Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

Ontario

ISSUE DATE: January 26, 2021 **CASE NO(S).:** PL190254
PL190255

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Michael Stanek
Subject:	Minor Variance
Variance from By-law No.:	6000-17, as amended
Property Address/Description:	672 Henderson Drive/ Part Lot 76, Concession 1, King, Part 3 65R5578
Municipality:	Town of Aurora
Municipal File No.:	MV-2017-15A
LPAT Case No.:	PL190254
LPAT File No.:	PL190254
LPAT Case Name:	Stanek v. Aurora (Town)

PROCEEDING COMMENCED UNDER subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Losar Developments Inc.
Subject:	Minor Variance
Variance from By-law No.:	6000-17, as amended
Property Address/Description:	684 Henderson Drive/ Part Lot 76, Concession 1, King, Part 3 65R5578
Municipality:	Town of Aurora
Municipal File No.:	MV-2017-16A
LPAT Case No.:	PL190255
LPAT File No.:	PL190255
LPAT Case Name:	Losar Developments Inc. v. Aurora (Town)

Heard: November 24-27, 30, December 1-3, 2020 by video hearing

APPEARANCES:

Parties	**Counsel**
Michael Stanek	David Germain
Losar Developments Inc.	David Germain
Town of Aurora	Andrew Biggart

DECISION DELIVERED BY MARGOT BALLAGH AND ORDER OF THE TRIBUNAL

OVERVIEW

[1] This Decision and Order results from the hearing on the merits of the Appeals by Michael Stanek and Losar Developments Inc. (the "Proponents") from the decision of the Town of Aurora's Committee of Adjustment (the "COA") to refuse their individual minor variance Applications made under s. 45(1) of the *Planning Act* (the "Act") for their respective properties, municipally known as 672 and 684 Henderson Drive (collectively, the "subject properties" and individually, "Lot 672" and "Lot 684").

[2] The subject Applications propose a building envelope and driveway access to allow for the future development of a single detached dwelling on each of Lot 672 and Lot 684, being two existing lots of record.

[3] As Counsel acknowledged, these minor variance Applications and resulting Appeals are quite out of the ordinary. The issues and applicable policy framework address two important competing interests: one to protect the environment (the public interest) versus one to be able to develop an existing lot of record (the private interest).

[4] These Applications are necessitated by the location of the subject properties within a Settlement Area in the Oak Ridges Moraine. Relief is required from the provisions of the current Town's Zoning By-law No. 6000-17, and more specifically as set out in provisions 14.1.2(ii), 14.1.3(i), 14.1.4(i) and 14.4.3(i) of this Zoning By-law. These provisions generally require that no development or site alteration occur on lands within Key Natural Heritage Features, Minimum Vegetation Protection Zones, Significant Woodland or Landform Conservation Area (Category 2) without an amendment to, or relief from the By-law, in accordance with the policies of the Official Plan ("OP") as amended by Official Plan Amendment No. 48 ("OPA 48") and the Act.

[5] The subject properties are adjacent land parcels on the north side of Henderson Drive east of Bathurst Street. The more easterly Lot 672, owned by Mr. Stanek, is approximately 1.2 hectares ("ha") in area. The larger Lot 684, owned by Losar Developments Inc., is approximately 2.0 ha in area. The subject properties are identified within a Settlement Area of the Oak Ridges Moraine Conservation Plan, 2017 (the "ORMCP") and are identified within the Town's current Zoning By-law as Estate Residential (ER). The subject properties are presently surrounded by existing residential development to the north, east and west, with a transportation corridor of Henderson Drive to the south, and the municipally-owned Case Woodlot located south of Henderson Drive.

[6] The Parties agree that the subject properties are entirely within Significant Woodland and contain other overlapping Key Natural Heritage Features. A permanent coldwater tributary traverses the subject properties from south to northeast and is categorized as fish habitat. The Significant Woodland is comprised of mature deciduous and coniferous forest. The Proponents have treated the valley as significant valleyland, approximated by the extent of the meander belt plus 30 metres ("m"). The Proponents acknowledge unevaluated wetlands associated with the watercourse in the valley. There is a natural corridor through the subject properties for wildlife movement. There are potential snags (or habitat trees) for bats throughout the entire woodlot including the proposed disturbed areas. The woodland has been identified as potential habitat for

endangered bats, with consultation completed with the Ministry of Natural Resources and Forestry (“MNRF”) / Ministry of the Environment, Conservation and Parks (“MECP”) who administer the *Endangered Species Act* (“ESA”). Snapping Turtles are known to nest nearby in the roadside area, but this is off the subject properties. It is common ground that these are therefore unique and environmentally-sensitive lands.

[7] The Proponents’ Applications for minor variances in April 2017, were shaped by prior consultation with the Town departments, the Region of York, the MNRF, the Oak Ridges Moraine Conservation Authority and other external agencies. The Proponents submitted further technical reports and documents with revised Applications in February 2018 and March 2019 to respond to concerns raised following public input, as well as a Town peer review of the Proponents’ Natural Heritage Evaluation (“NHE”). The August 2020 witness statement submission made by the Proponents present some further changes to try to reduce impact to the key natural heritage features.

[8] The Town’s planning staff recommended approval of the minor variance application subject to conditions for Lot 672, but did not recommend approval for the minor variance application for the larger Lot 684. The Town’s COA ultimately refused both Applications in May 2019. The Proponents appealed the decisions to this Tribunal.

[9] The Tribunal previously directed that these Appeals be heard together given that the required variances are the same for Lot 672 and Lot 684, and evidence in common will be proffered. Given the complexity and magnitude of matters that were expected to be introduced at the hearing and the quantum of technical studies/reports and expert witnesses to be presented, ten days were originally set aside for the hearing. The Parties filed over 1400 pages of documents. The eventual hearing spanned eight days.

THE HEARING

[10] More than 150 people attended the video hearing.

[11] George Skoulikas, president of the Henderson Forest Aurora Ratepayers Association (“HFARA”), confirmed for the Tribunal that the HFARA relied solely on its written Participant Statement filed with the Tribunal, and no longer wished to exercise party status in the proceedings. Hearing no objection from the other parties, the Tribunal agreed to convert the status of HFARA from party to participant.

[12] The Parties filed a 1434-page joint document book, comprised of two volumes, marked as Exhibits 1A and 1B respectively. Counsel for the Parties filed a List of Agreed Facts dated November 23, 2020, marked as Exhibit 4, which provides foundational matters not in issue as between their land use planners. They also provided at page 1434 of Exhibit 1B, a list of facts agreed to by their respective Ecologists. More documents were filed by each party during the course of the hearing and were marked as further Exhibits.

[13] In support of the Applications for the minor variances to allow the proposed development, the Proponents presented evidence through their two witnesses: Ryan Guetter, a land use planner; and Brian Henshaw, an ecologist. In opposition to the Applications, the Town presented evidence through their land use planner, Franco Romano, and their ecologist, Don Speller. The four witnesses were duly affirmed and qualified, without objection, to provide opinion evidence within their areas of expertise to the Tribunal.

[14] Both Counsel acknowledged that these Applications are ultimately subject to the test for minor variances as set out in section 45(1) of the Act. An appeal to the Tribunal pursuant to section 45 of the Act is a hearing *de novo* and the onus remains on the Proponents to satisfy the Tribunal for authorization of variances that the requested variances meet the four tests pursuant to section 45(1) of the Act, namely, that the variances would:

1) maintain the general intent and purpose of the Official Plan;

2) maintain the general intent and purpose of the By-law;

3) be desirable for the appropriate development or use of the land, building or structure; and

4) be minor in nature.

[15] In addition, it is common ground that section 2 of the Act requires the Tribunal to have regard to matters of provincial interest, and section 3(5) of the Act requires the Tribunal to ensure its decisions are consistent with the Provincial Policy Statement 2020 *(“*PPS”) and conform with any applicable Provincial Plans in effect.

[16] Counsel advised that they first would address the Applications in the context of the Act*,* the PPS*,* and the applicable, in-effect Provincial Plans, being the ORMCP, A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2019 (“Growth Plan”), and the Lake Simcoe Protection Plan, 2009 (“LSPP”). These analyses, and in particular the analysis of the ORMCP in this case, along with analyses of the Official Plans of the Region and Town and the applicable Zoning By-laws, would ultimately inform the four tests in section 45(1) of the Act.

The Planning Act

[17] The Tribunal was directed to sections 2(a), (c),(h), (j), (m), (n), (p), (r) and (s) of the Act as particularly applicable matters of provincial interest to which the Tribunal must have regard in this case. These sections generally relate to protection of the natural environment, orderly development of healthy communities, the provision of housing, the balancing of public and private interests and appropriate locations for growth.

[18] Mr. Guetter gave his opinion that the Applications have proper regard to the applicable matters of Provincial interest.

[19] Mr. Romano gave his opinion that the proposal does not properly implement the applicable sections of the Act, including the requirement to have proper regard to matters of Provincial interest. An example given by Mr. Romano was that, in his view, the Proponents had not provided sufficient information about built form for him to opine whether proper regard was given to s. 2 (r) of the Act. The Proponents seek building envelopes for future development and have deferred the detail design until after a decision on the Applications. Another example provided by Mr. Romano was that there has been no evidence tendered that demonstrates that these two lots need to be developed for residential dwellings to further the public interest and that there has been no evidence tendered to demonstrate that the two dwellings need to be constructed on these sites to satisfy a Growth Plan conformity issue related to population in the Town.

[20] The Act requires the Tribunal, in carrying out its responsibilities under the Act, to have regard to, among other matters, matters of provincial interest, and the Tribunal is satisfied that there has been proper regard to the applicable matters of provincial interest, as will be apparent in this decision.

Provincial Policy Statement ("PPS 2020")

[21] In order for the Tribunal to authorize the requested variances, the Tribunal must be satisfied by the evidence that the variances are consistent with the PPS. Mr. Guetter provided his opinion that the Applications for variances are consistent with the policies of the PPS 2020. In contrast, Mr. Romano provided his opinion that they are not consistent.

