

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: July 03, 2024

CASE NO(S):

OLT-22-004732
OLT-23-001265

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Len Ferragine
Subject:	By-law No. 2022-97
Description:	to re-designate the subject property to permit a cemetery and accessory uses
Reference Number:	D14-20-02
Property Address:	3999 10th Sideroad
Municipality:	Town of Bradford West Gwillimbury
OLT Case No.:	OLT-22-004732
OLT Lead Case No.:	OLT-22-004732
OLT Case Name:	Ferragine v. Bradford West Gwillimbury (Town)

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Len Ferragine
Applicant:	Ahmadiyya Muslim Jama'at Canada
Subject:	Proposed Official Plan Amendment
Description:	to re-designate the lands to permit a cemetery and accessory uses
Reference Number:	BWG-OPA-22032
Property Address:	3999 Sideroad 10
Municipality/UT:	Town of Bradford West Gwillimbury/County of Simcoe
OLT Case No.:	OLT-23-000246
OLT Lead Case No.:	OLT-22-004732

PROCEEDING COMMENCED UNDER subsection 85(1) of the *Funeral, Burial and Cremation Services Act*, 2002, S.O. 2002, c.33

Applicant:	Ahmadiyya Muslim Jama'at Canada
Appellant:	Len Ferragine
Appellant:	Doris Becher Neinhaus
Subject:	Establishment of Cemetery or Crematorium
Description:	To establish a new cemetery
Property Address:	3999 Sideroad 10
Municipality/UT:	Town of Bradford/West Gwillimbury
OLT Case No.:	OLT-23-001265
OLT Lead Case No.:	OLT-23-001265

Heard: April 9-11, 15-19, 25-26, 29-30 and May 2, 2024
by Video Hearing

APPEARANCES:

Parties

Counsel/Representative*

Ahmadiya Muslim Jama'al Canada	Aaron Platt Alexandra Whyte
Len Ferragine, and Kevin, Darryl, Kristen, David and Patricia Eek	Isaac Tang Brett Davis Hanna Rioseco
Doris Becher Nienhaus	Marc Kemerer
Town of Bradford West- Gwillimbury County of Simcoe	Leo Longo Samantha Trottola*

DECISION DELIVERED BY JEAN-PIERRE BLAIS AND ORDER OF THE TRIBUNAL

[Link to Final Order](#)

INTRODUCTION

[1] The work of the Tribunal very often concerns where Ontarians will live. In rare instances, such as this one, the Tribunal must also decide where they will be buried. The latter, however, is no less important than the former to our human condition.

[2] Ahmadiya Muslim Jama'al Canada, an incorporated not-for-profit entity ("Applicant" or "AMJC"), seeks to develop a cemetery on lands known municipally as 3999 Sideroad 10 ("Subject Property"), in the Town of Bradford West-Gwillimbury ("Town") with accessory uses. To this end, AMJC filed on February 7, 2020, an application to amend the Town's Official Plan ("OPA") and an application to amend the Town's comprehensive Zoning By-law No. 2010-050, as amended ("ZBA") pursuant to the *Planning Act*, R.S.O. 1990, c. P. 13, as amended ("Planning Act").

[3] In addition, AMJC filed with the Town an application pursuant to s. 84(1) of the *Funeral, Burials, Cremation Services Act*, S.O. 2002 c. 33 ("FBCSA") which requires the approval of a local municipality to establish a cemetery in a municipality if, in the opinion of the municipality, it is "in the public interest" to do so.

[4] The OPA and ZBA were deemed complete by the Town on February 27, 2020. Following revisions to the original development proposal, Town staff recommended approval of the OPA and ZBA, and Town Council adopted on September 20, 2022, By-laws No. 2022-98 and 2022-97 adopting the OPA and ZBA respectively. The ZBA included two Holding provisions relating to (a) ensuring an appropriate development agreement is in place; and (b) monitoring of landfill gases associated with the municipal waste disposal facility north of the Subject Property.

[5] On September 20, 2022, Town Council also approved the request under the FBCSA.

[6] On February 21, 2023, the County of Simcoe ("County"), the Upper Tier Municipality, approved the OPA.

[7] A Site Plan Application ("SPA") has not yet been filed after those approvals. The development cannot proceed in the absence of the SPA approval. The Tribunal was made aware of conceptual plans for the proposed cemetery.

[8] Len Ferragine, the owner of lands to east of the Subject Property, filed Appeals pursuant to s. 17(36) and s. 34(19) of the Planning Act with respect to the OPA and ZBA.

[9] Further to a Case Management Conference ("CMC") Decision dated September 25, 2023, Doris Becher Neinhaus, the owner of lands to the south-east of the Subject Property, was granted Party status to the Appeals brought by Mr. Ferragine under the Planning Act, and Denis Jakac, Andy Karistinos, Cynthia Riley, and Dave Nieme were granted Participant status.

[10] Mr. Ferragine, and Ms. Becher Neinhaus, as well as Kevin and Samantha Eek, Darryl and Kirstin Eek, and David and Patricia Eek (together the "Eeks") filed Appeals pursuant to s. 85 of the FBCSA. Under s. 85(3) of the FBCSA, the Tribunal may reverse the decision appealed from and substitute its own decision.

[11] The Eeks are not Parties to the Appeals under the Planning Act, but, as discussed below, the planning issues are relevant and overlap with the "public interest" test under the FBCSA.

[12] Further to a CMC Decision dated October 4, 2023, the OPA Appeal and the ZBL Appeal were consolidated. Moreover, further to a CMC Decision dated January 25,

2024, the Appeals under the Planning Act were ordered to be heard together with the Appeals pursuant to the FBCSA, and the Applicant and the County were added as Parties to the *FBCSA* Appeals.

[13] The Town and the County informed the Tribunal at the outset of the Hearing that they would not take an active role in the matter but would monitor the proceeding. Mr. Kemerer, Counsel for Ms. Becher Neinhaus, also informed the Tribunal that he would not be present at all stages of the Hearing, but his client was present for almost the entire proceeding.

[14] Samantha Eek withdrew as a Party, took no part in this hearing, did not instruct Counsel, and did not retain any of the expert witnesses.

[15] Although the proceeding had been set down for a 17-day hearing, the Tribunal did not sit on April 12, 22, 23, 24, as well as May 1 and 3, 2024. Final arguments were heard orally on May 2, 2024.

BACKGROUND

[16] In 2008, AMJC purchased the Subject Property and other lands to the south. The Town's Zoning By-law at the time permitted cemetery use. However, the site plan application process stalled because the Town was undergoing a conformity process to address the revised Provincial Policy Statement 2005. Through this conformity exercise, the Town's By-law was revised to restrict certain uses on agricultural designated lands and eliminated the Applicant's previous rights to develop the intended cemetery and place of worship.

[17] The Applicants had to start an entirely new application process.

[18] Although the Applicant owns lands to the south which are comprised of agricultural fields, the present Appeals relate only to the Subject Property.

[19] AMJC is a religious and cultural entity responsible for the benefit and welfare of the Ahmadiyyan community. Although no direct evidence was submitted about the Ahmadiyyan community, it became implicitly apparent to the Tribunal, and was not contested by the Parties, that the members of that community consider themselves to be followers of the Islamic faith. However, other members of the Islamic community consider them non-Muslim and heretics. They have been persecuted and oppressed since their inception. So called “mainstream” Muslims consider Ahmadis not to be Muslims and do not allow them to be buried in Muslim graveyards.

[20] Under Islamic tradition followed by the Ahmadiyyan community, the body of the deceased should be buried as soon as possible after death, which means that funeral preparations begin immediately. The first step after death is to clean and wash the body. Once the body is prepared, it is brought to a viewing hall for family and community members to mourn and view. After viewing the body, funeral prayers are offered. Due to the Canadian climate, these steps are usually done inside. Islamic prayers require room for standing, sitting, kneeling, and bowing. Men and women are generally separated into distinct rooms when offering prayers. Following prayers, the burial process commences with in-ground burials using coffins. Cremation of the body is forbidden. Following the burial, the immediate family will gather and receive visitors. It is customary to offer food or drink on-site.

[21] Musis are members of the Ahmadiyyan community who pledge at least 10% of their income and 10% of their estate to the community. Musis are reserved a special place in Ahmadiyyan cemeteries.

SUBJECT LANDS AND SURROUNDINGS

[22] The Subject Property is situated north of the Town’s settlement area and are approximately 48.6 acres. It has a frontage of approximately 882 feet along 10th Sideroad.

[23] The Subject Property is currently occupied by one single detached building near the 10th Sideroad. The building is used as a Place of Worship and was established on the Subject Property prior to the enactment of the Town's Zoning By-law No. 2010-050 that created the prohibition for Places of Worship on Agricultural (A), Rural (RU) and Deferred D2 zones. There is thus a deemed legal non-conforming use.

[24] The interior of the Subject Property is undeveloped land consisting of recreational fields, two ponds, a gravel parking area, and a large woodlot.

[25] The Subject Property is bounded by 10th Sideroad to the west, 12th Line and woodlots to the north, 210 acres woodlots to the east and farm field to the south. Further north-east of the wooded areas is a municipal waste facility on the north side of the 12th Line. There are single detached dwellings and farmhouses in the vicinity.

PROPOSED DEVELOPMENT

[26] An OPA and a ZBA are required to implement the proposed cemetery and accessory uses. The OPA would add a Special Policy Area to the Subject Property which would permit the proposed cemetery, associated uses and recognize the existing Place of Worship use. The ZBA would rezone the Subject Property from "Deferred – D2" to "Rural (RU)" zone and include a set of site-specific development standards to facilitate the proposed development.

[27] The proposed burial area would be approximately 15 acres in size, which is approximately one-third of the Subject Property. The site would include five existing or new buildings, including a 10,000 square feet multi purpose place of assembly building, a network of paths, a gravel parking area, a proposed gravel road which would branch from the main road into the burial grounds and open spaces.

[28] The OPA includes a lot coverage of approximately 2% of the Subject Property, excluding the Environmental Protection lands, a minimum 15 metre setback from 10th

Sideroad and a minimum setback of 30 metres from the limits of the existing tree line coverage as per the Lake Simcoe Region Conservation Authority (“LSRCA”) regulations.

[29] The ZBA limits the Gross Floor Area (“GFA”) for each building and structure and limits the accessory uses.

