

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: June 26, 2014

CASE NO(S): PL100472

Sifton Properties Limited has appealed to the Ontario Municipal Board under subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from the failure of the City of Brantford to make a decision respecting a proposed plan of subdivision on lands composed of Lots 21 to 23, Concession 3 (277 Hardy Road) in the City of Brantford. (Approval Authority File No. 29T-04505)

OMB Case No.: PL100472

OMB File No.: PL100472

Sifton Properties Limited has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's neglect to enact a proposed amendment to the Official Plan for the City of Brantford to redesignate land at 277 Hardy Road to permit a range of residential densities.

(Approval Authority File No.: OP-06-04)

OMB Case No.: PL100472

OMB File No.: PL100473

Sifton Properties Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's neglect to enact a proposed amendment to Zoning By-law PZ-12-04 of the City of Brantford to rezone lands respecting 277 Hardy Road from Low Density Residential to Medium Density Residential to permit a range of residential densities.

OMB Case No.: PL100472

OMB File No.: PL100474

Grandview Ravines Inc. has appealed to the Ontario Municipal Board under subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from the failure of the City of Brantford to make a decision respecting a proposed plan of subdivision on lands composed of 125 Golf Road in the City of Brantford.

(Approval Authority File No. 29T-04504)

OMB Case No.: PL100472

OMB File No.: PL100882

Grandview Ravines Inc. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's neglect to enact a proposed amendment to the Official Plan for the City of Brantford to redesignate land at 125 Golf Road to permit a range of residential densities.

(Approval Authority File No.: OP-06-04)

OMB Case No.: PL100472

OMB File No.: PL100881

Grandview Ravines Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's neglect to enact a proposed amendment to Zoning By-law No. 160-90 of the City of Brantford to rezone lands respecting 125 Golf Road from Residential with a Holding provision (H-RIB) and Open Space (OS1) to Open Space (OS3), Medium Density Residential (R4A) and Residential (R1C) to permit a residential subdivision with an open space reserve.

OMB Case No.: PL100472

OMB File No.: PL100807

Appellant:	Grandview Ravines Inc.
Appellant:	Sifton Properties Ltd.
Subject:	Interim Control By-law No. 99-2010
Legislative Authority:	Subsection 38(4) of the <i>Planning Act</i> , R.S.O. 1990, c. P.13, as amended
Municipality:	City of Brantford
OMB Case No.:	PL100472
OMB File No.:	PL101314

Appellant:	Sago Yesahta
Appellant:	Lucia Joniec, Et Al
Appellant:	Samuel Rizzo Estates Inc.
Appellant:	Telephone City Aggregates Inc.
Appellant:	Sifton Properties Ltd.
Appellant:	Ferrero Canada Ltd.
Appellant:	1272274 Ontario Inc.
Appellant:	Grandview Ravines Inc.
Subject:	Proposed Official Plan Amendment No. 166
Legislative Authority:	Subsection 17(24) of the <i>Planning Act</i> , R.S.O. 1990, c. P.13, as amended
Municipality:	City of Brantford
OMB Case No.:	PL100472
OMB File No.:	PL110302

Appellant:	Sago Yesahta
Appellant:	Ferrero Canada Ltd.
Appellant:	1272274 Ontario Inc.
Appellant:	Sifton Properties Ltd.
Appellant:	Samuel Rizzo Estates Inc.
Appellant:	Grandview Ravines Inc.
Subject:	By-law No. 23-2011
Legislative Authority:	Subsection 34(19) of the <i>Planning Act</i> , R.S.O. 1990, c. P.13, as amended
Municipality:	City of Brantford
OMB Case No.:	PL100472
OMB File No.:	PL110303

APPEARANCES:

Parties

Counsel*/Representative

City of Brantford	Ian J. Lord ⁺
Sifton Properties Limited	Barry R. Card ⁺
Grandview Ravines Inc.	Russell D. Cheeseman ⁺
Telephone City Aggregates Inc.	Alan R. Patton ⁺
Ferrero Canada Ltd.	Richard R. Minster ⁺
Hodiskeagehda, Sago Yesahta (Haudenosaunee, Six Nations)	Susan Draper
Lucia Joniec, Rose Kendra, Janine Heather, Susan Hardy	Lucia Joniec
1272274 Ontario Inc. In Trust and Goldie Davidovits	Barry R. Card*
Samuel Rizzo Estates Inc., Jaclyn Chandler, James Chandler, Shannon Bernardi, Peter Bernardi	James A. Hitchon ⁺

HEARING EVENT INFORMATION:

Hearing: Held in Brantford, Ontario from October 15, 2012 to August 9, 2013

DECISION DELIVERED BY C. CONTI AND ORDER OF THE BOARD**INTRODUCTION AND SUMMARY**

[1] This is the decision for multiple appeals against nine planning instruments related to properties at 277 Hardy Road and 125 Golf Road (“subject properties”) in the City of Brantford (“City”). The matters that are under appeal and are dealt with in this decision are as follows:

1. Applications by Sifton Properties Limited (“Sifton”) for a residential Plan of Subdivision, an Amendment to the City’s Official Plan, and a Zoning By-law Amendment for the property at 277 Hardy Road, originally filed on March 11, 2004 by the previous owner of the land and carried on by Sifton after acquiring the property in January of 2008. The applications were appealed by Sifton on March 17, 2010 on the statutory basis of the lack of a decision by the City.
2. Applications by Grandview Ravines Inc. (“Grandview”) for a residential Plan of Subdivision, an Amendment to the City’s Official Plan, and a Zoning By-law Amendment for the property at 125 Golf Road, originally filed on March 11, 2004 by the previous owner of the lands and carried on by Grandview after acquiring the property in January 2008. The Official Plan Amendment and Plan of Subdivision applications were appealed by Grandview on July 12, 2010 on the statutory basis of the lack of a decision. The application for a Zoning By-law Amendment was appealed by Grandview on the same basis on July 29, 2010.