[22] The PPS applies throughout the Province and represents minimum standards. It is to be read in conjunction with the other Plans. Provincial Plans take precedence over the PPS only to the extent of any conflict.

[23] The Parties agree that the subject properties are within "Settlement Areas" as defined by the PPS. Settlement Areas are to be the focus of growth and development;

however, as Mr. Guetter acknowledged, the policy “does not mean you should develop every square inch of a Settlement Area”.

[24] The focus of the evidence was on the natural heritage policies in the PPS 2020. Policy 2.1.1 states that “Natural features and areas shall be protected for the long term”. The Town told the Tribunal that this is the start of the policy regime which speaks to ‘prohibiting /not permitting’ development.

[25] It was acknowledged that the subject properties were significant woodlands in Ecoregions 6E, and both Counsel addressed the natural heritage Policy 2.1.5, which reads:

> *Development* and *site alteration* shall not be permitted in: …(b) *significant woodlands* in Ecoregions 6E …unless it has been demonstrated that there will be no *negative impacts* on the natural features or their *ecological functions*. [italics in original to indicate defined terms].

[26] The Town argued that it is the impact to the subject properties that is to be considered. In other words, the Town says the Proponents need to demonstrate that there will be no negative impact on the natural features or their ecological functions on the subject properties. In contrast, the Proponents argued that there is little sense to limit the analysis of impact to the area delineated by the property boundaries and that the area considered should include the neighbouring woodlands to the Northeast and the South. In any event, it appears to be common ground that this policy does not require analysis “to the extent possible” of impact to the whole “Plan Area”, as policy 7(b) of the ORMCP does (discussed below under the ORMCP heading).

[27] The PPS defines “negative impacts” in regard to the applicable *natural heritage features and areas*, as “degradation that threatens the health and integrity of the natural features or *ecological functions* for which an area is identified due to single, multiple or successive *development* or *site alteration activities*.” [italics in original to indicate defined terms].

[28] Both ecologists agreed that the wetlands and fish habitat would be protected. The issue between the Parties related to whether there would be no negative impact to the Woodlands.

[29] In his examination in chief, Mr. Henshaw conceded that there would be impacts from added stresses to the significant woodlands; however, he said those impacts would not threaten the health and integrity of the significant woodlands due to the proposed mitigation measures including native re-plantings. He also characterized the woodland as an “urban woodlot” that had already adapted to urban stresses. He gave his opinion that the addition of two houses on the subject properties, that are already abutted by subdivisions, will not make much difference to the natural feature and would not amount to degradation. As such, he said it would not constitute a negative impact as that term is defined in the PPS.

[30] However, in cross-examination, Mr. Henshaw agreed s. 2.1.5(b) of the PPS is mandatory language that development shall not be permitted unless there are “no negative impacts”. He agreed that cutting down trees could constitute degradation as it is used in the definition of “negative impact” in the PPS, and that a single development can cause a negative impact. He agreed that “ecological function” was broader than keeping trees alive and included the benefit the trees represented to the species that might use that woodlot. He further agreed on cross-examination that the development would add to the stress already on the woodlot by adding incremental stress to the trees, flora, bats and ecological function.

[31] In paragraphs 434 & 444 of his Witness Statement at page 1217 of Exhibit 1B, Mr. Guetter also acknowledged that the proposed development of the subject properties will result in some ecological disturbance to the significant woodlands. In addressing the ecological test in policy 7 of the ORMCP, he qualifies this admission by saying that the building envelopes, driveways and grading have been positioned in a manner which will not adversely impact the ecological integrity of the entire Oak Ridges Moraine Plan Area, which comprises some 190,000 ha. Again, the wording of the ecological integrity

test in the PPS is different and does not measure impact in the context of the same geographical area.

[32] Mr. Speller gave his opinion that the Proponents have not demonstrated that the proposed removal of Significant Woodland would not result in “no negative impacts” on the woodland or its associated ecological functions.

[33] The Town takes the position that the Proponents’ own NHE by Beacon fails to demonstrate that there will be no negative impacts caused by the proposed development as required by the PPS. The Town points to the report where it addresses “Policy Conformity” stating… “the proposed development on 672 and 684 Henderson Drive should not adversely affect natural heritage features on the subject properties….” (emphasis added). The Town contends that this opinion is a “far cry” from demonstrating no negative impacts. Mr. Henshaw admitted in cross-examination that cutting down trees was a degradation of the natural features. In response to Mr. Henshaw’s comments that the trees would be replaced elsewhere to mitigate the impact, the Town contends that the PPS requires an examination of the natural heritage features on this site and not elsewhere in the Town. It also notes that no restoration plan has been presented to demonstrate where replacement trees will be planted. It characterizes the Proponents’ approach as ‘we will figure it out later”.

[34] Based on the evidence provided to date, the Tribunal could not properly assess whether the Applications would be consistent with policy 2.1.5 of the PPS. The policy requires demonstration *that there will be no negative impacts on the natural features or their ecological functions.* The Tribunal was left with an admission by Mr. Henshaw that the removal of trees would have a negative impact. While Mr. Henshaw also tried to reassure the Tribunal that the negative impact could be mitigated by restoration replanting to compensate for the removed trees, the details of such a restoration plan were left to the future. The Proponents could only provide an estimate of the number of trees that would be removed, and this estimate had changed in the past. The proposed disturbed area for the development had also changed in various resubmissions. Mr.

Speller admitted that replanting would help to mitigate the impact if it was done properly, with the caveat that it could take years to do so. The evidence was that some restoration plantings would be done off-site where they would not benefit the more immediate area. The evidence fell short of demonstrating no negative impacts when considering the subject properties, or even when considering the expanded surrounding woodlands to the northeast and south. Therefore, the Tribunal could not find, based on the evidence currently available, that the Applications were consistent with policy 2.1.5 of the PPS.

[35] The Parties also addressed policy 2.1.7 of the PPS which states:

> *Development* and *site alteration* shall not be permitted in *habitat of endangered species and threatened species,* except in accordance with *provincial* and *federal requirements*. [italics in original to indicate defined terms.]

[36] The Proponents submit that the ecologists agreed that the Province (MECP) had stated its requirements and that those should be followed and therefore policy 2.1.7 is satisfied. While Mr. Speller in cross-examination said “what MECP say goes”, he also said that he did not agree with the assessment that two bat rocket boxes would replace the tree function for roosting.

[37] The Town says that in this case, the Proponents take the position that there is no evidence that this site qualifies as habitat of endangered or threatened species because it only qualifies as habitat if you actually see the animal (in this case bats) there. Since Mr. Henshaw did not see the endangered bats there, he claims it does not qualify under this policy. However, Mr. Henshaw told the Tribunal that he never looked for bats because to do this would double the cost and would take more time. Instead they chose to implement mitigation strategies such as bat boxes in the event bats were there. They chose to assume there were bats. The Town argues that this line of reasoning is as shocking as it is faulty. The Town says one cannot argue that a site does not meet the test of a habitat if one never looks for the species. The Town says, in this case, the

position put forward by Mr. Henshaw is even more questionable when one reads the Memorandum from the meeting with the Ministry in which it is noted that, “If we prove there are not bats, is that better for the buyer. It would remove that restriction BUT bats are most likely there so it is not worth the effort to try and prove this.” (Tab 10 p. 135 Exhibit 1A). The Town also noted that section 10 of the ESA prohibits the damage or destruction to the habitat of an endangered or threatened species. While the enforcement of the ESA is not within the Tribunal’s jurisdiction, the existence of the protection in that legislation underscores the import of preserving such habitat.

[38] In a letter dated July 29, 2019 (p. 935 of Exhibit 1B) Jeff Andersen writes on behalf of the MECP as follows” “MECP staff have received the revised memorandum. If the memorandum is followed an authorization under the *Species at Risk Act* would not be required for the project with respect to species at risk bats.”

[39] Mr. Romano provided his opinion that consistency with the PPS is not satisfied for reasons detailed in paragraph 4.5 of his Witness Statement at p. 1115 of Exhibit 1B.

[40] Based on the evidence throughout the hearing, the Tribunal is satisfied that there is a high likelihood that endangered bats exist on the subject properties. The Tribunal is further satisfied by the evidence that following extensive consultation with MECP, the agency responsible for administering the ESA, the Proponents are prepared to implement mitigation strategies to MECP’s satisfaction to address impacts of the proposed development on the potential bat habitat as if it had been determined that the bats actually existed there. Accordingly, the Tribunal finds that the proposed development subject to the condition that the mitigation strategies satisfactory to MECP are implemented, is consistent with policy 2.1.7 of the PPS.

Oak Ridges Moraine Conservation Plan (“ORMCP”)

[41] Both Parties agree that the subject properties are within a Settlement Area of the Oak Ridges Moraine. Policy 18(1) of the ORMCP gives the purpose of Settlement Areas

to focus and contain urban growth by: …(a) minimizing the encroachment and impact of development on the ecological functions and hydrological features of the Plan Area. Policy 18(2) gives the objective of Settlement Areas of, (a) maintaining, and where possible improving or restoring, the health, diversity, size and connectivity of key natural heritage features, key hydrological features and the related ecological functions.

[42] Mr. Guetter provided his opinion that the Applications conform to the ORMCP by qualifying for the exemption provided in policy 7 of the ORMCP, as discussed below.

[43] Mr. Romano provided his opinion that they do not conform because the proposal seeks site development and site alteration which are prohibited by s. 22 of the ORMCP; it has not been demonstrated, nor does he believe, that the subject properties benefit from the ORMCP exemptions as they relate to a previously authorized single dwelling; and the proposal would have the opposite effect to maintaining, improving, restoring and /or not adversely affecting the natural features associated with the subject properties.

[44] Of the key natural heritage features listed in Policy 22(1), the Parties agree and the Tribunal finds, that the subject properties contain Wetlands; Fish Habitat; Candidate Significant Wildlife Habitat; and likely Significant Valleylands; and that the subject properties are entirely within Significant Woodlands.

