Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: May 16, 2022 **CASE NO(S).:** OLT-21-001849
(Formerly PL190619)

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

Applicant and Appellant:	Catherine & Don Acchione
Subject:	Request to amend the Official Plan - Refusal of request by Town of Caledon
Existing Designation:	Environmental Policy Area
Proposed Designated:	High Density Residential
Purpose:	To permit development of 8 storey residential condominium
Property Address/Description:	84 Nancy Street
Municipality:	Town of Caledon
Approval Authority File No.:	POPA 19-02
OLT Case No.:	OLT-21-001849
Legacy Case No.:	PL190619
OLT File No.:	OLT-21-001849
Legacy File No.:	PL190619
OLT Case Name:	Acchione v. Caledon (Twn.)

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

Applicant and Appellant:	Catherine & Don Acchione
Subject:	Application to amend Zoning By-law No. 2006-50 - Refusal or neglect of Town of Caledon to make a decision
Existing Zoning:	Environmental Policy Area 1 and 2
Proposed Zoning:	Multiple Residential
Purpose:	To permit development of 8 storey residential condominium
Property Address/Description:	84 Nancy Street
Municipality:	Town of Caledon
Municipality File No.:	RZ 19-03
OLT Case No.:	OLT-21-001849
Legacy Case No.:	PL190619

OLT File No.:	OLT-21-001881
Legacy File No.:	PL190619
Heard:	January 17 to January 21, 2022 (inclusive); January 24, to January 26, 2022 (inclusive); January 28, 2022; January 31, 2022; February 1 to February 4, 2022 (inclusive); February 7, 2022; February 9, 2022

APPEARANCES:

Parties	**Counsel**
Catherine and Don Acchione ("Appellants")	Patrick Harrington
Town of Caledon ("Caledon")	Raj Kehar
Regional Municipality of Peel ("Peel")	Rachel Godley* (*Peel withdrew as a Party, effective January 17, 2022)
Toronto and Region Conservation Authority ("TRCA")	Tim Duncan

DECISION DELIVERED BY WILLIAM R. MIDDLETON AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This proceeding involves the Appellants' development proposal for their property located at 84 Nancy Street, an irregular shaped property with an area of approximately 0.78 hectares ("ha") (1.92 acres) in the Village of Bolton ("Bolton" or "Village") within Caledon ("Subject Site"). The Appellants' appeals are from certain decisions taken by the Town of Caledon ("Town" or "Caledon") to deny their applications. The hearing of this matter proceeded by video conference before the Ontario Land Tribunal ("Tribunal" or "OLT") for a period of 16 days commencing on January 17, 2022 and finishing with oral final argument on February 9, 2022 (collectively, "VH").

[2] The Subject Site is designated as a Rural Service Centre, one of three areas that the Town and the Region of Peel ("Peel"), the upper tier municipality, have identified as being the focus of growth and intensification. Notwithstanding this designation, Caledon still wishes to maintain its rural setting and character elsewhere within the Town. The current building form proposed by the Applicants is for a six (6) storey building plus mechanical penthouse ("MPH") with 97 residential units. Step backs are provided mostly on the building's easterly façade, tiering the storeys from six to two. The overall height of the building is 30.8 metres ("m") inclusive of the MPH ("Development").

[3] The proposed Caledon Official Plan Amendment ("OPA") and amendment of Zoning By-law No. 2006-50 ("ZBA") that are the subject of these appeals propose to re-designate and re-zone a portion of the Subject Site from Environmental Policy Area ("EPA") to High-Density Residential with a maximum residential floor space index of 2.27 and a maximum height of 30.8 m, including mechanical equipment. The remaining portion of the Subject Site, which functions as an environmental and erosion hazard buffer, is to remain EPA.

[4] Counsel for the Town points out that the Subject Site is within a 'Significant Valleyland' adjacent to a 'Significant Woodland' and is also within the Bolton Heritage Conservation District ("HCD") and is within the vicinity of, but not within, the Bolton Core Area Secondary Plan.

[5] The Town contends that the Development:

> …is technically a six storey building, viewing the building from the Bolton HCD and/or Nancy Street reveals a building that reads as eight storeys stepping down on the east-west wing to four storeys. This is because two of the parking levels are above grade and exposed to the public realm, and would read as storeys from an urban design and human scale perspective.

[6] As is the case for all of Bolton, the Subject Site is located with the Humber River Valley Corridor ("Valley Corridor"). Lands within the Valley Corridor have multiple roles to play – preservation of natural features and hazards, conservation of cultural heritage

and being the focus for growth an intensification as part of the Rural Service Centre. The Applicants submit that the Subject Site has the potential to contribute to all three roles – however, the Town and the Toronto Region Conservation Authority (“TRCA”) adamantly reject the notion that the Development in its current form does so.

[7] TRCA is an "authority" established under the *Conservation Authorities Act*, R.S.O. 1990, c. C.27 ("CA Act"). The CA Act provides TRCA with a mandate to offer broad and watershed-based resource management programs and policies, as approved by TRCA's board of directors. In carrying out its programs, TRCA acts as a regulatory authority, a service provider, a resource management agency, a public commenting body pursuant to the *Planning Act*, R.S.O. 1990, c. P. 13 (“PA”), and a provincially delegated authority in regards to natural hazards. Across disciplines and venues, it is the mandate of TRCA to monitor, work and advocate for good management practices with respect to the natural system.

[8] The entirety of the Subject Site is regulated by TRCA pursuant to Ontario Regulation 166/06 – Toronto and Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses ("O. Reg. 166/06"). Permits are required from TRCA for any works within the regulated area, including earthworks, grading and servicing.

[9] According to counsel for TRCA, accommodation of the Development will require significant excavation into the side of the valley wall, resulting in the removal of: (1) the valley slope; (2) meadowland vegetation and habitat; and (3) woodland edge habitat and vegetation. There are significant erosion concerns associated with the Subject Site. Accordingly, any decision approving the Development and the OPA and ZBA must therefore:

> *“…address the full suite of applicable environmental and natural hazard planning policies. TRCA's involvement in these appeals is therefore critical, given its various commenting roles and its technical expertise.”*

A. MATERIALS BEFORE THE TRIBUNAL

[10] The following materials were before the Tribunal at the VH:

a) TRCA and Town of Caledon Motion Record RE: Striking of Reply Witness Statements, comprising 1411 pages;

b) TRCA and Town - Book of Authorities, comprising 93 pages;

c) Applicant's Responding Motion Record, comprising 17 pages;

d) Applicant's Book of Authorities, comprising 27 pages;

e) Joint Document Book, comprising 4 volumes and 177 tabs;

f) Consolidated Statement of Agreed Facts, comprising 30 pages;

g) Consolidated Book of Witness Statements and Reply Witness Statements, comprising 24 tabs and 1145 pages;

h) Applicant's Visual Evidence, comprising 106 pages;

i) Town of Caledon Visual Evidence, comprising 6 pages;

j) TRCA Visual Evidence, comprising 20 pages;

k) Extract from Town of Caledon Official Plan – Glossary (Section 6.7), comprising 32 pages;

l) MOU between TRCA and Region of Peel comprising 6 pages;

m) MOU between TRCA and Town of Caledon, comprising 8 pages;

n) TRCA Field Staking Protocol comprising 6 pages;

o) Peel Region Withdrawal of Party Status, correspondence dated January 14, 2022 comprising 1 page;

p) Peel Region Clarification regarding Withdraw of Party Status, correspondence dated January 14, 2022 comprising 1 pages;

q) December 17, 2021, correspondence, together with schematic and viewpoint B illustration comprising 4 pages;

r) Revised Architectural Plans dated January 18, 2022;

s) Air Photos from 2017 and 2018 of Subject Property from Town of Caledon GIS website;

t) Viewshed Analysis Report prepared by MHBC for 55 Kerr Street, Cambridge;

u) OMB Decision regarding Village of Bolton Heritage Conservation District, dated December 4, 2017;

v) Updated Acknowledgement of Expert's Duty form signed by Bernard Lee on September 29, 2021;

w) Agreed Upon 'H' Conditions as between the Applicant and Town (see Attachment 1 hereto);

x) Additional Town of Caledon Official Plan Extracts: Section 6 – Implementation and Section 7 – Bolton Core Area Secondary Plan;

y) Curriculum Vitae of Maria Parish, TRCA;

z) Decision of OMB issued January 15, 2010 for PL090391; and

aa) Letter from TRCA to Town of Caledon RE: 232 & 240 King Street West, Caledon, dated April 15, 2016.