POSITION OF THE PARTIES

[30] Although the Applicant explained that it started what it described as a “painstaking” and “thorough” application process in 2020, it submitted that its project began well before then, and that the establishment of a new cemetery is an iterative process. It argued that it has done all that should be required *up to this stage*, and further refinements will occur through the Site Plan Control process. It stated that the proposal has received considerable scrutiny from the staff of the Town, the County and the LSRCA through numerous rounds of comments and adjustments.

[31] For the Applicant, a cemetery should be able to be developed on the Subject Property because the OPA and the ZBA meet all the land use planning statutory tests under the Planning Act, specifically pursuant to s. 2, 3, and 24. On the contentious issues, the Applicant submits that: (a) it has addressed all the hydrological issues that must be addressed *at this stage*; (b) the proposed cemetery will not have an undue impact on transportation on the local road network; (c) the size and uses of the accessory buildings are appropriate for the proposed cemetery; (d) there is a need for a cemetery; (e) alternative locations have been appropriately studied; and (f) approval of the cemetery in the public interest pursuant to the FBCSA.

[32] As part of this appeal process, the Applicant requested changes to OPA and ZBA that were originally approved by the County and the Town. Specifically, the proposed changes are:

- a. clarifying in both the OPA and the ZBA that the multi purpose place of assembly building is “for end of life and Ahmadiyya Islamic Burial traditions”;
- b. specifying in the ZBA that the maximum permitted height for all new development is 9.5 metres; and
- c. add a holding provision (H#) and Environmental Protection “EP” Zone in the ZBA, which may be lifted once a groundwater mitigation and monitoring program is prepared to the satisfaction of the Town with any mitigation and/or monitoring requirements secured through a Site Plan Agreement.

[33] References hereinafter to the OPA and ZBA includes the above amendments.

[34] The Applicant requested that the Appeals under the Planning Act be allowed in part, but only to reflect the above changes. With respect to the Appeals under the FBCSA, the Applicant requested that the Appeals be dismissed.

[35] The Appellant Ferragine submits that the OPA and ZBA do not meet the statutory tests: namely the tests of “having regard” to matters of provincial interest; conformity to the Growth Plan for the Greater Golden Horseshoe 2020 (“Growth Plan”); consistency with the Provincial Policy Statement 2020 (“PPS”); conformity to the County of Simcoe Official Plan 2008, as amended (“County OP”); conformity to the Town’s Official Plan 2000, as amended (“Town OP”); and do not represent good planning. More specifically the Appellant Ferragine argues that the proposed cemetery is not compatible with the surrounding agricultural and rural lands and would result in a permanent loss of lands in a prime agricultural area. Moreover, in his view, the Applicant did not properly conduct critical supporting studies on the hydrological issues, alternative site locations and the needs assessment. He also submits that the traffic assumptions are inaccurate or incomplete.

[36] The Appellants Ferragine and Eeks submit that the approval of the cemetery on the Subject Property is not in the public interest under the FBCSA. For them, the public interest test encompasses not only the planning issues, but also the lack of technical evidence provided in support of the proposed cemetery.

[37] Appellant Becher Neinhaus aligned her position with the position of the Appellants Ferragine and the Eeks. She adopted their final submissions with a few additional arguments.

[38] The Appellants Ferragine and Becher Nienhaus requested that the Appeals under the Planning Act be allowed and that the approvals of the OPA and ZBA be denied. The Appellants Ferragine, Becher Nienhaus and the Eeks also requested that the Tribunal allow the Appeals under the FBCSA.

POSITION OF PARTICIPANTS

[39] The Participants raised concerns about the impact of the proposed cemetery development on drinking water, traffic, noise, the natural habitat, wildlife, agricultural activity, and the loss of farmland. These issues were fully canvassed by the Parties and are discussed further in this Decision.

EVIDENCE

[40] The Tribunal considered oral evidence from 11 individuals:

- a. Pierre Chauvin, a Partner with MacNaughton Hermesen Britton Clarkson (“HMBC”), retained by the Applicant and qualified by the Tribunal to provide expert evidence in land use planning;
- b. David Lukezic, a Project Manager with WSP Canada Inc., retained by the Applicant and qualified by the Tribunal to provide expert evidence on

transportation engineering matters, including traffic and parking related matters;

- c. Doug Annand, a Partner with urbanMetrics Inc., retained by the Applicant and qualified by the Tribunal to provide expert evidence in the field of land economics;
- d. Archie Sirati, Principal Engineer and president of Sirati & Partners Consultant Ltd., retained by the Applicant and qualified by the Tribunal to provide expert evidence in the field of hydrogeology;
- e. Sean Colville, a Principal at Colville Consulting Inc., retained by the Appellants Mr. Ferragine and the Eeks and qualified by the Tribunal to give expert evidence in agrology with a focus on agricultural practices and the review of agricultural policy;
- f. Katherine Gibson, a hydrologist, retained by Ms. Becher Neinhaus, Mr. Ferragine and the Eeks, and qualified by the Tribunal to provide expert evidence in the field of hydrogeology;
- g. Andre Lower, a Senior Transportation Engineer at Trans-Plan Transportation Inc., retained by Mr. Ferragine and the Eeks and qualified by the Tribunal to provide expert evidence on matters of transportation engineering; and
- h. Chris White, a Land Economist and Principal at Parcel Economics Inc., retained by Mr. Ferragine and the Eeks and qualified by the Tribunal to provide expert evidence in the field of land economics;

- i. Joshua Morgan, a Principal at Morgan Planning and Development inc., retained by retained by Mr. Ferragine and the Eeks and qualified by the Tribunal to provide expert evidence land use planning;
- j. Ms. Becher Neinhaus, as a lay witness; and
- k. Max Hansgen; as a lay witness called by Ms. Becher Neinhaus.

[41] The Appellant Becher Neinhaus proposed to file additional an Document Book of over 800 pages after the due date under the Procedural Order. Mr. Platt, Co-counsel for the Applicant, objected to the filing as it was provided late. He also objected because the documents were repetitive with previously filled documents and were an attempt to obliquely add opinion evidence into the record. At the Hearing, the Tribunal allowed the documents to be filed but underscored that much of the documentation appeared to have very little probative value or could be objected to as inadmissible if a witness attempted to enter the documents into evidence on examination in chief of a lay witness. The documentation included writings of individuals who were not witnesses (and thus not subject to cross-examination), contained hearsay or were excerpts from Wikipedia.

[42] Although not requested to do so by the Tribunal, Mr. Kemerer, Counsel for Appellant Becher Neinhaus, refiled a significantly abbreviated Book of Documents on behalf of his client. For the most part, Mr. Kemerer directed his client's examination and the examination of Mr. Hansgen to matters on which they were qualified to testify as lay witnesses. Ms. Becher Neinhaus, as a Party to the Appeals, could not be qualified to provide expert evidence because she lacked the requisite independence despite her extensive knowledge and experience in the field of agriculture. Similarly, Mr. Hansgen, as the President of and advocate for a farming association, could not provide non-partisan opinion evidence. The Tribunal afforded his testimony very little evidentiary weight.

ISSUES

[43] The issues to be considered by the Tribunal fall under two broad groupings: those under the Planning Act and those under the FBCSA.

[44] In the first grouping, in addition to the broader land use planning issues that flow from s. 2, 3 and 24 of the Planning Act with respect to the OPA and ZBA, these Appeals specifically raise the following Planning Act issues between the Parties:

- a. Does the proposed development of a cemetery in a prime agricultural area align with the statutory tests including having regard to matters of provincial interest, consistency with the PPS, conformity with the Growth Plan, conformity to the County's Op and conformity to the Town OP?
- b. Is there an identified need for the proposed cemetery?
- c. Have reasonable alternative locations been appropriately considered?
- d. Is the proposed non-agricultural use compatible with the surrounding area?
- e. Have the hydrogeological issues been appropriately considered and addressed?
- f. Have the transportation issues been appropriately considered and addressed?
- g. Are the accessory uses and buildings appropriate?

[45] In addition to the Planning Act issues, the Tribunal must also consider whether allowing the establishment of a cemetery on the Subject Property in the "public interest" pursuant to the FBCSA?

[46] The Tribunal will consider those issues *seriatim*.

ANALYSIS

PLANNING ACT ISSUES

a. Agricultural Issues

[47] For the Appellants, the main question for Tribunal is to determine whether the Subject Property, which is designated as a prime agricultural area and contains approximately 11% Class 1 soils, should be permanently removed from the Agricultural System to permit the proposed non-agricultural use. Similarly, the Applicant states that the central issue in this case is the interpretation of Policy 2.3.6.1 of the PPS.

[48] The PPS provides at Policy 2.3 that prime agricultural areas are to be protected for the long-term use of agriculture. The policy framework for allowing the proposed cemetery, a non-agricultural use, on the Subject Property is set out in the “4-part” test at Policy 2.3.6.1 of the PPS. Non-agricultural uses are permitted only if:

- a. The land does not comprise a specialty crop;
- b. The proposed use complies with the Minimum Distance Separation (“MDS”) formula;
- c. There is an identified need for additional land to accommodate the proposed use; and
- d. Alternative locations have been evaluated.

[49] The broad policy objective articulated at Policy 2.3.1 is echoed in Policy 4.2.6(2) of the Growth Plan, Policy 3.6.5 of the County OP, and Policy 7.2.1.1 of the Town OP. Whilst the Policy 2.3 of the PPS is subject to analysis under the standard of “consistent

with” pursuant to s. 3(5)(a) of the Planning Act, it is elevated to the standard of “conformity” pursuant to s. 3(5)(b) and s. 24 of the Planning Act for the Growth Plan and the County OP.

[50] It should be noted, however, that the “identified need” test in paragraph c. and the “alternative location” test in paragraph d. of the PPS are carried forward in the County OP at Policy 3.6.12 and are therefore subject to scrutiny on the standard of “conformity” pursuant to s. 24 of the Planning Act.

[51] It is common ground that the proposed non-agricultural use does not engage an analysis pursuant to paragraphs a. (specialty crops) and b. (MDS restrictions) of Policy 2.3.6.1.