[45] Policy 22(2) states that all development and site alteration with respect to land within a key natural heritage feature or the related minimum vegetation protection zone is prohibited except in six certain specific situations (eg. Forest, fish and wildlife management, conservation and flood or erosion control projects etc.) which Mr. Henshaw conceded do not apply to this case. It was common ground therefore that, barring satisfaction of policy 7, the proposed development does not conform with the ORMCP.

[46] Policy 23(1) states that “A natural heritage evaluation shall: (a) demonstrate that

the development or site alteration applied for will have no adverse effects on the key natural heritage feature or on the related ecological functions."

[47] Adverse effect is defined in the ORMCP as "any impairment, disruption, destruction or harmful alteration." The Town takes the position that, because Mr. Henshaw admitted that the proposal will add to the stress to which this woodlot is already subjected, the proposal does not conform to the ORMCP, again barring satisfaction of policy 7.

[48] The Parties agree that the ORMCP designates the subject properties "Settlement Areas" and the subject properties are within a Category 2 Landform Conservation Area.

Landform conservation areas policy 30(6) provides:

> *An application for development or site alteration with respect to land in a landform conservation area (Category 2) shall identify planning, design and construction practices that will keep disturbance to landform character to a minimum, including, (emphasis added)*
>
> *(a) maintaining significant landform features such as steep slopes, kames, kettles, ravines and ridges in their natural undisturbed form;*
>
> *(b) limiting the portion of the net developable area of the site that is disturbed to not more than 50 per cent of the total area of the site; and*
>
> *(c) limiting the portion of the net developable area of the site that has impervious surfaces to not more than 20 per cent of the total area of the site.*

[49] *"Net developable area"* is defined in the ORMCP as "the area of a lot or site, less any area that is within a key natural heritage feature or a key hydrological feature."

[50] The Town submits that the Proponents failed to present any design or construction practices as anticipated by this policy 30(6). The Town says that Mr. Henshaw and Mr. Guetter are asking the Tribunal to accept that all the detail will be 'worked out later' when fulfilling conditions. The Town submits that if developing in an ecologically sensitive area, the plans must be presented (down to the construction

practices) to demonstrate that disturbance will be kept to a minimum.

[51] The Town further contends that this policy and the definition of “net developable area” makes it clear that there is zero percent net developable area on this site because the entire site is a key natural heritage feature (Significant Woodland). The Town notes that only Mr. Romano presented this fact to the Tribunal. The Town also suggests the Tribunal draw a negative inference from the fact the Proponents did not re-call their witness in reply to address this issue.

[52] It was Mr. Henshaw’s evidence that the impervious surface and disturbed areas of the latest development proposal are less than the permissible threshold values as per section 30(6) of the ORMCP. However, his calculations were based on the full lot area and did not address the implications of the definition of “net developable area”. The Proponents rely on their calculations, the Settlement Area designation under the ORMCP and the locations of the building envelopes as demonstration that best efforts have been made for the builder to adopt design and construction practices to keep disturbance to landform character to a minimum to satisfy the requirements of the ORMCP. Mr. Henshaw further noted that impervious areas may be mitigated through detailed design with the use of low-impact development measures, such as permeable pavers or gravel. While this additional possibility to reduce impacts was intended to be positive, it also underscores the fact that impacts may not yet be reduced to the extent possible as improvements may still be made to the proposed developments.

[53] If the Applications meet the tests in policy 7 of the ORMCP, then the other policies in the ORMCP are rendered moot, including the landform conservation areas policy 30(6). It was the Proponents’ submission that, while it is not necessary for the Applications to comply with these landform conservation policies (or other policies beyond policy 7 in the ORMCP), their compliance is beneficial in demonstrating that impacts will be minimized.

[54] The Proponents submit that if the two tests in policy 7 of the ORMCP are met,

nothing in the plan applies to preclude the proposal. The Town submits that while policy 7 is important, it is the four tests of section 45(1) of the Act that must ultimately decide these Appeals.

[55] Policy 7 of the ORMCP, which was the focus of much of the hearing, provides:

> ***Previously authorized single dwelling***
>
> *7. Nothing in this Plan applies to prevent the use, erection or location of a single dwelling if,*
>
> *(a) the use, erection and location would have been permitted by the applicable zoning by-law on November 15, 2001; and*
>
> *(b) the applicant demonstrates, to the extent possible, that the use, erection and location will not adversely affect the ecological integrity of the Plan Area.*

[56] The Parties agree that policy 7 of the ORMCP provides an exception for single dwelling development provided both tests in (a) and (b) are satisfied.

The first test - Policy 7(a) ORMCP

[57] The Parties agree that, in 2001, the subject properties were zoned “RR-Rural Residential Zone” under Zoning By-law No. 2213-78, as amended (see Exhibit 4 #7).

[58] However, while Mr. Guetter gave his opinion that the use, erection and location of the single detached dwellings on the lots as depicted in the proposed minor variance Applications would have been permitted by the applicable Zoning By-law on November 15, 2001, Mr. Romano gave his opinion that the Zoning for these lands in 2001 did not permit the construction of a dwelling – only the potential for that use.

[59] This led to what Counsel for the Proponents, Mr. Germain, aptly described as the “rabbit hole” analysis.

[60] While the Rural Residential (R) Zone, which applied to the subject properties on November 15, 2001 provided the use permission for a single dwelling, as Mr. Guetter

stated (p. 1268 Ex 1B), Mr. Romano argued that the key words in policy 7(a) of the ORMCP are not just the “use” but also the “erection” and “location”. In Mr. Romano’s view, the erection and location portion of the test is not met.

[61] Mr. Romano took the Tribunal to provision 6.17.3 of Zoning By-law No. 2213-78, which related to the fill and construction area which, according to Exhibit 10 covered much of the subject properties. It reads:

> *No person shall erect any building or structure in any Fill and Construction Area as shown on Schedule “A” except in accordance with the provisions of Ontario Regulation 782/74 as amended by Ontario Regulation 346/79.*

[62] *Ontario Regulation 782/74* is under the *Conservation Authorities Act,* in which the “Authority” means South Lake Simcoe Conservation Authority. Counsel referred the Tribunal to the relevant sections of the regulation as follows:

> 2. *The areas described in the Schedules are areas in which, in the opinion of the Authority, the control of flooding or pollution or the conservation of land may be affected by the placing or dumping of fill.*
>
> *3. Subject to section 4, no person shall,*
>
> *(a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;*
>
> *(b) place or dump fill or permit fill to be placed or dumped in the areas described in the Schedules whether such fill is already located in or upon such area, or brought to or on such area from some other place or places….*
>
> *4. …the Authority may permit in writing the construction of any building or structure or the placing or dumping of fill …if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping…will not affect the control of flooding or pollution or the conservation of land.*
>
> *5. No person shall commence to construct any building or structure or dump or place fill…before permission to do so has been obtained under section 4.*

[63] The Proponents argue that, in order to find that the erection of a single detached dwelling would have been prohibited by 6.17.3, it must be found that all the following are true:

1) that the fill and construction area remained on the subject properties in 2001;

2) that there was no potential building envelope outside of the fill and construction area in 2001;

3) that O. Reg. 782/74 remained in force in 2001;

4) that O. Reg. 782/74 would prohibit the construction of a dwelling anywhere on the subject properties; and

5) that the need to obtain a permit from the conservation authority would negate the underlying residential permission for the purposes of policy 7 of the ORMCP.

[64] The Proponents submit that none of these propositions are true, for the following reasons:

1) The York Region Land Division Committee found in 1982 that the subject properties were suitable for suburban residential purposes (Exhibit 16 – re Consent application);

2) In February 2001, the Town rezoned the adjacent properties and there is no indication in the attached zoning schedule, which includes the subject properties, that a fill and construction area remained in place at that time;

3) The erection of buildings was governed by s. 3(a) of O. Reg. 782/74 and permission from the conservation authority is only required to construct a dwelling in a pond, swamp or floodplain;

4) O. Reg. 782/74 was repealed in 1980; and

5) The requirement to obtain a permit from a conservation authority is akin to the

> need to obtain a building permit. It is a further approval that is required outside the *Planning Act* process. The need to secure the further approval does not negate the zoning permission.

[65] Mr. Guetter provided his opinion that all use-related and performance standard regulations of the Rural Residential (R) Zone in Zoning By-law No. 2213-78 are met with compliance with the proposed dwelling locations and the subject properties' applicable zoning would permit the use, erection and location of single dwellings on Lot 672 and Lot 684 as depicted in the proposed minor variance Applications.

[66] Further Mr. Guetter opined that the Fill and Construction Area shown on Schedule "A" referred to in section 6.17.3 of the 1978 Zoning By-law includes both the subject properties and the surrounding residential area. He noted that by February 2001, the surrounding area were developed and zoned for residential uses. In his opinion, the development of the surrounding adjacent residential area is conclusive in demonstrating that section 6.17.3 of Zoning By-law No. 2213-78, which was a regulation governing development in floodplain areas did not represent a prohibition to development of those adjoining lands. He went on to say that given that the proposed dwellings on the subject lands are not within a floodplain, the provision of section 6.17.3 would not represent a restriction or prohibition to development in the manner proposed by Mr. Romano.

[67] In Mr. Guetter's view, the ORMCP test applicable in this case is specific to the use, erection and location being permitted by the applicable Zoning By-law on November 15, 2001 not on the basis of whether a development application approval, permits or other authorizations had been obtained. The basis for this distinction is further reinforced when one considers other sections in the ORMCP policy framework, such as in sections 6(b) and 8, which relate to provisions stipulating that building permits had to have been issued or an application approved by a specific date. Policy 7(a) provides no such requirement. The test under Policy 7 of the ORMCP, which applies to the subject properties, is, in his opinion, deliberate in its intention for the

permission of the use, erection and location of a single dwelling to be tied to the applicable Zoning By-law in force on November 15, 2001. Mr. Guetter considers Mr. Romano's reference to "capable of being" erected, as support of his opinion that the ORMCP provisions of policy 7(a) would not require an applicant to demonstrate fulfillment of permits or other authorizations to be afforded application of the policy.