B. MOTION TO EXPUNGE CERTAIN REPLY EVIDENCE

[11] On the first day of the VH, TRCA and the Town ("Moving Parties") brought a Motion ("Motion") seeking an Order for a declaration that the following portions of the Appellants' record constitute improper reply evidence (collectively, "Impugned Sections"):

(a) Paragraphs 2, 4, 5, and 6 of the Reply Witness Statement ("WS") of Robert Whyte, dated December 2, 2021

(b) Paragraphs 5, 6, and 7 of the Reply WS of Raza Mehdi, dated December 2, 2021;

(c) Paragraphs 2, 3, and 5 of the Reply WS of Martin Quarcoopome, dated December 2, 2021;

(d) Paragraphs 1.1-1.10 of the Reply WS of Bernard Lee, dated December 2, 2021;

(e) Paragraphs 1, 2, 3, and 5 of the Reply WS of Whitney Moore (in reply to the witness statement of Maria Parish), dated December 2, 2021;

(f) Paragraphs 2, 3, and 4 of the Reply WS of Whitney Moore (in reply to the WS of Adam Miller), dated December 2, 2021; and,

(g) Pages 7, 8, and 21 to 41 of the Appellants' Visual Evidence

[12] In addition, the Motion sought the following relief:

(a) An Order striking the Impugned Sections from the record of the within appeal;

and

(b) An Order prohibiting the Appellants from tendering or relying on the information and/or opinions contained in the Impugned Sections at the hearing for the within appeal.

[13] Counsel for the Moving Parties argued that the relief sought in the Motion ought to be granted by the OLT because:

(a) Counsel for all Parties reached an agreement for the exchange of WS's and expert reports that represented a modification, (often called the 'civil procedure model'), of the usual rules followed in OLT proceedings the timelines of which were incorporated in the Procedural Order ("PO") issued by the Tribunal;

(b) The purpose for using this agreed model:

> "…was to allow flexibility regarding the foregoing timelines and to permit the Appellants' to serve an updated final set of plans, while still ensuring that each of the Responding parties knew and understood all materials on which the Appellants intended to rely before responding…";

(c) The Impugned Sections of the Appellants' Reply WS's and Visual Evidence package contain improper reply evidence that either raises new issues and facts that should have been raised in the original WS, or confirms and reinforces the opinions contained in the original WS, thereby improperly splitting the Appellants' case and depriving the Respondents of a fair opportunity to respond;

(d) The Appellants should not be permitted to tender or rely on any of the information or opinions contained in the Impugned Sections at the VH;

(e) Proper reply evidence is only permitted to contradict or qualify new material facts that have been adduced by the responding party's evidence. It is

incumbent on the party beginning the case to exhaust its evidence in the first instance. Reply evidence is permitted only where the Respondent has raised new material facts or issues that the Appellant has had no opportunity to deal with and could not reasonably have anticipated or foreseen. (See *Stewart v. Kingsway General Insurance Co*., 2000 CarswellOnt 2105, at para 1; *R. v. Krause*, 1986 CanLII 39 (SCC), [1986] 2 SCR 466 at p. 474);

(f) A party is not permitted to split its case by first relying on prima facie proof, and when this has been shaken by the adversary, adducing confirmatory evidence. The rationale for this rule against "case-splitting" is that a responding party is entitled to know and have an opportunity to respond to the case against it before it presents its evidence. (See *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd. Patten and L.A. Corney Commercial Deliveries Ltd. v. Bernard and Dynamic Displays Ltd*., 1966 CanLII 282 (ON CA));

(g) In each Impugned Sections, the witness in question offered opinions on facts and matters that were known at the time of the witness' original witness statement and should have been dealt with therein rather than in a reply witness statement;

(h) In some of the Impugned Sections, new matters were introduced and in others, the reply evidence was either merely confirmatory, designed to enhance and supplement the witness' original opinion evidence or aimed at correcting errors in the original witness statement;

(i) The effect of the Impugned Sections, if admitted, would mean that the 'responding' witnesses of TRCA and the Town would have no opportunity to respond in writing within their own already-delivered WS's;

(j) The appropriate remedy for the Appellants' improper reply evidence is to strike the Impugned Sections from the record and to prohibit the Appellants

and their witnesses from relying on the information and opinions contained therein at the hearing of the appeal. The Tribunal has jurisdiction to make such an order pursuant to subsections 8(2) and 9(1) of the *Ontario Land Tribunal Act, 2021,* S.O. 2021, c.4, Sched. 6, and Rule 1.4 of the Tribunal's Rules of Practice and Procedure;

(k) If the Appellants are permitted to rely on the Impugned Sections at the hearing, the Moving Parties will suffer prejudice, as they have been denied the opportunity to create the necessary written foundation for their responses to the Appellants' improper reply;

(l) At the Tribunal, parties presenting their cases in chief can be prohibited from relying on information and opinions not previously disclosed through their witness statements. This principle is supported by rule 7.4 of the Tribunal's rules of Practice and Procedure, which outlines the required content of witness statements and clarifies that experts who fail to provide this information within the time ordered by the Tribunal can be precluded from testifying at the hearing; and

(m) The Appellants' reply evidence has left the Moving Parties in a vulnerable position in which the Appellant could object to any evidence that the Moving Parties have not disclosed in their WS's that would otherwise respond to the Appellant's improper reply. Striking the Impugned Sections from the record and prohibiting the Appellants' reliance thereon will protect the Moving Parties from this predicament at the hearing.

[14] Counsel for the Appellant argued in response that the Motion ought to be dismissed by the Tribunal on the grounds that:

(a) The agreed revised timelines set out in the PO enabled the parties opposite (including the Public Authorities) to receive and review not just the revised proposal, but also the Appellant's evidence in support of the revised proposal.

The intent was to provide this information well in advance of the deadline for the witness WS's for the parties opposite;

(b) The revised timelines represented a staggered, "civil litigation" style exchange to better facilitate a review of the revised proposal than would be typical under the Tribunal's standard Procedural Order. The standard Procedural Order contemplates simultaneous "blind" exchanges of WS's and does not require advance notice of changes to an appealed development project;

(c) The timelines agreement did not alter the standards for evidence before the Tribunal. The agreement to exchange pursuant to the "Revised Timeline" did not thereby convert these 'public interest' proceedings to a '*lis inter partes'*, (dispute between only the Parties such as in a civil litigation case) nor did the agreement place any different evidentiary onuses upon either the Public Authorities or the Appellant;

(d) Unlike the courts, the Tribunal is not tasked with deciding a *lis inter partes*, but is instead performing a broader role wherein good planning in the public interest is to be the deciding factor. The hearing of a *Planning Act* appeal is not litigation and should not be treated as if it is litigation. The Tribunal's goal is to seek the best evidence in support of the appropriate interpretation and application of Provincial, Regional and Local policies and regulations in the relevant context;

(e) As required by subsection 12(2) of the Ontario Land Tribunal Act, 2021, the Tribunal is to seek the above-summarized evidence in a manner that offers "the best opportunity for a fair, just and expeditious resolution of the merits of the proceedings." This principle of ensuring "the best opportunity for a fair, just, expeditious and cost- effective resolution of the merits of the proceedings" is repeated in Rule 1.3 of the Tribunal's Rules of Practice and Procedure. Rule 1.3 also directs that the Rules be "liberally interpreted" in furtherance of this goal;

(f) In particular, all Parties understood that the Appellant would have the sole right of reply. Moreover, the WS's filed by the parties opposite (including the Public Authorities) represented the first time that the Appellant had received written feedback in respect of the revised proposal. Aside from the Issues List, there was nothing limiting the content of the Public Authorities' witness statements;

(g) There are no express restrictions on reply evidence contained in the Tribunal's *Rules*. According to Rule 1.4, where a matter is not expressly addressed in the Tribunal's *Rules*, the Tribunal "*may*" adopt or follow the procedures set out in the *Rules of Civil Procedure* where appropriate and do whatever is necessary to adjudicate effectively and completely to resolve the merits of any dispute on any matter. There is no automatic default to the *Rules of Civil Procedure* – it is left to the contextual discretion of the Tribunal;

(h) The central thesis of the Public Authorities' motion is that the Appellant has failed to adhere to civil litigation principles governing reply statements by not limiting such statements to matters that are new and/or unexpected. The Public Authorities repeatedly accuse the Appellant of case splitting and/or repeating evidence in effort to bolster its case;

(i) During their upcoming *viva voce* testimony, the witnesses for the Appellant will be entitled respond to the various assertions made by the witnesses for the Public Authorities. This includes the contents of the Public Authorities' WS's. In preparing and filing its reply statements, the Appellant has provided a summary of its witnesses' intended evidence in direct response to the opinions and assertions made by the Public Authorities' witnesses. The Public Authorities (and the Tribunal) accordingly benefit by knowing more about what the Appellant's witnesses will say during their evidence-in-chief than they would had no Reply WS's been filed;

(j) The Reply WS's do not represent case splitting or repetition. Instead, they

satisfy the purpose of disclosing to the parties and the Tribunal the contrary evidence anticipated to be given in the hearing. Given the context of this proceeding, the Public Authorities have not been prejudiced. The principles of reply evidence articulated in paragraphs 22 to 26 of the Notice of Motion are, at their core, about ensuring that the Public Authorities have a right to know the case they have to meet before their respective cases begin;

(k) The PO indicates that the Appellant will call its case first. Each of the Public Authorities will have full rights of cross-examination of each of the Appellants' witnesses – including the contents of each of the Reply WS's – before commencing their respective cases;

(l) Should a witness on behalf of any party purport to give evidence that is irrelevant or inadmissible, any opposing party will have the opportunity to object. The presiding Member will, at that time, have the benefit of context in ruling on any such objection(s). The Member may also determine the weight to be accorded to any opinion evidence proffered during the hearing. Submissions as to the weight to be accorded to a witness' evidence will be received at the conclusion of the proceeding; and

(m) The Appellant submits that the process leading up to the commencement of this hearing has ensured that the Public Authorities' ability to prepare, understand and conduct their respective cases has not been prejudiced.

