

Court File Number: CV-19-00058683-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

TWO SISTERS RESORTS CORP. and SOLMAR (NIAGARA 2) INC.

Applicants

and

THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE

Respondent

APPLICATION under Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194 and under Section 273 of the *Municipal Act 2001*, S.O. 2001, c. 25, as amended

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following pages.

THIS APPLICATION will come on for a hearing on **Thursday February 14th, 2019, at 10:00 a.m.**, at **59 Church Street**, St. Catharines, Ontario.

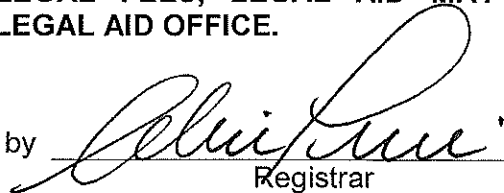
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicants' lawyer(s), and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: JAN 25 2019

Signed by


Registrar

Address of Court office 59 Church Street
St. Catharines, Ontario

TO: The Corporation of the Town of Niagara-on-the-Lake
1593 Creek Road
Virgil, ON L0S 1T0

APPLICATION

THE APPLICATION IS FOR:

1. Two Sisters Resorts Corp. and Solmar (Niagara 2) Inc. (together, the "**Applicants**", and individually, the "**Applicant**"), make application against the Respondent, The Corporation of the Town of Niagara-on-the-Lake (the "**Town**") for:
 - (a) an Order quashing the following for illegality, pursuant to s. 273(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25:
 - (a) Resolution No. 2 of the Council of the Respondent passed at the Special Council Meeting held on August 13, 2018 (the "**Resolution**"), which approved recommendations of the Municipal Heritage Committee ("**MHC**") and directed that "Notices of Intention to Designate" (collectively, the "**Notices of Intention**") under the *Ontario Heritage Act*, R.S.O. 1990, c. O.18 (the "**OHA**") be issued for the properties known municipally as 144 John Street East, 176 John Street East, 200 John Street East and 588 Charlotte Street, Niagara-on-the-Lake; and
 - (b) By-law 5079-18 of the Respondent (the "**By-law**"), being a By-law to confirm the proceedings of the Special Council Meeting held on August 13, 2018 wherein the Resolution was passed, with respect to the By-Law's application to the Resolution,

(the By-law and the Resolution collectively being the "**Impugned Instruments**");
 - (b) the Applicants' costs of the Application on a substantial indemnity basis; and

- (c) such further and other relief as counsel may advise and this Honourable Court permit.

THE GROUNDS FOR THE APPLICATION ARE:

In a Nutshell

- 2. The Town has illegally attempted to designate the Applicants' lands under the *OHA*. *The Town's actions must be undone.*
- 3. Specifically, the Impugned Instruments should be quashed for illegality upon the following grounds:
 - (a) The Town failed to comply with the requirements of the *OHA* in passing the Impugned Instruments;
 - (b) The By-law does not conform with the Town's Official Plan, thereby directly contravening s. 24(1) of the *Planning Act*, R.S.O. 1990, c. P.13;
 - (c) The Impugned Instruments rest inextricably upon the Notices of Intention, which are impermissibly vague and overbroad; and
 - (d) In passing the Impugned Instruments, the Town acted outside the fundamental principles of administrative law.

Background

The Parties

- 4. The Applicants are:
 - (a) Two Sisters Resorts Corp. ("**Two Sisters**"), the owner of lands known municipally as 144 and 176 John Street East, in the Town, which it purchased in February, 2017; and
 - (b) Solmar (Niagara 2) Inc. ("**Solmar**"), the owner of lands known municipally as 200 John Street East and 588 Charlotte Street in the Town, which it purchased in January, 2018 and April, 2018, respectively.

(Collectively, all of the lands which are the subject of this Application are referred to as the "**Subject Lands**".)

