ONSC 6386, at para 45. That applies regardless of the narrower terms of the Conservation Plan. In this sense, "[c]ompliance with the provincial Act does not necessitate defiance of the municipal by-law; dual compliance is certainly possible": *Law Society of Upper Canada v Barrie (City)* (2000), 46 OR (3d) 620, 629-30.

[35] That said, the regulation by the CHL By-law and Conservation Plan of the provision of "service or things" by a private landowner in respect of "Culture, parks, recreation and heritage" does amount to a direct contradiction to the prohibition in s. 11(8)5 of the *Municipal Act*. It is axiomatic that, "A municipality must exercise its powers in accordance with the purposes sought by the legislature": *Immeubles Port Louis Ltée. v Lafontaine (Village)*, [1991] 1 SCR 326, 349. I understand the Supreme Court's admonition that, "Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold": *Shell Canada Products Ltd. v Vancouver (City)*, [1994] 1 SCR 231, 244. Here, however, the Town has provided just such a clear demonstration.

[36] In s. 11(8)5 of the *Municipal Act*, the legislature expressly established areas where municipalities are not to tread, and yet that is precisely where the Town has gone in the CHL By-law and the Conservation Plan. This kind of direct contravention of a statutory provision limiting the Town's power meets the *Spraytech* test of invalidity: as between the power to legislate in ss. 8(3) and 11(3)5 of the *Municipal Act* and the specific prohibition not to legislate in s. 11(8)5, dual compliance is impossible.

[37] The Supreme Court of Canada has very recently confirmed that a by-law exhibiting this kind of excess of conferred jurisdiction is illegal and is subject to being quashed. "An abuse of power occurs where a public body exercises its power of regulation unlawfully, that is, in a manner inconsistent with the purposes the legislature was pursuing in delegating the power": *Lorraine (Ville) v 2646-8926 Quebec Inc.*, 2018 SCC 35, at para 26. The Impugned By-laws were enacted without a proper purpose under the *Municipal Act* and in direct contradiction to a specific statutory

limitation of the Town's authority. For that reason, they are *ultra vires* the authority of the Town to enact them.

III. Bad faith

[38] The finding that the Impugned By-laws are directly contrary to the provincial legislation that conferred the power to enact them can bring the analysis of those by-laws to an end. Strictly speaking, it does not matter whether they were enacted in good or bad faith, or whether they are drafted in a way that is clear or vague; municipal by-laws that are not legislatively authorized cannot stand.

[39] I am cognizant, however, that the parties spent a substantial amount of time and effort on the issues of bad faith and vagueness, and that these issues formed a central part of Clublink's challenge to the Impugned By-laws. For the sake of completeness, therefore, I will proceed to address them as well.

[40] The first thing to note is that *ultra vires* and bad faith are not unrelated to each other. The Court of Appeal has opined that one strong indicator of bad faith on the part of a municipal council is the passing of a by-law that is not statutorily authorized: *Markham v Sandwich South (Township)*, 1998 CanLII 5312, at para 2 (Ont CA).

[41] The Court of Appeal has stated on numerous occasions that, "[i]llegality under s. 136(1) [now s. 273(1) of the *Municipal Act*] includes bad faith": *Equity Waste Management of Canada v Panorama Investment Group Ltd.* (1997), 35 OR (3d) 321, at para 26 (Ont CA). Generally speaking, "[b]ad faith by a municipality connotes a lack of candour, frankness and impartiality": *Ibid.*, at par 61. To be clear, the allegation of bad faith is not a personal criticism of Town officials or council and does not connote individual wrongdoing. As Robins J. described it in *H.G. Winton Ltd. v Borough of North York* (1978), 20 OR (2d) 737, 744-5:

> To say that council acted in what is characterized in law as 'bad faith' is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members...But it is to say, in the factual situation of this case, that Council acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government [citations omitted].

[42] In coming to a determination of whether a by-law can be impugned on this ground, "the court should have regard to the presence or absence of certain evidentiary 'badges' or indicia of bad faith": *Luxor Entertainment Corp. v North York* (1996), 27 OR (3d) 259, at para 101 (SCJ). The most common badges of bad faith include: "questionable timing; decisions made under false pretenses; improper motives; lack of notice; the usual practices and procedures are set aside; the parties most affected are kept in the dark; or the law singles out one individual or property": *Toronto Taxi Alliance Inc. v City of Toronto*, 2015 ONSC 685, at para 106. As the courts have frequently pointed out, any one of the evidentiary badges of bad faith might not on its own be sufficient to undermine the validity of a by-law, but "it is the cumulative effect of all of the badges, viewed collectively, which the court should take into account": *Luxor*, at para 101.

[43] Counsel for Clublink submits that the strongest indicator of bad faith is that the CHL By-law is purportedly applicable to all cultural heritage landscapes in the Town, but its application has been aimed at Glen Abbey alone. The Town's cultural heritage official and affiant, Susan Schappert, confirmed in her cross-examination that Clublink, and Clublink alone, has been required to adhere to a Conservation Plan, despite many properties falling within the Town's other cultural heritage districts. The press release issued by the Town upon passage of the CHL By-law stated expressly that Town council was concerned to "conserve the cultural heritage value and attributes of the Glen Abbey Golf Course". This focus, in turn, reflected the staff report on which the CHL By-law was based that was specific to the Glen Abbey property. Indeed, the CHL By-law, which mandates the production of a conservation plan for all heritage properties, was only enacted after the Town's development of the Conservation Plan for Glen Abbey was already underway.

[44] In fact, despite the supposedly general requirement in the CHL By-law that conservation plans be prepared within three months of its passing, the Town has neither produced plans for other affected properties nor notified the owners thereof of the CHL By-law's requirement that they do so. Moreover, the timing of the CHL By-law and other Impugned By-laws is suspiciously coincidental with Clublink's application under s. 34 of the *OHA* to demolish the Golf Course in preparation for its redevelopment (i.e. the subject of my previous judgment between these parties).

[45] The Conservation Plan also seeks to reinforce the Town's insistence that Clublink proceed via s. 33 rather than s. 34 of the *OHA* for any given alteration. Section 33 gives the Town the final say over Clublink's application without any true right of appeal, while s. 34 provides a right of appeal to the Land Planning Appeal Tribunal. The Conservation Plan's failure to reference s. 34 is an error, but it nevertheless may not directly contradict the *OHA* so as to on its own render the Plan *ultra vires*; as I explained in my previous judgment, whether s. 33 or s. 34 apply may depend on variables such as whether the subject of the application is a "structure". On the other hand, the complete omission of s. 34 is certainly a glaring and seemingly strategic one. It therefore may reflect on the good faith of the Town in imposing the Conservation Plan on Clublink.