3. Official Plan Amendment No. 166 (“OPA No. 166”) by the City adopted on March 7, 2011 to enact the provisions of the Waterfront Master Plan (“WMP”) for the properties at 277 Hardy Road and 125 Golf Road appealed by Sifton, Grandview, Sago Yesahta, Lucia Joniec, Rose Kendra, Janine Heather, Susan Hardy, Samuel Rizzo Estates Inc., Telephone City Aggregates Inc. (“TCA”), Ferraro Canada Ltd., and 1272274 Ontario Inc. In Trust and Goldie Davidovits. This planning instrument was appealed for various reasons which were provided in the notices of appeal;
4. Zoning By-law No. 23-2011 by the City adopted on March 7, 2011 to enact the provisions of the WMP for the properties at 277 Hardy Road and 125 Golf Road appealed by Sifton, Grandview, Sago Yesahta, Ferrero Canada Ltd., Samuel Rizzo Estates Inc., 1272274 Ontario Inc. In Trust and Goldie Davidovits. This planning instrument was appealed for various reasons which were provided in the notices of appeal.
5. Interim Control By-law No. 99-2010 (“ICBL”) by the City approved by City Council on September 7, 2010 for the properties at 277 Hardy Road and 125 Golf Road appealed by Sifton and Grandview for reasons identified in the notices of appeal.

[2] Both of the subject properties are located in the western part of the urban area of the City. The properties lie between Highway (“Hwy”) 403 to the north and the Grand River to the south. A large industrial area, called the Northwest Industrial Park is located to the west of the properties. To the east of the properties are residential areas and a golf course.

[3] The Sifton property consists of 42.49 hectares (“ha”) of land on the south side of Hardy Road with the Grand River at its south limit. The proposed subdivision covers 21.47 ha of the property. A total of 125 single family residential lots and a medium density block with a maximum of 93 dwelling units are proposed. The property consists

mainly of agricultural fields and forested lands and it is bisected by a small watercourse which originates north of Hardy Road and empties into the Grand River. Much of the total property containing some significant natural heritage features and the Grand River floodplain is excluded from the plan of subdivision. The proposal, if approved, will result in approximately 28.75 ha of the Sifton lands being left in open space.

[4] The Grandview property lies to the northeast of the Sifton lands at the northwest corner of Hardy Road and Golf Road. Hwy 403 is located at its northern boundary. It consists of 35.3 ha of land that is partially forested with some agricultural fields. A total of 205 dwelling units are proposed. The property contains a small watercourse which originates on the lands to the north, west and east and empties into the Grand River. Through the proposal, approximately 23 ha of the Grandview property will be retained as open space.

[5] Both properties contain portions of the Davisville Swamp wetland which has been classified as provincially significant. The properties also contain a number of other features of natural and cultural heritage significance.

[6] The properties are designated as Low Density Residential and Open Space in the City's Official Plan with delineations of Environmental Control Policy Areas, and Environmental Protection Policy Areas covering portions of each property. The properties are zoned residential with a Holding Symbol and Open Space in the City's Comprehensive Zoning By-law. The provisions of the Official Plan require that an Environmental Impact Assessment ("EIA") be undertaken to ensure that natural heritage features and functions are protected in association with any residential development that may be permitted on the properties. The Official Plan and Zoning By-law require that all City requirements must be satisfied before the Holding Symbol can be lifted on the lands. The Official Plan Amendments and Zoning By-law Amendments are required because each proposal includes medium density units.

[7] The Ontario Municipal Board (“Board”) heard evidence over the course of a 19 week hearing divided into three phases from 39 expert witnesses, some of whom provided evidence in more than one phase. The Board also heard evidence from seven lay witnesses who provided evidence on behalf of one of the parties and from 27 participants. A complete list of the witnesses is provided in Appendix 1.

[8] In addition to the normal daytime sessions, three evening sessions were convened to provide an opportunity to hear testimony from those who were not able to attend during normal hearing hours.

[9] The Board has carefully considered all of the evidence and submissions. The submissions of the parties and the critical evidence are discussed in substantial detail later in this decision, and specific findings and the reasons for the Board’s conclusions are provided. A brief summary of major conclusions is provided in the remainder of this section. However, for a complete understanding of the Board’s reasons for arriving at these conclusions, reference should be made to the full decision.

[10] At the outset it must be stated that the Board recognizes the sincere interest in the future of the subject lands of all of the parties and participants. This was expressed clearly on numerous occasions during the course of the hearing.

[11] The City considers the lands at 277 Hardy Road and 125 Golf Road which contain a wealth of natural heritage and cultural features, to be a significant asset and a key part of the City’s WMP. The area residents seek to protect the features of the lands and maintain the special character of the area in which they reside. The Haudenosaunee have unresolved land claims over an area which includes the subject properties and seek to have their interest acknowledged and maintained. Ferrero Canada Ltd. (“Ferrero”) wants to ensure that use of the properties will not impact its industrial operation. Sifton and Grandview are seeking approval of their development plans for the properties and to ensure that the development potential of the properties is

maintained. The other parties are generally attempting to protect their interests in land that they own in the vicinity of the properties.

[12] This hearing has illustrated the complexity of resolving planning issues where there are numerous competing interests for the use of lands, all having some legitimacy. The length of time that Appellants' planning instruments have been in process (since 2004), and the number of iterations of the plans that have been subject to review by the City, while not particularly unusual, is in part an indication of the difficulty in resolving issues for the properties. The length of time that the applications have been in process is in part responsible for the *impasse* between the parties. Clearly the interests of the City and its view of the ultimate use of the properties have changed since the applications were filed.

[13] However, the *Planning Act* ("Act") requires a balancing of economic, social and environmental interests when considering land use planning issues. Environmental, cultural, and natural heritage features as well as the social and economic benefits of development, all must be given significant weight when determining land uses as directed by the provisions of the Provincial Policy Statement ("PPS"). One of the key matters that the Board has weighed in making this decision is whether the proposed development plans and the measures intended to mitigate impacts are sufficient to ensure protection of the natural and cultural heritage aspects of the properties.

[14] Unfortunately, even after a lengthy hearing in which many qualified experts provided well-founded but opposing views and where lay witnesses strongly presented their positions, the Board cannot, through this decision, provide resolution to all of the issues raised in this appeal.

[15] However, after considering all of the evidence and submissions, the following matters have become clear which are critical to the Board's decision:

1. The Board has concluded that the changes enacted through OPA No. 166 and Zoning By-law No. 23-2011 to implement the Grand River Heritage

- Waterfront designation and zoning which will remove all potential for residential development of the properties constitutes a down designation and down zoning;
2. The long standing Board practice which is supported by the relevant jurisprudence requires that down zoning should only be proposed in conjunction with consideration of compensation for the reduced development potential of the lands;
 3. The analyses provided through the WMP and the Natural Heritage Analysis for the subject properties do not provide sufficient basis for removing the residential designation on all of the Sifton and Grandview lands;
 4. The WMP contains statements which point to public open space uses and eventually public acquisition of the two properties;
 5. The significant natural heritage features and functions and the cultural heritage features can be protected through appropriate subdivision design and impact mitigation measures in conjunction with partial residential development of the properties;
 6. However, fundamental issues related to servicing and secondary access are unresolved for both plans of subdivision which must be addressed prior to draft approval of the Sifton plan and prior to approval of the full Grandview plan;
 7. In order to address City requirements and/or to ensure the protection of natural heritage features, significant changes to the plans are required including increased buffer widths and eliminating encroachment into the provincially significant wetland.