5. The Respondent Town is a municipal corporation as described in the *Municipal Act, 2001*, S.O. c. 25, as amended.

The Subject Lands

6. The Subject Lands can be characterized in two groups.
 - (a) The first group consists of the 144 and 176 John Street East properties, which are known in the community as the “**Randwood Lands**”.
 - (b) The second group consists of parcels adjacent to the Randwood Lands and known municipally as 200 John Street East and 588 Charlotte Street (the “**Adjacent Lands**”).
 - (c) The Randwood Lands and the Adjacent Lands were originally part of a larger holding (referred to in the community as the “Rand Estate”), which was subdivided.
7. The Randwood Lands are listed on the Town’s Municipal Register of Cultural Heritage Properties (the “**Register**”), but are not designated under the *OHA*.
8. The Adjacent Lands were listed on the Register in April, 2018, but are not designated.
9. Pursuant to the *Planning Act*, the Randwood Lands are designated under the Town’s Official Plan, and zoned, for use as a hotel and conference centre, as a result of development approvals obtained from the Town in 2011 by a previous owner (the “**2011 Approvals**”).
 - (a) The 2011 Approvals for the Randwood Lands include Official Plan Amendment No. 51 (“**OPA 51**”). Section 2 of OPA 51 says that:

“...at site plan approval stage, the property shall be designated under Part IV of the Ontario Heritage Act.”

[emphasis added]

- (b) Also, in the Preamble of OPA 51, non-operative, explanatory text says that:

“The property will undergo designation under Part IV of the Ontario Heritage Act *at the site plan application stage, once the details of the development have been determined.*”

[emphasis added]

10. Pursuant to the *Planning Act*:

- (a) The property at 588 Charlotte Street is designated “Low Density Residential” and is zoned “Residential Development (RD)”.
- (b) Approximately half of 200 John Street East is within the urban boundary, and also designated Low Density Residential, with the remainder being outside the urban area and designated “Agricultural”. The land designated for residential use is zoned Residential Development (RD).

11. The *OHA* prohibits the alteration or demolition of buildings or structures for which a Notice of Intention has been issued, unless, the Notice of Intention is withdrawn by the municipality, or the municipality grants approval. The *OHA* also prohibits the alteration of property if the alteration is likely to affect the property’s “heritage attributes”.

12. These prohibitions are currently in effect for all of the Subject Lands as a result of the passing of the Impugned Instruments.

The Planning Applications

The Randwood Lands

13. In November 2017, Two Sisters filed applications under the *Planning Act* for a Zoning By-law Amendment and Site Plan Approval for the Randwood Lands

(collectively, the “**Randwood Planning Applications**”). These propose to maintain the previously-approved hotel and associated uses, with changes to the number of hotel rooms, the hotel height, the number of restaurants and outdoor patios, seating capacity, lot coverage and setbacks.

14. As part of the Randwood Planning Applications, Two Sisters submitted a *Heritage Impact Assessment* prepared by Leah Wallace Land Use & Heritage Planning Services, dated October 30, 2017 (the “**Applicants’ HIA**”). It assessed the significant heritage resources on the Subject Lands.
15. The Applicants’ *HIA* evaluated the heritage impacts of the proposed hotel and conference centre development on the Randwood Lands, as well as for a proposed residential Plan of Subdivision on the Adjacent Lands, although applications had not yet been submitted for the latter.
16. On January 25, 2018, a public open house was hosted by the Town for the Randwood Planning Applications.
17. In response to input received from commenting agencies and the public, a resubmission of the Randwood Planning Applications was filed with the Town on July 10, 2018, which included revisions to the Site Plan.
18. Council failed to make a decision on the Randwood Planning Applications within the time period required by the *Planning Act*, and Two Sisters appealed them (the “**Appeals**”) to the Local Planning Appeal Tribunal (the “**LPAT**”) on September 19, 2018. The Appeals are being processed by the LPAT in the normal course.

The Adjacent Lands

19. Solmar intends to develop the Adjacent Lands as a residential subdivision. To that end, it participated in a pre-application consultation meeting with Town staff on July 6th, 2017.

20. Formal applications under the *Planning Act* have not yet been filed with the Town for the Adjacent Lands.

The Heritage Designation Process For The Subject Lands

21. The Applicants' involvement in a potential heritage designation of the Randwood Lands first began in June, 2017, when the Applicants were given notice that the Town's MHC would be considering a request by one of its members for a heritage designation of the Randwood Lands at its June 13, 2017 meeting.
22. Representatives of the Applicants attended the meeting and advised the MHC that it was Two Sisters' intention to make a designation request for the Randwood Lands at the site plan approval stage, in accordance with the requirements in OPA 51.
23. At that meeting, the MHC suggested that a list of important heritage features be created and brought forward to Town Council, and that a site visit be undertaken. However, no formal recommendations were adopted or forwarded to Council at that time.
24. Eight months later, on February 13, 2018, the Randwood Planning Applications were scheduled for consideration by the MHC, pursuant to its mandate to advise Council on planning applications with an impact on heritage resources. At that meeting:
 - (a) Directly contrary to Town By-law No. 3760-03, which establishes the terms of reference and operating procedures for the MHC, and also contrary to the position of the Town Clerk, the MHC accepted deputations from members of the public on the Planning Applications. Representatives of the Applicants, and the Applicants' heritage planning consultant, made deputations.
 - (b) The MHC adopted recommendations to be made to Council, including that:

- (i) A detailed inventory and analysis be provided with respect to interior heritage attributes at structures on the Subject Lands, as well as for all "exterior elements" of the "Dunington-Grubb landscape";
 - (ii) An assessment under Ontario Regulation 9/06 *Criteria for Determining Cultural Heritage Value or Interest* made under the OHA (a "**Regulation 9/06 Analysis**") be undertaken for all of the Subject Lands, *including the Adjacent Lands*; and
 - (iii) The Adjacent Lands be listed on the Register.
- (c) The Adjacent Lands were not on the agenda, nor was there any notice to Solmar that they would be addressed.
25. The MHC's February 13, 2018 recommendations were considered by Town Council's Committee of the Whole ("**COW**") on March 5, 2018.
26. The COW approved the MHC recommendations and amended them, *inter alia*, to require that the Regulation 9/06 Analysis be completed *prior to* site plan approval, to "request" that the Applicant allow two members of the MHC to photograph the property, and to require the Applicant to "complete a heritage permit application".
27. Approximately a month later, on March 19, 2018, Town Council deferred consideration of the COW's March 5, 2018 recommendations, at the Applicants' suggestion, to allow the Applicants time to meet with residents and attempt to resolve issues related to the Planning Applications and the heritage concerns. This meeting took place, but no resolution emerged.
28. On April 16, 2018, Council adopted the March 5 recommendations of the COW with additional amendments.

29. On May 8, 2018, *without notice to the Applicants*, MHC considered and approved recommendations to Council to proceed with a heritage designation of all of the Subject Lands, and to refuse the Randwood Planning Applications.
30. On June 4, 2018, the COW considered the MHC's May 8, 2018 recommendations, and approved recommendations to Council to undertake the heritage designation process for all of the Subject Lands and direct staff to prepare and give Notices of Intention for all of the Subject Lands.
31. On June 11, 2018, Council adopted the recommendations of the COW, without amendment.
32. On June 25, 2018, Solmar gave notice to the Town, as required by the *OHA*, of its intention to demolish certain structures on the Adjacent Lands, which the Applicants' *HIA* had concluded were not of heritage significance or interest (the "**Demolition Request**").
33. On August 8, 2018, the MHC considered a report from Town planning staff containing draft Notices of Intention for all parcels of the Subject Lands, and recommending that the Notices be issued (the "**Staff Report**"). Notwithstanding all that had happened to that date, this was the first time the Town had a report from its own staff. The Staff Report:
 - (a) Indicated that the Subject Lands had been evaluated by the Town's retained heritage consultants, Letourneau Heritage Consulting Inc. (the "**Town's Consultant**"), based on Provincial criteria, and were considered to be of cultural heritage value or interest, in whole.
 - (b) Said that "it is anticipated that *the key heritage attributes will be further refined* once the notices of intention to designate have been served and prior to adoption of the by-laws". [*emphasis added*]
 - (c) Recommended, in respect of the Demolition Request, that with the exception of one building at 588 Charlotte Street and an accessory

structure at 200 John Street East, permission be granted to demolish the remaining structures.

34. At the time that the Staff Report and the draft Notices were published:
 - (a) There was no heritage impact report from the Town's Consultant, a fact confirmed by Town staff *via* e-mail, and verbally by Ms. Amy Barnes, an employee with the Town's Consultant, at the August 8, 2018 MHC meeting; and
 - (b) Ms. Barnes confirmed at the same meeting that she had not visited the Randwood Lands as of that date.
35. At the August 8, 2018 meeting, the MHC adopted the recommendations in the Staff Report, but amended the draft Notices for the Adjacent Lands to include all of the structures included in the Demolition Request, *despite the advice and recommendations from the Staff Report and Ms. Barnes at the meeting that these structures did not constitute heritage attributes, and notwithstanding that there was no expert report in the Town's hands justifying this course of action.*
36. On August 13, 2018, Council directed that the Notices of Intention - as recommended by the MHC - be given under the OHA for each of the parcels of the Subject Lands.
37. The Applicants have appealed the merits of the proposed designation of the Subject Lands to the Conservation Review Board (the "**CRB**"). Those appeals are being processed by the CRB in the normal course.
38. In November of 2018, over two months *after* Council's direction to issue the Notices, the Applicants were provided with a report dated September, 2018 from the Town's Consultant, *Cultural Heritage Evaluation Report* (the "**Town Consultant's Report**"). This is the first document produced by the Town that contains a Regulation 9/06 Analysis for the Subject Lands.