[46] Clublink points out that with the passage of the CHL By-law, all alterations or demolitions of designated properties must be approved by the Town if the alteration will affect its cultural heritage. This includes Glen Abbey, which has been designated under Part IV of the *OHA*, as well as properties within cultural heritage districts designated under Part V of the *OHA*. Clublink, as already indicated, complains that it alone has been made to face a Town approval process for alterations and demolitions, and points to this singular treatment of Glen Abbey as a sign of the Town's bias. In response, the Town states that Glen Abbey is not unique, and points to the numerous properties that operate under a similar approval process by virtue of being located in a heritage district designated under Part V.

[47] Despite the generally applicable language of the CHL By-law, no other conservation plans have been produced by other property owners, including those in Part V designated heritage districts. The Town has approved alterations of properties in those districts since the passage of the CHL By-law even though those owners have not adhered to any conservation plan in proposing their alterations. And that is despite the fact that under the CHL By-law it is the conservation plans that are supposed to set out for the owner those features that constitute the property's cultural

heritage and that thereby set the parameters of permissible alterations. Ms. Schappert testified that up until the date of her cross-examination the Town has considered and approved six applications for alterations of properties in the Town's four heritage conservation districts, and that none of those approvals was based on any sight-specific conservation plan. That requirement has been imposed on the Glen Abbey property alone.

[48] Counsel for the Town points out that the cultural heritage designation of Glen Abbey pursuant to the *OHA*, and the implementation of that designation via the Impugned By-laws, did not change the permitted use of the property. The Town's zoning by-law already zoned Glen Abbey for use as a golf course, and the cultural heritage designation and Impugned By-laws merely reinforced this use. It is the Town's position that it did not have to enact the Designation By-law and implement it with the Impugned By-laws, but it had the power to do so and did so transparently.

[49] Clublink's counsel responds to this by pointing out that zoning works in a more generalized way than a by-law enacted pursuant to or in fulfillment of an *OHA* mandate. Many properties are zoned open space and could appropriately be used for a golf course. Cultural heritage considerations, on the other hand, fall into a special and more rarified category.

[50] Clublink contends that there is something odd about the need to resort to the *OHA* in order to preserve the very use for which the property was already zoned. What this suggests, according to Clublink's counsel, is that Glen Abbey's perpetual use as a golf course could not be guaranteed on land use and zoning principles alone, especially since the province's existing growth plan calls for increased growth and housing density. Zoning, in other words, changes with acceptable redevelopment proposals; cultural heritage designations, on the other hand, stay permanently in place and permit only those alterations that comply with a restrictive conservation plan.

[51] The Town's position that Glen Abbey was already zoned for golf course use, and that the Designation By-law and the CHL By-law and Conservation Plan implementing its terms really changed nothing, is seen by Clublink as reflecting the Town's lack of good faith. In reality, the Conservation Plan changes everything when it comes to re-developing and otherwise making changes to Glen Abbey. As seen in the previous section, the Conservation Plan governs nearly every detail of the property. Moreover, while the existing zoning by-law may permit the property's use as a golf course, the Conservation Plan requires it. That difference is more than just a nuance; it is a game-changer in every sense of the term.

[52] It is Clublink's view that the Town's approach to it is entirely in disregard of its rights as owner, and that the Town has sought to appropriate for itself and the residents collectively the value that inheres in the Glen Abbey property. In making this argument, it points to, among other things, the public statements of residents who inveighed with Town council to do "everything in their power to stop" Clublink's redevelopment proposal. Clublink states that this public outcry prompted the Town to expedite its cultural heritage study and to refuse to even consider Clublink's own redevelopment proposal until forced to do so by an Ontario Municipal Board ("OMB") ruling.

[53] Moreover, Clublink submits that the Town is aware of the fact that it cannot use the *OHA* or the Impugned By-laws passed in implementing the *OHA* policy to require an owner to carry on

a specific type of business. Ms. Schappert conceded this point in her cross-examination. And yet, in various Town-issued documents, Glen Abbey is referred to as a "Town landmark", as if its value must inure to the benefit not of its private owner but to the Town at large. In its Notice of Intent to Designate Glen Abbey issued August 24, 2017 ("NOID"), the Town specifically noted the attachment of other private property owners to the Golf Course and its ongoing existence as such [at p. 4]:

> Contextual Value
>
> The Property is a landmark within the Town of Oakville. The quality of the golf course, and its connection to the Canadian Open, have been important in defining the character of this community... The course is also a central defining feature of its immediate neighbourhoods, which were created in response to the construction of the course.

[54] Clublink submits that the upshot of the Impugned By-laws in implementing the cultural heritage designation of Glen Abbey is to appropriate the value of the property to the surrounding residents and owners. In contrast to the concern shown for the neighbourhoods in the immediate vicinity of Glen Abbey, which the Town observes were built and attracted purchasers specifically because of the existence of the Golf Course, the Town has given no consideration whatsoever to the impact of its by-laws on Clublink as owner of Glen Abbey. In fact, in the Town Council Report dated August 16, 2017, which was the basis for issuing the NOID, it is observed that, "There are no known financial implications of this report at this time." A similar lack of concern for financial implications is evident with respect to the Town's enactment of the Conservation Plan. It is the Town's interest in preserving Glen Abbey's use as a championship golf course, and not Clublink's interest as property owner with financial concerns of its own, that forms the essence of the Conservation Plan.

[55] The courts have, of course, acknowledged that all town planning, including heritage designations, may entail the curtailment of property rights for some and the enhancement of property values for others: *Canadian Pacific Railway Co. v Vancouver (City)*, 2004 BCCA 192, at para 45, aff'd 2006 SCC 5. It is axiomatic, however, that "the City [must have] considered the matter in terms of balancing the interests of individual property owners in [the designated heritage area] against the overall community interests": *Cummings v Vancouver*, 2016 BCSC 1918, para 202. No such balancing is evident in the CHL By-law or the Conservation Plan.

[56] In point of fact, the Town was certainly aware of the financial implications not only of the NOID, but of the CHL By-law and the Conservation Plan, when these were enacted. Clublink had already submitted its redevelopment proposal to the Town, and the OMB had already required that the Town at least consider that proposal.