[16] In consideration of the above matters, the Board has concluded that portions of the property can be developed for residential purposes while meeting all requirements

of the PPS and the relevant planning documents. Therefore, the Board is not prepared to approve the City's planning instruments that are OPA No. 166 and Zoning By-law No. 23-2011, which would implement the provisions of the WMP and remove all residential development potential on the Sifton and Grandview lands.

[17] However, there are a number of fundamental issues that are outstanding and could affect the design of the plans of subdivision and impact the amount of developable area. Subject to some revisions, the Board is prepared to grant approval of the Sifton and Grandview Official Plan Amendments and Zoning By-law Amendments for the subject properties. However, with the exception of an area of the Grandview site on which 15 lots are proposed, the Board must conclude that the plans of subdivision are premature. These matters are fully explained later in this decision.

[18] In coming to these conclusions, the Board recognizes the vision for the subject properties contained in the WMP and the importance of the area to the City and the local residents. The findings of the Board in this decision are not intended to question this vision or the importance of the subject area; only the manner that the City has chosen to pursue this vision is under question.

[19] Ian Lord in his argument indicated that this appeal should not be turned into a land compensation matter and the Board agrees that the issue of compensation is not before it. However, the Board cannot ignore statements in the WMP in reference to the subject properties as well as other properties that state, "Lands currently designated for development should be protected in public open space..." (Exhibit 4C, Tab 17, p. 1069) and "The long-term securement of these lands will be subject to discussions, negotiation, and in some instances, resolution through a Board hearing" (Exhibit 4C, Tab 17, p. 1127). Proposed OPA No. 166 which would eliminate the residential designations contains land securement policies (Exhibit 188). Furthermore, the WMP mentions securing a continuous linear greenway along the Grand River in the northwest (Exhibit 4C, Tab 17, p. 1122) and park symbols are located on both the Sifton and Grandview properties (Exhibit 4C, Tab 17, p. 1066).

[20] It should also be noted that one of the City's planning witnesses, Matt Reniers, said in his witness statement, "It is the desire of the municipality to secure the subject lands to ensure the long term protection of the significant natural features and functions...." (Exhibit 1, Tab 1, p. 5). Mr. Reniers explained that there are a number of options for land securement besides acquisition and that his recommendations are based on planning concerns, not upon land securement or land value considerations.

[21] The Board acknowledges that acquisition of the subject properties is not specifically included as a project in the implementation section of the WMP, and from the evidence, Council has not passed a resolution directing acquisition.

[22] However, in view of these factors, it is difficult to arrive at any conclusion other than in the longer term; the intent is for these properties to be in public ownership. While this Decision refuses the City's instruments, it does not prevent the City's pursuit of its objectives for the lands.

[23] The Board's reasons for arriving at the above-noted conclusions and other relevant findings are provided in the remainder of this decision.

ISSUES

[24] There are multiple key issues in these appeals. The proposed plans of subdivision must meet all of the requirements of s. 51(24) of the Act. The proposed Official Plan Amendments must be appropriate and comply with the provisions of the Act and be consistent with the requirements of the PPS. The Zoning By-law Amendments must comply with the City's Official Plan and the provisions of the Act and also be consistent with the PPS. In this context, a major consideration in these appeals has been compliance of the proposed developments with the PPS requirements for the protection of natural heritage and archeological features. Also, the provision of services and access to the subdivision sites has been a major consideration.

[25] Another main issue has been determination of the intent of the Official Plan designations which provide for residential land use on parts of the subject properties, but also identify Environmental Control Policy Area and Environmental Protection Policy Area provisions in the same locations. Is some residential use of the properties established through the designations and zoning, and if so, do the City's proposed Official Plan Amendment and Zoning By-law Amendment constitute down-zoning?

[26] In addition, the Board has had to carefully assess the interests of the Haudenosaunee/Six Nations for the subject properties. The interests of Ferraro Canada Ltd. ("Ferraro"), Telephone City Aggregates Inc. ("TCA"), and the other area properties owners have also required careful consideration.

[27] These and other issues relevant to the Board's determination are discussed in greater detail in the remainder of this decision. The issues list for the hearing was adopted through the prehearing process for these appeals and was attached to the procedural order. All of these issues are addressed in this decision, although they may not be specifically referenced.

PLANNING AND POLICY CONTEXT

[28] The critical planning documents and polices which the Board has considered in relation to these appeals are discussed in the sections below.

Official Plan and Zoning By-law

[29] The potential for residential use of the subject properties as well as the significant environmental features of the sites have long been recognized in the City's planning documents.

[30] The evidence includes two versions of the Official Plan, the 2004 version which was in force when Sifton and Grandview filed their applications and the 2012 version of the Official Plan which received final approval after OPA No. 166 and Zoning By-law No. 23-2011 were adopted by Council. The relevant provisions of both plans are virtually

identical in most cases. Significant differences between the two plans are discussed in the appropriate sections of this decision.

[31] The subdivision proposals must comply with all relevant sections of the Official Plan. However, the Board considers the policies discussed below to be crucial to making this decision.

[32] Portions of each property are designated as Low Density Residential in the City's Official Plan (Exhibit 4A, Tabs OP-2004 and OP-2012). The area designated residential includes the agricultural fields and some of the adjacent area and comprises more than half of the area of each property. The portions of the properties containing the Provincially Significant Wetland, the Grand River floodplain and parts of the tributary watercourses are identified as Environmental Protection Policy Areas. The Environmental Control Policy Area includes all of the residentially designated part of the Sifton lands and part of the residentially designated area of the Grandview lands. The lands containing the Grand River floodplain on the Sifton property and the south part of the Grandview property are designated as Open Space. It should be noted that an area at the northern and eastern section of the Grandview lands is shown with only the residential designation and no Environmental Control Policy Area or Environmental Control Protection Area indications.