[52] The evidence suggests that approximately 15 acres of the Subject Property has been used for agricultural purposes in the past and could be used again in the future for that purpose. The Appellants argue that this would not be a negligible loss for a viable agricultural use.¹

[53] For the Appellants, the OMAFRA Publication 851 (“OMAFRA Guidelines”) is an important resource to interpret Policy 2.3 of the PPS with respect to both the needs test and the alternative location test. They argue that agriculture is to remain the principal use in prime agricultural areas, those areas are to be protected for future generations and the removal of lands from agricultural production, if any, is to be minimal.

[54] By contrast, Mr. Platt, Co-Counsel for the Applicant, cautions against using the OMAFRA Guidelines in an overly prescriptive manner. He underscored that the OMAFRA Guidelines are not a statute, a regulation or a provincial policy statement

¹ *Tannous v. Kingsville (Town)*, 2017 CanLII 36192

adopted by a Minister or the Ontario Cabinet. For him, they are merely best practices. He also urged the Tribunal not to rigidly adhere to them. He also pointed out that unlike other Policies in the PPS, Policy 2.3 does not set out that the OMAFRA Guidelines must be used.

[55] Parties used various ways to describe the “4-part test” at Policy 2.3.6.1 including “challenging test”, a “(very) high bar”, a “stringent test”, or a “rigorous assessment”. However, Mr. Tang, Co-Counsel for the Appellants Ferragine and the Eeks, admitted that Policy is not an absolute prohibition and that there are circumstances that consistency with the PPS and conformity with the County OP could nevertheless be achieved.

[56] The Tribunal finds that, on its face, section 1.1 of the OMAFRA Guidelines represent “best practices rather than specific standards that must be met in every case”. Mr. Colville and Mr. Morgan testified that the OMAFRA Guidelines are widely relied upon. Be that as it may, with respect to the OMAFRA Guidelines, Mr. Morgan incorrectly states at paragraph 25 of his Witness Statement that proposed cemetery “directly contravenes” the guidance provided by the OMAFRA Guidelines. One cannot “contravene” a guideline without inappropriately trying to elevate mere guidelines to what they are not.

[57] Indeed, Mr. Morgan is incorrect when he states at paragraph 17 of his Witness Statement that “the starting point for a planning discussion related to non-agricultural uses in prime agricultural areas is a prohibition” [Emphasis added]. Mr. Chauvin correctly points out that the PPS elsewhere uses explicit prohibitive language (see for example Policies 2.1.4 and 3.1.2 of the PPS) when the intent of the PPS is to establish a prohibition. The Tribunal does not have to ensure consistency and conformity of the OPA and ZBA to the OMAFRA Guidelines.

[58] For the Tribunal, the added challenge of the OMAFRA Guidelines is that they deal very little with proposed cemetery use, and very little is to be gained by analogies

to other types of non-agricultural uses, such as golf courses and firework storage facilities, that have no ethnoculturally significant considerations.

[59] Based on the evidence presented, including the evidence of Mr. Chauvin, Mr. Colville, and the Agricultural Impact Assessment dated July 2021, the Tribunal finds that the proposed cemetery development will have no discernible impact on the agri-food system in Ontario and will protect the agricultural resources of the Province, a relevant matter of provincial interest. The proposed development will not impact the ability of sustaining agricultural uses and operations on the surrounding lands. There will be a marginal or negligible loss of prime agricultural lands. The Subject Property is on the edge of lands subject to a rural designation and is not in the middle of a prime agricultural area. It is not “surrounded” by prime agricultural lands. The proposed cemetery development will not remove land currently in agricultural production and will not fragment or isolate surrounding farmland. It is far from clear that livestock operations could be introduced on the Subject Property due to existing non-farm residential uses in the area. Therefore, the impacts if any, will be negligible and can be mitigated.

[60] Considering this, the Tribunal must nevertheless also consider both the “identifiable needs” test and the “reasonable alternative location” test set out in the “4-part” test in both the PPS and the County OP.

b. Identified Need for a Cemetery

[61] Policy 2.3.6.1(c) of the PPS provides that there ought to be an identified need for additional land to accommodate the proposed non-agricultural use. Similarly, Policy 3.6.12(b)(3) of the County Official Plan states that non-agricultural uses in prime agricultural areas may only be permitted if there is an identified need within the planning horizon for additional land to be designated to accommodate the proposed use.

[62] Mr. Annand testified for the Applicant with respect to the need for a cemetery. In his professional opinion there is a need for the proposed cemetery, particularly as it

relates to the needs of the Ahmadiyya community as there is currently no Ahmadiyya specific cemetery anywhere in Canada, in Ontario or in Simcoe County. He testified that there is only 4 hectares of cemetery land available in the Town and that this is an insufficient supply to meet the future demand over the planning horizon, which is typically 10 to 15 years for cemeteries. There is no cemetery land in the Town dedicated to members of the Muslim faith. He also opined that cemeteries are required to plan for a far longer time frame of up to 100 years.

[63] Mr. Annand also testified with respect to cemetery trends. He noted that there was a growing number of multicultural cemeteries, that modern cemeteries offer a variety of amenities, and that pre-arrangements were growing (so-called “pre-needs”) thus placing added pressure on overall demand. He explained further that clients expected more natural facilities and landscaping in addition to burial plots, and that the cost of land in the Greater Toronto Area has resulted in cemetery development in outlying municipalities.

[64] Mr. Annand specifically testified with respect to the Cemetery Needs Assessment Report dated February 2020 (“CNA”) which included population growth forecasts and annual number of deaths forecast for both the County and the Town until 2041, as well as the religious affiliation of residents of the County and the Town.

[65] The CNA indicates that over the past 20 years, the Ahmadiyya community has grown steadily in Canada and has nearly 30,700 members across Canada. Approximately 20% of the community are Musis who would expect a reserved burial place in an Ahmadiyya cemetery due to their financial sacrifice. More than 77% of the Canadian Ahmadiyya community resides in Ontario. As of 2018, two-thirds of the Ahmadiyya community who live in the County, live in the Town.

[66] The CNA also explains that there is an active Site Plan Application for a new non-denominational cemetery in the Town located at 3369 Line 23 which, if built, would

increase the supply of cemetery land but would not serve the specific needs of the Ahmadiyya community.

[67] The CNA also establishes that in 2016 the total available supply of cemetery land in the County was approximately 150 acres, nearly two-thirds of which was non-denominational or Roman Catholic. There is no cemetery land in the County dedicated to members of the Muslim faith. As a result, the Muslim community is forced to use either a dedicated Muslim cemetery outside the County or in a non-denominational cemetery with a dedicated Muslim garden.

[68] Based on assumptions relating to death rates, burials of County residents outside the County (so-called out flow), burials rates of County non-residents in the County (so-called in-flow), the depletion of cemetery lands in and around the City of Toronto, and the growing practice of cremation and other emerging burial practices in the non-Muslim population, the CNA concludes that the land requirements for the various types on interments in the County shows a shortfall of over 38 gross acres of cemetery land by 2041 and over 356 gross acres by 2071. For the Town, there would be a nearly 5 gross acre deficit by 2041, and nearly 28 gross acres by 2071. Given the growth of pre-need demand for cemetery plots (as opposed to at-need burials), the CNA posits (in 2020) that a complete absorption of supplies as early as 2028 for the County and 2023 for the Town.

[69] For Muslim cemeteries, the CNA estimates an increase in demand for nearly 12 gross acres by 2041 in the County and nearly 36 gross acres by 2071.

[70] In an agreed Statement of Facts, Mr. Annand and Mr. White agreed that a 2071 timeframe is appropriate for evaluating cemetery need, in addition to interim forecast periods consistent with the planning horizon in the PPS. They also agreed that it is appropriate to include inflow and outflow in the analysis of cemetery usage, the population projections and the cohort mortality rates and the projected number of deaths in the CNA.

[71] Mr. White, who testified for the Appellant, was critical of Mr. Annand's reliance on population statistics provided by the Applicant to Mr. Annand. Yet, Mr. White did not provide his own statistics to refute the statistics relied on by Mr. Annand, nor did he provide any alternate source of information that could provide a more accurate estimate of the Ahmadiyyan population in Ontario. Indeed, Mr. White provided no analysis of alternative capture rates, population numbers or suitable alternative and available cemetery sites that would be usable by the Ahmadiyya community. The Tribunal finds that there is no basis to find fault in the methodology and assumptions used by Mr. Annand to reach his conclusions. Moreover, the Tribunal notes that Mr. White conceded on cross-examination that he had no reason to doubt the demographic information provided by AMJC to Mr. Annand.

[72] In the end, the Tribunal notes that Mr. White and Mr. Annand agreed there is a need for an Ahmadiyyan cemetery. Where they diverge is whether the need is specific to the Subject Property.

[73] For the Tribunal, the Appellants are trying to read extra words in the test at Policy 2.3.6.1(3), *i.e.*, the need must be at the proposed site for the cemetery. The Appellants submitted that there is no connection between the need for an AMJC cemetery and the market area for the need. They submitted that their experts established that there is a "fundamental disconnect" and an "analytical gap" between the needs analysis and the reasonable alternative location evaluation. They rely on s. 3.2.1 of the OMAFRA Guidelines for this conclusion.

[74] The Tribunal is not persuaded that this is an appropriate interpretation of Policy 2.3.6.1(3). Policy 2.3.6.1(3) does not expressly include the proposed lands as in Policy 2.3.6.1(1), nor is the reference to the proposed site implicit by the subject matter as it is in Policies 2.3.6.1(1) (MDS) and 2.3.6.1(4) (alternative location). An MDS calculation requires two reference points including the proposed site and an alternative location must be an alternative to the proposed site.

[75] In any event, even if the need test should be applied with respect to the proposed site, the Tribunal finds that there is ample evidence before the Tribunal that the proposed cemetery location is rationally justified. First, most of the Ontario Ahmadiyyan community lives in the Town. Second, the Subject Property is central to the Ahmadiyyan community in Ontario between the Regions of York and Peel, and the southern portion of the County. Third, the growth of the AMJC community is projected to be north of the Peel and York Regions along the 400 highways. Fourth, there is a growing cultural and religious Ahmadiyyan footprint in the area surrounding the Subject Property, through the development of:

- a. a new seminary purchased in January 2022, the Ahmadiyya Institute of Theology and Comparative Religion, at 4073 4th Line, Cookstown (a 10-minute drive from the proposed cemetery);
- b. Maryam Mosque and potential elementary school purchased in January 2018, at 110 Line 7 South, Oro-Medonte (a 35-minute drive from the proposed cemetery); and,
- c. a new Mosque purchased in June 2023 at 52 Simcoe Road and 46 Thomas Street, Bradford (a 5-minute drive from the proposed cemetery).