[68] It is Mr. Guetter's opinion that the provisions 6.17.3 and 6.22, and the Fill and Construction Area shown on Schedule A, do not represent a prohibition or restriction for the subject properties and it is his opinion that the use, erection and location of a single dwelling on each of Lot 672 and Lot 684 would have been permitted on November 15, 2001.

[69] Mr. Guetter concludes that the erection and location of a single dwelling was permitted on the subject properties as the lots are located outside the floodplain and were capable of being serviced. The development of the surrounding residential area, which existed prior to November 15, 2001, and the subject properties Rural Residential (R) Zone category in force at the time, further demonstrates that the subject properties would have been permitted in a zoning compliant manner for residential development on November 15, 2001, and that each lot would allow for the use, erection and location of a single dwelling in fulfillment of the provisions of policy 7(a) of the ORMCP.

[70] The Proponents referred the Tribunal to *L.D.C.M. Investments Ltd. et al. v. Town of Newcastle et al.* (1975), 8 O. R. (2d) 504, a decision in which the Divisional Court held that where a Zoning By-law is poorly drafted so that there is considerable doubt as to its scope or effect and thus gives rise to an issue between a landowner and the municipality as to the uses to which the land may be put, the by-law should not be construed liberally. If the expressions used in the by-law are doubtful, the doubt must be resolved in favour of the landowner.

[71] The Tribunal has given careful consideration to the arguments of both parties, and the direction of the Divisional Court in interpretation of an unclear By-law, as to

whether the Applications meet the test in policy 7(a) of the ORMCP. The Tribunal prefers the evidence of Mr. Guetter, and finds that the use, erection and location of a single detached dwelling would have been permitted by the applicable Zoning By-law on November 15, 2001. The Tribunal therefore finds that the Applications meet the first test of policy 7 of the ORMCP.

The Second Test - Policy 7(b) of the ORMCP

[72] Having established that the Applications meet the first test in policy 7 of the ORMCP, the Tribunal had to next consider whether they also meet the second "ecological integrity" test.

[73] The ecology witnesses, Mr. Henshaw and Mr. Speller, came to different conclusions as to whether the Proponents have demonstrated, to the extent possible, that the use, erection and location will not adversely affect the ecological integrity of the Plan Area.

[74] Both ecology witnesses agreed that the Plan Area referred to the entirety of the Oak Ridges Moraine Conservation Plan Area, comprising approximately 190,000 ha. This means any adverse affect is to be considered in the context of this larger geographical area.

[75] Mr. Henshaw told the Tribunal that policy 7(b) of the ORMCP required them to "do best by the site" by avoiding any natural features that they could and minimizing impacts. In Mr. Henshaw's opinion, the Proponents have addressed the "extent possible" requirement by avoiding several overlapping features entirely (i.e. fish habitat, watercourse, wetland) and two others almost entirely (meander belt plus 30 m, valleylands). Mr. Speller agreed that the wetland and fish habitat would be protected by significant buffers, and that the existing biota corridor function will be maintained. It was common ground that the impact to the likely significant valleyland would be minor as the only encroachment into it would be a portion of the driveway on Lot 672.

[76] It was the impact to the Significant Woodland that raised the biggest issue between the Parties. Mr. Henshaw conceded that it is not possible to avoid the loss of some significant woodlands while allowing the proposed development; however, he gave his opinion that they had minimized the impact to the extent possible.

[77] Mr. Henshaw took the Tribunal to the August 2020 revised NHE (pg. 893 of Exhibit 1B) to review the dimensions of the potential disturbance for the latest development proposal. For Lot 672, with a total area of 1.15 ha or 11,500 square metres ("m^2"), he said they had managed to reduce the total footprint from 1,663 m^2 to 1400 m^2, representing a 16% reduction from the previous proposal. For Lot 684, with a total area of 2.02 ha or 20,200 m^2, he said they had managed to reduce the total footprint from 3,806 m^2 to 2,653 m^2, representing a 30% reduction from the previous proposal. He also noted that a significant portion of the footprint is attributed to grading, much of which will be restored.

[78] In his view, the "extent possible" test has been discharged, rendering the "ecological test" moot. In any event, his opinion is the ecological integrity of the Plan Area refers to the entire Oak Ridges Moraine Conservation Plan Area, such that the removal of a small portion of an urban woodlot, as in this case, could not be considered to affect the ecological integrity of the Plan Area on its own merits. In Mr. Henshaw's opinion, the building envelopes were positioned in the best location for each lot to ensure the least impact on the natural heritage features.

[79] When pressed in cross-examination, Mr. Henshaw admitted that it may be possible to reduce the impacts of the development even more but that will not be known until the detail design stage. He conceded that at this point, that means they have not done as much as possible. There could be further improvement, although some could be "physically but not practically possible" due to planning and costs involved. Mr. Henshaw admitted that possibly more could be done to decrease impact at the detail design stage.

[80] In cross-examination, referencing Lot 684, Mr. Guetter agreed that the precise sitting of the dwelling is not reflected on the proposed building envelope but said a 500 m^2 building would be located somewhere within the 916m^2 envelope. He agreed that the impervious surface area could be further reduced from 8.5% to 2.5% depending in part on materials used for the driveway and limiting the size of the building. When asked in cross-examination if he agreed the Tribunal should limit the impervious area to 2.5%, Mr. Guetter said it would not be fair to do that.

[81] Mr. Henshaw addressed the sensitive issue related to the endangered species of bats that were “near certain to be onsite” according to MNRF and to have habitat on the subject properties. He told the Tribunal that there had been extensive consultation with MNRF and the MECP as to whether they were required to do acoustic monitoring to test for maternity roosts for bats in the area. He said that the MECP was satisfied that the ESA was not triggered in terms of requiring a permit (also see page 935 of Exhibit 1B). He noted that the portions of significant woodlands that will require removal to accommodate the future development have been surveyed based on the potential for endangered bat roosting habitat, as required by MNRF regulations, and following these assessments and consultations with MNRF, the proposed building envelopes for each lot have been revised in order to protect particular identified snags. Certain mitigation measures are required by MECP to reduce the potential for harm to the bats as listed in the NHE at page 902 of Exhibit 1B. Some examples of mitigation that will be done, according to Mr. Henshaw, include monitoring of removal of the trees by an arborist, restoration planting and the installation of rocket box style roosting structures to address lost bat roosting habitat.

[82] Mr. Henshaw conceded that there would be some incremental impact on the significant woodlands; however, he qualified that impact as less significant because he said the woodlot is already highly urbanized. He told the Tribunal that there were physical impacts already to the subject properties from noise and light, as well as activities such as the dumping of garden yard waste and the spread of invasive plants, from the neighbouring properties.

[83] While Mr. Henshaw gave his opinion orally that the proposed development, with the proposed mitigation measures, would not adversely affect the ecological integrity of the Plan Area, the NHE signed by Mr. Henshaw, at page 903 of Exhibit 1B, concludes that " Based on these assessments and recommended mitigation measures, the proposed development on 672 and 684 Henderson Drive should not adversely affect natural heritage features on the subject properties, and therefore demonstrates conformity with the ORMCP, LSPP, Regional and Municipal Official Plans." (emphasis added) The Town argued that this is not the proper test and Mr. Henshaw admitted that the written opinion was poorly worded.

[84] Mr. Speller's evidence to the Tribunal was that the development footprint on the subject properties is located in woodlands that have notably high wildlife tree (snag) densities such that it is considered high quality potential maternity roost habitat for bats. Mr. Speller told the Tribunal that the Ontario MNRF has confirmed that two endangered bat species (Northern Myotis and Little Brown Myotis) are known to exist in the vicinity of the subject properties. A third endangered bat species (Tri-Colour Bat) could potentially be found there. He said Consultants of the Proponents have indicated that the proposed developments will result in the removal of areas of candidate maternity roost habitat for these bat species.

[85] In Mr. Speller's view, the impact caused by developing a few hectares of significant woodlands may seem small relative to the entire Oak Ridges Moraine Plan Area, but there could still be an adverse affect to the ecological functions. He gave the analogy of someone losing a finger and still being able to function but being adversely affected. He said developing a few hectares here and there on the Oak Ridges Moraine was akin to death by a thousand cuts.

[86] Mr. Speller gave his opinion that the proposed development would not constitute "minimizing the encroachment and impact of development on the ecological functions …of the Plan Area" and would not "maintain, improve or restore the health, diversity, or size of the Significant Woodland or its related ecological functions" and that the

Proponents have not demonstrated to the extent possible that the loss of Significant Woodland and candidate significant wildlife habitat will not adversely affect the ecological integrity of the Plan Area.

[87] The Town submits that earlier submissions of the proposed development showed larger areas of disturbance and yet were still supported by the Proponents' experts as meeting the test of minimizing impact "to the extent possible". The Town says they were clearly wrong then, as demonstrated by the fact that the development area and resulting impact were able to be, and have been, reduced. The Town further points to Mr. Henshaw's admission that more work still needs to be done to assess the impacts and try to reduce the impacts. That, the Town says, is an admission that the Proponents do not satisfy the test in policy 7(b).

[88] The Proponents submit to the Tribunal that the Town's Peer reviewer, Mirek Sharp, concurred with the Proponents that the proposed development would meet the test in policy 7(b) of the ORMCP in his letter marked Exhibit 8. However, Mr. Sharp's comments are qualified as he writes:

> Overall, …if there is more complete demonstration that impacts have been minimized at this stage of the submission (noting the opportunity exists for further impact reduction when detailed design is undertaken), it is our opinion that the NHE and scoped Tree Inventory Memorandum are sufficient, assuming our few concerns are addressed.

[89] The Tribunal recognizes that the Proponents have worked with the various agencies to address concerns and have revised the proposed development to try to minimize impacts in order to meet the ecological integrity test to qualify for the exemption provided by policy 7 of the ORMCP from the prohibition to develop in the key natural heritage features. The Tribunal is also sympathetic to the Proponents' complaint that the "goal posts kept moving". They told the Tribunal that it was not until the Appeals that the Town suggested the information provided was insufficient. However, as the Town noted, the goal posts are the policies, which have not changed, are available for anyone to see, and with which there must be compliance. The Town said it is a policy-

led and not a staff-led scheme.