[33] Section 8 of both versions of the Official Plan sets out the requirements for development in Environmental Protection Policy Areas and Environmental Control Policy Areas (Exhibit 4A, Tab OP-2004, p. 8-1 to 8-11). These areas are identified in schedule 3-1 of both versions of the Official Plan. Section 8.2.1 sets out the policies for Environmental Protection Policy Areas providing these areas with the highest level of protection. In the 2004 version of the Official Plan, s. 8.2.1 includes the following:

In addition to the provisions of Section 8.1.8, development within the Environmental Protection Policy Areas, as identified on **Schedule 3-1 – Natural Heritage: Environmental Areas**, may be permitted in accordance with the land use designations on **Schedule 1 – Land Use Plan** subject to the following policies:

1. Environmental Protection Policy Areas have the highest level of intended protection and shall include significant portions of the habitat of threatened and endangered species, provincially significant prairies, provincially significant savannahs, Provincially-significant wetlands, ravines with watercourses, significant forested areas the Regulatory Floodplain of the Grand River, a vegetative buffer zone along its course and areas of significant groundwater discharge....” (Exhibit 4A, Tab OPO-2004, p. 8-3)

[34] Only passive recreational uses and certain required public uses are permitted in these areas.

[35] There are some differences between the 2004 and 2012 versions of the Official Plan regarding the types of natural heritage features identified in s. 8.2.1. The relevance of these differences is discussed where appropriate in this decision.

[36] Section 8.3.1 of both versions of the Official Plan in part states the following:

In addition to the provisions of Section 8.1.8, development within the Environmental Control Policy Areas, as identified on **Schedule 3-1-Natural Heritage: Environmental Areas**, may be permitted in accordance with the land use designations on **Schedule 1- Land Use Plan**, subject to the following policies:

1. Environmental Control Policy Areas contain sensitive natural features such as steep slopes, streams, wetlands, areas of groundwater discharge and representative tree cover, and are designated on the basis of being comprised of fish habitat, significant woodlands, significant wildlife habitat, significant Areas of Natural and Scientific Interest, natural linkages, and locally significant prairies and savannahs. Policies are intended to conserve natural conditions and functions and to promote integration with proposed land uses.
2. Development and site alteration may be permitted within Environmental Control Policy Areas if it is demonstrated in an Impact Assessment that there will be no negative impacts on natural features or the ecological functions for which the area is identified or where an appropriate compensation or remedial strategy is approved by the City, the Grand River Conservation Authority and all other approval authorities. This Impact assessment will be conducted in accordance with the Impact Assessment Guidelines contained in Appendix III of this Plan, and to the satisfaction of the City, the Grand River Conservation Authority, and all other approval authorities.... (Exhibit 4A, Tab 2004 OP, p. 8-5)

[37] As noted earlier, the main zoning categories on the properties are residential with a Holding Symbol, and Open Space. More specifically, the Sifton lands are zoned H-R1B and OS3 while the Grandview lands are zoned HR-1B and OS1 (Exhibit 4C, Tab 14). Section 16.5 of the 2004 Official Plan includes policies for Holding By-laws (Exhibit 4A, Tab OP-2004, p. 16-4 and 16-5) of which the following are particularly relevant:

16.5.1 Council may enact holding bylaws in accordance with the *Planning Act*, in order to limit or prevent the use of certain lands until such time as Council is satisfied that development can be achieved which satisfies the provisions of the Official Plan.

16.5.2 Generally, holding bylaws will be applied to lands which are unserved or undeveloped at the date of adoption of this Plan. Holding bylaws will identify the ultimate use of these lands in accordance with this Plan and shall identify the holding restriction by affixing an “H” prefix to the land use zone applicable to the lands.

16.5.4 Prior to enacting a bylaw to delete the holding provision in accordance with the *Planning Act*, Council shall be satisfied that:

1. adequate servicing, such as water supply, sewage disposal facilities, storm water drainage, solid waste collection and disposal, and roads can be provided;
2. all necessary requirements of the City have been satisfied;
3. all necessary subdivision or development agreements have been entered into, and that the conditions of these agreements have been or will be met, and
4. development satisfies all other relevant policies of this Official Plan.

These policies have been carried forward in s. 18.5 of the 2012 Official Plan.

[38] There was some dispute at the hearing and in the argument of the parties about whether the policies of the Official Plan provided any development permissions for the Sifton and Grandview properties. The City maintained that no permissions existed until the requirements of the Official Plan for Environmental Control Policy Areas were met, that is until an EIA demonstrated that development could occur without negative impacts on the natural heritage features and ecological functions and until all other requirements of the City had been satisfied.

[39] Sifton and Grandview maintained that the residential use of the lands was recognized through the residential designation and zoning, and they provided a number of studies and reports which anticipated residential development of the lands. These included the Comprehensive Environmental Review (“CER”) (Exhibit 63) which City staff used as a guiding document for a period of time, and the draft (Exhibit 3A, p. 245) and final peer reviews of previous environmental reports for the subdivisions (Exhibit 5A, Tab 11) which the City contracted Dougan & Associates to complete. In addition, the North West Master Plan (Exhibit 4B, Tab 12 and 13), which City Council adopted in

principal, served as a guide for development and servicing of the area for a period of time. The Board will discuss these documents further later in this decision in relation to the specific development proposals.

[40] The Board recognizes that no residential approvals have been granted for the Sifton and Grandview properties. However, in consideration of the above-noted documents and the policies of the Official Plan, the Board concludes that the relevant City planning documents recognize some intended residential use of the Grandview and Sifton properties.

[41] It should be noted that the lands are designated as residential in both the 2004 and 2012 versions of the Official Plan. The five year review of the 2004 Official Plan under the current provincial planning policy regime which resulted in the 2012 Official Plan, did not change the extent of residential designation on the Sifton and Grandview properties. No Official Plan Amendment is required to use the lands for Low Density Residential purposes. The reason for the Official Plan Amendments proposed by Sifton and Grandview is that both plans of subdivision include medium density residential blocks.

[42] Furthermore, Official Plan policy 16.5.2 states that the Holding By-laws will identify the ultimate use of the lands where the holding zone is applied. While the Board was not provided with the text of the Holding By-law, the City's comprehensive By-law clearly shows the H symbol applied to the residential, R1B zone. If the ultimate use of the lands were intended to be other than residential, this should have been identified in the zone symbols applied to the lands. The Board was provided with no evidence that the Holding By-law identified any other ultimate use.