[57] Moreover, the Town itself has in the past acknowledged – indeed, exploited – the fact that the Golf Course did not represent the most financially valuable use of the Glen Abbey property. In a 2007 decision by the OMB, the Town attempted to increase Clublink's property tax assessment by attributing to Clublink the notional value of a housing development on the Glen Abbey land.

The Town based its position on a study by urban planner Ruth Victor showing that a housing development, and not a golf course, was the "highest and best use" for the Glen Abbey property.

[58] As the OMB put it in rejecting the Town's sought-for increased assessment, "[t]here is certainly an inconsistency that warrants some form of explanation": *Clublink v Oakville*, 2017 CarswellOnt 7477, at para 71. The OMB then went on to opine on the Town's motives in pursuing this gambit in light of the fact that the Town would likely not authorize the "highest and best use" on which it relied [paras 71-72]:

> [Counsel for the Town] offers the view that although the Victor Report is an independent planning opinion, it is one prepared for establishing what could potentially be the 'highest and best use' for the purpose of assessment. As he explained, it is not an opinion prepared to establish the merits of such a redevelopment scheme (and those merits are not being tested here in any event)...
>
> The Board concludes that the Victor Report offers evidence of little more than an attempt by the Town, perhaps in a fit of unwise avarice, to maximize property tax revenue from the Glen Abbey site...

[59] Without meaning to overstate the point, "avarice" is a less than charitable characterization of a public authority's approach to a rate payer and rights holder. It is not just a descriptive term, it is a judgmental one. That is, it speaks of more than a quest for financial advantage; it speaks of an improper or unethical financial advantage. Avarice – a word one does not often hears outside of a religious context – is identified as one of the seven deadly sins of biblical commentary, or the "capital vices" as St. Thomas Aquinas referred to them: Thomas Aquinas, *The Summa Theologica* (2d edn, 1920), Fathers of the English Dominican Province, trans., Q 84; I-II, 84, 3. Although the OMB ultimately decided to play it down in the context of a property tax appeal, it is not a proper approach for the Town to take in exercising its statutory powers and not one that commends itself to this court.

[60] The upshot is that the Town is keenly aware of the development value locked up in alternative uses for the Glen Abbey property when it suits its need to raise tax revenue. At the same time, it is blithely unaware of the value locked up in the very same property when it suits its need to suppress all development beyond its current use. The OMB was of the view that the first of these contradictory stances was unwise and greedy, but not a signal of bad faith. I am of the view that the second contradictory stance is one step over the line. It can signal nothing but bad faith.

[61] It is troubling enough for a municipality to ignore the use of a property in favor of its unattainable financial potential; it is twice as problematic for the same municipality to then ignore the financial potential of a property in favor of freezing its current use. Counsel for Clublink submits that this conduct on the part of the Town amounts to an expropriation of the Glen Abbey property. That is, of course, a far-reaching allegation, since there was no explicit taking of the property and Clublink is still left with its title and previous level of enjoyment of the property.

[62] That said, the Supreme Court of Canada has recently confirmed that an expropriation can take place in disguised form where "a municipal government limits the enjoyment of the attributes

of the right of ownership of property to such a degree that the person entitled to enjoy those attributes is *de facto* expropriated from them": *Lorraine (Ville) v 2646-8926 Québec Inc.*, 2018 SCC 35, at para 27. Indeed, the OMB has long been of the view that land use "designations cannot be used to create public parks or publicly accessible open spaces. This requires that the lands be legally acquired by consent or through due process, and that fair compensation be paid.": *Spellman v Essex (Town)*, 2002 CarswellOnt 5112, at para 107. What goes for zoning and planning designations also goes for heritage designations. The wholesale transfer of property value from owner to community cannot be accomplished cloaked in the disguise of an otherwise valid municipal power.

[63] Of course, municipalities generally enjoy considerable discretion in making planning and heritage decisions. The leeway that affords the Town, however, is not unlimited. "'Discretion' necessarily implies good faith in discharging public duty": *Roncarelli v Duplessis*, [1959] SCR 121, 140. Accordingly, a municipality may not...be held liable for the exercise of its regulatory power if it acts in good faith or if the exercise of this power cannot be characterized as irrational": *Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, [2004] 3 SCR 304, at para 23. But when it acts in the absence of good faith, and knowingly strips the value out of a property for the benefit of other municipal residents who purchased in nearby neighbourhoods, the scope of legitimate discretion has been exceeded.

[64] In his affidavit supporting this Application, the Senior Vice-President of Clublink, Robert Visentin, deposed that the continued running of the Golf Course costs in the range of $2,000,000 per year. There is nothing in the record to cast doubt on this figure. Counsel for the Town's response to this is to indicate that this simply reflects the cost of running the golf course; neither the CHL By-law, nor the Conservation Plan, nor any of the other Impugned By-laws serve to increase the expense.

[65] While the Town's response is in a theoretical sense correct, it suffers from the same blind spot from which much economic analysis suffers: it neglects transaction costs: see Douglas Allen, "Transaction Costs", in: *Encyclopedia of Law and Economics, vol. I: The History and Methodology of Law and Economics*, Bouckaert, Boudewijn and De Geest, Gerrit, eds. (Chelthenham: Edward Elgar Press, 2000), at p. 893. Clublink complains that the Conservation Plan is excessively detailed in its regulation of the ongoing management of the Glen Abbey property. The thorough coverage of the Conservation Plan necessarily adds time, labour, and expense to much of the business of Clublink in managing its property.

[66] A brief review of the Conservation Plan reveals that it does not shy away from the bureaucratization of minutia. It requires an application to staff for a proposed change in the contours of a single bunker or mound, changes in the shape or length of a green, etc. It requires an application to council for a proposed addition or elimination of a cart path, an internal road, etc. It requires an application to Town staff for the removal of up to four trees and an application to Town council for the removal of over four trees. The Impugned By-laws even include the new By-law 2018-43, entitled "A by-law to amend the Private Tree Protection By-law 2017-038". That regulatory innovation, when applied to this over 200-acre forested property, increases arboreal control to the point where changing a single cedar or pine may in some circumstances be subject to the Town's Heritage Advisory Committee.