The Impugned Instruments Should Be Quashed

Non-Compliance With The OHA

39. In passing the Impugned Instruments, the Town did not comply with the requirements of s. 29(1) of the *OHA*.
- (a) The Town passed the Resolution to give the Notices of Intention before the required justification through a Regulation 9/06 Analysis was completed by the Town's Consultant, which was necessary in order to determine whether, and which components of, the Randwood Lands and the Adjacent Lands meet the prescribed criteria.
 - (b) In fact, at the time that the Impugned Instruments were passed, the Town Consultant's Report had not been completed, and the consultants had not even attended on the Randwood Lands.
 - (c) The Notices of Intention do not contain a proper description of the heritage attributes of the Subject Lands, as required by s. 29(4) of the *OHA*.
40. Council knew, or ought to have known, that the Notices of Intention were improper, because a report justifying their issuance had not been completed, and was not before Council when it passed the Impugned Instruments.
41. Further, the Staff Report explicitly acknowledged that the heritage attributes in the Notices of Intention were *anticipated to change* after the Notices were issued.
42. In addition, with respect to the Adjacent Lands, the Notices of Intention include attributes added by the MHC without any heritage conservation justification, and in fact contrary to clear acknowledgement by Town Staff and the Town's Consultant that *they are not heritage attributes*.

The By-law Does Not Conform With The Town's Official Plan

43. Subsection 24(1) of the *Planning Act* prohibits the Town from passing a by-law for any purpose which does not conform with its Official Plan.

44. OPA 51 specifically directs that the heritage designation of the Randwood Lands will be done at the time of Site Plan Approval, and the explanatory Preamble says that this is to happen once the “details of the development” have been “determined”.
- (a) At the time that the Notices of Intention were issued, thereby initiating the heritage designation of the lands, a Site Plan Approval Application had been filed by Two Sisters for the Randwood Lands. However, that Application had not been approved (and still has not been), has subsequently been appealed to the LPAT, and is still subject to review, amendment, and approval or refusal, in that forum.
 - (b) Also, just one month before the Impugned Instruments were passed, Two Sisters had filed a resubmission of its Planning Applications, which included revisions to the Site Plan.
 - (c) There is no way to characterize these facts other than to say that the “details of development” have *not* been “determined”, and the proposed designation is not happening at the “site plan approval stage”.
45. In passing the Impugned Instruments, the Town has directly contravened the clear and explicit direction in OPA 51 about the timing of designation. The By-law through which this was done therefore fails to conform with the Town’s Official Plan, violates s. 24(1) of the *Planning Act*, and is illegal for that reason.

The Notices of Intention are Vague and Overbroad

46. The Impugned Instruments are based upon the Notices of Intention, and dependent upon them for legitimacy.
47. The Notices of Intention identify heritage attributes that are vague and overbroad, and consequently do not allow the Applicants to reasonably understand what can or cannot be done with the Subject Lands.

48. Specifically, the Applicants cannot know whether or where demolition or alterations on the Subject Lands would be permitted without municipal consent if they are designated under the OHA, because *they cannot know with any degree of certainty what the heritage attributes of the Subject Lands are.*
49. The Notices of Intention identify the following “heritage attributes”:
 - (a) For 176 John Street East, the “surviving elements of the Dunington-Grubb landscape *including* the formal stone path, sunken lily pond with sculpture, arched stone bridges”. [*emphasis added*]
 - (b) For 144 and 200 John Street East: the “surviving elements of the Dunington-Grubb landscape”.
50. Put simply, there is no way to know what are, precisely and comprehensively, the “surviving elements of the Dunington-Grubb landscape”, the terminology used for all three of the properties.
51. The three properties are, in total, approximately 15 hectares in size, the majority of which is not occupied by buildings or structures, and could therefore be considered “landscape”. The Applicants have no way of knowing from the Notices of Intention whether it is *all or only parts of* their properties that are part of the “Dunington-Grubb landscape”, nor can they tell what the “surviving elements” are.
52. This problem is hardly alleviated for 176 John Street East by the inclusion of a list of attributes for that specific parcel, because *the list is preceded by the word “including”*. This obviously opens up the possibility that the *entire property* is within the “Dunington-Grubb landscape”, or its “surviving elements”, without apparent limitation.
53. As noted in paragraphs 11 and 12 above, the effect of the Notices of Intention is to significantly restrict the Applicants’ rights to alter their properties and to demolish or remove buildings or structures. And under the OHA, *these*