[43] The Board recognizes that s. 8.3.1.1 of the Official Plan states that development and site alteration "may be permitted" depending on the results of an impact assessment in Environmental Control Policy Areas. However, it seems clear from s.

16.5.2 that the ultimate use of a portion of the lands under the Environmental Control Policy Area is intended to be residential.

[44] Mr. Lord addressed the issue of whether the “principle of development” or any “right to develop” had been established for the lands in his argument, contending that development of the properties was always conditional on satisfying a number of policies and satisfying servicing requirements. In his argument he states, “The “principle of development” demonstrated by “Low Density Residential” (Schedule 1) designation was coupled by equal and contemporaneous “Natural Heritage” (Schedule 3-1 to 3-3) designations that suspended development on Environmental Protection Policy Area , Environmental Control Policy Area “Adjacent Lands” and other relevant policies related to the lifting of the “H” holding control in the City Official Plan....” (Exhibit 212, p. 4). City planning witnesses were not consistent in characterising the identification of Environmental Protection Policy Areas and Environmental Control Policy Areas as “designations”, but they all maintained that these policies are of the same importance as the residential policies in s. 7. Christopher Pigeon initially characterised these Policy Areas as an “overlay” to the land use designations, but through cross examination he agreed that they are designations. Sifton’s Official Plan Amendment refers to these policy areas as “designations” and proposes deleting them from portions of the property. However, the Grandview Official Plan Amendment does not propose deleting or changing the policy areas on the Grandview property. Furthermore, Robert Dragicevic, the planning witness for Ferraro, acknowledged in his testimony about the Grandview proposal, that there are existing residential permissions to develop the lands.

[45] In reviewing the submissions, the Board does not agree that the policies and delineations of Environmental Control Policy Areas and Environmental Protection Policy Areas are intended to be designations similar to Official Plan land use designations. The language used in the Official Plan is not completely consistent in this regard, but generally the policy areas are referred to as “delineations” not “designations”. The Official Plan in s. 8.1.8 uses the term “designations” to refer to these areas, but s. 8.1.2

of the Official Plan states that this section of the Official Plan (referring to s. 8 which is entitled “Natural Heritage”):

... establishes policies and delineations as shown in **Schedule 3-1 – Natural Heritage: Environmental Areas** and **Schedule 3-2 – Natural Heritage: Mineral Resources**, which will be applied in conjunction with the land use policies and designations of Section 7 and **Schedule 1 – Land Use Plan** and **Schedule 2 – Modified Policy Areas (Exhibit 4A, Tab 2004 OP, p. 8-1)**.

[46] Section 8.1.3 also refers to the policy areas as “delineations”. If the intent is that Environmental Protection Policy Areas and Environmental Control Policy Areas are “designations” then the language of the Official Plan should consistently use this term. There is no lack of consistency in referring to the land use designations.

[47] In carefully reviewing the Official Plan and considering the submissions, the Board concludes that the policies in s. 8.2.1 and 8.3.1 are intended to modify, where necessary, the land use designations. Environmental Protection Policy Areas and Environmental Control Policy Areas are not designations that establish uses; rather the relevant sections provide policies requiring an environmental study and other measures to ensure that significant natural heritage features and functions are protected in conjunction with some residential uses. It should be remembered that these lands are within the urban area of the City, immediately south of a major highway and east of an industrial area. The Board concludes that the residential designation was applied to the lands because of their location and because they were at least in part deemed suitable to support the intended use. Furthermore, for parts of the Grandview property the residential designation is not subject to the Environmental Control Policy Area delineation.

[48] The intent of s. 8.2.1 and 8.3.1 is to refine the areal extent of the uses identified in the designations of properties through environmental studies and to identify measures to mitigate impacts. In the Board’s view, the ultimate intended use of the lands was established by the land use designations and zoning. This is clear through s. 16.5.2 of the Official Plan which, in the Board’s view, indicates that the ultimate intended use of the lands is identified by the symbol next to the “H” in the By-law for lands under

a holding zone. In the case of the subject lands, the symbol next to the “H” is an “R” delineating a residential zone. The Environmental Protection Policy Area and Environmental Control Policy Area provisions are intended to determine how much of the properties can be allocated to the residential uses and to ensure that the natural heritage features and functions and the natural heritage system are protected in association with development.

[49] Determining the limits of residential use through the requirements of s. 8.2.1 and 8.3.1 could inevitably involve considering a variety of development scenarios and mitigation measures. It would be an extreme application of these policies to determine that no residential development can occur on the properties. However, the Board recognizes that this is a possible result if it is clearly demonstrated through an EIA that any residential development with appropriate mitigation or compensation measures would have an unavoidable negative impact.

[50] The holding zone provision imposes additional requirements for ensuring servicing is available and that all other requirements of the City are fulfilled. Failure to find an appropriate method of servicing the property or fulfilling other City requirements only prevents the lifting of the holding zone until a suitable option is determined. It does not affect the underlying residential zoning or the residential designation of the lands.

[51] In view of the above and considering the relevant provisions of the Official Plan together, the Board finds that the land use designations establish a reasonable expectation of some residential use of both properties. From the evidence, the intent of the City’s in-force planning documents is to permit some residential use on a portion of both the Sifton and Grandview lands, the extent and location of which is to be defined by an EIA.

Provincial Policy Statement

[52] The PPS applies to all of the applications that are under appeal. The policies of the PPS provide critical guidance for the consideration of the municipal planning

documents and the proposals that are under appeal. There was some debate at the hearing about whether the Provincial Policy Statement 1997 (“1997 PPS”) or the Provincial Policy Statement 2005 (“2005 PPS”) is applicable to the proposals. However, the debate focussed more on the “have regard” or “be consistent with” requirements in the Act for the respective versions of the PPS. The relevant provisions of both versions of the PPS are similar and are in many cases identical.

[53] Both versions of the PPS call for a coordinated approach to planning where economic, social and environmental factors are given due consideration. Particularly relevant to the Board’s decision in this appeal, are the Natural Heritage policies, the Water Quality and Quantity policies and the Cultural Heritage and Archeological Resources policies.

[54] The policies, in s. 2.3.1 and 2.3.2 of the 1997 PPS and in s. 2.1.3 to 2.1.6 of the 2005 PPS, prevent development in significant wetlands and significant portions of the habitat of endangered and threatened species. In the 2005 PPS, significant coastal wetlands are included in this category. In both versions of the PPS, development may be permitted in significant wetlands in the Canadian Shield, significant woodlands, significant valleylands, significant wildlife habitat, and significant areas of natural and scientific interest (“ANSI”) subject to demonstrating that there will be “no negative impact on the natural heritage features and functions.” As well, development may be allowed in adjacent lands to these features if it can be demonstrated that there is no negative impact.