[67] The Town's response also misses the point of Mr. Visentin's evidence. Preserving Glen Abbey as an operating Golf Course – especially one operating at championship golf standards as required by the Conservation Plan – is a money-losing proposition for the property owner. It is entirely geared toward preventing what the Town knows to be – indeed, what the Town has itself previously argued to be – Glen Abbey's highest and best use. And while a property owner does not necessarily have a right to put its property to the highest and best use, and the Town has a right to invoke other policy objectives in the face of such a proposed use, Clublink has a right to expect *some* value in its land be preserved and taken into account. Otherwise, the running of Glen Abbey becomes an interminable expense for Clublink, effectively replacing tax revenue with private funding in running a public amenity.

[68] I will conclude with a comment endorsed by Rosenberg JA on behalf of a unanimous Court of Appeal in *Pedwell v Pelham (Town)*, [2003] OJ No 1774, at para 73: "[City officials'] own subjective assessment of the righteous character of their conduct does not resolve the problems of whether they acted in good faith in so doing". Here, there is no suggestion that the Town enacted the Impugned By-laws out of any motive other than what they thought was the best interest of their constituents at large. Nevertheless, the Town enacted a Conservation Plan and other Impugned By-laws that improperly disregard the interest of Clublink in favour of the interest of other residents. It stripped value from Glen Abbey and effectively transferred it to those other residents.

[69] Counsel for Clublink submits that the CHL By-law and Conservation Plan appear to be the only ones of their kind in Ontario, and are the only ones anywhere that target a golf course as an ongoing business. This comes as little surprise.

[70] Counsel for the Town states that the CHL By-law tracks the provincial policy as set out by the Ministry of Culture in its *Heritage Property Evaluation, supra.* That policy guide, at p. 55, expressly references "parks, gardens, battlefields…golf courses, farmscapes" as illustrations of properties that might qualify as "cultural heritage landscapes".

[71] As a policy guide, the Ministry of Culture publication is, of course, recommendatory only, and does not have the force of law. Moreover, most municipalities would be cognizant that while a golf course may have heritage value, there is a difference in the way the policy is to be implemented when dealing with a privately as opposed to a publicly owned golf course. As Ms. Schippert has confirmed for the record, there is nothing in the *OHA* or otherwise in provincial legislation and policy that empowers a municipality to require a private business – whether it is a cemetery, a farm, or a golf course – to keep running as a business. The Conservation Plan for Glen Abbey stands alone in that regard.

[72] For the Impugned By-laws to ignore the economic impact on the property owner, and to effectively require a property owner not only to maintain its property but to stay in business, all for the benefit of other residents of the Town, is to reflect bad faith decision-making. And the community-spirited intentions of Town officials and council in enacting these measures provide no defense.

[73] The Supreme Court of Canada has observed that the legislature has "recognized that the preservation of Ontario's heritage should be accomplished at the cost of the community at large,

not at the cost of the individual property owner, and certainly not in total disregard of the property owner's rights": *St. Peter's Evangelical Lutheran Church v Ottawa*, [1982] 2 SCR 616, 624. To knowingly act otherwise is an expression of bad faith.

IV. Vagueness

[74] Properly drafted statutes "limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens": *Regina v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 639. A by-law can be void for vagueness even if the overall purpose of it is clear. While any analysis of the terms of a by-law must recognize that an enacting city council requires some flexibility, the meaning must be possible for affected residents to discern. Thus,

> A by-law is invalid for vagueness and uncertainty if: (a) it is not sufficiently intelligible to provide an adequate basis for legal debate and reasoned analysis; (b) it fails to sufficiently delineate any area of risk; and, (c) it offers "no grasp" for courts to perform their interpretive function. This standard is exacting, and the onus is on the applicant to establish that the by-law should be declared invalid.
>
> *Wainfleet Wind Energy Inc. v Township of Wainfleet*, 2013 ONSC 2194, at para 31.

[75] One example of a by-law that meets this test of vagueness is where it uses terminology that is not susceptible to an agreed-upon definition: see *Hamilton Independent Variety and Confectionary Stores Inc. v Hamilton* (1983), 143 DLR (3d) 498 (Ont CA). Another is where the terminology in the by-law is too general and cannot readily be applied to specific cases: see *913719 Ontario Ltd. v City of Niagara Falls*, [1995] OJ No 2275 (Ont CA). Yet another is where one person's conduct results in a violation of the by-law and another person's similar conduct does not: see *2312460 Ontario Limited v Toronto (City)*, 2013 ONSC 1279.

[76] The CHL By-law imposes the requirement of a conservation plan on all properties that fall within a "cultural heritage landscape in or on a protected heritage property". Likewise, section 2.1.4 of the CHL By-law prohibits alterations of a cultural heritage landscape or substantive changes in a protected heritage property except in accordance with the specific conservation plan for the property.

[77] There are four cultural heritage districts proclaimed by the Town. Each district is itself a cultural heritage landscape, and the language of the CHL By-law is sufficiently broad that it could capture any given property within one of these districts. It is entirely unclear from the terms of the CHL By-law which properties require a conservation plan and what the contents of the plan must be.

[78] In fact, Ms. Schappert, the very municipal officer in charge of enforcing the Town's cultural heritage policy, was unable in cross-examination to identify which properties were caught by the requirement that they adhere to a conservation plan. I hasten to say that this was not a failing of Ms. Schappert's; the CHL By-law simply gives no guidance as to how to distinguish a property

that is subject to its terms from any other. In keeping with that confusion, no conservation plans have been produced for any property within the Town except for Glen Abbey.

[79] Since the Glen Abbey Conservation Plan is specifically geared toward the operation of a championship golf course, and no other property is equivalent to Glen Abbey, there is no way for other property owners to take from this one precedent whether to produce a plan or to determine if the Town will produce one for them. Furthermore, without a conservation plan in place, a property owner subject to the CHL By-law does not have any way of assessing a proposed alteration to their property.

[80] For that matter, Town officials are every bit as much in the dark as are property owners. Despite this vagueness that inheres to the Impugned By-laws, Ms. Schappert has confirmed that alterations for properties with cultural heritage landscapes (other than Glen Abbey) have been approved by the Town without the need for any conservation plans at all.

[81] Similarly, the amendments to the Property Standards By-law, which are included in the package of Impugned By-laws, require an owner to "maintain the elements and features of a protected heritage property that hold up, support or protect the heritage value or interest and heritage attributes". Again, an owner cannot determine from the face of this by-law what the particular legal requirements are, and a Town official cannot determine what it is that needs to be enforced.