The Town and the County, and thus the site of the proposed cemetery development, is strategically and geographically important to the Applicant, and the need can thus be rationally linked to the site of the proposed cemetery.

[76] Given that no Ahmadiyyan cemetery currently exists in Ontario and given that Ahmadiis are not permitted to be buried in so-called “mainstream” Muslim graveyards, the Tribunal finds that there is demonstrated need for the proposed cemetery. This is particularly true if one considers: (a) the very long timeframes associated with obtaining land use approvals for cemeteries; (b) the need to project that need well beyond a 25-year horizon; and (c) the practical reality of considering not only the current burial needs

but also the “pre-needs” for burial plots by reserving space to accommodate the long-term end-of-life needs of family and other community members. For the Tribunal, religious affiliation is a reasonable factor to consider in a needs analysis. However, the Tribunal notes that proposed cemetery will not only meet the needs for an Ahmadiyyan community, but it will also help alleviate the shortfall of cemetery space generally in both the County and the Town as outlined in the CNA.

[77] Therefore, the Tribunal finds that the proposed cemetery contemplated in the OPA and the ZBA is consistent with the “identifiable needs test” in the PPS and conforms to the similar test in the County OP.

c. Reasonable Alternative Locations

[78] Policy 2.3.6.1(4) of the PPS states that alternative locations have been evaluated and (i) there are no reasonable alternative locations which avoid prime agricultural areas; and, (ii) there are no reasonable alternative locations in prime agricultural areas with lower priority agricultural lands [emphasis added]. Policy 3.6.12 of the County OP has similar provisions.

[79] The Subject Property has not been identified or designated as a specialty crop area by the Province, County or Town. Based on the Canada Land Inventory, the Subject Property consist predominantly of Class 3 soils, although some pockets Class 1 soils are present. Nearly 40% are disturbed soil areas that are not rated. Two-thirds of the soils are lower priority agricultural lands.

[80] Mr. Chauvin testified with respect to the Rural Assessment Analysis Report (“RAAR”)². In his professional opinion, the RAAR demonstrates that there are no reasonable alternative locations among the various rural and settlement areas with the ability to accommodate the proposed use and scale due to various land use constraints. He also opined that there was no reasonable alternative area with the same or lower priority agricultural lands. Although there may be available parcels within the urban/settlement area, Mr. Chauvin opined that such parcels should be for future residential growth given Ontario’s housing crisis.

[81] The Applicant submitted that the review of alternative locations was done in consultation with Town and County staff, and the Town and the County accepted the reasoning advanced by the Applicant’s consultants. For the Applicant, there must be some comfort and reliance drawn by an applicant when public authorities do not require the examination of 100s if not 1000s of alternative sites. For the Applicant, the history of the purchase of the Subject Property when cemetery use was allowed as of right is also relevant.

[82] The Appellants submitted that the alternative location analysis of the Applicant was wanting. For them, the methodology employed by the AMJC’s consultants to conduct the reasonable alternative locations assessment is fundamentally flawed as it would have screened out the Subject Site, among other alternative locations that would not have required developing in prime agricultural areas. They argued that a simple and cost-effective desk-top exercise could have identified many more potential sites. Mr. Colville testified that the Applicants should have assessed a study area encompassing all of Simcoe County south of Barrie.

² The 2010 RAAR was prepared at the time in conjunction with proponents of a Roman Catholic cemetery.

[83] It was eventually a consensus amongst the experts that a settlement area is not, from a land use planning perspective, the preferred location for a cemetery. A cemetery is an intensive land use. Their presence in settlement areas would result in a suboptimal use of municipal infrastructure that would best be used for housing.

[84] The Tribunal agrees with the evidence of Mr. Chauvin that the use of the word “reasonable” intends to insert a qualitative rather than a quantitative assessment and imports the need for a balanced approach to any evaluation. Even Mr. Morgan conceded on cross-examination that the word “reasonable” imports a level of subjectivity to the analysis, and may mean different things in different circumstances.

[85] In particular, the Tribunal accepts Mr. Chauvin’s evidence that it would be unreasonable to identify many potential sites through a desktop exercise, because a proper analysis to validate the desktop exercise requires an undue multiplicity of expensive and time consuming “boots on the ground” approaches on too many locations. A long list of potential alternative locations becomes even more daunting if one considers whether the alternate location is on the market for sale, as well as the need to gain access rights to execute a due diligence with respect to multiple land use issue, including such things as natural features, natural hazards, MDS restrictions, conservation authority regulations.

[86] For the Tribunal, the RAAR takes a reasonable approach. It would not be reasonable to require an analysis of the AMJC’s entire market area, which potentially includes all the Greater Toronto Area and the County. This is especially true since the AMJC has already an established and growing presence at and around the Subject Property.

[87] Mr. Morgan testified that the RAAR applied excessive constraints to identify potential alternative locations. He noted in particular the 50-acre criteria and the exclusion of County Greenlands. While Mr. Morgan may be correct that County Greenlands and Town Natural areas would not *a priori* prevent cemetery developments,

their exclusion was not for the Tribunal necessarily unreasonable given the time and costs of “boots on the ground” realities noted above.

[88] The Tribunal finds that screening out Greenlands designation from the study area was appropriate due to the underlying land use constraints, including significant wetlands, woodlots, and sand and gravel resources. Similarly, it would be unreasonable that any potential sites in the Town, County or broader geographic area must be investigated as a potential alternative site. In addition, the Tribunal must also be cognisant that a potential site must be available to the market.

[89] Mr. Morgan testified that looking for alternative locations was not a laborious process, yet the Tribunal notes that he did not identify specific alternative sites until his Reply Witness Statement. The practice of holding back very important information at the reply stage is discouraged by the Tribunal. In any event, of the five alternative locations within 10 kilometers proposed through his desktop exercise (which Mr. Morgan described as “worthy of further review”), the Tribunal finds that they include properties requiring significant further “on the ground” investigations using experts (for example, MDS assessment, hydrogeological assessment, ecological assessment), properties on unpaved roads which would be unsuitable for a cemetery, locations that are actively farmed unlike the Subject Property, a property crossed by watercourses, a property with substantial improvements in the form of an equestrian barn and a riding area and a property designated as a century farm.

[90] The Tribunal finds that the study area chosen for the RAAR was appropriate, the level of analysis in the RAAR was appropriate and the alternative locations studied were reasonable. The Applicant met the onus, viewed through a reasonable and pragmatic lens, to demonstrate that they have prepared the required alternative location assessment. The PPS and the County OP require an effort which is reasonable. The Applicant are not expected to seek perfection supported by infinite resources and infinite time. The bar Mr. Morgan implicitly wishes to set through his evidence would almost be impossible to meet and cannot be supported by the Tribunal. It would amount

to a prohibition contrary to the policies of the PPS and the County OP. Those policies are stringent but they are not intended to be prohibitions.

[91] Accordingly, the Tribunal finds that the Applicant has demonstrated that alternative locations have been evaluated, there are no reasonable alternative locations which avoid prime agricultural areas and there are no reasonable alternative locations in prime agricultural areas with lower priority agricultural lands. The Tribunal finds that the evidence of Mr. Chauvin should be preferred over the evidence of Mr. Morgan. Mr. Chauvin was forthcoming and not evasive and argumentative. By contrast, Mr. Morgan's evidence was not responsive to questions, was evasive and he failed to listen carefully to questions on cross-examination. Mr. White, the Appellants' expert in land economics, admitted on cross-examination that reviewing a significant number of parcels of land would be a "pretty large undertaking" that would require the involvement of other experts, such as land use planners, transportation experts and agrologists. He also conceded that this would be expensive and time consuming.

[92] Considering the Tribunal's above findings with respect to the "identifiable needs" test and the "reasonable alternative location test" and given Mr. Chauvin's evidence that the "4-part test" has been met (which the Tribunal accepts), the Tribunal finds that the proposed use of the Subject Property for a non-agricultural purpose, *i.e.*, the development of a cemetery with accessory uses, is appropriate and is consistent with the PPS. Conformity with the County OP is also found for the same reasons.

[93] The Tribunal finds that the proposed non-agricultural use has regards to matters of provincial interest in s. 2(b) of the Planning Act, is consistent with Policy 2.3.6.2 of the PPS and conforms to Policy 3.6 of the County OP. With respect to the latter, the Tribunal notes that the ultimate paragraph of Policy 3.6.12 of the County OP provides that the impacts from any new non-agricultural uses on surrounding agricultural operations and existing land uses are to be mitigated "to the extent feasible" using Site Plan Control. On cross-examination, Mr. Colville agreed that any mitigation can be secured at the detailed design stage and secured through a site plan agreement.

[94] The Subject Property is not currently used for agricultural purposes, is not in a specialty crop area and the permanent loss of approximately 15 acres of agricultural land will have a negligible impact on agriculture in the Province. Similarly, the proposed cemetery development conforms to Policy 7.2 of the Town OP as the agricultural resource base of the Town will be maintained and preserved. The proposed development will not introduce significant building coverage and is consistent with the rural character.

d. Compatibility with Existing Character

[95] The Appellants argue that the proposed cemetery is not compatible with the surrounding agricultural and rural land use.

[96] Policy 3.6.12(b)(6) of the County OP states that non-agricultural uses in prime agricultural areas may only be permitted if it can be demonstrated that the proposed use is compatible with the surrounding agricultural uses or in a location that is separated from the primary agricultural operations by physical features and demonstrated to cause minimal disruption to the surrounding area. The County OP also states that local Municipalities shall utilize Site Plan Control to regulate the impact of non-agricultural uses in prime agricultural areas. Policy 4.2.6(3) of the Growth Plan provides that where agricultural uses and non-agricultural uses interface outside settlement areas, land use compatibility will be achieved by avoiding, minimizing and mitigating adverse impact on the agricultural system. Policy 8.7 of the Town OP requires development to occur in a manner to ensure compatibility with surrounding areas.