[55] The natural heritage policies of both versions of the PPS also call for the protection of fish habitat.

[56] The 1997, PPS requires the protection of surface and groundwater features and functions through s. 2.4.1. The corresponding policies in s. 2.2 of the 2005 PPS have been substantially expanded.

[57] The definitions of “negative impacts” and “significant” are particularly relevant to these appeals and have minor differences in each version of the PPS. The 1997 PPS definition of “negative impacts” is reproduced below and the definition of “significant” is reproduced in part:

Negative impacts means:

- a. in regard to fish habitat, the harmful alteration, disruption or destruction of fish habitat, except where it has been authorized under the Fisheries Act, using the guiding principle of no net loss of productive capacity.
- b. in regard to other natural heritage features and areas, the loss of the natural features or ecological functions for which an area is identified.

Significant means:

- in regard to wetlands and areas of natural and scientific interest, an area identified as provincially significant by the Ministry of Natural Resources using evaluation procedures established by the province, as amended from time to time;
- in regard to other features and areas in policy 2.3, ecologically important in terms of features, functions, representation or amount, and contributing to the quality and diversity of an identifiable geographic area or natural heritage system. Criteria for determining significance may be recommended by the Province, but municipal approaches that achieve the same objective may also be used.
- in regard to other matters, important in terms of amount, content, representation or effect.

[58] In the 2005 PPS, the definition of “negative impacts” and the definition of “significant” related to wetlands, ANSI and habitat of endangered and threatened species are as follows:

Negative impacts means:

- a. in regard to policy 2.2, degradation to the quality and quantity of water, sensitive surface water features and sensitive ground water features, and their related hydrologic functions, due to single, multiple or successive development or site alteration activities;
- b. in regard to fish habitat, the harmful alteration, disruption or destruction of fish habitat, except where, in conjunction with the appropriate authorities, it has been authorized under the Fisheries Act, using the guiding principle of no net loss of productive capacity; and
- c. in regard to other natural heritage features and areas, degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities.”

Significant: means:

- a. in regard to wetlands, coastal wetlands and areas of natural and scientific interest, an area identified as provincially significant by the Ontario Ministry of Natural Resources using evaluation procedures established by the Province, as amended from time to time;
- b. in regard to the habitat of endangered species and threatened species, means the habitat, as approved by the Ontario Ministry of Natural Resources, that is necessary for the maintenance, survival, and/or the recovery of naturally occurring or reintroduced populations of endangered species or threatened species, and where those areas of occurrence are occupied or habitually occupied by the species during all or any part(s) of its life cycle....”

[59] The above policies have been critical in the Board’s determinations regarding the potential restrictions on development resulting from the need to protect natural heritage features and functions and cultural heritage features, and the ultimate intended use of the properties.

[60] With regard to natural heritage features and functions, the relevant provisions of the Official Plan generally repeat the intent of the provisions of the PPS.

[61] In the Board’s view, the PPS establishes a hierarchy of environmental features and functions and establishes a greater level of protection for the features and functions that, at the provincial level, are of most concern. Section 2.3.1(a) of the 1997 PPS identifies significant wetlands south and east of the Canadian Shield and significant portions of habitat of endangered and threatened species as requiring the greatest level of protection. Both versions of the PPS clearly prohibit any development in these areas. The 2005 PPS also includes significant coastal wetlands in this category.

[62] Other significant natural heritage features and functions listed in s. 2.3.1(b) of the 1997 PPS and s. 2.1.4 of the 2005 PPS are also protected, but there is no prohibition against all development within or adjacent to these features. Rather they are subject to the “no negative impact” test where development can only be permitted if it has been demonstrated that there will be no negative impact on the natural heritage features and their ecological functions. The no negative impact test also applies to adjacent lands to the natural heritage features.

[63] Section 8 of the Official Plan provides corresponding policies to these provisions of the PPS. Section 8.2.1 includes in Environmental Protection Policy Areas, a number of additional features beyond those included in the corresponding sections of the PPS. While s. 8.2.1 does not provide an absolute prohibition to development in Environmental Protection Policy Areas, it is clear that only passive recreation should be the general predominate use and that development which may cause environmental degradation is prohibited (Exhibit 4A, Tab OP-2004, p. 8-3).

[64] The policies for Environmental Control Policy Areas in s. 8.3.1 of the Official Plan include the majority of features identified in s. 2.1.3(b) of the 1997 PPS and s. 2.1.4 of the 2005 PPS, and they establish the no negative impact test as being the major requirement for determining the extent of development.

[65] Section 8.4 of the Official Plan also includes requirements for use of the no negative impact test on adjacent lands similar to the requirement in the PPS (Exhibit 4A, Tab OP-2004, p. 8-7).

[66] In applying these policies it is important to also consider the relevant definitions. In regard to natural heritage features, other than fish habitat, the 1997 PPS indicates that a negative impact is: "... the loss of the natural feature or the ecological functions for which an area is identified." The 2005 PPS definition maintains the intent of this definition, but provides further guidance in that a negative impact for features other than fish habitat and water features is "... degradation that threatens the health and integrity of the natural features or ecological functions for which the area is identified...."

[67] The definitions of negative impact in both versions of the PPS are consistent with each other and are not contradictory. The 2005 PPS view simply provides greater clarity on what constitutes a negative impact.

[68] In the Board's view, the PPS does not define every impact as a negative impact, but only those where the impact is to the degree or extent that there is loss of an ecological feature or function or where there is degradation that threatens the health or

integrity of the feature or function. From these definitions, the Board concludes that minor impacts which do not result in the loss of a feature or function or where the health and integrity of the feature or function is not threatened may be acceptable under the PPS. The term “negative impact” is not defined in either the 2004 or 2012 version of the Official Plan and the Board was not provided with alternative definitions in the evidence.