[15] The Tribunal notes that in addition to the arguments set out in paragraphs [13] and [14] above, counsel for the Moving Parties also provided their detailed critiques of the Impugned Sections and counsel for the Appellants responded to those critiques. Although the Tribunal necessarily reviewed the WS's and Reply WS's raised by counsel for all Parties, in the interests of brevity, neither the critique nor the response will be duplicated here.

[16] The OLT delivered an oral decision on January 18, 2022, the second day of the

VH, denying the Motion to expunge the Impugned Sections but providing certain additional rulings and conditions, as set out in paragraph [25] below. The Tribunal indicated that it would further elaborate on the reasons for its Motion ruling in this Decision and does so in paragraphs [17] to [24] below.

[17] Vice-Chair Lanthier in the recent OLT Decision dated March 17, 2022 in OLT-22-002019 (*Durham Region Home Builder's Association v. Ajax (Town),* 2022 CarswellOnt 3581 ("*Durham Region Home Builders Case*") paragraph [16] thereof, has very ably summarized what are the key issues for the OLT on a similar motion to strike certain aspects of reply evidence:

> (a) Identifying the objectives of the pre-hearing disclosure requirements for an expert's reports under the Tribunal's Rules and legislation;
>
> (b) the treatment of reply evidence within both the pre-hearing stage and in a hearing;
>
> (c) the concept of "splitting the case" of a party and the nature of the rule that prevents a party from doing so when reply evidence is called in a hearing;
>
> (d) the considerations at play when examining the propriety of a reply witness statement produced before the hearing, and whether this also constitutes a "splitting of a party's case";
>
> (e) how a party may be prejudiced if its reply expert witness statements disclosed under the Tribunal's Rules and a Procedural Order are struck and thus, excluded from consideration at the hearing on the merits; and
>
> (f) how a party may be prejudiced if the content of a reply witness statement that is not proper reply evidence is received by that party from the opposing party, and is there a remedy that may address such prejudice beyond striking the offending content of the reply witness statement.

[18] This Tribunal also agrees with the further analysis of Vice-Chair Lanthier set out at paragraphs [24], [26], [34], [35], [40] [44] of his OLT decision referenced in paragraph [17] above:

> Under the procedural processes for disclosure, although each expert witness must set out what evidence he or she considers relevant to address an issue before the Tribunal, provide opinions and conclusions based upon expertise, and explain the reasons for such opinions and conclusions, that expert may not necessarily anticipate each and every factual basis, example, opinion, or aspect of critical analysis that the other Party's witness may provide in their primary witness statement. Experts may approach an issue from a different perspective, relying upon different facts and information such that they may not necessarily predict or

anticipate all content that they wish to rely upon in support of their opinions or conclusions. The Reply Witness Statement is the opportunity to respond to such specifics, examples and analysis and explanations proffered by the other expert witness but not, to that point, yet dealt with by the replying expert. And:

In the adversarial process, it is inevitable that the reply evidence will serve to reinforce the expert's evidence already provided in the witness statement of first instance. This is to be distinguished from Reply evidence, which is wholly repetitious and merely revisits the same content already provided in the first Witness Statement and is unrelated to what was set out in the opposing expert's Witness Statement." And:

…in preparation for the "battle of the experts" in the hearing, there is bound to be some elaboration and reiteration of the expert's previous evidence again in the Reply statements, such that parts of the Reply evidence, when put under stringent examination and dissected, could have arguably been included in the originating witness statement. But if this elaboration or reiteration arises, as a matter of common sense, in the process of addressing the content of the other expert's witness statement, the elaboration or repetition does not necessarily make it inadmissible and struck from introduction at the hearing. When this happens some "staggered release" of the expert's evidence…is inevitable and not necessarily objectionable…some measure of lenient flexibility should be considered by the Tribunal in determining whether the separate parts of the whole of an expert's proposed evidence at the hearing should be in the first-instance witness statement or in the reply witness statement.

Notwithstanding, this practical flexibility that should be permitted in the fleshing out of the experts' reasons, opinions and conclusions in the pre-hearing disclosure phase of a proceeding, reply evidence cannot simply be a "rehashing" and repeating of the initial expert opinion, starkly disassociated from, or having only a tenuous and questionable connection to, anything contained in the other expert's report. It must also be relevant to the issues and admissible. In cases where the Reply evidence is found to be repetitious, inadmissible or irrelevant, the Tribunal may exclude such content. As the Tribunal indicated, for example, in the case of 1066266 Ontario Ltd. v. Toronto (City) 2018 LNONLPAT 93, (the "1066266 Decision"), where portions of an expert's Reply evidence merely ran through the opposing witnesses and attempted to point out inaccuracies of their evidence, or where other portions of the Reply Witness Statement were found to be improper hearsay evidence, and thus inadmissible, the Tribunal found it appropriate to strike such Reply evidence.

In the Tribunal's view, when balancing the possibility that some portions of a Reply Statement might instead have been better placed within the originating Witness statement against the objective of ensuring each party has full disclosure of the opinions, reasons and conclusions to be presented by the other side, and that all such evidence is properly before the Tribunal, the objective of adequate disclosure and presentation of the expert's evidence must prevail over a need for exactness and precision as to whether those opinions, reasons and conclusions are correctly disclosed within the originating witness statement or within the reply

> witness statement.
>
> Striking the content of Reply Witness Statements should be reserved for material in the Reply, which is clearly: (a) redundant or repetitive; (b) non-responsive to the issues and irrelevant; (c) inadmissible; or (d) is being proffered for the first time where the offending party has not, in good faith, adhered to the requirements of the Procedural Order requiring the filing of a witness statement. Failing to abide by the terms of the Tribunal's Order and the Tribunal's Rules interferes with the orderly and expeditious case management of a proceeding through the use of time lines and procedures for the exchange of witness statements and disclosure, and is designed to minimize time and costs for the parties.
>
> [all emphasis added]

[19] It is important to keep in mind the difference between oral reply evidence tendered during a hearing versus reply evidence provided in witness statements during the pre-disclosure process in an OLT case pursuant to a Procedural Order This too was pointed out by Vice-Chair Lanthier at paragraph [49] of the *Durham Region Home Builders Case* in considering the line of cases including *R. v. Krause* [1986] CanLII 39 (SCC), 2 S.C.R. 466 (which were relied on by TRCA and the Town on the Motion):

[20] In a Tribunal appeal, (or any formal hearing for that matter) the presentation of a party's "case" occurs only upon the opening of the hearing when the Appellant makes the opening statement and undertakes the calling of witnesses and the presentation of the evidence. An Appellant must close its case and confirm all evidence has been presented before the responding party begins to present its case.

[21] Accordingly, it is incorrect to refer to a party "splitting its case" during the pre-hearing disclosure phase when the procedural requirements, as reviewed above, relate to the disclosure of an expert's evidence to permit each party to know the case it must meet, including the proposed evidence, opinions and conclusions to be advanced by each expert. As the hearing has not yet commenced, a party is not really "splitting its case" by dividing the disclosure process.

[22] The "ill" that is to be avoided by the rule preventing a party from splitting its case through the introduction of improper reply evidence, is the prejudice caused to the

accused, Appellant, Applicant or Plaintiff in the final presentation of the evidence. This includes a motion for leave to appeal (*Guelph (City) v. Ontario (Ministry of the Environment*, [2014] O.E.R.T.D. No. 14), or a hearing on any interim motion, or a final hearing on the merits where the first party has formally closed its case (*Cham Shan Temple v. Ontario* (Ministry of the Environment), [2015] O.E.R.T.D. No. 9) and where the presentation of each party's "case" is undertaken for final determination of the issues.