[97] The Tribunal accepts the evidence of Mr. Colville that the surrounding agricultural operations are typical of the Greater Golden Horseshoe area. He admitted on cross-examination that Places of Worship and cemeteries exist throughout the landscape of rural, settlement and agricultural areas.

[98] Mr. Morgan testified that he visited 19 cemeteries within a 10-minute drive of the Subject Property and stated that he found nothing like the proposed cemetery development. They ranged in sizes, being on average 2 acres, but as large at 9.5 acres. Only six cemeteries had accessory buildings. However, the Tribunal notes that all these cemeteries were established in the 19th century, likely for Christian uses. Mr. Morgan's evidence lacked ethnocultural subtlety.

[99] Tribunal accepts the evidence of Mr. Chauvin and finds that the proposed cemetery will be compatible with the existing surrounding agricultural character and uses. The cemetery will be setback from the surrounding agricultural operations. There are no MDS concerns. Landscaping, planting, vegetative buffering, and fencing, secured through Site Plan Control, will mitigate impacts, if any. The Tribunal expects that the proposed cemetery, like almost all cemeteries, will have a pastoral quality. The Tribunal notes that cemeteries, though smaller and older, are already part of the surrounding fabric.

e. Hydrogeological Issues

[100] Policy 2.2 of the PPS seeks to protect, improve and restore the quality and quantity of water in the Province, particularly where there are sensitive water resources. The Subject Property is within a Highly Vulnerable Aquifer, a Significant Groundwater Recharge Area and a wellhead protection area. Policy 2.2.2 states that mitigation measures may be required to protect water features and their hydrologic functions.

[101] Cemeteries are among the chief anthropogenic sources of pollution and contaminants in groundwater. Pathogens (such as bacteria, viruses, protozoa, and intestinal fungi) and other contaminants (such as metals and nutrients) travel through ground water and surface water and might adversely impact wetlands, creeks, and wells. Chemical substances include cosmetics, pigments, fillings, pacemakers, paints, vanishes and hardware. These contaminants have a potential negative impact on human health, as well as other forms of life.

[102] The Applicant argues that hydrogeological studies adequately address the hydrogeology issues and concerns. It notes that the Town, the County and the LSRC approved the work done to address the concerns at this stage. Mr. Chauvin explained that the LSARC reviewed the application material considering the Lake Simcoe Protection Plan and the South Georgian Bay Lake Simcoe Source Protection Plan 2015. Mr. Sirati testified with respect to the various versions of the Hydrogeological Impact Studies he prepared, and the various rounds of comments received from staff from the Town, the County and the LSACA.

[103] Mr. Sirati also testified that the rate of migration of bacterial and viruses travelling through soil could be in the range of 1 to 3 meters per year depending on soil moisture and composition, once the leachates eventually leave the coffin and the textiles in the coffin. He also explained that bacteria and viruses will not likely survive for a sufficient length of time to travel any distance that would be of concern.

[104] Mr. Sirati explained that the prohibition of embalment in the AMJC community reduced chemical contaminants, but acknowledged that the migration of other chemicals, such as metals or nitrates, will require further investigation. Although not an ecologist, Mr. Sirati explained, based on numerous studies he has reviewed throughout his long career, that the existing downgrade woodlands to the east of the proposed burial site, depending on the tree species present, were likely to have a major impact on the movement of contaminants because of the water-absorbing capacity of roots systems. Lack of water reduces the rate of migration and survivability of certain contaminants such as bacterial.

[105] The Applicant admits that further work and study will be required at the Site Plan Application stage, noting that the ZBA will require a monitoring and mitigation program for surface and groundwater secured through a site plan agreement. The program must be satisfactory to the Town. It is at that subsequent stage, the Applicant argues, that the precise location of interments will be finalized. It submits that precise burial location is

required for a fulsome assessment of the hydrogeological risks, and precise location of burial plots is a matter for Site Plan Control.

[106] The Appellants argue that there is a significant amount of information that was not before the Town and the County when they approved the OPA and ZBA, and that the Applicant has not demonstrated that the impacts to ground and surface water from the contaminants have been addressed. For the Appellants, there are many aspects of the Subject Property that are not well understood from a hydrogeological perspective including: (a) shallowness of groundwater on the site; (b) missing data on the highwater table, particularly after the spring freshet; (c) a fulsome understanding on the connections between the groundwater and the surface water on the site, including with the two ponds; (d) the existence of a discontinuous aquitard and the potential vertical movement of water; (e) the lack of assessment of neighbouring private wells, whether owned or not by the Appellants, and their pumping capacity.

[107] The Appellants were also critical of Mr. Sirati's evidence because he had no information on the total number of interments, made questionable assumptions about annual interment rates, and where the burial plots would be located. They urged the Tribunal to prefer the evidence of Ms. Gibson. For the Appellants, consistency with the PPS cannot be demonstrated in the absence of a better understanding of the hydrogeological issues at this stage, *i.e.*, before Site Plan Control.

[108] Ms. Becher Neinhaus is also concerned about the potential contamination of the water resources running to and near her property.

[109] The Tribunal heard very detailed scientific evidence as to the likely location of groundwater on the site of the proposed cemetery on the Subject Property, the likely direction of flow, the source of contamination in cemeteries, the rate at which those contaminants travel through the ground depending on groundwater features, the likely porousness and permeability of the soils on the Subject Property, the survivability of bacteria and viruses over time given soil conditions, preferential vertical and horizontal

flow pathways, mechanisms of migration of contaminants, and the rates of decay and absorption of contaminants of interest.

[110] Ms. Gibson did inform her opinion from a review of the literature, including in the UK, Australia and Europe. She criticized Mr. Sirati's studies for having failed to refer to such studies including Guidelines adopted by the then Ontario Ministry of the Environment in 1989.

[111] These latter Guidelines were made pursuant to the *Cemeteries Act*, which was repealed in 2012, and no new Guidelines have been adopted under the FBCSA, the replacement legislation. The use of such Guidelines would be of little assistance to the Tribunal. Similarly, the Tribunal finds that the studies and scientific literature advanced by Ms. Gibson are of limited probative weight in the absence of established similarities in soils and other ground conditions. The Tribunal notes Mr. Sirati's point that Ms. Gibson's studies are from geographic zones that underrepresent countries with high number of burials following the Islamic tradition.

[112] Ms. Gibson also testified that it would have been reasonable Mr. Sirati to collect baseline water quality samples from the private water wells closest to the proposed cemetery. Yet, Ms. Gibson admitted on cross-examination that she herself collected no such samples, including from the wells of her own clients.

[113] With respect to well-head protection, it is apparent to the Tribunal that the nearest municipal well is over 8 kilometers from the Subject Property. This was not the subject of much discussion at the Hearing.

[114] For domestic wells, groundwater flow directions appear, subject to more detailed study, to be away from any nearby domestic wells. It should be noted that Appellant Ferragine's well is 500 meters away from the burial area and Appellant Becher Neinhaus's well is 1000 meters away. These downgrade wells to the east of the proposed cemetery are separated from the Subject Property by a substantial woodlot. It

is also apparent to the Tribunal that potential contamination cannot occur in the absence of decomposition of a body, decomposition cannot begin in the absence of a burial, burials cannot commence without a site plan approval, and the site plan agreement will include a monitoring and mitigation program acceptable to Town. Ms. Gibson conceded in cross-examination that the monitoring program does not need to be established before an approval.

[115] The Appellants argued that Ms. Gibson had extensive experience with contaminated sites. Mr. Kemerer argued that Ms. Gibson's evidence was "untouched" in cross-examination. However, what the Tribunal perceived was a witness with little or no previous experience testifying as an expert witness before this or any other Court or Tribunal. For instance, the Tribunal finds that it was not particularly useful for her to elaborate on key issues in her Reply Witness Statement when the facts and issues could have been raised in her original and very brief Witness Statement. The Tribunal discourages "trial by ambush". She also relied on out-of-jurisdiction studies that had no demonstrated connection to the case at hand.

[116] On the hydrogeological issue, the Tribunal prefers the evidence of Mr. Sirati that the risk of contamination of wells is low at this stage and that any residual risks with respect to ground and surface water can be managed through mitigation measures. The Tribunal concludes that, if required, the mitigation measures could include: (a) only interring on gentle slopes since unsaturated groundwater flow tends to mimic the local topography; (b) avoid interring in areas where the substrate demonstrates high permeability such as coarse sand and gravel; (c) maintain buffer zones between the burial site and down gradient neighbours to allow attenuation to occur through time and distance; (d) maintain grave sites above seasonal high groundwater table; and, (e) continue a monitoring program for groundwater levels and groundwater quality in the vicinity of burials plots. These will be issues at Site Plan Control.

[117] The Tribunal finds that the holding provision in the ZBA with respect to a monitoring and mitigation program, supported by the requirement for a site plan

agreement, is an appropriate means to address the potential risks of contaminants in the ground and surface water based on what has been disclosed by the studies so far. Mr. Serati's Reports and studies completed up to this point and the future monitoring and mitigation program are, together, sufficient for the Tribunal to conclude that the OPA and ZBA are consistent with the PPS, and do not raise issues under the Planning Act, the Growth Plan, the County OP, and the Town OP.

[118] The Tribunal has modified the ZBA by requiring that the monitoring provision with respect to the monitoring and mitigation program be satisfactory not just to the Town, but also to the County and LSRCA.

f. Transportation Issues

[119] Policy 9.2.2.6 of the Town's OP provides that development can only be permitted on roads that have the capacity to accommodate the increased traffic generated by that development.

[120] Mr. Lukezic, the Applicant's transportation expert, testified with respect to a Traffic Impact Study ("TIS") prepared by his firm for the proposed cemetery development in accordance with the Terms of Reference for the study specified by the Town and the County. The TIS included both an intersection capacity analysis and a parking supply analysis. On cross-examination, Mr. Lukezic confirmed that the TIS considered agricultural traffic, particularly at harvest time, of large tractors and other large farm equipment.

[121] In his professional opinion, vehicular traffic associated with funeral services will not negatively impact local streets during peak events and the addition of site-generated traffic is projected to have negligible impact on the projected traffic operations. Turning movements at the intersections are projected to operate under capacity with acceptable levels of service delays. Traffic data was collected in mid-morning and mid-afternoon due to the site's cemetery use, instead of traditional morning and afternoon traffic peaks.