[82] Property standards that are vague run the risk of transforming applicable standards to subjective value judgments. As the Supreme Court has observed, a law, including a municipal by-law, may not be "so pervasively vague that it permits a 'standardless sweep' allowing law enforcement officials to pursue their personal predilections": *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123.

[83] The argument about the vagueness of the Impugned By-laws is intertwined with the argument about bad faith. These municipal instruments appear to suffer from an attempt to bury specifically targeted policies within general language. That is, the CHL By-law, the amendments to the Property Standards By-law, and the other Impugned By-laws are unintelligible because they attempt to speak in general terms about a policy that is arguably specific to Glen Abbey. This confusion explains why the property owner does not have comprehensible notice of the contents of the Impugned By-laws and Town council and staff do not have intelligible limits to their enforcement discretion.

[84] "The 'doctrine of vagueness' is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion.": *Nova Scotia Pharmaceutical*, at 626-627. The Impugned By-laws are vague, and therefore undermine the rule of law. They cannot survive the present challenge.

V. Disposition

[85] The Impugned By-laws, including the Conservation Plan for the Glen Abbey property, are hereby quashed.

[86] The parties are encouraged to attempt to resolve costs among themselves.

[87] If costs cannot be agreed upon, counsel may address them in written submissions. I would ask that counsel for Clublink provide me with brief submissions and a Costs Outline or Bill of Costs within two weeks of the date hereof, and that counsel for the Town provide me with brief submissions within two weeks of receiving Clublink's submissions. The costs submissions may be emailed directly to my assistant.

December 11, 2018

Morgan J.

CITATION: Clublink v Town of Oakville, 2018 ONSC 7395
COURT FILES: CV-18-591564
DATE: 20181211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED

Applicant

– and –

CORPORATION OF THE TOWN OF OAKVILLE

Respondents

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: December 11, 2018

CITATION: Town of Oakville v. Clublink, 2018 ONSC 6386
COURT FILES: CV-17-585698 and CV-17-587268
DATE: 20181025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CORPORATION OF THE TOWN OF OAKVILLE Applicant	*Sandra Barton, Rodney Northey, Jennifer King, and Nadia Chandra*, for the Town of Oakville
– and –	
CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED Respondents	*Earl Cherniak, Cynthia Kuehl, and Mark Flowers*, for Clublink Corporation ULC and Clublink Holdings Limited
AND BETWEEN:	
CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED Applicants	
– and –	
CORPORATION OF THE TOWN OF OAKVILLE Respondent	
	HEARD: July 16-17, 2018

E.M. MORGAN J.

I. Sections 33 and 34 of the *Ontario Heritage Act*

[1] Clublink Corporation ULC and Clublink Holdings Limited (together, "Clublink"), the owner of the renowned Glen Abbey Golf Course (the "Golf Course" or "Glen Abbey"), seeks to demolish the Golf Course and redevelop it as a residential community. The Town of Oakville (the "Town") opposes this plan. It has designated the Golf Course and the property on which it is situated a heritage site under section 29, Part IV, of the *Ontario Heritage Act*, RSO 1990, c. O.18 ("*OHA*").

[2] The dispute is, formally speaking, narrowly focused on a question of procedure: having had its property designated under s. 29 of the *OHA*, can Clublink now apply to the Town under s. 34(1) of the *OHA* for permission to demolish the entire Golf Course, or must it proceed under s. 33 and apply to alter the property? For the parties, this is a significant procedural distinction for a number of reasons. One of the most important of these reasons is a tactical one based on the different routes of appeal entailed in an application under each of these respective sections of the *OHA*.

[3] Clublink prefers the s. 34(1) option, as any decision by the Town council under that section carries with it a right of appeal to the Local Planning Appeal Tribunal ("LPAT"). LPAT has the authority to either uphold or overturn the decision of Town council under s. 34. By contrast, the Town prefers the s. 33 option, as the only right of "appeal" under that section is to the Conservation Review Board ("CRB"). The CRB, however, cannot overrule the decision of the Town, but rather only has powers to make recommendations to Town council, which retains the power to make a final decision on the property owner's application.

[4] Beyond the narrow procedural issue at stake, each side in this controversy expresses great suspicion of the other's ultimate ambitions. Clublink made it clear during the hearing of the matter that it fears that the Town will compel it to forever run an aging and outdated sporting facility. For its part, the Town made it clear it fears that Clublink will replace an extraordinarily picturesque property which is a centrepiece of the Oakville community with something altogether ordinary. Like dueling Joni Mitchells, Clublink accuses the Town of making it captive on a carousel of time, while the Town accuses Clublink of taking paradise and putting up a parking lot.

[5] Neither of these portraits is accurate. But perhaps more importantly, each side's portrayal of the other significantly overstates the actual legal contest in this Application and Counter-Application. Neither the Town's designation of Glen Abbey as a cultural heritage landscape, nor Clublink's redevelopment proposal, is at stake here.

[6] The question considered in the Application and Counter-Application before me here is, as stated above, a strictly procedural one: can Clublink use section 34 of the *OHA*, which permits a property owner to apply to Town council for permission to "demolish or remove a building or

structure on the property", to seek consent for the removal of the Golf Course in its entirety (or nearly its entirety)?

[7] The Town submits that the Golf Course is not a "building or structure", and that its natural and landscaped features such as trees, creeks, tees, greens, fairways, bunkers, and watercourses, are likewise not buildings or structures within the terms of section 34. Clublink submits that section 34 is a remedial section for properties designated under the *OHA* and that its terms are sufficiently broad to cover properties of all shapes and sizes including the Glen Abbey Golf Course.

II. The Glen Abbey property

[8] Clublink has owned the Glen Abbey property since February 1999, when it bought it from the Royal Canadian Golf Association, the predecessor of what is now known as Golf Canada. The property is located at municipal address 1313 and 1333 Dorval Drive, Oakville, Ontario (the "Property"). It consists of an 18-hole course designed by Jack Nicklaus to be a championship golf course that was constructed in the 1970s, together with a number of buildings. The roughly 94 hectares of the Property includes 32 hectares of valleylands located in the Sixteen Mile Creek Valley and approximately 62 hectares of tablelands above the valley.

[9] Situated on the Property is also a building known as the RayDor Estate, which is leased to Golf Canada and a number of other office tenants. This portion of the Property, which has the municipal address 1333 Dorval Drive, is not part of the Golf Course, and was already subject to a designation under the *OHA* at the time of Clublink's purchase in 1999. This previous designation, which took place in 1993, remains in force. It relates to the RayDor Estate building alone, and by its express terms does "not extend outward to include the golf course".