[23] The Tribunal has distinguished those cases…where the refusal to receive or strike improper reply evidence in a hearing led to a ruling to prevent a "splitting of a party's case". They are not applicable to the facts on this Motion. As stated by Vice Chair Lanthier in the *Durham Region Home Builders Case*:

> …the prejudice which arises in the calling of improper rebuttal evidence by the Crown in a murder trial, and the principles which apply to severely limit improper reply evidence during the last opportunity by the Crown to present evidence, is not present when an expert's reply witness statement is being produced under a Procedural Order, which addresses the issues that are being placed before the Tribunal and eventually heard.
>
> (emphasis added)

[24] During oral argument on the Motion, upon questioning by the Tribunal, counsel for TRCA and the Town were unable to point to any material prejudice caused by the inclusion of the Impugned Sections beyond the sort of "principled prejudice" described by Vice-Chair Lanthier at paragraph [52] of the *Durham Region Home Builders Case*:

> …based upon the perceived offense of splitting… [one Party's] … case through the disclosure of opinions and conclusions in the Reply Witness Statement that could have been advanced in the Witness Statement of first instance. That, as indicated, is not a correct categorization of the pre-hearing disclosure process.

[25] As noted, the Tribunal dismissed the Motion to expunge certain parts of the Applicant's Reply WS's brought jointly by the TRCA and the Town, orally ruling as follows:

(a) It is apparent – and regrettable - that the Appellants may not have strictly adhered to the mutual understandings of the Parties' counsel with respect to the content of proper Reply WS's;

(b) However, the expungement of large portions of the Appellants' Reply WS's sought on this Motion is an extraordinary measure that the Tribunal is of the view would be unwarranted in the circumstances of this case;

(c) While the Tribunal may have regard for the Rules of Civil Procedure, it is not bound to apply them strictly and has the power under its own Rules and under its applicable statutes to control its own process and to make determinations aimed at receiving the best available evidence and determining the issues in any proceeding in a fashion that is expeditious, fair and just;

(d) The Tribunal has carefully considered the jurisprudence referred to by the Moving Parties counsel in their Motion Record and in their Book of Authorities but is of the view that the facts and issues in much of this case law are distinguishable from those present in this appeal;

(e) The prejudice claimed by the Moving Parties may be remedied by certain rulings that the Tribunal is prepared to make;

(f) The Tribunal will not restrict the otherwise permissible cross-examination of all Appellant witnesses who delivered Reply WS's, including cross directed at the impugned form and content of the Reply WS's;

(g) The Tribunal will not restrict the otherwise permissible tendering of oral evidence from any of the Moving Party witnesses addressing any aspects of the Appellant's Reply WS's, notwithstanding that such evidence may not have been set out in the WS's of those Moving Party witnesses;

(h) The Tribunal will permit the late filing of otherwise permissible 'Sur-Reply' WS's from those Moving Party witnesses who wish to respond in writing to any of the Appellant witnesses who delivered Reply WS's. Such Sur-Replies may be in summary format, at the option of counsel for the Moving Parties;

(i) While the Tribunal would prefer to receive such Sur-Replies prior to the cross-examination of the applicable Moving Party witnesses (also to be provided to the Appellants at the same time), the Tribunal is also prepared to consider receiving 'post-cross-examination' filings of Sur-Replies after hearing submissions from the Parties' counsel as to why this is required and any contrary submissions from the Appellant's counsel; and

(j) The Tribunal will take into account all of the circumstances leading to this Motion, including the form and content of the Appellant's Reply WS's and all steps taken by the Moving Parties pursuant to this Motion Ruling and all additional costs incurred by the Moving Parties in that regard, in the event that the Moving Parties at or following the conclusion of this Hearing seek a costs order as against the Appellants – in accordance with the OLT Rules.

[26] Despite the rulings made as described in paragraph [25], the cross-examination of all Appellants' witnesses proceeded at the VH without any objection or controversy related to the Impugned Sections. As well, neither TRCA nor the Town filed, or sought to file, Sur-reply evidence from any of their witnesses either prior to, during or following the VH.

C. ISSUES AND ANALYSIS

(i) Test for the OPA and ZBA

[27] There is no disagreement that the applicable test pertaining to the OPA and ZBA applications sought by the Appellants are as described by the Town's counsel in the Town's final argument submissions. The Appellants has the onus to demonstrate that

those planning instruments must:

(a) have regard for the matters of Provincial Interest set out in s. 2 of the *Planning Act,* R.S.O. 1990, c. P13 (“PA”);

(b) have regard for City Council’s decision on the instruments pursuant to section2.1(2) of the *Planning Act*;

(c) be consistent with the Provincial Policy Statement, 2020 (“PPS”);

(d) shall conform with A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2019 (“Growth Plan**”**);

(e) conform with the Region of Peel Official Plan (“Peel OP”)

(f) conform with the Town of Caledon’s Official Plan (“Town OP”);

(g) conform with the Bolton Heritage Conservation District Plan (“Bolton HCD Plan”);

(h) have regard for the Town-Wide Urban Design Guidelines (‘UDG”); and

(i) must otherwise respect principles of good planning and be in the public interest to approve.

(Collectively, the “Test””)

[28] The Parties reached agreement on some of the issues related to the Test, as was set out in Exhibit 20, the Agreed Upon ‘H’ Conditions as between the Applicant and Town, appended as Attachment A to this Decision.

[29] The Town’s counsel also argued that pursuant to s. 2.1(2) of the *Planning Act*, the Tribunal is required to “have regard to” the Town’s staff report dated December 3, 2019, related to the Development, which recommended refusal of the OPA and ZBA and the subsequent decision of Town Council to accept that recommendation.

[30] The “have regard to” test referenced in paragraph [29] does not oblige the OLT to accept the Town Council’s decision. In the Ontario Divisional Court case of *Ottawa (City) v. Minto Communities Inc.*, 2009 CanLII 65802 (ON SCDC) (“*Minto”)*, the City of

Ottawa argued that, in the context of section 2.1 of the PA, the words “have regard to” imposed an obligation on the [then O.M.B.]… to afford considerable deference to municipal councils' land planning decisions…[and] that the OMB, as an appellate body, ought to apply the deferential standard of “reasonableness”.

[31] However, in *Minto* the Divisional Court rejected the above proposition and instead ruled at paragraph 16 that:

> Questions of law that engage the specialized expertise of the Board, such as the interpretation of its own statute, attract a standard of reasonableness. In this case, the Board was interpreting one of its home statutes, the Planning Act, using its expertise in land use planning, its familiarity with the Provincial Policy Statement 2005 and its understanding of its own public interest mandate under the Act.
>
> [emphasis added]

[32] The Court in Minto went on to state:

> [Counsel for]… the City, points out… that if this court were considering a review of the decision by the municipality, without any intervening process before the OMB, great deference would have to be afforded to Council's decision. However, the main reason for such deference is the recognition that the court does not inherently have any expertise in land use planning decisions. On the other hand, the OMB certainly does. The OMB can therefore oversee or review planning decisions by municipal councils from the vantage point of its expertise. There is another important difference between the court and the OMB. Unlike the court, the Board may determine the appeal based on fresh and expanded evidence, rather than merely reviewing the record of what was before Council in making its decision. The OMB process affords the parties a full hearing that includes an opportunity to present evidence, including expert evidence that may not have been before the municipal council in making its decision… Furthermore, it is important to keep in mind that the appeal process before the Ontario Municipal Board is not merely a lis between parties, but a process requiring the OMB to exercise its public interest mandate. The decision to be made by the Board transcends the interests of the immediate parties because it is charged with responsibility to determine whether a land planning proposal is in the public interest…on an appeal the Board has the obligation to exercise its independent judgment on the planning merits of the application and to assess the proposal and the positions of the parties from the perspective of applicable legislation, regulations, provincial plans, the provincial policy statement, official plans and bylaws and even the potential impact on neighbouring municipalities... [emphasis added]

[33] Aston, J. for the Divisional Court thus concluded:

> The legislature used language that suggests minimal deference when choosing the words "have regard to", considering the many other expressions it could have used to signal the level of deference suggested by the City in this appeal. In my view the traditional role of the Board, and the broad powers it exercises, should not be altered radically without a [clearer]… and specific expression of legislative intent… In my view…the words "have regard to" do not… suggest more than minimal deference to the decision of Municipal Council. However, in the context of the Planning Act, and balancing the public interest mandates of both the Board and the municipality, I would agree… that the Board has an obligation to at least scrutinize and carefully consider the Council decision, as well as the information and material that was before Council. [emphasis added]

The Divisional Court reached the same conclusion on the standard of minimal deference owed by the LPAT [OMB] to municipal council decisions in the case of *R & G Realty Management Inc.* v. *North York (City)* [2009] O.J. No. 3358 ("*R & G Realty")*. This Tribunal is bound by the Divisional Court rulings in *Minto* and *R&G Realty* and therefore, recognizes its obligation to carefully consider the Council's decision

[34] Counsel for the Town also suggested a useful overview of the remaining issues to be determined by the Tribunal:

(a) Does the Development conserve the cultural heritage landscape on the Subject Site?