[69] With regard to the definitions of the term “significant” in the PPS, the 1997 version of the PPS does not provide a specific definition for the term in reference to the habitat of endangered and threatened species. The determination of significance is the same as for other natural heritage features that are included in s. 2.1.3 (b). The 2005 PPS does provide a specific definition indicating that significant habitat of endangered and threatened species is “habitat, as approved by the Ontario Ministry of Natural Resources....” The Board considers the 2005 PPS definition to be simply a clarification of the 1997 definition and finds no contradiction between the two. As the provincial Ministry responsible for designation and protection of endangered and threatened species, and responsible for the *Endangered Species Act* (“ESA”), the Ministry of Natural Resources (MNR) would have carried the responsibility for identifying significant habitat under the 1997 PPS, even if not specifically referenced as doing so. As noted earlier, the 2005 PPS generally provides more detail and clarity than the 1997 PPS, but the provisions are similar. In reviewing the two versions, the Board concludes that the 2005 PPS generally provides a greater focus on protecting environmental features.

[70] With regard to endangered and threatened species, the Board interprets the PPS definitions as indication that not every observation of an endangered or threatened species on a property should be considered as proof of the existence of significant habitat on that property. Section 2.1.3 (a) of the 1997 PPS prohibits development in “significant portions” of endangered and threatened species habitat and significant portions of this habitat must be “ecologically important” related to a number of factors as stated in the definition. Under the current PPS and in the Board’s view under the practice of the 1997 PPS, the identification of significant habitat of endangered and threatened species must be that which is which is approved by the MNR.

[71] From a review of the provisions and the testimony of the expert witnesses, the Board concludes that natural heritage policies in both versions of the PPS are often identical, and have the same intent. The 2005 PPS policies in some cases provide more detailed direction. Any differences that are relevant to the Board's determination are discussed in the remainder of the decision.

[72] During the course of the proceeding, the Board heard no evidence regarding the 2014 PPS which came into effect on April 30, 2014. The Board expects that all future planning applications for the subject lands will address the 2014 PPS.

Growth Plan

[73] The Growth Plan for the Greater Golden Horseshoe ("Growth Plan") came into effect in 2006 after the Sifton and Grandview applications were filed, but before the City's instruments were passed. In consideration of dates of filing the applications and passage of the City's instruments, the Board considers the Growth Plan applicable to the OPA No. 166 and Zoning By-law No. 23-2011, but not applicable to the Sifton and Grandview applications. This issue is discussed further in the context of the specific planning instruments.

Clergy Principle

[74] There was some dispute among the parties about the versions of the Official Plan and PPS that should apply to the subdivision proposals. The Sifton and Grandview applications were submitted in 2004 prior to the issuance of the 2005 PPS and prior to the adoption of the 2012 Official Plan.

[75] Part II of the 2005 PPS states that it, "...applies to all applications, matters and proceedings commenced on or after March 1, 2005 (Exhibit 4A, Tab 7, p. 175). Furthermore, the Board has long operated on the basis of the "Clergy Principle", enunciated in the decision, *Clergy Properties Ltd. v. Mississauga (City)*, (1996) O.M.B.D. No 1840, whereby applications should be reviewed in the context of the

planning policy regime that was in force at the time of the application. This has been a general principle of the Board which has been consistently applied with some minor variations.

[76] The concerns for the use of the Clergy Principle (“Clergy”) focussed mainly on its applicability to the planning instruments related to the subdivisions. Mr. Lord in his argument contended that Clergy should not apply to the City’s planning instruments, OPA No. 166 and Zoning By-law No. 23-2011 which would entail that they would be considered under the 2004 Official Plan and the 1997 PPS.

[77] While the ICBL and City’s instruments relate to the Sifton and Grandview properties, the Board does not consider them to be part of the same continuum that started with the filing with the subdivision applications in 2004. The City’s instruments arose as a result of a separate process and were approved under the current planning policy regime. Therefore, the application of the Clergy Principle in this instance would require consideration of OPA No. 166 and By-law No. 23-2011 under the current planning policies including the 2005 PPS and the Growth Plan.

[78] The Board will also apply the 2012 version of the City’s Official Plan in reviewing the City’s planning instruments. While it is similar to the 2004 Official Plan and was not formally in-force on February 22, 2011 when OPA No. 166 and Zoning By-law No. 23-2011 were adopted, it contains a number of amendments to the 2004 Official Plan that would have been in effect. There are some relevant differences between the 2004 and 2012 Official Plan that are discussed later in this decision in relation to the City’s planning instruments.

[79] The applicable provisions of the both versions of the PPS are similar to each other and the Board has found few significant differences in its review of the documents. Generally, strict application of the Clergy Principle is likely to make little difference in the Board’s consideration of the planning instruments under appeal. The main area where the application of the Clergy Principle could influence the outcome of the appeal is in

determining the degree of discretion that could be exercised by approval authorities and the Board in applying the two versions of the PPS to the Sifton and Grandview planning instruments.

[80] The Act required that approval authorities “have regard for” the 1997 PPS, while the Act was changed in January of 2007 so that the requirement is now that approval authorities must “be consistent with” the 2005 PPS. Russell Cheeseman, in his argument (Exhibit 206) maintained that the Board should strictly apply the Clergy Principle to the applications for the Sifton and Grandview proposals. He maintained that in having regard for the provisions of the PPS, an approval authority, and the Board in this case could exercise some flexibility in applying PPS requirements. In particular, the prohibition against allowing development within provincially significant wetlands could be relaxed so that some minor intrusion could be allowed. This position was also expressed through the evidence of Robert Walters, the expert planning witness for Grandview.

[81] Mr. Cheeseman provided a number of authorities to support the strict application of Clergy Principle.

[82] Mr. Lord argued that the Clergy Principle provides no assistance to the consideration of the applications (Exhibit 212, p. 12 to 17). He referred to authorities where the Board has provided some relief to the strict application of the Clergy Principle. He also referenced s. 3(5) of the Act in relation to the City’s instruments which were adopted by Council under the current planning policy regime.

[83] Mr. Lord further noted that the length of time since the applications were submitted, the changes in ownership of the subdivision lands, the multiple revisions to the plans for the lands, and other factors as reasons that the Clergy Principle should not be strictly applied (Exhibit 212, p. 14 and 15).

[84] There has undoubtedly been some variance in the application of the Clergy Principle by different members of the Board over the years. This member is of the view

that as noted in the decision, *Sun Life Assurance Company of Canada v. Burlington (City)*, (2007) O.M.B.D. No. 1277 that the Clergy Principle is, "... an enunciation of a principle of natural justice and procedural fairness..." (Grandview Authorities, Tab 3, p. 12). Applicants must be able to have some reliance on the planning requirements that must be satisfied when applications are submitted. However, this member also agrees with the approach expressed in the decision *Dumart v. Woolwich (Township)*, [1997] O.M.B.D. No. 1817, that the new planning policies can be considered but they will not be determinative. In other words, decisions regarding planning applications must be based upon the planning regime in place at the time of the application. New planning policies may have some influence, but the decisions must be based upon the policies in effect at the time of the application.