Traffic growth for the Town was considered as part of the background traffic. Pedestrian traffic was expected to be non-existent.

[122] Mr. Lower, the Appellants' transportation expert, questioned in his evidence many aspects of the TIS including the quality of the traffic data, the trip generation assumptions, the source of the data, the trip distribution relied upon, the existing conditions, the traffic background growth rate, the incomplete listing of performance indicators and the "throat length". Mr. Lukezic responded to these points in his Reply Witness Statement and provided the Tribunal with additional evidence and studies.

[123] For the Appellants, the TIS conclusions remain inaccurate for three reasons. First, because Mr. Lukezic was unable to confirm the proxy-site he had used had a funeral on the day of the traffic count. Second, the Appellants argued that funeral peak demand is not predictable, yet Mr. Lukezic conducted no assessment of an alignment of the traffic peaks. Third, Mr. Lukezic did not consider the proposed cemetery at 3369 Line 13, which shares the same road network.

[124] The Tribunal is not persuaded by these arguments. Faced with Mr. Lower's methodological criticism, Mr. Lukezic conducted further data collection. Although not perfect in some respects, it provided fresh data to the Tribunal to consider. Mr. Lower made no such effort. He was thus unable to persuade the Tribunal that traffic and parking rendered the OPA and ZBA inconsistent or non-conforming to the applicable policies.

[125] The Tribunal also notes that Mr. Lower only advanced a peer review of Mr. Lukezic's evidence and did not conduct his own analysis nor did he provide his own study. For the Tribunal, his evidence merely raised an apprehension that there might be traffic and other transportation issues without any evidence in support of that apprehension. Mr. Lukezic's evidence is more probative.

[126] Considering the weight to be placed on the evidence of both experts in the circumstances, the Tribunal finds that the traffic impact of the proposed cemetery development will not be undue. The evidence supports the conclusion that there are no intersection capacity issues and if there are impacts, they will be negligible regardless of the methodology used. Traffic will operate at satisfactory levels.

[127] Travel to the Subject Property already exists due to the activities at the existing mosque especially during times of Muslim daily prayers. Although one could expect higher volumes associated with Friday prayers, no Party provided any evidence to establish that a funeral would likely occur at the same time as Friday prayers. Mr. Lukezic explained that the TIS adapted the trip generation estimate in the Institute of Transportation Engineers Trip Generation Manual, 10th Edition, Land Use Code 566: Cemetery which presumed a Sunday rather than a Friday day of weekly observance. That Land Use Code includes buildings for funeral services in the definition of cemetery and is not limited to mere burial uses. Mr. Lukezic's reliance on the Code was appropriate. The Tribunal understands from the record that a procession of vehicles is not a typical occurrence for burial ceremonies following the Islamic tradition.

[128] With respect to parking, the Tribunal also finds that the proposed number of parking spaces is adequate. The Town's Zoning By-law would normally require 166 parking spaces, including five barrier free spaces. The Applicant is proposing 288 spaces, including 11 barrier free spaces. The Tribunal accepts the evidence of Mr. Lukezic that a conservative estimate of parking needs for the site is about 186 spaces. Consequently, the proposed supply of 288 parking spaces is more than adequate for regular attendance at funerals. In the exceptional circumstances that a funeral attracts a larger number of mourners, Mr. Lukezic recommended that a spill over parking area should be provided to avoid parking on the gravel shoulder portion of Sideroad 10, a County of Simcoe rural road with posted speed limit of 80 km/h. On cross-examination, Mr. Lower agreed that spill over parking would be advisable and could be addressed through Site Plan Control.

g. Accessory Use Buildings

[129] The matter of accessory buildings and their use was not addressed in the Appellants' closing arguments despite having presented evidence from Mr. Morgan on the subject.

[130] The ZBA provides for the following buildings and accessory uses, with specific maximum GFAs for each:

- a. A multi-purpose place of assembly building for end of life and Ahmadiyya Islamic Burial Traditions, visitation, and office (no more than 10,000 square feet)
- b. A funeral supplies building (no more than 1,800 square feet)
- c. An equipment storage building (no more than 1,800 square feet);
- d. Caretaker residences consisting together of two units within a 2-storey semi-detached building (no more than 4,193 square feet)
- e. An existing place of worship (mosque) and residence (no more than 2,695 square feet)

[131] Mr. Morgan questioned the need, size, and scale of the multipurpose building, as well as the need for two caretaker residences.

[132] The Tribunal heard evidence from Mr. Chauvin, and accepts that the proposed size and use of the assembly building is an appropriate accessory building driven by the cultural and religious practices of the AMJC community including: the need for separate viewing rooms, washroom, shoe storage rooms, entrances and foyers for men and women; a common hall for family members and relative to gather; an area to

accommodate small refreshments during end-of-life gatherings; an additional room for private mourning and reflection for the deceased immediate family prior to burial; a receiving room, a cold room, a washing room and a shroud storage area to prepare the deceased for burial; and, a small administrative office. Areas reserved for women could not be used as “spill-over” to accommodate a larger number of men, and vice-versa. The Tribunal notes that Mr. Morgan conceded on cross-examination that he had made no investigation with the AMJC or otherwise with respect to Islamic funeral practices. His objection is based on the requirements of the building code rather than the specific religious requirements or cultural specificity of the members of Ahmadiyyan community.

[133] For the Tribunal, the place of assembly represents less than 0.5% of the Subject Property and is clearly an accessory for the main cemetery use and necessary given the cultural and religious context of the proposed cemetery. The size and scale of the building is appropriate, especially given the specific needs of the AMJC community. The height limitation along with landscaping will assist in reducing any perceived mass from the structure. The revised ZBA limits the height to 9.5 metres, while the usual building height in the Agricultural zone is 11 metres. The Tribunal also accepts Mr. Chauvin’s evidence concerning the vast array of large permissible agricultural structures including drive sheds, livestock barns, riding arenas, grain elevators, silos, and greenhouses, many with vastly different aesthetic characteristics and massing profiles. The new buildings proposed would not be constructed but for the proposed cemetery.

[134] The Tribunal also finds that having two caretaker residence is not inappropriate and both are accessory uses. In the Agreed Statement of Facts, Mr. Morgan and Mr. Chauvin agreed that one caretaker residence is a reasonable component to a cemetery. Having two caretaker residences, combined in a single semi-detached building, is reasonable considering the likely ongoing security concerns on the site and to ensure a constant presence due to religious imperative of having interments rapidly after death.

[135] Given the definition of “Accessory Use” in Part 8 of the Town OP, there is a clear relationship with the use of all the new buildings with the principle use (*i.e.*, the

cemetery use) to properly recognize them as accessory use buildings. They are accessory and subordinate to the main use. By necessary implication, the Tribunal rejects Mr. Morgan's evidence that the proposed development is an assembly of uses.

ISSUE UNDER THE FBCSA

[136] The legislator has provided the Tribunal very little guidance on how to interpret what constitutes the "public interest" pursuant to s. 84(1) and 85(3) of the FBCSA. Clearly, however, the "public interest" cannot be equated to the "interest of the public".

[137] Based on caselaw of the Tribunal and its predecessor ³, advanced to be persuasive though not binding on the Tribunal, the Appellants submitted the following criteria for an analysis under the FBCSA⁴:

- a. the protection of prime agricultural areas is significant to the public interest analysis;
- b. the preferences and interests of an applicant seeking to establish a cemetery do not, on their own, represent the public interest;
- c. the ease of vehicular accessibility to the proposed site, for instance the proximity of 400 series highways, is irrelevant;

³ *Re JAAS Holdings Inc.*, CarswellOnt 8608, paragraph 14; *Ummati Cemetery v. Cramache (Township)*, 2023 LNONLT 1432; *2020151 Ontario Inc. (Creek View) Crematorium v. Norfolk (County)*, 2017 CanLII 63302.

⁴ The FBSCA replaced the repealed *Cemeteries Act*.

- d. the economic considerations of an applicant seeking to establish a cemetery, including its charitable status, is irrelevant;
- e. it is not in the public interest to defer the resolution of several outstanding questions to Site Plan Control;
- f. there must be a demonstrated need for additional cemetery land;
- g. the loss of farmland;
- h. there is a preference for cemeteries to be on rural lands
- i. the impact on the water table;
- j. the traffic impact;
- k. the impacts on surrounding farmlands; and,
- l. the lack of sufficient information.

[138] For the Appellants, the proposed cemetery did not meet the public interest test. On the final criteria, the Appellants underscores that, in their view, there was significant missing information on several critical hydrogeological concerns that remain to be evaluated.

[139] The Applicant argues that it has met the public interest test under the FBCSA and submits that the public interest test under the FBCSA must go beyond the analysis under the Planning Act. The Applicant also notes that Town staff, regarding another proposed cemetery in the Town, provided a non-exhaustive list of factors to be considered in determining the public interest: zoning; population projections, mortality rates; social determinants of health and income polarization; religious and cultural needs of death and disposition; and community use trends.

[140] The Applicant submits that for private individuals or groups alleging a risk to the public interest, it is imperative to demonstrate the harm they are alleging. Private individuals, it argues, are presumed to be pursuing their own interests rather than those of the public at large⁵, and the first defender of the public interest is the Municipal Council (and upon appeal, the Tribunal)⁶. It notes that the Town Council approved the establishment of the cemetery. It submits, based on its review of the relevant cases of the Tribunal or its predecessor⁷, there has been no successful third party appeals under the FBCSA (or the now repealed *Cemeteries Act*), and very few successful Appeals against the original Decision of a Municipal Council.

[141] From the outset, and throughout the Hearing, the Tribunal inquired what was the appropriate interpretation of the public interest test set out in the FBCSA. The Tribunal proposed to the Parties a conceptual model based on a Venn diagram, where one circle, representing the statutory tests under the Planning Act, overlaps with a second circle, representing the “public interest test” under the FBCSA. All Parties agreed that this was a useful conceptual model. In final argument, Mr. Tang, Co-Counsel for the

⁵ *RJR-MacDonald Inc. v. Canada (AG)*, 1994 1 SCR 311, paragraph 68.

⁶ *Ajax (town) v. Pickering (City)*, [2017] O.M.B.D. No. 663, paragraph 21; *Whitby (town) v. Oshawa (City)*, [2009] O.M.B.D. No. 663, paragraph 21; *Jaglowiz v. Muskoka Lakes (Township)*, [2018] O.M.B.D. No. 140, paragraph 26.