(b) Is the Development compatible with the character of the area surrounding the Site?

(c) Does the Development have no negative impacts on the Valleyland on the Subject Site, and the Significant Woodland adjacent to the Subject Site?

(d) Is the Development located in hazardous lands subject to erosion, and if so, does the Development pose an unacceptable risk to human healthy and/or property?

(e) How should the Tribunal reconcile competing planning objectives of growth / intensification vs. protection of cultural heritage, character, natural heritage and natural hazards?

(ii) <u>The Subject Site is within a Rural Service Centre Permitting Growth and Intensification</u>

[35] Unsurprisingly, the Appellants focused on the policy framework that justify the utilization of the Subject Site as an area for growth and intensification – while the Town and TRCA directed the Tribunal to the issues that could lead to a determination that the Development is not permitted. Notwithstanding this difference in approach, there is no apparent disagreement about the policies governing the Subject Site that may support intensification, nor was there any suggestion from the Town and TRCA that there ought to be no redevelopment of the Subject Site, upon which currently only a single-family dwelling and some outbuildings exist.

[36] There is also no dispute that the Subject Site is within a designated Rural Service Centre in Bolton. Policies directing growth to the Rural Service Centres are contained within both the Peel OP and the Town OP.

[37] The Appellants' counsel points out in final submissions that:

> The [Peel OP policies]… on Growth Management (Policy 5.5.) repeatedly indicate that it is an objective of the Region to "optimize" the use of the existing land supply (Policy 5.5.1.1) as well as existing and planned infrastructure (Policy 5.5.1.5). [Peel OP]…also directs "a significant portion of new growth" to the built-up areas through intensification (Policy 5.5.2.2.) and prohibits the establishment of new settlement areas (Policy 5.5.2.4). At the local level…[Town OP]… (Policy 2.2.2) includes a settlement pattern that concentrates the majority of new residential and employment development in the Rural Service Centres, including Bolton…[Town OP] (Policy 3.1.1) also includes the following direction…: Growth management policies that focus new development into areas that can be planned as compact, diverse and transit-supportive communities while minimizing impact on the natural environment and rural/agricultural resources.

[38] On the other hand, counsel for the Town argues that the OPA and ZBA applications must be consistent with "…*the mandatory protection policies in the PPS, 2020*" and that only if the Appellants establish that the Development has satisfied those PPS polices, can it be considered "…*whether intensification is appropriate for the…"* Subject Site. This relates to the cultural heritage, natural heritage and natural hazard protection policies of the PPS, 2020, and other subordinate documents. However, the

Town's counsel admits that this "…*does not mean that these policies are an outright prohibition on development as these policies contain flexibility within them.*"

[39] Similarly, counsel for TRCA contends that:

> The hurdles to the development proposal are numerous and it falls to the appellants to demonstrate… that the Amendments: have regard for matters of provincial interest; are consistent with the… [PPS]; conform with the…[Growth Plan]…; conform with the [Peel OP and Town OP]…When it comes to matters of natural heritage and hazard, satisfying the above tests correlates in large degree with whether the… [OPA and ZBA]…show adequate consideration for TRCA's Living City Policies for Planning and Development in the Watersheds of the TRCA ("LCP"). While the policies of the… [Peel OP and Town OP]…incorporate localized approaches to protecting the natural environment and public safety, the policies of the PPS nonetheless represent minimum standards…

(iii) <u>The Planning Evidence is in Conflict but the Opinions of Both Expert Witnesses rely on Disputed Evidence on Cultural and Natural Heritage Matters</u>

[40] Mr. Quarcoopome is a land use planner and provided a WS, Reply WS and testified at the VH on behalf of the Appellant. He a Registered Professional Planner and full Member of the Canadian Institute of Planners and has a Bachelor of Environmental Studies with Honours in Planning from the University of Waterloo, received in 2005. Mr. Quarcoopome has been practicing as a land use planner for over 15 years and hs been involved in the review, preparation and analysis of Official Plans, Secondary Plans, precinct plans, neighbourhood plans, Zoning By-laws, and have processed Planning Act applications in a variety of municipalities across Ontario, including in Peel Region, including in the Town. The Tribunal qualified him to provide opinion evidence on land use planning matters.

[41] In his WS, Reply WS and in his oral testimony, Mr. Quarcoopome opined as follows:

(i) the Draft OPA and Draft ZBA that facilitate the Development have appropriate regard for all relevant sections of the PA, are consistent with

all relevant policies of the PPS, and conforms to the Growth Plan, the Peel OP and the Town Official Plan;

(ii) The development is located outside of the woodland area, but is located within significant valleylands as defined in the PPS (and as contended by the experts for the Town and the TRCA);

(iii) the OPA, ZBA and the Development are compatible with surrounding lands and are representative of good planning;

(iv) the proposed Development conforms with the Living City Policies of the TRCA relate to terrestrial resources, water resources, natural features and areas, natural hazards, and potential natural cover and buffers;

(v) the Subject Site is located within the Village of Bolton Heritage Conservation District ("HCD") Plan and the Development conforms with the Ontario Heritage Act and the HCD Plan; and based on the evidence of Philip Evans of ERA Architects Inc, the Applicant's heritage expert, the impact of the proposed development on tthe cultural heritage value of the HCD has been appropriately conserved and the Development has regard for the significant cultural heritage value of the HCD;

[42] Mr. Flewwelling is a land use planner and Associate at GSP Group Inc. and provided a WS and Reply WS on behalf of the Town and testified at the hearing of this appeal. He has a Bachelor of Environmental Studies from the University of Waterloo and graduated in 2002. Mr. Flewwelling is a full member of the Ontario Professional Planners Institute (OPPI) and the Canadian Institute of Planners (CIP) and has 19 years of professional experience in land use planning. He was qualified without objection before the Tribunal to provide opinion evidence on land use planning matters.

[43] In his WS, Reply WS and in his oral evidence at the VH, Mr. Flewwelling opined as follows:

(i) the Draft OPA and Draft ZBA that facilitate the Development do not have appropriate regard for all relevant sections of the PA, are not consistent with all relevant policies of the PPS and do not conform to the Growth Plan, the Peel OP or to the relevant sections of the Town OP;

(ii) the Development is incompatible with surrounding land uses and the Draft OPA and Draft ZBA are not appropriate and do not represent good planning. The Development is within hazard lands, propose significant construction within a significant valleyland and natural heritage corridor and is not compatible with the Bolton HCD;

(iii) he disagreed with Mr. Quarcoopome's statement that matters of Provincial interest had been respected since the Development does not have regard for:

(a) the protection of ecological areas and natural systems. The Subject Property is located within the Humber River Valley;

(b) the conservation of cultural features. The Subject Site is within the approved Village of Bolton Heritage Conservation District;

(c) the orderly development of safe and healthy communities. The Subject Site has been identified as hazardous lands due to erosion potential;

(d) the protection of public health and safety. The Subject Site has been identified as hazardous lands due to erosion potential;

(e) the appropriate location for growth and development. The Subject Property is identified as hazardous lands due to erosion potential and is within a Significant Valleyland; and

(f) the promotion of development that is sustainable.

[44] As noted in paragraphs [39] and [40] above, both Mr. Quarcoopome and Mr. Flewwelling expressly rely on the evidence of the heritage experts for the Appellant and for the Town respectively. In other words, the conclusions reached by Mr. Quarcoopome depend on his acceptance of the heritage related opinions of Mr. Evans and, in turn, Mr. Flewwelling's opinions are similarly based on the conclusions of Mr. David Stewart, the Town's urban design expert, and the opinions of Ms. Wendy Shearer, a landscape architect and cultural heritage specialist.

[45] The Tribunal notes that all the land use planning witnesses and heritage witnesses agree that policy 2.6.1 of the PPS, 2020 requires that "…significant cultural heritage landscapes shall be conserved" (emphasis added) and that there is no dispute that the Subject Property contains a significant cultural heritage landscape that is defined by the boundaries of the Bolton HCD Plan. The debate between the Appellant on one hand and the Town and TRCA on the other is with respect to whether the Proposed Development *conserves* the significant cultural heritage landscape.

[46] The Tribunal further notes that the Appellants' counsel conceded in final argument that:

> …there is nothing in the PPS or the Growth Plan indicating that the needs of growth allow applicants to ignore other planning policies respecting the protection of the natural environment or the conservation of cultural heritage…

[47] For the reasons further discussed at Part **C (iii)** below at paragraph [49] onward, the Tribunal accepts the contention of the Town that the Development, as proposed, fails to satisfy the applicable cultural heritage requirements. Thus, the Tribunal accepts and prefers the planning opinions and conclusions of Mr. Flewwelling related to this issue and does not accept the contrary opinions and findings of Mr. Quarcoopome.