[90] The Tribunal must be satisfied that the Proponents have demonstrated, to the extent possible, that the use, erection and location will not adversely affect the ecological integrity of the Plan Area. Based on the evidence provided, including the admissions that more could be done at the detail design stage to reduce impacts, the Tribunal cannot find that there is conformity with policy 7(b) of the ORMCP.

[91] The Tribunal considered whether conditions of approval could ensure future implementation of any possible further mitigation strategies to reduce adverse impacts and whether such would discharge the conformity safeguard.

[92] The Proponents propose detailed conditions of approval (page 1237) which they say are based on staff and agency comments. They contend that these conditions provide for a further detailed design and review process.

[93] Mr. Romano gave his opinion at the hearing that the proposed conditions of approval are too vague, have scant oversight, and are missing information such as sign off by engineering. He noted that the conditions are organized by Agency and not topic and that the wording is different from the conditions of approval recommended by the Town planning staff to the COA.

[94] In cross-examination, Mr. Romano was asked if his concern about the lack of information provided regarding proposed construction practices for the proposed development could be addressed by adding a condition of approval to the effect that the construction practices had to be to the satisfaction of the Town. Mr. Romano disagreed that such a condition would alleviate his concern saying that policy considerations need to be considered first and that such parameters and conditions should have been hammered out in advance of seeking approval. He also gave his opinion that a plant restoration plan should have been provided and approved by the Town and Conservation Authority in order to properly assess impacts for policy considerations and

that it was not appropriate to be done in the future as a condition of approval. Mr. Romano said the Proponents did not provide a concept plan, let alone a site plan for that. Mr. Romano said the Lake Simcoe Region Conservation Authority (“LSRCA”) might be satisfied but he is not because, in his view, the level of detail is still at the conceptual level and no one really knows how much land will be disturbed.

[95] Mr. Henshaw admitted in cross-examination that an NHE is typically done at the detail design stage but in this case, it was done at the conceptual stage. He noted that the Proponents wanted the opportunity for the dwelling to be designed subsequent to authorization of the minor variance Applications.

[96] The Town submitted that detail design is needed to properly assess impact to know if it has been minimized to extent possible before the authorization of the minor variances.

[97] Based on the evidence, including the opinion evidence of the witnesses, the Tribunal was not satisfied it would properly discharge its legislated duty to ensure conformity with the ORMCP policies by making the Applications subject to the conditions as proposed by the Proponents and objected to by the Town.

[98] Accordingly, the Tribunal finds that the Proponents, at this time, have failed to demonstrate to the extent possible that the use, erection and location will not adversely affect the ecological integrity of the Plan Area. For this reason, the Tribunal finds that they have not established that they meet the exemption to develop on the subject properties and the Applications are therefore not in conformity with the previously discussed policies of the ORMCP.

A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2019 (the “Growth Plan”)

[99] Mr. Guetter gave his opinion to the Tribunal that the Applications conform with the Growth Plan. In contrast, Mr. Romano gave his opinion that they do not conform.

[100] The Town referred the Tribunal to the following statements in the introductory sections of the Growth Plan:

- "A Place to Grow will continue to ensure protection of our …natural areas and support climate change mitigation and adaption as Ontario moves towards the goal of environmentally sustainable communities."

- "This plan builds upon the policy foundation provided by the PPS…"

- "This Plan is to be read in conjunction with the PPS".

- "This Plan must also be read in conjunction with other provincial plans as defined in the *Planning Act* that may apply within the same geography."

- "A Place to Grow represents minimum standards."

[101] The Parties agree that the subject properties are identified as "Settlement Areas" and within the built boundary as defined by the Growth Plan.

[102] The Proponents noted that to the extent that the Growth Plan applies in the ORMCP, it defers to the PPS. In other words, if the development proposal is consistent with the PPS, it also conforms with the Growth Plan.

[103] The Town referred the Tribunal to Policy 4.2.2.6 as applicable to the Applications. That policy states: Beyond the Natural Heritage System for the Growth Plan, including within settlement areas, the municipality: (a) will continue to protect any other natural heritage features and areas in a manner that is consistent with the PPS.

[104] The Town contends that the evidence presented by Mr. Speller clearly demonstrates that the Proponents are not protecting the natural heritage features on this site in a manner that is consistent with the PPS. Mr. Speller, when highlighting the

absence of any construction or design plans having been prepared by the Proponents as well as the failure of Mr. Henshaw to protect the endangered bats, advised the Tribunal that this proposed development is the antithesis of protecting the natural heritage features.

[105] Section 1.2.3 of the Growth Plan provides guidance as to how to read the Growth Plan in relation to the PPS and other Provincial Plans (in this case the ORMCP). It indicates that "like other provincial plans, this Plan builds upon the policy foundation provided by the PPS and provides additional and more specific land use planning policies to address issues facing specific geographic areas in Ontario….The policies of this Plan take precedence over the policies of the PPS to the extent of any conflict, except where the relevant legislation provides otherwise." It further indicates that "where there is a conflict between…the ORMCP…and this Plan regarding the natural environment…, the direction that provides more protection to the natural environment…prevails".

[106] Given that the Tribunal was not satisfied that the Applications were consistent with policy 2.1.5 of the PPS, the Tribunal similarly cannot find that the Applications conform to policy 4.2.2.6 of the Growth Plan**.**

Lake Simcoe Protection Plan, 2009 ("LSPP")

[107] While in Mr. Guetter's opinion, the Applications conform with the LSPP, in Mr. Romano's opinion, they do not conform.

[108] The relevant LSPP policy is 6.33-DP which provides:

> An application for *development* or *site alteration* shall, where applicable:
>
> a. increase or improve *fish habitat* in streams, *lakes* and *wetlands* and any adjacent *riparian areas*:
>
> b. include landscaping and habitat restoration that increase the ability of native plants and animals to use *valleylands* or *riparian areas* as *wildlife habitat* and

> movement corridors;
>
> c. seek to avoid, minimize and/or mitigate impacts associated with the quality and quantity of urban run-off into receiving streams, *lakes* and *wetlands*…[italics in original to indicate defined terms.]

[109] The Proponents told the Tribunal that they have worked with the LSRCA to address possible LSRCP concerns through proposed remedies and conditions, including revisions to the proposed development to minimize impacts through avoidance of natural heritage limits and buffers and through proposed restoration of disturbed areas where possible.

[110] Mr. Henshaw referred the Tribunal to what he called the "sign off" letter from LSRCA at page 972 of Exhibit 1B. In this letter dated August 3, 2018, the LSRCA indicates: *"We have reviewed the latest submission and confirm that our comments have been addressed. On that basis, it is recommended that any approval of this application be subject to the following conditions:*

1. *A restrictive covenant shall be registered on title for both properties to ensure that the remaining natural heritage features be protected in perpetuity.*

2. *An Edge Management Plan for the boundary of the proposed woodland removal areas shall be prepared to the satisfaction of the LSRCA. A cedar rail/natural living fence will be required to delineate the development boundary.*

3. *A Restoration Plan shall be prepared to the satisfaction of the LSRCA.*

4. *A detailed grading plan shall be prepared to the satisfaction of the LSRCA and the Town which demonstrates the use of retaining walls as a means to reduce the impacts associated with the required grading.*

Please note: a permit from the LSRCA will be required prior to issuance of municipal approvals for any site alteration or development on the part of these

lands that is within an area governed by Ontario Regulation 179/06 under the Conservation Authorities Act. Permit requirements may require the preparation of additional technical studies."

[111] The Proponents contend that the edge management and plantings of native species, together with the establishment of a 30 m minimum vegetation protection zone ("MVPZ" or buffer) around the meander belt of the watercourse on the subject properties satisfy this policy. They noted that the LSRCA has indicated that its comments have been addressed.

[112] Mr. Romano, however, told the Tribunal that the proposed development does not conform to the LSPP policies because the proposed development demonstrates no attempt to improve the natural features on the site and it does not address urban run-off because the work has not been done to address stormwater management. He says the proposed development conflicts with higher order policies which take precedence in areas of conflict.

[113] The requirements in policy 6.33-DP of the LSPP as discussed above generally emphasize increasing or improving habitat and avoiding, minimizing and/or mitigating impacts. While there was little, if any, evidence to demonstrate there would be an increase or improvement to habitat, there was also little concern raised by either ecologist as to potential impacts on the fish habitat, likely significant valleylands, buffers or biota corridor. The main focus of concern in the Appeals was the impact to the significant woodlands. The Proponents will need to overcome the issues related to inconsistency with the PPS and non-conformity with the ORMCP first, after which conformity with the LSPP will follow.

The Four Tests for Minor Variances

[114] The review of the foregoing legislation and Policies informs the four tests for authorization of minor variances as set out in section 45(1) of the Act. All four tests must

be met in order for the Appeals (of the decisions to refuse the Applications) to succeed.

1. The General Intent and Purpose of the OP

[115] To authorize the minor variances, the Tribunal must be satisfied that they maintain the general intent and purpose of the Official Plans. As already noted, this test does not require conformity with the Official Plans.

York Region Official Plan (YROP)

[116] Mr. Guetter gave his opinion that the Applications maintain the intent and purpose of the YROP in contrast to Mr. Romano who gave his opinion that the Applications do not meet the general intent and purpose of the YROP.

[117] The natural environment policies in the YROP state that it is a goal of the Region "To protect and enhance the natural environment for current and future generations so that it will sustain life, maintain health and provide an improved quality of life."

[118] The Parties agree that the subject properties are within the "Urban Area" as identified by York Region Map 1 – Regional Structure.

[119] The Parties further agree that the subject properties are not located within York Region's Greenlands System as per Map 2 – Regional Greenlands System. The Regional Greenlands System is identified on the south side of Henderson Drive, across the street from the subject properties.