⁷ *Miller v. Powassan (Municipality)*, 2015 CarswellOnt 13919; *The Roman Catholic Episcopal Corporation of the Diocese London in Ontario v. Lakeshore (Town)*, 2019 CanLII 94091; *Unmati Cemetery v. Cramahe (Township)*, 2023 CarswellOnt 18441; *2020151 Ontario Inc. (Creek View Crematorium) v. Norfolk (County)*, 2017 CarswellOnt 15116; *Dozzi v. Beckwith (Township)*, 2003 CarswellOnt 6139; *Birch Mount Park Inc. v. Toronto (City)*, 2010 CarswellOnt 3085; *Re JAAS Holdings Inc.*, 1998 CarswellOnt 8608; *Steeple Hill on the Lake v. Ajax (Town)*, 2018 CarswellOnt 6397

Appellants Ferragine and the Eeks, agreed that under the FBCSA analysis the Tribunal may look beyond the Planning Act considerations.

[142] For the Tribunal, there is a considerable zone of overlap between the two circles. There are, of course, theoretically certain matters under the Planning Act which are wholly irrelevant to the FBCSA's public interest test. Similarly, there are matters under to the FBCSA analysis which are wholly irrelevant to the Planning Act analysis.

[143] Given the Tribunal's finding under the Planning Act issues which, if applied under the FBCSA analysis support the dismissal of the FBCSA Appeal, the Tribunal must ask itself whether there are other non-Planning Act considerations advanced by the Appellants that supports the allowing the Appellants' Appeal under the FBCSA. The Tribunal finds that there are none. The "significant missing information" argument raised by the Appellants is essentially information pertaining to the Planning Act analysis.

[144] On the contrary, the Tribunal finds that there are non-Planning Act public interest factors that support the establishment of the proposed cemetery. The Tribunal accepts the submission of the Applicant that the Ahmadiyyan community is a persecuted religious group that does not have a faith-based cemetery in this Province to bury deceased members of their community even though 77% of their population in Canada resides in Ontario. In the *Unmati* case⁸, the Tribunal noted that burials could occur in existing Muslim cemeteries in Ottawa or Toronto until suitable land is found. That option is not available to members of the Ahmadiyyan community who desire a final resting place in a faith-based cemetery. Moreover, the location is central to the growing population of their community between the southern part of Simcoe County and north of the York and Peel Regions. The cemetery is important to the community's strategic growth in and around the Town and aligns with the community's commitment to the

⁸ *Unmati Cemetery v. Cramabe (Township)*, *supra*, paragraph 100.

Town. It will provide members of the AMJC community a central place of religious significance and will include a designated section for the Musi population.

CONCLUSION

[145] The Tribunal finds that the OPA and ZBA had regard to the relevant matters of provincial interest set out in s. 2 of the Planning Act, are consistent with PPS 2020 pursuant to s. 3(5)(a) of the Planning Act, conform to the Growth Plan pursuant to s. 3(5)(b) of the Planning Act, conform to the County OP pursuant to s. 24 of the Planning Act, conform to the Town OP pursuant to s. 24 of the Planning Act, constitute good planning and are in the public interest pursuant to the Planning Act. The Tribunal makes its findings while exercising regard for the decision of the Town and County pursuant to section 2.1(1)(a) of the Planning Act and the extensive record before them, but also being cognisant that the present Appeal is an appeal *de novo*.⁹

[146] The Tribunal also finds that the proposed cemetery is in the public interest pursuant to the FBCSA.

[147] The Tribunal agrees with the Applicant that it has done everything required under the statutory requirements pursuant to the Planning Act and the FBCSA up to this stage. Further work will proceed under the Site Plan Control process. In the opinion of the Tribunal, the Applicant has successfully reached the first milestone.

ORDER

[148] **THE TRIBUNAL ORDERS** that:

⁹ *City of Ottawa v. Minto Communities Inc.*, 2009 CanLII 65802, paragraphs 29 and 31.

- a. The Appeal with respect to the Official Plan is allowed in part and the Official Plan for the Town of Bradford West-Gwillimbury is amended as set out in **Attachment 1** to this Order;
- b. The Appeal with respect to the Zoning By-law Amendment is allowed in part and By-law No. 2010-050, as amended, of Town of Bradford West-Gwillimbury is hereby further amended as set out in **Attachment 2** to this Order; the Tribunal authorizes the Municipal Clerk of Town of Bradford West-Gwillimbury to assign a number to this By-law for record keeping purposes;
- c. The Appeals pursuant to the *Funeral, Burials, Cremation Services Act* are dismissed.

“Jean Pierre-Blais”

JEAN-PIERRE BLAIS
MEMBER

Ontario Land Tribunal

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

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

ATTACHMENT 1

Amendment to the Official Plan of the Town of Bradford West-Gwillimbury

*North Part of Lot 11, Concession 11, being Part of Part 1 on Plan 51R-26166,
known municipally as 3999 Sideroad 10*

THE CONSTITUTIONAL STATEMENT

The following Amendment to the Official Plan of the Town of Bradford West Gwillimbury consists of two parts.

PART 1 - THE PREAMBLE

The PREAMBLE consists of the purpose, location and basis for the Amendment and does not constitute a formal part of the actual Amendment.

PART 2 - THE AMENDMENT

The AMENDMENT consisting of the text and Schedule 1 constitutes Amendment No. 32 to the Official Plan for the Town of Bradford West Gwillimbury.

PART 1 - THE PREAMBLE

1. PURPOSE OF THE AMENDMENT

The purpose of this Amendment is to introduce site specific policies for the agricultural portion of the subject lands and to redesignate a portion of land as Special Policy Area No. 7.2.10 affecting the lands shown on "Schedule 1" attached hereto, to clarify the permitted uses on the subject lands.

2. LANDS SUBJECT TO THE AMENDMENT

The lands affected by this Amendment are shown on "Schedule 1" attached hereto as "Lands Subject to Amendment 32", hereinafter referred to as the subject lands. The subject lands are located east of Sideroad 10 and south of Line 12, legally described as North Part of Lot 11, Concession 11, being Part of Part 1 on Plan 51R- 26166, municipally known as 3999 Sideroad 10, and have an area of approximately 19.5 hectares (48.4 acres). The proposed amendment will facilitate development of a cemetery with accessory uses consisting of a multi purpose building, maintenance buildings and residences, as well as recognize a place of worship.

3. BASIS OF THIS AMENDMENT

The subject property contains an existing detached residence used as a Place of Worship, a use permitted on the property under the former Township of West Gwillimbury Zoning By-law 79B25, as amended. The former Township of West Gwillimbury's Zoning By-law 79B25, as amended, continues to apply to the subject property, which permits a cemetery use in addition to a place of worship.

The proposed development and associated Official Plan Amendment is consistent with the application Provincial and County plans and policies, and meets the general intent of the Official Plan and Zoning By-law.

An associated Zoning By-law amendment is also required to implement site-specific development standards, including detailing of permitted uses and lot coverage and setbacks from environmental features.

PART 2 - THE AMENDMENT

1. INTRODUCTION

Part 2 - The Amendment consisting of the following text and attached Schedule A constitutes Amendment No. 32 to the Town of Bradford West Gwillimbury Official Plan.

2. DETAILS OF THE AMENDMENT

The Town of Bradford West Gwillimbury Official Plan is amended as follows:

- (a) Schedule A "Rural Land Use Plan" is amended to identify Special Policy Area (SP 7.2.10) on the Subject Lands
- (b) A new subsection "7.2.10 Special Policy Area – North Part of Lot 11, Concession 11, Town of Bradford West Gwillimbury" is added to Town of Bradford West Gwillimbury Official Plan Amendment No. 32, following subsection 7.2.9, as follows:

"7.2.10 Special Policy Area – Part of the North Half of Lot 11, Concession 11, Town of Bradford West Gwillimbury

On those lands designated "Agricultural" on Schedule "A" attached hereto which are identified as "Special Policy Area (Section 7.2.10)" the following policies shall apply:

- A cemetery shall be permitted.
- Accessory uses permitted in conjunction with the cemetery shall include:

- A multi-purpose place of assembly building for end of life and Ahmadiyya Islamic Burial Traditions, visitation and office consisting of not more than 929 sq m (10,000 sq ft);
- A funeral supplies building consisting of not more than 167.23 sq m (1,800 sq ft);
- An equipment storage building consisting of not more than 167.23 sq m (1,800 sq ft);
- caretaker residences, cumulatively consisting of not more than 2 units within a semi-detached building, and not more than 390 sq m (4,193 sq ft);
- an existing Place of Worship and residence consisting of not more than 250.40 sq m (2,695.29 sq ft)

The cumulative area of the lot that may be occupied by all buildings or Structures shall not exceed approximately 2% of the lands subject to this Special Policy Area, excluding the Environmental Protection lands.

All new development shall be set back a minimum of 15 metres from 10th Sideroad and a minimum of 30 m from the limits of the existing tree line coverage as per LSRCA regulations.”

3. IMPLEMENTATION AND INTERPRETATION

The provisions of the Official Plan of the Town of Bradford West Gwillimbury as amended with respect to the implementation and interpretation of this Plan, shall also apply to this Official Plan Amendment.