(iv) The Development As Currently Proposed Fails to Satisfy Cultural Heritage Requirements

[48] The Tribunal agrees with the submission of counsel for the Town that all the land use planning witnesses and heritage witnesses agree that policy 2.6.1 of the PPS, 2020 requires that "…*significant cultural heritage landscapes shall be conserved*". All the land use planning witnesses and heritage witnesses also acknowledge that other subordinate policy documents, such as the Growth Plan, and the Town OP, contain similar policies aimed at conservation of heritage resources. Thus, if policy 2.6.1 of the PPS is not met, then the similar policies 4.2.7 of the Growth Plan and policy 3 of the Town OP are also not met. Moreover, there is no dispute that the Subject Property contains a cultural heritage landscape that is significant and is defined by the boundaries of the Bolton HCD Plan.

[49] As noted above in paragraph [46] the resultant key issue to be determined is whether the Development conserves the significant cultural heritage landscape.

[50] The PPS defines "conserved" as follows:

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

[51] As referenced in paragraph [45] above, the Appellant's heritage expert was Mr. Evans and the opposing experts for the Town on heritage and design matters were Mr. Stewart and Ms. Shearer. It should be noted as well that Mr. Raza Mehdi was also qualified on behalf of the Appellant to provide urban design / architectural opinion evidence and that Mr. Nick Miele was qualified as to provide opinion evidence for the Appellant on landscape architectural matters. Both Mr. Mehdi and Mr. Miele, as noted above in paragraph [10] also provided WS and Reply WS's.

[52] In the Tribunal's view, the main conflict in evidence between the Parties was apparent from the contrasting opinions of Mr. Evans for the Appellant and Mr. Stewart

and Ms. Shearing for the Town, and therefore the Tribunal will not repeat here an outline of the opinions reached by Mr. Mehdi and Mr. Miele for the reasons set out in paragraph [63] below.

[53] Mr. Evans is a professional architect and Principal at ERA Architects Inc., a Toronto-based firm that specializes in heritage architecture. He has 20 years of experience in the field of architecture and planning for heritage conservation and was qualified to provide opinion evidence to the OLT on such matters.

[54] Mr. Stewart is registered professional planner and a member of Canadian Institute of Planners. He has served as the Town's control architect and urban design consultant for more than 10 years and in that role conducted numerous urban design peer reviews for a variety of development applications on behalf of the Town. Mr. Stewart has familiarity with urban design policies and guidelines pertaining to a wide range of development types within the Town and has worked on various development projects in the Town over the past 20 years

[55] Ms. Shearer is a landscape architect and cultural heritage specialist in private practice with extensive experience in the identification, evaluation and planning for the conservation of a wide range of heritage sites and cultural heritage landscapes. She is a former Adjunct Professor, School of Landscape Architecture, University of Guelph and has more than 30 years of relevant professional experience.

[56] Ms. Shearer and Mr. Stewart were qualified without objection to provide opinion evidence to the Tribunal on matters related to their respective fields of expertise and testified together in a panel at the VH.

[57] Mr. Stewart's evidence in his WS and viva voce testimony was that:

(i) the OPA and ZBA do not comply with pertinent urban design policies and guidelines of the PPS, the Growth Plan, the BHCD Plan, the Town OP and the TWDG. If permitted, the proposed built form would set an undesirable precedent

that will negatively impact the character of the village;

(ii) The Subject Site is located on the upper slopes of the Humber River valley, a significant valley corridor within an Environmental Policy Area; located within the BHCD, at the southern threshold / gateway to the village and identified as being within key viewscapes; and located within a stable low-rise residential neighbourhood within the BHCD;

(iii) When evaluated against relevant policies and guidelines which are meant to protect the heritage character of the village of Bolton and ensure compatible infill development, the proposed development is inappropriate for this location given the site context;

(iv) The top of the proposed building will be highly visible above the established ridge of the Humber River Valley) causing it to negatively impact key viewscapes that are considered to be heritage attributes within the BHCD plan (i.e. views from within the District to the Humber River valley slopes which provide a green backdrop to the village; and views descending north and south into the village along Queen Street).

(v) These heritage attributes must be conserved in order for the village to maintain its cultural heritage value and he relied on the cultural heritage landscape evidence of Ms. Shearer in support of this opinion; and

(vi) the proposed scale, height and massing of the building form does not reinforce the historic character of the old village of Bolton; will cause negative visual impact on heritage attributes of the District; does not reflect the scale of, or demonstrate compatibility with, the existing built form character of the BHCD; and will tower over adjacent low-rise properties located further down the slope to the north; and

(vi) the incremental design measures undertaken in the applicant's revised submission are inadequate to mitigate the building's visual impact on key viewscapes within the BHCD nor do they address compatibility matters with neighbouring properties within the District. The architectural design of the building is not respectful of the scale and character of existing historic buildings and recently constructed contemporary buildings within the District. The proposed building design results in a monolithic and imposing built form with scale and massing that emphasizes its verticality and fails to respect its context within the BHCD or its impact on neighbouring low-rise built form. It also lacks active uses and fenestration on the first 2 floors due to the sloping grade of the valley wall that exposes 2 parking levels with a height of 7.6m or 25 feet. This does not support a safe and comfortable pedestrian-oriented public realm.

[58] Ms. Shearer in her WS and oral evidence was of the opinion that:

(i) the Village of Bolton HCD Plan outlines many features of heritage value: Setting, Patterns of Development, Streetscapes and character areas, Architecture and landscape, and Key Viewscapes. Several of these attribute categories are relevant to evaluating the compatibility of the proposed development;

(ii) Within the Setting category, there is a description of the green bowl and topography of the Humber River valley, providing a distinctive setting and green threshold, screening the Village from surrounding development. The second aspect of Setting is described as "the green thresholds at the north and south entrances to the village, which provide a transition from the densely treed and green valley slopes to the openness of the commercial core and the centre of the Village with views to the surrounding residential neighbourhoods;

(iii) The proposed configuration of the building in the proposed Development impacts on these attributes. The visual setting described in the document identifies the vegetated and green qualities of the slope. It is without buildings

that would otherwise prevent the slope from screening and acting as the transition between the development in the centre of the village and development on the plateaus beyond the top of the slope. Adding a large building with a different colour and exterior detailing on the slope represents a loss of this defining attribute;

(iv) Within the section Patterns of Development, there is a statement “The containment of development in the village at the base of the valley and the absence of development on the green valley slopes.” Adding the proposed multi-storey building on the slope will permanently change this identified attribute. The extensive excavation and regrading needed for its construction will alter most of the property and the opportunities for landscape restoration are very limited because of the size of the building footprint and the required parking, driveways and hardscaping. This is a long term and major adverse impact to the undeveloped slope that cannot be effectively mitigated by the proposed landscape concept plan;

(v) In the section Key Viewscapes, a relevant point is: Viewscapes from within the District to the Humber River valley slopes, which provide a green backdrop to the village. [the Appellant’s expert] Philip Evans’ Witness Statement contains a section with revised illustrations showing the views of the Subject Site from three key viewpoints. These images are taken from the viewpoints most relevant to the proposed Development from the several identified in the HCD Plan. These historic views have heritage value since they are a key part of the visual character that is recognized by the community and visitors as the “sense of place” and identity of Bolton. The viewscapes have been described by Mr. Philips as well as illustrated with graphic representations that show the cones of vision but those representations do not encompass the entire portion of the view that is mentioned in the description but assists in understanding where the key viewpoints are located and the general focal point of the view;

(vi) The view to the north from the southern gateway taken at the brow of the slope shows a similar overview of the village as in the first view. This view is framed by the dense vegetation on either side lining the road cut. The image of the proposed condition indicates that this vegetation will remain but will be altered with the addition of a major part of the Appellant's proposed Development highly visible above it;

(vii) In summary, in all the images provided for the proposed condition of the three relevant viewscapes, the Development / building is visible above the existing tree line that is a key component that defines the views. Having any portion of a building visible above the treeline alters the recognized value of the view and is an intrusive impact on the heritage character of the Village area;

(viii) The proposed Development is located on the top section of the slope that defines the "green bowl and topography" identified in the HCD Plan as a heritage attribute. The visual impact of the Development as it is configured has a major impact on the heritage attribute and its associated heritage value since it will require extensive regrading of the slope that will not be mitigated through landscape design;

(ix) The inclusion of the site within the HCD boundary signals that the site contributes to the "sense of place" of Bolton nestled within and defined by the Humber River Valley topography and vegetation. The HCD has put in place a process to review changes within the designated place (and properties adjacent to it) in order to ensure that the heritage attributes and heritage values that have been identified through community engagement are safeguarded. The Development as now proposed will have adverse impacts on the described heritage character of the HCD;