[120] Mr. Speller referred the Tribunal to section 2.2.4 of the YROP where it states:

> ***It is the policy of Council:***
>
> *To prohibit development and site alteration within key natural heritage features, key hydrologic features, and adjacent lands, unless:*
>
> *a. it is demonstrated through a natural heritage evaluation, hydrological*

> *evaluation, or environmental impact study that the development or site alteration will not result in a negative impact on the natural feature or its ecological functions; or*
>
> *b. authorized through an Environmental Assessment.*

[121] In Mr. Speller's opinion, the proposed development will result in a negative impact on the natural feature and its ecological function, most notably through the permanent removal of Significant Woodlands in a likely Significant Valleyland and the loss of hundreds of trees in the development footprint in a "high quality potential maternity roost habitat" for at least two and possibly three endangered bat species, known to be found in the vicinity of the subject properties. Policy 2.1.19 states that "…for portions of the Region that are within the Oak Ridges Moraine, applications for development and site alteration will only be approved if they comply with the provisions of the [ORMCP]."

[122] Policies 2.2.4 and 2.2.14 also make it clear that development in a key natural heritage feature within the Oak Ridges Moraine is not permitted, except as provided in the ORMCP. In other words, the YROP defers to the ORMCP with respect to the protection of natural heritage in the ORMCP area.

[123] Policy 2.2.14 provides:

> 2.2.14 *That notwithstanding policy 2.2.4 of this Plan, development or site alteration is not permitted in key natural heritage features and key hydrological features or associated vegetation protection zone on the Oak Ridges Moraine, in the Greenbelt, and in the Lake Simcoe watershed, except as provided in the [ORMCP], the Greenbelt Plan and the Lake Simcoe Protection Plan.*

[124] Policy 2.2.44 provides:

> *That notwithstanding policy 2.2.4 of this Plan, development and site alteration is prohibited within significant woodlands and their associated vegetation protection*

zone except as provided for elsewhere within this Plan.

[125] The Proponents submit that if there is conformity with the ORMCP, then it follows that there is also maintenance of the general intent and purpose, of the YROP.

[126] Mr. Romano gave his opinion that the proposal does not comply with the ORMCP and therefore cannot maintain the intent and purpose of the YROP.

[127] Policy 2.2.55 requires that, in landform conservation areas, "…Planning, design and construction practices for any development and site alteration are required to satisfy the [ORMCP]." (emphasis added).

[128] The Town again pointed to the importance and expectation of provision of detail design and construction practices for development of environmentally-sensitive lands such as the subject properties. The Town contends that the Proponents have not provided details of the proposed development sufficient to demonstrate conformity with the ORMCP and to meet the intent and purpose of the YROP.

[129] The Town noted that Mr. Guetter, when attempting to demonstrate that the subject Applications maintained the general intent and purpose of the YROP, relied upon the same evidence and opinions as he did for the PPS and the ORMCP. It was the Town's contention that Mr. Guetter's evidence and opinion are as equally flawed when applied to the YROP as when it is applied to the PPS and the ORMCP.

[130] Based on the available evidence, and the earlier finding that the Applications do not conform with the ORMCP, the Tribunal further finds that the Applications do not maintain the general intent and purpose of the YROP.

Town Official Plan ("OP") / Official Plan Amendment No. 48 ("OPA 48")

[131] In the context of a minor variance application, the Proponents need to satisfy the

Tribunal that the Applications maintain the general intent and purpose of the Town's OP and OPA 48.

[132] Mr. Guetter gave his opinion that the Applications maintain the general intent and purpose of the OP and OPA 48.

[133] Mr. Romano gave his opinion that the Applications do not maintain the general intent and purpose of the Town's OP or OPA 48. Mr. Romano further opined that the subject lands do not benefit from OPA 48 ORMCP-related exemptions.

[134] The Parties agree that the subject properties are designated Oak Ridges Moraine Settlement Area by the OPA 48 and that Schedule K of the OPA 48 identifies the presence of ORM Key Natural Heritage Features on the subject properties. The Act requires the Official Plans of the Town and the Region to conform with the ORMCP.

[135] The Town's OP Schedule A shows the land use designations as Stable Neighbourhoods and Private Parkland for the subject properties.

[136] The Town told the Tribunal that when reading the Town's OP, it is critical to note that the ORMCP states, "Nothing in this Plan is intended to prevent municipalities from adopting Official Plan policies and zoning provisions that are more restrictive than the policies of this Plan, except where prohibited by this Plan or where it conflicts with other provincial plans." According to the Town, it has adopted policies that are more restrictive than the policies of the ORMCP.

[137] The Town submits that OPA 48, the Town's ORMCP conformity OPA, makes it clear that the proposed development is not permitted. He points out that OPA 48, as adopted and approved, states, "Where the policies of this Plan contradict the policies of the [ORMCP], the more restrictive policies shall prevail with the exception of policies that apply to agricultural uses, mineral aggregate operations and wayside pits."

[138] The key policy in the Town OPA 48 is 3.13.3 which operates in conjunction with policy 3.13.5(c).

[139] Policy 3.13.5 (c) indicates that all development and site alteration is prohibited within a key natural heritage feature or hydrologically sensitive feature and their related minimum vegetation protection zones as established, except as otherwise provided for in policy 3.13.3.

[140] Policy 3.13.3 provides:

> ***Existing Uses and Prior Approval Policies***
>
> a *For all lands situated on the Oak Ridges Moraine…the following policies shall apply to all existing uses, notwithstanding any other more restrictive policies to the contrary within this Plan. (emphasis added)*
>
> f *The conversion of an existing use to a similar use is permitted, in all land use designations on the Oak Ridges Moraine, if it can be demonstrated by the applicant, that the conversion:*
>
> *i will bring the use into closer conformity with the [ORMCP]; and*
>
> *ii will not adversely affect the ecological integrity of the Oak Ridges Moraine Area.*
>
> g *The use, erection or location of a single dwelling and related accessory uses are permitted on the Oak Ridges Moraine, if:*
>
> *i the use, erection and location would have been permitted by the applicable zoning by-law on November 15, 2001;*
>
> *ii prior to issuance of a building permit, the applicant demonstrates, to the extent possible, that the use, erection and location will not adversely affect the ecological integrity of the Oak Ridges Moraine, by means of a natural heritage or hydrological evaluation or other required study in accordance with the policies of the [ORMCP]; and*
>
> *iii notwithstanding Subsection 3.13.3g.ii above, where said lands are located within the Oak Ridges Moraine Settlement Area, the policies of Subsections 3.13.4.f.iv and 3.13.4.f.v shall also apply.*

[141] The Proponents submit that policy 3.13.3 (g) is a transition provision which mirrors policy 7 of the ORMCP, with the addition of item (iii), which the Parties agree does not apply in this case. The Proponents say that this policy operates similarly to

policies 3.13.3 (h) and (i) as they all contain the same transition date, and none of them requires, or makes any reference to an established use. They say the Town OP and OPA 48 permit single dwellings that were zoned for such purposes prior to 2001 even if they are within significant woodlands or other key natural heritage or hydrologic features.

[142] The Town says the Proponents' interpretation of policy 3.13.3 (g) is wrong because they have ignored the heading "*Existing Uses and Prior Approval Policies"* and policy 3.13.3 (a) which the Town says both make clear that the policies that follow apply to existing uses and prior approvals. The Town says these policies were in keeping with natural justice to protect existing rights predating the more restrictive policies of the ORMCP. The Town says policy 3.13.3(g) applies to the existing use and not the permitted use. The Town also notes the policy says prior approvals and not prior uses. The Town says the existing use on the subject properties was and is, as testified to by Mr. Romano, conservation uses or a 'vacant woodlot'. He says there is no permission in policies (b) to (i) under which the proposed development qualifies. He says policy (g), which was the subject of the cross-examination of Mr. Guetter, allows an existing use to be rebuilt. For example, if there is already a 1,200 ft^2 house on the site and the owner wants to build a 2,000 ft^2 house at a different location on the same property, the owner must demonstrate that the use, erection and location of the 2,000 ft^2 house would have been permitted on November 15, 2001 and must also meet the other requirements.

[143] The Town says this policy does not allow a new house (i.e. a non-existing use) to be constructed. The Town submits that if the policy intended to be read as the Proponents and Mr. Guetter assert, the policy would have said, "the following policies shall apply to all lands…" but instead the language in (a) restricts permissions to 'existing uses' and not the creation of a new use.

[144] The Town contends that it is impossible for the Proponents to demonstrate conformity with the Town's Official Plan in light of the clear language of OPA 48 which is more restrictive than the ORMCP, as is permitted and encouraged by Provincial policy.

Further, the Town submits that the Applications do not maintain the general intent and purpose of the Town's policy which the Town says was to allow only existing uses to continue after 2001.

[145] The Tribunal has given considerable attention to the different interpretations proposed by the Parties and in particular, to the arguments as to whether policy 3.13.3(g) should be read as applicable only to existing uses. While the heading and (a) suggest it should, the absence of reference to "existing use" in (g) when such reference to "existing use" is included in (b) – (f), suggest it should not. Again, ambiguity in the wording of a by-law should be resolved by interpretation in favour of the Proponents. Accordingly, the Tribunal accepts the Proponents' position that policy 3.13.3 (g) should be interpreted in the same way as policy 7 of the ORMCP, which has very similar wording for both tests in order to qualify for an exemption against the prohibition to develop on the subject properties. It follows that, while the first test in both policies is met, the second test ("ecological integrity test") is not because the Proponents have failed to demonstrate to the extent possible, that the use, erection and location will not adversely affect the ecological integrity as required.

[146] Policy 3.13.3 (g)ii of OPA 48 has the added requirement of an NHE. While the Proponents have provided an NHE, it was noted by Mr. Henshaw that NHEs are normally done at the detail design stage and not the conceptual stage as in this case.