SCHEDULE 1

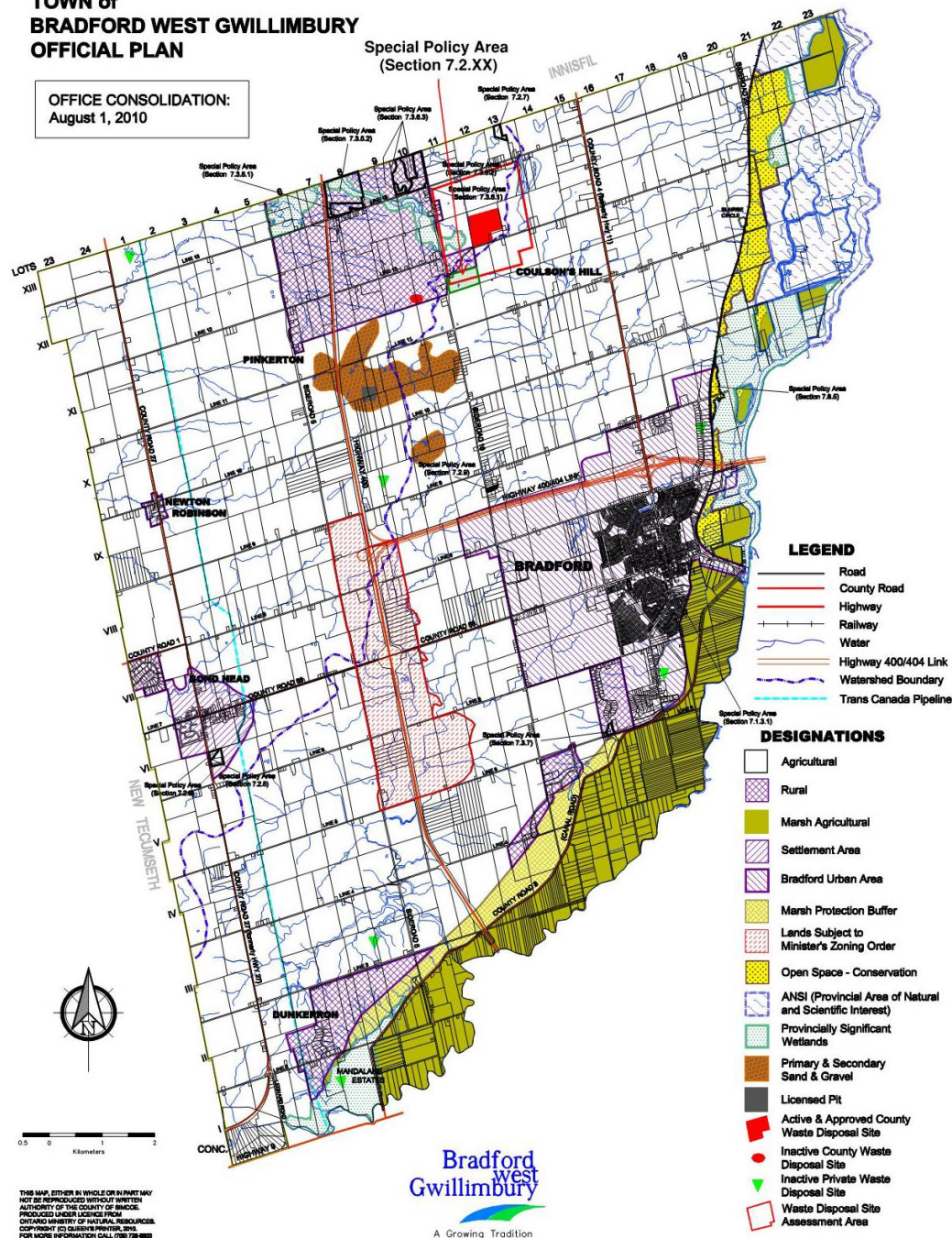
SCHEDULE SP-1

Schedule A RURAL LAND USE PLAN

Schedule A as approved the the Ontario Municipal Board.

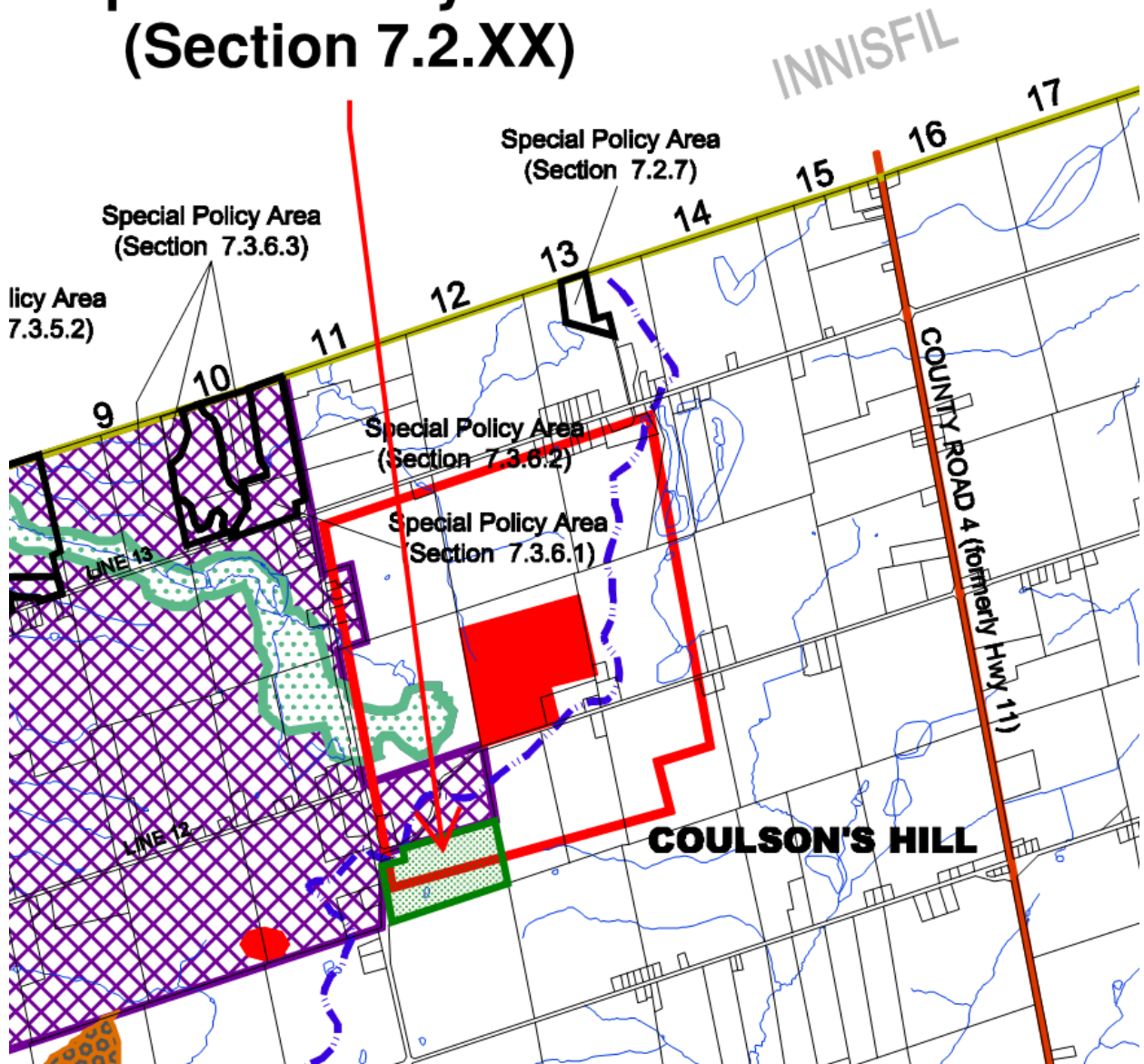
TOWN of BRADFORD WEST GWILLIMBURY OFFICIAL PLAN

OFFICE CONSOLIDATION:
August 1, 2010



**SCHEDULE SP-1
(ZOOMED IN)**

Special Policy Area (Section 7.2.XX)



ATTACHMENT 2

A By-law to amend Zoning By-law 2010-050 of the Town of West Gwillimbury, as amended, for lands located in North Part of Lot 11, Concession 11 being Part 1 of Part 1 on Plan 51R-26166 and municipally known as 3999 Sideroad 10, Town of Bradford West Gwillimbury, County of Simcoe.

-
1. All provisions of By-law 2010-050 shall apply to the lands located in the North Part of Lot 11, Concession 11 and being Part of Part 1 on Plan 51R-26106 and municipally known as 3999 Sideroad 10, Town of Bradford West Gwillimbury, County of Simcoe as shown on Schedule "A" attached hereto and forming part of the By-law except as varied by Section 3 herein.
 2. By-law 2010-50 including Schedule 'B' thereto, is hereby further amended by rezoning the lands municipally known as 3999 Sideroad 10 to the Agricultural Exception Holding "A*35 (H1)(H#)" and "Environmental Protection "EP" Zones, as shown on Schedule "A" attached hereto and forming part of this By-law.
 3. Table 12.1 of Part 12 of By-law 2010-050 is hereby further amended by adding the following exception:

EXCEPTION	SCHEDULE	LOCATION	REGULATIONS
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A*35	Schedule A Map 9 Schedule A Map 10	Part of the North Half of Lot 11, Concession 11; 3999 Sideroad 10	<p>On lands zoned A*35, a cemetery use and accessory uses shall be permitted.</p> <p>A maximum combined gross floor area of 2,220 sq m (23,871 sq ft) shall be permitted for all buildings and structures on the Subject Lands. Accessory uses permitted in conjunction with the cemetery shall include:</p> <ul style="list-style-type: none"> - a multi purpose place of assembly building for end of life and Ahmadiyya Islamic Burial Traditions, visitation and office consisting of not more than 929 sq m (10,000 sq ft); - a funeral supplies building consisting of not more than 167.23 sq m (1,800 sq ft); - an equipment storage building consisting of not more than 167.23 sq m (1,800 sq ft); - caretaker residences, cumulatively consisting of not more than 2 units within a 2-storey semi-detached building, and not more than 390 sq. m (4,193 sq. ft); - an existing Place of Worship and residence consisting of not more than 250.40 sq m (2,695.29 sq ft). <p>All new development shall be set back a minimum of 15 metres from 10th Sideroad and a minimum of 30 m from the limits of the existing tree line coverage as per LSRCA regulations.</p> <p>A maximum height of 9.5 m shall be permitted for all new development.</p>
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4. The Holding (H#) provision may be lifted once a groundwater mitigation and monitoring program is prepared to the satisfaction of the Town, the County of

Simcoe and the LSRCA with any mitigation and/or monitoring requirements secured through a Site Plan Agreement.

5. This By-law shall come into force and take effect pursuant to the provisions of the *Planning Act*, R.S.O. 1990, c. P.13, as amended.

SCHEDULE A**TOWN OF BRADFORD WEST GWILLIMBURY****Schedule "A"****By-law 2022-97**

Area zoned to the Agricultural Exception Hold "A*35 (H1)(H#)" Zone.



Area zoned to the Agricultural Exception Hold "A*35 (H1)(H2)(H#)" Zone



Area zoned to the Environmental Protection "EP" Zone