(x) <u>These impacts cannot be adequately mitigated because of the proposed form, massing and height of the building</u>. <u>This Subject Site is not on the valley floor but rather near the top of the slope that defines the edge of the historic</u>

settlement. The higher elevation of the site makes it visible from several different vantage points that have been recognized as heritage attributes having heritage value. The building is not in keeping with the overall scale of the designated HCD. [emphasis added];

(xi) The proposed Development has not demonstrated that it is compatible with the heritage character of the District because of its scale massing and its location on the south slope that defines the setting of the village. Further it is not in keeping with the overall intent of the final HCD Plan that incorporated a robust engagement strategy involving community participants throughout its preparation. The highly valued "sense of place" that is described in the HCD Plan is a result of their contribution. The Development as proposed does not respect or add to that description of the historic place;

(xii) the Heritage Impact Assessment ("HIA") carried out for the Appellant does not demonstrate that other alternatives were investigated that would have had fewer impacts on the heritage attributes designated in the HCD. It is unclear why the proposed building of a multi-storey height and form is the preferred option for the Subject Site from a heritage perspective. It is possible that other low or potentially mid-rise buildings of likely smaller massing and scale, could meet the heritage guidelines, but these alternatives have not been explored and are not sought for approval by the Applicant [emphasis added]; and

(xiii) In summary, the proposed Development has not complied with the intentions of the relevant objectives or principles for managing change. Further, it does not propose a building project that is compatible with the designated attributes and heritage values of the HCD.

[59] In the Tribunal's view, both Ms. Shearer and Mr. Evans agree that the relevant heritage attributes from the Bolton HCD Plan are as follows: (i) the green bowl and topography of the Humber River valley which provide a distinct setting and green threshold, screening the village from the surrounding area; (ii) the green threshold at the

north and south entrances to the village, which provide a transition from the densely treed and green valley slopes to the openness of the commercial core and the centre of the village with view to the surrounding residential neighbourhoods; (iii) the containment of village development at the base of the valley and the absence of development on the green valley slopes; (iv) the distinctive streetscape of Nancy Street characterized by examples of architecture from the different periods of Bolton's development; and (v) viewscapes from within the District to the Humber River valley slopes together with views descending north and south into the village and Humber River valley along Queen Street.

[60] On the other hand, Mr. Evans was apparently of the view that green valley slopes means only those portions that are treed while Ms. Shearer's evidence was that meadow lands would also encompass this. Also, Mr. Evans does not believe that the green threshold is on or near the Subject Property, contrary to Ms. Shearer.

[61] Mr. Evans discounts the heritage value of the Subject Property because it is identified as a 'non-contributing property' in the Bolton HCD Plan. However, on cross examination, he acknowledged that a previous OLT decision approved the Bolton HCD Plan recognizing that the non-contributing property identification related only to built infrastructure on the Subject Property. Ms. Shearer's evidence acknowledges that the existing building on the Subject Property has no heritage value, but does not agree that this means that the Subject Property itself has no heritage value. The Tribunal accepts her evidence that the Subject Property contributes in a meaningful way to the cultural heritage landscape given its prominent location adjacent to Queen Street near the crest of the valley slope.

[62] On balance, the Tribunal found the evidence of Mr. Stewart and Ms. Shearer to be more persuasive and accepted and preferred it over (i) the written and oral evidence of Mr. Evans on cultural heritage matters and on the issue of whether the Development appropriately conserved the cultural heritage landscape; and (ii) to the extent of any conflict with the opinions and conclusions reached by Mr. Mehdi and Mr. Miele.

[63] Moreover, the Tribunal agrees with the contention of counsel for the Town that Mr. Evans fails to explain in either his written and/or oral testimony how certain mitigation measures he discussed in his viva voce evidence serve to protect the cultural heritage landscape in a manner that ensures that its cultural heritage value or interest is retained.

[64] The Applicant has relied on the developments at 50 Ann Street and 60 Ann Street as examples of development within the Bolton HCD that are similar to the proposed Development – and counsel for the Applicant certainly spent much time exploring the relevance of those Ann Street projects in his very able cross-examination of the Town's expert witnesses.

[65] However, as confirmed by Mr. Stewart in his testimony, 50 Ann Street was approved before the Bolton HCD Plan came into effect. In addition, 60 Ann Street is not located on the green valley slopes and is also not within one of the key protected viewscapes. 60 Ann Street would obviously also have fit the character of its surrounding area by virtue of the approval and development of 50 Ann Street. On the other hand, as noted in Part **3 (v)** below the Development is not compatible with its immediate context.

[66] In a similar vein, counsel for the Appellant spent considerable time in his cross-examinations of Town witnesses and in his submissions concerning the development at the southeast corner of King Street and Station Road in the Town ("King Station Development") as a precedent for the Development on the Subject Property. The Tribunal disagrees that the King Station Development is in any way determinative of the issues on this appeal concerning this Development and notes as well that the King Station Development had existing development rights and is also outside of the Bolton HCD.

(v) <u>The Development as Currently Proposed Is Incompatible with the Surrounding Area…but Could be Modified to Achieve Compatibility</u>

[67] The Tribunal will not review in detail the conflicting opinions of Mr. Mehdi and Mr.

Stewart, in light of its conclusions reached above in Part **3 (iv)** and in Part 4 **Conclusions**.

[68] The Tribunal accepts the essence of the evidence of Mr. Mehdi that compatibility between the Development and its immediate surroundings is achieved through the use of setbacks, building placement and orientation, upper-level stepbacks, terraces and materiality. These measures could work with revised elements of Mr. Miele's landscape plan to assist the Development to better blend with its surroundings to minimize its own impact. Mr. Stewart's opinion that the building will always present as a different-in-kind, mid-to-high-rise structure to other structures to south along Nancy Street and into the Subject Site does not lead to the irrevocable finding that no building(s) similar to the one proposed in the Development ought to be permitted.

[69] In summary, as more fully described in the Tribunal's **Conclusions** below at Part 4, it is the Tribunal's view that the current Development proposal could be modified to better address the heritage attribute concerns outlined in Part 3 above, if the Appellant is willing to work with the Town and the TRCA to that end. Similarly, through that effort a revised Development that is more compatible with its surrounding context could be achieved.

[70] The Tribunal notes and agrees with the submissions of Appellant's counsel in final argument that:

> As was also indicated by Mr. Mehdi, many of the design details specified in the Town's various guidelines are matters of site plan that can and should be addressed through detailed design. These include matters of cladding, vent placement, ground floor animation and the screening of facilities related to loading and waste…
>
> …Given the policy context and directions respecting intensification, it is not sufficient to simply assert that a mid-to-high rise development is not compatible with a low-rise neighbourhood. Effort must be made to achieve site and design specific solutions to lessen perceived impacts while also facilitating the efficient use of land

(v) <u>The Issue of Negative Impacts on the Valleyland and the Adjacent Significant Woodland</u>

[71] As noted by counsel for TRCA, Mr. Donald Ford was qualified to provide expert evidence in the fields of geoscience and hydrogeology and he testified that the Subject Site was wholly within the Humber River Valley – a significant valleyland within the meaning of the PPS and the only Canadian Heritage River within TRCA's jurisdiction. Mr. Ford advised the Tribunal that the valley's landform prominence was at the heart both of the valley's status as a "feature" and the elevation of its status to that of "significant".

[72] Given the findings set out in Part 3 above concerning cultural heritage matters and its **Conclusions** concerning the currently proposed Development as set out in Part 4, the Tribunal is of the view that it is unnecessary to make any detailed findings on the issue of negative impacts on the valleyland and the significant woodland adjacent to the Subject Site (collectively, “Negative Impacts”).

[73] However, leaving aside its rulings on cultural heritage attributes, the Tribunal would not have found that the currently proposed Development would be unacceptable due to these alleged Negative Impacts. In that regard, the Tribunal accepts the opinions and conclusions of Ms. Whitney Moore of Dillon Consulting, who provided a WS, Reply WS and who provided opinion evidence at the VH as an expert in matters of biology and ecology - wherever those opinions were in conflict with: (i) the evidence of Ms. Maria Parish who provided opposing evidence on behalf of the TRCA which employs her as a Senior Planning Ecologist and (ii) the evidence of Mr. Adam Miller who is the TRCA’s Senior Manager, Development Planning and Permits and provided a WS and oral testimony for the TRCA at the VH as a land use and environmental planner.