[147] According to Mr. Guetter's Planning Justification Cover Letter dated April 12, 2017 (Tab 3 of Exhibit 1A), the Town's OP and OPA 48 seek to ensure that development within ORMCP *Settlement Areas* does not adversely affect the ecological integrity of the Oak Ridges Moraine key natural heritage features. In his Witness Statement at page 1212 of Exhibit 1B, he gives a slightly different version of the intent and purpose of the OP policies as "to ensure that on existing lots of record with key natural heritage and key hydrologic features, which are permitted to be developed, the development occurs in a manner which respects and limits impact to these features."

[148] In final submissions, the Proponents contend that the OP aims to protect the natural environment and OPA 48 demonstrates a clear intent to provide for limited development rights. They say policy 3.13.3(g) and 3.13.5 (c) represent the balance struck by Council between these two interests. Development within key natural heritage features can take place on existing lots of record that meet the test in policy 7 of the ORMCP and 3.13.3(g) of OPA 48, provided that impacts are minimized in accordance with those policies. (See paragraphs on ORMCP)

[149] Mr. Guetter said the intent and purpose of the ecological integrity test is to minimize the impact and encroachment of development on the Oak Ridges Moraine in accordance with the policies of the ORMCP. He said this test is not evaluating impact on individual key natural heritage and hydrologic features but on the Oak Ridges Moraine Plan Area. He said he relies on the opinions of Mr. Henshaw that the current Applications satisfy the ecological integrity test.

[150] Mr. Guetter provided detailed reasons for his opinion as to why he believes the minor variances maintain these stated intents and purposes of the OP policies in paragraphs 407 to 420 of his Witness Statement in Exhibit 1B.

[151] The Town submits that the variances requested do not maintain the general intent and purpose of the Town's OP for the reasons provided regarding OPA 48 and also due to the other policies in the Town's OP which speak to permitting passive recreational uses and conservation uses on lands designated as Private Parkland. Further, the Town notes the Town has Environmental Protection designation policies, which are agreed by all experts as being applicable.

[152] The Town referred to policy 12.5.2(d) of the Town's OP which does not permit development or site alteration within the habitat of endangered species, and policy 12.5.2(g) which specifically states that "a new single detached dwelling shall not be permitted within wetlands, the habitat of endangered, threatened or special concern species or environmentally significant areas." The Town says the policies referenced

above regarding the YROP must also be considered and it is clear that the Applications do not maintain the general intent and purpose of the YROP.

[153] As discussed previously, the Tribunal finds that the Applications do not provide sufficient information to properly demonstrate to the extent possible that the use, erection and location will not adversely affect the ecological integrity as required, and thus do not conform with the ORMCP. Until conformity is met with the ORMCP, the intent and purpose of the YROP, Town's OP and OPA 48, all of which implement the policies of the ORMCP, are not maintained.

2. The General Intent and Purpose of the Zoning By-law

[154] To authorize the minor variances, the Tribunal must be satisfied that they maintain the general intent and purpose of the Zoning By-law.

Zoning By-law No. 6000-17

[155] The Parties agree that the current Zoning By-law No. 6000-17, as amended, zones the subject properties as "ER – Estate Residential Zone".

[156] It is common ground that the proposed building envelope meets the Estate Residential (ER) Zone Standards including minimum lot area, minimum lot frontage and minimum setbacks.

[157] The Proponents contend that this zoning permits residential uses and that the Zoning By-law permits development in natural heritage features in limited circumstances with the intent and purpose to balance the private right to develop against the public interest in protecting the environment. They note that the Town zoning examiner identified 4 required variances, all of which relate to provisions 14.1.2(ii), 14.1.3(i), 14.1.4(i) and 14.4.3(i)), that specifically contemplate relief in accordance with OPA 48.

[158] The Town notes that all applicable provisions of a Zoning By-law must be complied with in order for a use, building or structure to be erected, or capable of being erected, lawfully.

[159] Mr. Romano told the Tribunal that the most pertinent provision in Zoning By-law No. 6000-17, as amended, is 14.1.2 which provides the avenue for minor variance relief proposed for the subject properties as follows:

> *14.1.2* ***Settlement Area Lands Within Key Natural Heritage Features***
>
> *Despite any other provisions of the By-law to the contrary, where a lot…or portion of a lot is located within one or more of the key natural heritage features and/or hydrologically sensitive features identified…and the said lands are also located within the "Oak Ridges Moraine Settlement Area", …then the following provisions shall apply:*
>
> *i) the only uses, building and structures permitted on that portion of said lot that is within the feature shall be uses legally existing as of November 15, 2001…;*
>
> *ii) no development or site alteration including expanding, enlarging or otherwise altering an existing use, building or structure shall occur on that portion of said lot that is within the feature, …without an amendment to, or relief from this By-law, in accordance with the policies of the Official Plan as amended by Official Plan Amendment Number 48 and the Planning Act….*

[160] This provision, as well as the applicable policies in other plans mentioned earlier, require an examination of the Zoning By-law in effect as of November 15, 2001, the day before the *Oak Ridges Moraine Conservation Act* was deemed to come into force, being Zoning By-law No. 2213-78, as amended.

[161] The submissions related to Zoning By-law No. 2213-78 are discussed previously in the context of the similarly worded provision of policy 7(a) of the ORMCP. The Proponents also point out that the Town staff acknowledged a single detached dwelling was permitted as of right. Until the Appeal, the Proponents say the only issue raised pertained to the potential impact of the proposed development on the natural features.

[162] For generally the same reasons as discussed previously, the Tribunal finds that

the requirement in 14.1.2 i) is met. A single detached dwelling was a permitted use legally existing as of November 15, 2001.

[163] Section 14.1.2 ii) provides a limited exception for development within a feature if relief from the prohibition to develop in a feature in this By-law, in accordance with the policies of the OP as amended by OPA 48 and the *Planning Act* is obtained. Accordingly, the Proponents brought their Applications for minor variances for relief from the By-law.

[164] According to Mr. Guetter's Planning Justification Cover Letter dated April 12, 2017 (Tab 3 of Exhibit 1A), the general intent and purpose of the Zoning By-law No. 2213-78 provisions regulating development and site alteration for ORMCP *Settlement Areas* within key natural heritage features is to ensure development is respectful of the surrounding landscape and will protect the ecological conditions of the Oak Ridges Moraine.

[165] In his Witness Statement at page 1215 of Exhibit 1B, he says the general intent and purpose of the Zoning By-law provisions is to regulate development and site alteration for ORMCP Settlement Areas within key natural heritage features to ensure that development addresses the ecological integrity of the Oak Ridge Moraine Plan Area and is in conformity with the policies of the Town OP, OPA 48 and other relevant planning policies.

[166] Mr. Guetter provided detailed reasons for his opinion as to why he believes the minor variances maintain these stated intents and purposes of the Zoning By-law in paragraphs 421 to 427 of his Witness Statement in Exhibit 1B.

[167] In his view as of April 2017, the proposed building envelopes were positioned to ensure the least possible disturbance on the surrounding natural heritage features, thereby meeting the general intent of the provisions for which the relief is being sought. Again, the Tribunal is troubled by this conclusion when it is apparent by the reduced

footprint proposed in 2020 that less disturbance had been possible when pressed.

[168] The Proponents submit that the subject properties are currently zoned to permit residential uses. If Council had intended them to be undevelopable, they would have been rezoned O2 (private open space) as was done with the lands to the northeast.

[169] The Proponents submit that the proposed building envelopes comply with all the zone requirements regulating actual development in terms of lot frontage, setbacks and maximum lot coverage.

[170] Mr. Guetter told the Tribunal the intent and purpose of provision 14.1.4.iii) regarding vegetation removal in significant woodlands was to limit vegetation removals to the actual area required. He said the current Applications have positioned the building envelopes to limit the amount of disturbance and conditions of approval have been proposed which encourage tree preservation and restoration to compensate for vegetation removal, which further maintains the general intent and purpose.

[171] In his view, Mr. Guetter said the intent of the Zoning By-law provisions is not to prohibit development but to provide a screening process for evaluating the Applications to ensure proper conformity with the ecological integrity test of the ORMCP. He said he relied on Mr. Henshaw's opinion that the removal of a small portion of woodland could not be considered to be affecting the ecological integrity of the Plan Area on its own merits as demonstrating the ecological integrity test was met thereby maintaining the general intent and purpose of the Zoning By-law to evaluate applications where development is proposed within key natural heritage and hydrologic features.

[172] In Mr. Guetter's opinion in 2017 and at the hearing in 2020, the proposed variances maintain the general intent and purpose of the Town's Zoning By-law.

[173] The Town submits that the requested variances do not maintain the general intent and purpose of the Zoning By-law. Mr. Romano noted that the Zoning By-law

does more than simply establish a screening process. The Zoning By-law No. 6000-17 does not permit the use of a single dwelling as of right. He said that the intent of the Zoning By-law is to require each application to make certain that it is assessed against all the relevant policy documents. The Zoning By-law (just like the policies) requires an applicant to come forward with a complete plan in terms of the use, erection and location of the dwelling to allow all of the impacts (from the start of construction to the end of construction) to be assessed.

[174] The Tribunal finds that the Applications are premature in that they have failed to provide enough information to properly assess impacts and to ensure proper conformity with the ecological integrity test of the ORMCP and consistency with the PPS. Accordingly, they cannot maintain the general intent and purpose of the applicable Zoning By-laws.

3. Desirability

[175] To authorize the minor variances, the Tribunal must be satisfied that they are desirable for the appropriate development or use of the land. This test considers impact, compatibility, appropriateness in the context of the surrounding area and planned context. This test also assesses whether consideration has been made to comply with the ER – Estate Residential Zone standards.

[176] Mr. Guetter provided detailed reasons for his opinion as to why he believes the minor variances are desirable in paragraphs 428 to 438 of his Witness Statement in Exhibit 1B.

[177] According to Mr. Guetter’s Planning Justification Cover Letter dated April 12, 2017 (Tab 3 of Exhibit 1A), the desirability and appropriateness of a minor variance can be addressed by assessing the compatibility of the proposal within the context of the surrounding area. In his view, the proposed building form for single detached dwellings is compatible with the low-density residential uses located to the north, east and west of

the subject properties. He opined that the proposed variances are facilitating an appropriate and desirable form of density and built form that is both consistent with the existing policy framework and respects the surrounding residential neighbourhood.