[10] In addition, in July 2016 ClubLink purchased part of the backyard of a residential property that abuts the Property, municipally known as 1301 Greeneagle Drive (the "Greeneagle Property"). The Greeneagle Property has never been part of the Golf Course or the Property, and prior to 2016 was owned by an owner unrelated to Clublink.

[11] The Town submits that for 30 years after its construction in the 1970's, there was no talk by the owner of the Golf Course of converting it to any other use. Clublink submits that this is not quite accurate, and that on one or two occasions, including in the process of appraising it for property tax purposes, Clublink and its predecessor in title, together with the Town, did raise the potential for redeveloping the Golf Course and Property. Regardless of this debate among counsel, the fact is that the Golf Course has been consistently used as a championship golfing facility, has frequently been the home of the Canadian Open, and has been a prestigious scenic and recreational focal point for the Town of Oakville.

[12] In 2015, Clubink's contract for hosting the Canadian Open was coming to an end. Although it still described Glen Abbey as one of its premier golfing properties, Clublink determined that it was economically advantageous to contemplate redeveloping the Property as a residential community, and to that end retained planners and commenced work on a redevelopment proposal. At about the same time, the Town engaged in what it calls a Cultural Heritage Landscape strategy

and began identifying properties that could be designated as cultural heritage properties under the *OHA*.

[13] The parties each contend that the other commenced their respective process as a response rather than proactively, but in fact they each appear to have come to their processes as a result of independent decisions. In any case, for the purposes of this Application the reciprocal arguments about 'who started it' are not particularly relevant. There is nothing inherently wrong with a property owner submitting a redevelopment proposal, and likewise nothing inherently wrong with a municipality identifying a property as suitable for cultural heritage designation. The question is, the Town having designated the property under the *OHA*, what is the proper route for the owner to take in seeking to make far-reaching changes to the property in the nature of those proposed by Clublink?

[14] That said, a brief explanation of background is necessary to put the Town's heritage designation and Clublink's redevelopment proposal into the relevant policy context. In early 2015, the Town began the process of implementing its Cultural Heritage Landscape strategy by engaging in a three-stage process: a) phase 1 – conduct an inventory of public and private lands for potential cultural heritage landscapes and narrow the 50 identified potential significant cultural heritage sites to 8 possible sites for designation; b) phase 2 – conduct a detailed assessment of the 8 properties and narrow the high priority landscapes to 4 for potential designation; and c) phase 3 – implement appropriate measures for protection of the 4 properties identified as significant cultural heritage landscapes.

[15] At a meeting of Oakville municipal council in May 2017, council directed staff to give priority to Glen Abbey in implementing cultural heritage protection measures. This ultimately resulted in the designation of the Property (including the entire Golf Course and, apparently, the Greeneagle Property) under s. 29 of the *OHA*. Once designated, s. 33 of the *OHA* provides that the owner may not "alter the property or permit the alteration of the property if the alteration is likely to affect the property's heritage attributes".

[16] In its factum, counsel for the Town of Oakville describes the significance of the Golf Course, stating that it is one of Canada's most famous courses, was designed as a tournament golf course that has hosted the Canadian Open, Canada's premier golf tournament, and was the first one designed by legendary golfer and designer, Jack Nicklaus [para 34]. The Town's written submissions go on to describe the features of the designated property that the designation seeks to preserve, noting that it contains "tees, greens, fairways, bunkers, hills, mounds, paths, trails, trees, vegetation, streams, creeks and ponds" [para 35].

[17] Counsel for the Town then goes on to observe what the Town perceives as the cultural significance of this landscape:

> Since it opened in 1976, Town planning policy has recognized the importance of the Glen Abbey property a major golf-related recreation and tourist facility, which provides the Town with significant tourist, economic and cultural benefits, and

> accordingly, has constrained its present and future uses to uses that are compatible with the property's principle use as a golf course [para 36].

[18] To be sure, it is not the Town's position that having been designated a cultural heritage landscape, the Golf Course must be frozen in time. Counsel for the Town made it clear in their submissions in court that the Town understands that a golf course, like many other sporting facilities, needs updating and renewal as time goes on. The Town is not in principle opposed to renovating and modernizing the 1970's-era design, but requires Clublink to go through the procedure provided for in the *OHA* for applying for such changes – i.e. a s. 33 application to alter any heritage attributes of the Property.

[19] As indicated, in the meantime Clublink proceeded to work on its redevelopment proposal. It hired a heritage consultant who specified how various cultural heritage resources on the Glen Abbey property could be retained in the proposal. Thus, in addition to a range of housing, the redevelopment proposal envisions a preservation of all streams and waterways, including the Sixteen Mile Creek that runs through the property. Clublink's counsel describes in its factum the proposal as having been produced with an eye to preserving the public, community-oriented nature of the property by conveying significant portions of the park and woodland areas of the property to the municipality or other appropriate public authority [para 2].

[20] Counsel for Clublink goes on to state what Clublink perceives as a significant contribution to the heritage aspects of the Property:

> Clublink contemplates that the entire valleylands, which includes Sixteen Mile Creek, and other portions of the property (totaling approximately 50 hectares or 124 acres) would be conveyed to a public authority without compensation as a condition of approval of the redevelopment. The result would be the conversion of privately owned green space, now accessible only to those who can access the golf course, to public green space open to everyone [para 15].

[21] As can be seen, the Town's conception of Glen Abbey's significance and Clublink's conception of its significance do not meet. Counsel for Clublink focused its development proposal on the Provincial Policy Statement with which s. 3(5) of the *Planning Act* requires new developments to conform. This includes heritage considerations as well as housing considerations, environmental considerations, protecting existing ecosystems, infrastructure considerations, and intensification of development. The Town, on the other hand, focused its designation proposal on preserving the Golf Course as a socio-cultural amenity, and implemented the Ministry of Tourism, Culture and Sport guidelines proclaiming that a cultural heritage "landscape", and not just a discrete property, could be designated under s. 29 of the *OHA*.

[22] In other words, while Clublink invoked planning principles, the Town invoked Culture and Sport principles. No amount of preservation of greenery, water, and aesthetic vistas can satisfy the Town, since what the Town wants to preserve is the Golf Course *qua* golf course. Likewise, no amount of permission to renovate or update the aging sporting facility can satisfy Clublink, since what Clublink wants is to demolish the Golf Course and build single-family housing on the portion that it does not turn over in a raw, natural state, to the public.