prohibitions apply now and going forward as if a designating By-law had been passed, and regardless of any rights to appeal or challenge the Notices.

54. In summary, the Notices of Intention are so broad and vague that the Applicants cannot discern which parts of the Subject Lands are heritage attributes; they therefore cannot know what they must do and not do in order to comply with their obligations under the OHA.

The Town Violated the Fundamental Principles of Administrative Law

55. In passing the Impugned Instruments, the Town acted unreasonably and arbitrarily, without the degree of fairness, openness and transparency required of a municipal government, and contrary to the fundamental principles of administrative justice.

56. The Town decided to pass the Impugned Instruments and issue the Notices of Intention even though:

- (a) the Town's Consultant had not completed a heritage assessment, or even attended at the Randwood Lands;
- (b) the Town was told that the list of heritage attributes in the Notices was not final, and actually included structures that were *not* heritage attributes;
- (c) the Planning Applications, and in particular the Site Plan Application, were still being processed, and the details of the development for the Randwood Lands were not determined; and
- (d) there is no public record of a principled reason or justification for the Town to do so.

57. By contrast, from the time that they first engaged on the heritage issues with respect to the Randwood Lands in June, 2017, and throughout the entire process leading up to the passage of the Impugned Instruments, the Applicants maintained their commitment to have the Randwood Lands designated under the

OHA once the details of the development were determined at the Site Plan approval stage, in accordance with the explicit policy direction in OPA 51.

Statutes and Regulations

58. *Ontario Heritage Act*, R.S.O. 1990, c. O.18, as amended.
59. Ontario Regulation 9/06, *Criteria For Determining Cultural Heritage Value or Interest*, made under the OHA.
60. *Municipal Act, 2001*, S.O. 2001, c. 25, as amended.
61. *Planning Act*, R.S.O. 1990, c. P.13, as amended.
62. Rules 14.02 and 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
63. Such further and other grounds as counsel may advise and this Honorable Court may permit.

DOCUMENTARY EVIDENCE TO BE RELIED ON:

64. The following documentary evidence will be used at the Hearing of the Application:
 - (a) The Affidavits of Giuseppe Paolicelli and Leah Wallace, to be sworn, served and filed; and
 - (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

Date: January 25, 2019

DAVIES HOWE LLP

The Tenth Floor
425 Adelaide St. W.
Toronto, ON
M5V 3C1

Michael Melling (LSO # 27422I)

michaelm@davieshowe.com

Meaghan McDermid (LSO #60212I)

meaghanm@davieshowe.com

Tel: (416) 977-7088

Fax: (416) 977-8931

SULLIVAN MAHONEY LLP

40 Queen St., P.O. Box 1360
St. Catharines, ON
L2R 6Z2

**Thomas A. Richardson, Q.C.
(LSO #13114I)**

tarichardson@sullivanmahoney.com

Sara J. Premi (LSO #36046Q)

sjpremi@sullivanmahoney.com

Tel: (905) 688-6655

Fax: (905) 688-5814

Lawyers for the Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT

St. Catharines, Ontario

NOTICE OF APPLICATION

DAVIES HOWE LLP

425 Adelaide St. W., 10th Floor
Toronto, ON M5V 3C1

Michael Melling (LSO # 274221)

Meaghan McDermid (LSO #602121)

Tel: (416) 977-7088

Fax: (416) 977-8931

SULLIVAN MAHONEY LLP

40 Queen St., P.O. Box 1360
St. Catharines, ON L2R 6Z2

Thomas A. Richardson (LSO #131141)

Sara J. Premi (LSO #36046Q)

Tel: (905) 688-6655

Fax: (905) 688-5814

Lawyers for the Applicants