[178] The Proponents further submit that the variances sought are desirable because they will add to the range and mix of housing available, the proposed conditions of approval provide for the restoration and maintenance in perpetuity of those portions of the subject properties outside the building envelopes. More importantly, he says the presence of homeowners on the subject properties will provide stewardship and eyes on the ground to ensure that the property is no longer used for illegal dumping of waste.

[179] Mr. Guetter gives his opinion that the current Applications demonstrate compliance with all performance zone standards.

[180] In Mr. Guetter's opinion, the current Applications propose minimal impact and are desirable and appropriate for the development of the land when considering the NHE calculation of total disturbed area for Lot 672 of 1,400 m^2 (12%) and for Lot 684 of 2,653 m^2 (13%). He says the total disturbed area is even less than the permitted maximum total lot coverage of 15%.

[181] He further notes the proposed condition of approval limiting the dwelling footprint to a maximum of 500 m^2 also demonstrates the current Applications are desirable for the appropriate development or use of the land.

[182] Mr. Guetter points to the development of an Edge Management Plan, Restoration Plan and Stormwater Management Report as appropriate conditions of approval that make the Applications desirable.

[183] In his view, Mr. Guetter felt the Applications are appropriate because they have undergone extensive consultation and review by Town departments, the Region, the LSRCA and a peer review by North-South Environmental Inc. and, he says their

concerns have been addressed by revisions to the proposed development or conditions of approval.

[184] The Town submits that the variances are not desirable for the appropriate development or use of the lands. They submit that there is not one policy document that calls for, or promotes, development on the subject properties. The only opening for development is a stringent exception.

[185] Mr. Romano testified that in his opinion, the proposal will denude substantially the natural features associated with the subject properties in a manner that is neither sensitive nor compatible to its physical and planning instrument context. In his opinion, the proposal is not within the planning and public interest and does not satisfy this test for a minor variance.

[186] The Town states that there is no evidence that development furthers the public interest. The Town emphasizes that the entire site is a Significant Woodland. It is a unique site with multilayered key natural heritage features. The Town says there is no policy requirement to develop every piece of land in a settlement area, especially one that is habitat for endangered bats, and which is used by other biota. The Town further submits that whether the development is desirable could not be fully answered at this time due to the lack of final drawings or construction plans.

[187] The Tribunal cannot find that the Applications are desirable where there is insufficient information to properly assess whether the proposed development conforms with the ORMCP and is consistent with the PPS.

4. Minor

[188] In Mr. Guetter's Witness Statement (page 1218 of Exhibit 1 B), he indicates that the variances being sought are the result of an ecological screening test resulting from provisions in the Town's Zoning By-law relating to natural heritage features. He says

“these variances are necessary in order to allow these settlement area lands, which are existing lots of record, to be developed for their intended use according to the ORMCP.”

[189] Mr. Guetter gives his opinion that the variances sought through the current Applications are minor in nature both specific to the subject lands, by measure of scale, but also in the context of the broader geographic scale that is the basis for the zoning regulation.

[190] The Proponents submit that this test relates to size and impact. In this case, no relief is sought from the performance standards in the Zoning By-law. They note there will be limited impact on the surrounding residential neighbourhood and its low density residential built form. In their view, this means size is not the issue. Impact is the only issue, and the only potential impacts identified have been ecological ones. They argue that, if the proposal satisfies the “no adverse effect” and “no negative impact” tests of the ORMCP and the PPS, then the applications meet the test of being minor.

[191] Mr. Guetter states that the current Applications propose lot coverages which will not adversely impact the surrounding area or the subject properties as a large portion of the lands will remain in their natural state.

[192] Mr. Guetter also states that the amount of impact has been minimized to the extent possible from earlier submissions of the Applications and mitigation measures have been proposed as conditions of approval. In his view, this demonstrates that the current Applications and the relief sought is considered minor in nature.

[193] Further he opines that the overall impact of certain tree removals, when considering that restoration will occur, can be considered minor in nature.

[194] The Town contends that the requested variances are not minor. They say not enough work has been done to truly understand and assess the full impacts. The Town submits that the Proponents have failed to demonstrate that the minor variances

requested are minor because they have not provided plans for construction or what will be built, and did not assess the impacts of noise and light, and have not provided a detailed tree replanting plan.

[195] Mr. Romano says removal of an estimated 380 trees is not minor and the loss of over an acre of significant woodlands is not minor. The Town submits that the requested variances are not minor because they would permit development on lands that have a net developable area, as defined in the ORMCP, of zero, since the entire subject properties are within a key natural heritage feature, being the Provincially Significant Woodland. Mr. Romano said the proposed development area is estimated to total 4,053 m^2, which he says is not minor in terms of the quantity and quality of the loss of a key natural heritage feature. He also cautions that the peer review suggests that 4,053 m^2 is not a maximum but that there is the potential for more of the woodlands to be disturbed by the proposed development. He noted lack of information regarding construction methods for the driveways, for example, make it impossible to know the magnitude of the disruption.

[196] The Town also submitted that the Applications would result in the removal of habitat for endangered bats. The Town acknowledges that Mr. Speller admitted that the decision of the MECP “is what it is” in relation to the acceptance of bat boxes but told the Tribunal it was not bound by any staff determination especially in the face of the evidence.

[197] The Town submits that the requested variances for the proposed development fall far short of the objectives of the PPS policy, which represent the minimum standards.

[198] The Tribunal is not satisfied that the variances requested are minor as conformity with the ORMCP, Growth Plan and LSPP and consistency with the PPS have not been demonstrated as yet.

SUMMARY CONCLUSION

[199] Lot 672 and Lot 684 are located in a Settlement Area of the Oak Ridges Moraine, are surrounded by urban development on three sides, were zoned “RR-Rural Residential Zone” under Zoning By-law No, 2213-78, as amended, and are zoned “ER-Estate Residential Zone” under Zoning By-law No. 6000-17, as amended. The Proponents wish to build a single detached dwelling on each of these existing lots of record.

[200] The Town’s opposition to the proposed development stems from the fact that the entirety of the subject properties represents Significant Woodland with overlapping additional Key Natural Heritage Features, including Wetlands, Fish Habitat, Candidate Significant Wildlife Habitat, and likely Significant Valleylands. There is a stream and a continguous corridor for the movement of fauna and flora. To the south, across Henderson Drive, is a municipally-owned woodlot. There is a high likelihood that the subject properties are habitat for two, and possibly three, endangered species of bat.

[201] The only participant in the proceedings, the Henderson Forest Aurora Ratepayer Association (HFARA), filed a Participant Statement in which, inter alia, the HFARA shared concerns about the removal of Significant Woodland, and also raised concerns about the impacts on species diversity and the effect on flooding.

[202] These Applications require balancing the private right to develop existing lots of record against the public interest in protecting the environment. The assessment of the Applications should not be approached as an exercise to prevent development on these existing lots of record, but rather to balance such proposed development with the environmental protection policies within the Provincial, Regional and Local planning framework. Ideally, the owners of existing lots of record should not be left with vacant land they cannot use, and for which they have not received any compensation from the Town. However, such sensitive lands, entirely within a key natural heritage feature with other multiple overlapping key natural heritage features, should only be developed in a

way that respects the applicable provincial, regional and municipal policies, represents good planning and is in the public interest.

[203] The Parties and the applicable planning agencies have worked hard to try to find this balance between public and private interests in these Applications. To their credit, the current development proposal before the Tribunal results in significantly less disturbance to the land than the original proposal. Progress was made. Of note, however, the original proposal was nevertheless supported by expert opinion that conformity was achieved with the ORMCP at the time of its submission. Notwithstanding such expert opinion, further mitigation strategies were found in subsequent re-submissions to reduce adverse impacts to the key natural heritage features. Improvement was possible when needed. In retrospect, it is clear, by the fact that further improvements could be made, that the Proponents had not demonstrated, *to the extent possible*, that the previously proposed developments would not adversely affect the ecological integrity of the Plan Area as required by the ORMCP, nor that there would be no negative impacts on the natural features or their ecological functions as required by the PPS.

[204] The question now is whether these same ecological integrity tests in the ORMCP and PPS have finally been met by the most recent and improved development proposal. With respect to the ORMCP, have they demonstrated “to the extent possible”? As the Proponent’s expert, Mr. Henshaw, put it, have they done their best by the site by avoiding any natural features that they could and minimizing impacts? With respect to the PPS, have they demonstrated that there will be “no negative impacts”?

[205] The evidence before the Tribunal was that more could likely be done. The Proponents’ own expert admitted that the latest proposed development would still result in some negative impact related to the Significant Woodland and that further mitigation of impacts may be possible, but would not be known, until the detail design stage. The Proponents suggest that the authorization for minor variances could be subject to their proposed conditions, some of which they said would ensure that the design and

construction practices etc. would be used to further reduce impacts on the environment.

[206] The Town submits that an exception to build in such a sensitive environmental area should only be allowed where the Proponents demonstrate that the Applications meet the ecological integrity tests before authorization of the variances. The Town submits that the Proponents have admitted that further mitigation of impacts are possible. The Planning Staff also acknowledged that there are opportunities through more detailed design to further reduce impacts to the environmental features. The Town argues that the Proponents should have provided more than a conceptual design in order to allow a proper analysis of whether any adverse impact has been minimized to the extent possible. The Town expert gave reasons for his opinion that the Proponents' proposed conditions of approval are not adequate to ensure conformity with the policies.

[207] Based on the whole of the evidence inclusive of the oral testimony of the experts and the documentary record and the oral and written submissions of the Parties, and for the reasons provided, the Tribunal finds that the Applications are not consistent with the PPS, and are not in conformity with the ORMCP or the Growth Plan. Further, the Tribunal finds that the Applications do not meet the four tests for authorization of minor variances as set out in section 45(1) of the Act.

ORDER

[208] The Tribunal orders that the Appeals are dismissed and the variances are not authorized.

"Margot Ballagh"

MARGOT BALLAGH
MEMBER