[23] The Town's mistrust of Clublink's development ambitions and Clublink's mistrust of the Town's cultural heritage preservation ambitions have led to a procedural stalemate. Clublink wishes to remove the Golf Course in its entirety, and has applied to Town council do so under s. 34(1) of the *OHA*. While Clublink is perhaps not optimistic about the Town's response to this application, it takes comfort in the fact that s. 34 provides for the possibility of a binding appeal to LPAT. The decision of LPAT will therefore be the final one.

[24] The Town wishes to preserve the Golf Course, and has refused to accept and process Clublink's s. 34(1) application. Rather, it has advised Clublink to apply under s. 33 of the *OHA* for permission to do alterations to heritage aspects of the Golf Course. While the Town is perhaps not optimistic about Clublink's response to such an application, it takes comfort in the fact that s. 33 provides only for a non-binding recommendation on appeal to the CRB. The Town's own decision will therefore be the final one.

III. Is a golf course a "structure"?

[25] Clublink submits that s. 34 is the correct procedural route for seeking the Town's permission to demolish the Golf Course. This includes the demolition or removal of 16 buildings as well as the tees, greens, sand traps and other hazards, embankments, fairways, cart paths, irrigation and drainage systems, and other infrastructure of which the Golf Course is comprised.

[26] Section 34(1) of the *OHA* provides that,

> No owner of property designated under section 29 shall demolish or remove a building or structure on the property or permit the demolition or removal of a building or structure on the property unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the demolition or removal.

[27] There is little doubt that the various buildings that are part of the Golf Course fall within the ambit of s. 34(1). The real issue between the parties is whether the other unique characteristics of the Golf Course qualify as "structures" for the purposes of this section.

[28] The Town takes the view that the landscaping and other distinctive features of the Golf Course are not "structures" in this sense. It submits that a narrow interpretation of this provision is necessary to implement the overall policy of the *OHA* in preserving cultural heritage, and that any broad or flexible interpretation of a word such as "structure" in s. 34(1) will result in the owner of a property designated under s. 29 sidestepping the municipality's right to determine the cultural heritage value and attributes of a designated property. In this sense, the Town perceives Clublink's resort to a s. 34 application as a form of "improper conduct".

[29] Clublink takes a broader view of how s. 34(1) is to be interpreted. It submits that an application under this section is a specific right granted to owners of designated properties in order to protect it from potential overreaching by municipal authorities. It takes issue with the Town's understanding of the purpose of the *OHA*, and characterizes the legislation's purpose as incorporating the need "to balance the interests of the public, community and the owner":

Tremblay v Lakeshore (Town), [2003] OJ No 4292, at para 27 (Div Ct). In this sense it sees redevelopment as consistent with the goals of the *OHA*, stressing that the policy under Part IV of the *OHA* – "Conservation of Property of Cultural Heritage Value or Interest" – is one of conservation, not preservation, and that "conservation work must be coordinated and integrated with planning and other future-oriented activities": *Rams Head Development Inc. v Toronto*, 2010 CarswellOnt8559, at para 63 (OMB), quoting Parks Canada, *Standards and Guidelines for the Conservation of Historic Places in Canada.*

[30] The competing prongs of the *OHA*'s policy objectives were discussed at length by the Supreme Court of Canada in *St. Peter's Evangelical Lutheran Church v Ottawa*, [1982] 2 SCR 616, 623-4. The Court observed that municipal concerns over heritage are to be exercised in a way that accommodates the owner's economic interests.

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

[31] The dual aspect of the heritage policy was reiterated by the Court of Appeal in *Toronto College Centre Street Ltd. v Toronto (City)* (1986), 56 OR (2d) 522, at para 38. Cory JA, for a unanimous Court, stressed that the *OHA* is to be interpreted purposively, and that the purpose is to accomplish heritage conservation in a way that does not run counter to the property owner's rights.

> ...the provisions of the Ontario Heritage Act, 1974 allowing municipal interference with private property rights should be construed purposively and liberally in order to allow municipalities to effectively preserve Ontario's heritage. On the other hand, the court recognized that there was a counterbalancing need to give equally liberal construction to those provisions of the Ontario Heritage Act, 1974 that were designed to protect the landowner's rights.

[32] The Court of Appeal went on in *Toronto College* to acknowledge that it is in the very nature of a designation under the *OHA* that the ability to fully exploit privately owned property will be curtailed. Thus, it was compelled to state, at para 42, that as a substantive matter, "[t]o achieve its aims the Act must interfere with private property rights." This acknowledgement was then tempered with the observation that the other side of the coin from the *OHA*'s substantive objectives, which are tilted toward the municipality, are its procedures, which are tilted toward the owner. Thus, the Court was compelled to continue, at para 42, with the statement that, "[t]o counterbalance such interference numerous procedural safeguards are enacted for the benefit of the property owner."

[33] It is evident that s. 34(1) of the *OHA*, with its right of appeal to the LPAT, is one such procedural safeguard. That is, if an owner of a designated property is not satisfied with the substantive determination by the municipal council as to whether demolition should be permitted to occur, the owner is protected by means of a procedural right to appeal the decision to a tribunal with authority to overturn the municipal decision. It almost goes without saying that the interpretation of the *OHA*, as with all statutes, is to reflect the object and intention of the legislature that enacted it: Sullivan and Dreidger, *Construction of Statutes* (4th ed., 2002), pp. 1-2. The objective of the legislature in providing procedural protection for the property owner, as identified by the Court of Appeal in *Toronto College*, therefore provides an important guidepost in interpreting and applying section 34(1).

[34] Section 26 of the *OHA* defines "property" as "real property and includes all buildings and structures thereon". There is, however, no specific definition in the *OHA* for "structure" as it is used in section 34(1). The interpretation of this term, as indicated above, is to be in keeping with the statute's policy objectives, and is to involve consideration of the context of the provision within the statute and of the statute as a whole: Sullivan and Dreidger, p. 282. It is to be read in its "grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 SCR 27, at para 21.

[35] Counsel for the Town, in their written submissions, place considerable emphasis on the fact that the expert consultants retained by Clublink did not use the term "structures" to describe the golf course and its natural features, but rather primarily used this term to refer to buildings. It is the Town's view that Clublink's experts referred to the phrases "structure", "building", and "landscape" as distinct categories. It is equally the Town's view, and that of its experts, that landscape features such as greens, fairways, etc. are not in ordinary usage, nor in heritage usage, commonly referred to as "structures".