[74] It is to be noted that TRCA’s counsel acknowledged in his final submissions that:

> Mr. Miller noted on cross-examination that the Site is not "sterilized" from development by the existing EPA designation and EPA1 and EPA2 zoning. Mr. Miller agreed that a significantly reduced form and relocated development footprint was more likely than the current proposal to be capable of being demonstrated to cause no negative impacts to the significant valleyland or its ecological functions

(vi) The Appellants have Satisfactorily Demonstrated That There is No Significant Risk of Erosion or Other Human Health Hazards

[75] As was so passionately framed by counsel for the TRCA, it is certainly the case that the Development as proposed would "*take an ice-cream scoop*" out of the significant slope on the Subject Site. It is to be hoped that a revised Development reached by a mutually-acceptable resolution, may lessen that effect to some degree.

[76] However, as is essentially accepted by the Parties, an intensification of development on the Subject Site to permit a multi-unit residential building(s) is both acceptable and in keeping with the applicable policy framework.

[77] The question of whether an unacceptable erosion hazard or other threats to human health is raised by the proposed Development was hotly contested at the VH. In that regard, the Appellant presented evidence from Mr. Bernard Lee, a geotechnical engineer who was qualified without challenge to provide opinion evidence on soil engineering matters pertaining to the Subject Site. In response, the TRCA relied primarily on the evidence of Dr. Ali Shirazi who is employed by the TRCA as a Senior Geotechnical Engineer who also testified, without objection, on soil engineering matters.

[78] On balance, the Tribunal accepts and prefers the evidence of Mr. Lee to the extent of its conflict with the opinions and conclusions of Dr. Shirazi. While Dr. Shirazi certainly has impressive credentials in this field, the Tribunal found him at times during his VH testimony prone to overstate his findings and their impact. Simply put, the Tribunal was unable to accept the notion that due to an alleged significant erosion hazard, that no multi-unit residential building could safely be constructed on the Subject Site which, as pointed out by the Appellant's counsel was the resultant outcome of Dr. Sharazi's opinion:

> While it was difficult to get Dr. Shirazi to confirm his various opinions, it was clear enough during cross-examination that Dr. Shirazi believed any land located below the crest of a slope associated with a valley is a hazard. To eliminate risk, Dr. Shirazi asserted that development must be set back either above the crest of slope or below the toe of slope

> associated with the Humber River Valley Corridor. The effect of this assertion is to essentially sterilize the majority of [the Subject Site]…

[80] On the other hand, Mr. Lee's opinion was that:

(i) The site is a sloping ground descending from east to west. The ground drops at an average gradient of 8º, or 7 Horizontal (H) : 1 Vertical (V) in the vicinity of the proposed building…Beyond the south and southwest boundaries of the property, there is a valley land dropping almost 25 m to the vicinity of Ted Houston Memorial Park, at a gradient of 2.5H to 3.0H:1V;

(ii) In respect of the steep west slope, which is not proposed as a site for the Development and which is an *erosion hazard* requiring identification of a toe erosion allowance (but inapplicable, given its distance from the Humber River), it required an assessment of slope stability (stable soils below the topsoil and fill) and an erosion access allowance;

(iii) At a 7:1 slope, the portion of the Subject Site which is proposed for development is gentle enough to not constitute an *erosion hazard* and therefore not require an assessment of toe erosion, slope stability and erosion access allowance; and

(iv) Therefore, while a portion of the site does have a hazardous slope, another portion of the site does not. Development is proposed to be setback away from the 'Long-Term Stable Top of Slope' associated with the hazardous slope. The balance of the site is available for appropriate development, subject to the implementation of approved retaining structures.

[81] It is the Tribunal's understanding that the 'retaining structures' referred to in paragraph [73] (iv) are reflected in the Agreed H Conditions appended hereto as Attachment 1. For clarity, the Tribunal is of the view that the Agreed H Conditions ought to be implemented in conjunction with any revised Development proposal put forward by the Appellant pursuant to the findings set out in the **Conclusions** in Part 4 below.

4. CONCLUSIONS

[82] Based on the evidence as described in Part 3 above, and particularly as set out in the findings of the Tribunal concerning cultural and natural heritage matters and incompatibility set out in **Part 3 (iv)** and **Part 3 (v)**, the Tribunal is not satisfied that the Development *as proposed* should be approved.

[83] On the other hand, the Tribunal is of the view that the Subject Site is suitable for intensification and that a building broadly similar to the Development with reduced height and massing would be appropriate and could be designed and constructed in a fashion that does meet the requirements of the PA, the PPS, the Growth Plan and the Bolton HCD Plan.

[84] In final argument, the Town's counsel stated:

> The Town, as supported by Ms. Shearer's opinion, is not saying that no development can occur on the Subject Property because of the significant cultural heritage landscape. Instead, the heritage value and/or interest of the Subject Property can be conserved with a development of a much smaller scale, height and massing. As opined by Ms. Shearer such a development would result in the Subject Property being dominated by (a) densely treed; and/or (b) green valley slopes, and any built structure(s) would be subordinate. Any such development would have to continue to preserve views descending north and south into the Village along Queen Street, and views from within the District to the Humber River Valley slopes

[85] The Tribunal notes that the Parties have concurred on the Agreed Upon 'H' Conditions as appended as Attachment A to this Decision. In the Tribunal's view, the H Conditions may form the partial basis of an opportunity for the Appellant to work cooperatively with the Town and the TRCA to revise its plans in order to reach agreement on the design and construction of one or more multi-unit residential buildings on the Subject Site.

[86] Of course, it is not the role of the OLT to devise the appropriate design and construction details of new buildings on the Subject Site for the Parties' consideration. On the other hand, the Tribunal agrees with much of what counsel for the Town stated

in final submissions as set out above in paragraph [84], and will offer some suggestions as to the broad parameters of a possible revised development that could be discussed and negotiated by the Parties if they wish to continue their discussions and negotiations as follows:

(i) repositioning and reducing the building footprint so that it is further set back from adjacent properties;

(ii) an overall building height of approximately 4 storeys, including rooftop mechanical penthouse facilities;

(iii) reduced massing and greater step-backs of all floors above ground-level;

(iv) reconsideration of the parking facilities with a view to minimizing their required space and the overall impact on views from and toward a new building; and

(iv) the use of exterior materials more compatible with the heritage attributes of the Town along with additional, denser landscaping and plantings surrounding the new building.

[87] To reiterate, the Tribunal certainly agrees with the Appellant that the Subject Site is suitable for the development of multi-unit residential buildings of reduced height and massing. Moreover, the Tribunal does not disagree with the Appellant's proposal to re-designate and re-zone a portion of the Subject Site from Environmental Policy Area ("EPA") to High-Density Residential. For further clarity, nothing in this Part 4 should be understood as a finding by the Tribunal that only a single building should be permitted on the Subject Site – at various points, a suggestion of some type of town home project was raised and the Tribunal is not by its remarks here suggesting that this would be impermissible.

[88] The Tribunal also recommends that the Parties contact the OLT to arrange for

facilitated mediation to assist them in reaching a settlement concerning a revised development application for the Subject Site.

[89] For the reasons stated above, although the Tribunal will not approve the proposed Development, it will not dismiss this appeal. Instead, the Tribunal will allow the Applicant/Appellant to amend its development proposal in accordance with the general directions outlined above in this Decision, including but not limited to the suggestions set out in paragraph [86] above and to continue discussions with the Town and the TRCA. As noted in paragraph [88], the Tribunal also encourages the Parties to consider utilizing the OLT mediation facilities.

[90] I will remain available to assist the Parties in considering any future proposal they may wish to present to the OLT in a settlement hearing arranged in accordance with the OLT Rules, or otherwise.

"William R. Middleton"

WILLIAM R. MIDDLETON
MEMBER

ATTACHMENT 1

Agreed upon 'H' Conditions for 84 Nancy Street, Caledon

1. The owner of the subject lands shall demonstrate through a qualified person, and to the Town's satisfaction, that the structural integrity and safety of the retaining walls is ensured for the life of the proposed development. The owner shall also submit to the Town a maintenance plan for the retaining wall, that is to the Town's satisfaction, and that demonstrates how the retaining wall will be maintained, repaired and/or replaced during the life of the proposed development.

2. The owner of the subject lands shall agree to the inclusion of the following terms in any site plan agreement entered into with the Town for the proposed development:

    a. The owner of the lands shall implement on an ongoing basis all of the recommendations contained in the maintenance plan for the retaining wall;

    b. Indemnification and release language, to the Town's satisfaction, specifically related to the retaining wall;

    c. That the obligations contained in paragraphs 2a and 2b shall be assumed by any future owners of the subject lands, including any condominium corporation; and

    d. The owner of the subject lands shall implement, to the Town's satisfaction, and at the owner's sole cost and expense, all improvements that are required to Nancy Street in order to facilitate the proposed development.

3. The owner of the subject lands shall demonstrate through a qualified traffic engineer and civil engineer, and to the Town's satisfaction, the structural integrity, vehicular and pedestrian safety of the proposed driveway and adjacent sidewalk including with respect to its slope.