[36] Counsel for Clublink responds to this argument by pointing out that the expert reports submitted on its behalf were done in support of its redevelopment proposal, and not in response to the s. 29 designation. Accordingly, Clublink submits that these reports did not consider whether the golf course and its various features were "structures" within the meaning of the *OHA* one way or another, and that they do not address the issue in the way the Town claims that they do. It is equally Clublink's view, and that of its experts, that man-made features such as artificial ponds, sand and water hazards, mounds, berms, embankments, bridges, tees, etc., are in ordinary usage, as well as in construction usage, commonly referred to as "structures".

[37] I do not find any of the experts particularly helpful in this regard. Debating the non-*OHA* meanings of a versatile term such as "structure" does little to advance the statutory interpretation question. What is more to the point is the way that the word is used in the very statutory context under consideration. Counsel for Clublink notes that the definition of "property" in s. 26 of the *OHA* states that this includes "real property and all buildings and structures thereon"; and, similarly, s. 34(1) itself refers to demolishing or removing a "building or structure on the property". This language in the statute signals that "structures" are not limited to buildings but rather includes things other than just buildings.

[38] Further, the evidence is that the Golf Course was constructed in accordance with Jack Nicklaus' professional design. It is not raw land, and it is substantially more than a landscaped garden. As Clublink points out, portions of the course have been renovated and rebuilt over time, and like all such constructions these features have a limited life. Counsel for Clublink emphasizes the evidence in the record of substantial irrigation infrastructure, subsurface drainage construction, earthwork spectator mounds or berms, artificial reservoir ponds, complex designed greens constructed in accordance with specific United States Golf Association standards, engineered bunkers, paved cart paths, etc.. All of these features require installation, physical maintenance, periodic renovation, and elaborate construction. Clublink submits that features that need to be constructed are structures that can be demolished.

[39] In other legal contexts, golf courses and other recreational facilities that have features similar to golf courses, have apparently been treated as structures. Thus, for example, in *Mont-Sutton Inc. v R*, 1999 CarswellNat 1186, the Federal Court of Appeal found that ski trails are a form of surface construction and can therefore be depreciated. The court in *Mount-Sutton* specifically emphasized, at para 21, that a designed and constructed ski trail is unlike "land or a plot of land on which a structure is erected (and which) cannot be depreciated." Following this case, the federal government issued a tax bulletin in which it specifically recognized that, like ski trails, the most identifiable features of a golf course – greens, tees, fairways – are man-made surface constructions and are depreciable assets: ITTN Bulletin, June 14, 2001.

[40] If constructed golf course features are depreciable, they cannot be land or landscape but rather are something constructed on the land or landscape. The Alberta Government Municipal Board has used this logic to conclude that golf courses are "structures" for the purposes of municipal tax assessment. In *Calgary Golf & Country Club v Calgary (City)*, 2004 CarswellAlta 2378, at para 72 rev'd on other grounds, 2006 ABQB 312, the Board reasoned:

> Golf course features like tees, greens and fairways are man-made and artificial constructions built on the land through bulldozing and other construction methods. They support human activities and in this specific case, the activity of golfing. Tees, greens and fairways and other golf features are thus like structures that support human activity and thus are building like.

[41] Employing analogous reasoning, the Ontario Municipal Board has held a landfill to be a "structure" within the meaning of the *Planning Act*: *Re City of Vaughan Official Plan Amendment 332 and Zoning By-law 364-91*, 1996 CarswellOnt 5842. Likewise, the British Columbia Supreme Court has found a drag strip to be a "structure" for zoning purposes: *British Columbia Custom Car Association v Mission (District)*, 1990 CarswellBC 534. Both decision-makers emphasized that these structures are "heavily engineered", *Re Vaughan*, at para 28, and are a "thing constructed": *BC Custom Car*, at para 35.

[42] I have little trouble accepting this logic. If a landfill and a drag strip are "structures" because of their engineered features, and if a golf course is a "structure" for income tax depreciation purposes and for municipal tax assessment purposes, then a golf course can certainly be a structure for cultural heritage purposes. While the statutory context of taxation is, of course, different from that of cultural heritage, the treatment of property features is the same. Tax

depreciation looks to the cost of man-made construction, not of natural land or garden landscapes, and s. 34 of the *OHA* looks to the demolition or removal of man-made construction, not of natural land or garden landscapes. The constructed features of a golf course are "structures" for *OHA* purposes just as they are for the other, analogous statutory purposes.

[43] In any case, it is empirically the case that creating a golf course requires structural work on the underlying land. Indeed, if there were no structural changes to be made to a property in order to turn it into a championship golf course, an owner would hardly need to hire Jack Nicklaus.

[44] It is evident that it is the structural aspects of Glen Abbey – the routing, shape and slope of the fairways and greens, the elevated mounds and berms for audience viewing, the creation of sand traps and other hazards, the underground irrigation and drainage engineering, the routing and installation of cart paths, etc. – that make it a championship course and, from the Town's point of view, a cultural heritage landscape in the first place. It is the architecture of the Golf Course, and not just some superficial, non-structural gardening or grooming of the landscape, that has made this Golf Course what it is.

IV. Disposition

[45] I find that the Glen Abbey Golf Course is both composed of structures and overall is a structure for the purposes of s. 34 of the *OHA*. Clublink has the right to make an application to the Town under s. 34(1) of the *OHA* for demolition and/or removal of buildings on Property and of the other structures of which the Golf Course is comprised. This includes the component parts of the Golf Course: tees, greens, hazards, fairways, cart paths, berms, embankments, and other related constructions and infrastructure.

[46] The Town is ordered to process Clublink's s. 34 application.

[47] The parties may make written submissions as to costs. I would ask that these include a Bill of Costs and accompanying submissions of no more than 3 pages.

October 25, 2018

Morgan J.

CITATION: Town of Oakville v. Clublink, 2018 ONSC 6386
COURT FILES: CV-17-585698 and CV-17-587268
DATE: 20181025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CORPORATION OF THE TOWN OF OAKVILLE

Applicant

– and –

CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED

Respondents

AND BETWEEN:

CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED

Applicants

– and –

CORPORATION OF THE TOWN OF OAKVILLE

Respondent

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: October 25, 2018