[85] In all cases procedural fairness must be guaranteed in the consideration of applying new policies to applications that are already in the review process.

[86] With regard to the Sifton and Grandview applications, the Board agrees with the submissions of Mr. Cheeseman that the Clergy Principle applies and the determinative planning policies will be those in the 1997 PPS and the 2004 Official Plan.

[87] There was some suggestion in the City's planning evidence that the Growth Plan should be given consideration for the Sifton and Grandview applications. However, these applications were filed in 2004 prior to the Growth Plan coming into effect. The Board will not consider the policies of the Growth Plan to be determinative in coming to a decision about the Sifton and Grandview applications.

[88] Having come to the above conclusions, the Board does not agree with the position of Mr. Walters that there should be some relief provided for the prohibition against intrusion into provincially significant wetlands. As noted earlier, the PPS establishes a hierarchy of natural heritage features and functions, and provincially significant wetlands are at the top of the hierarchy and are afforded the highest level of protection. This priority reflects the overall importance of wetlands in the natural

heritage system of the province and the extent of wetland loss that has occurred over the years. Simply because the “have regard” direction in the Act for applying the 1997 PPS may provide the Board with greater flexibility, does not mean that the Board should exercise flexibility with regard to s. 2.1.3 (a) for provincially significant wetlands. The Board also notes that s. 8.2.1 of the City’s Official Plan does not provide this flexibility. This matter is discussed further later in this decision in the context of the Sifton and Grandview proposals.

[89] With regard to the City’s instruments, the Board agrees with Mr. Lord that in view of the date of Council’s decision they should be considered under the 2005 PPS, the Growth Plan and the 2012 Official Plan. This is consistent with the Board’s application of the Clergy Principle.

Priority of City Instruments

[90] Mr. Lord raised the decisions *Wyeridge McKellar Developments Inc. v. McKellar (Township)* [2009], O.M.B.R. No. 509 and *Ajax (Town) Official Plan Amendment No. 25 (Re)* [2008] 58 O.M.B.R. 495 contending that in these cases, the Board provided relief from the application of Clergy where comprehensive planning measures were enacted through Interim Control By-laws. The Board views applicability of these decisions to the subject appeals as asserting that s. 38 of the Act requires that the provisions of Official Plan Amendments and By-laws that may be passed as a result of an ICBL, should be considered first under the current planning regime, and only if those new instruments fail could an application that may be in process be considered under the previous planning regime. In the above-noted Ajax Official Plan Amendment No. 25 decision, former Vice-Chair Jackson discussed the intent of Interim Control By-laws to provide “breathing space” for the consideration of land uses and potential enactment of new planning controls. In the decision he stated the following:

The nature of the breathing space is set out in section 38(6) of the *Planning Act* which provides that the zoning in effect prior to the passing of the Interim Control By-law will come into effect again after the expiry of the interim control period (breathing room) if Council has not passed a new zoning by-law consequent on the review or study within

the breathing room space. The *Planning Act* accordingly preserves the priority of Zoning passed in the period of the breathing period and if passed in that period the prior zoning does not come back into effect unless the new zoning which has its own notice requirements is appealed and is defeated on appeal. (City Authorities, Tab 17, p. 501)

[91] The Board concurs with this view of the priority set out in s. 38 and will in this decision deal with the instruments enacted through the ICBL before considering other matters. In his argument Mr. Lord contended that the planning instruments should be considered in this order.

[92] It should be noted that through the pre-hearing process, the appeals under consideration here were consolidated. Consequently, the Board is dealing with all matters before it together, in one hearing, and through one decision. Evidence provided in any one phase of the hearing can be considered in all phases and, where relevant, in relation to each of the planning instruments. While Sifton and Grandview provided evidence only in the area of land use planning during phase 3 of the hearing which dealt with the City's instruments, relevant expert evidence related to other disciplines provided in the other phases of the hearing is being used in relation to the Board's consideration of matters raised in phase 3.

[93] In recognition of the requirements of s. 38 of the Act, the Board will move to consideration of OPA No. 166 and Zoning By-law No. 23-2011 before moving to the instruments proposed by Sifton and Grandview.

INSTRUMENTS RESULTING FROM THE WATERFRONT MASTER PLAN

Background and Chronology

[94] The WMP commenced in 2009 resulting from a recommendation in the City's Community Strategic Plan. The WMP was carried out by a consulting team led by the Planning Partnership. A member of the City staff, Mr. Reniers, Director of Policy Planning for the City, directed the WMP process. Mr. Reniers provided planning opinion evidence at the hearing and evidence on the background and history of the WMP.

[95] The WMP is a broad based study that considered the area within the 35 kilometre (“km”) long reach of the Grand River that runs through the City. This area includes heavily urbanized portions of the City. The watersheds of some of the tributaries flowing into this reach of the River were also included in the study area.

[96] It is clear from a review of the documents and the study terms of reference (Exhibit 3B, p. 991 to 1006) that the City’s waterfront area is viewed as a valuable community asset and that the citizens who participated in the WMP process desired protection of natural and cultural features in the area and enhancement of recreational opportunities. While the study was not carried out under the provisions of the Act, the final terms of reference clearly identify consideration of planning and development matters as a major part of the work program and that the suitability of current land uses would be part of the review (Exhibit 3B, p. 1002).

[97] The evidence provided by the City demonstrates that there was a considerable effort to involve the public in the WMP process. However, in Mr. Reniers testimony he indicated that there was no direct effort to contact landowners within the study area. The Board understands that Maureen Zunti, a representative of Sifton, participated in the WMP process from the beginning, but that representatives of Grandview were not made aware of the WMP until February 2010.

[98] The study progressed through 2009 which included a number of public consultation sessions and information gathering. The natural heritage component of the WMP was prepared by the firm Plan B Natural Heritage (“Plan B”). Brad Bricker, a Principal of the firm provided expert ecology evidence at the hearing.

[99] The Board heard that at a workshop in January 2010, Mr. Bricker prepared an overlay identifying the significant natural heritage features and the recommended buffer zones on a map of the study area. This map summarized the work that Plan B had carried out during the course of the study. From the evidence it appears that based mainly upon the extent of the Sifton and Grandview properties that were within the

identified natural heritage system and the proposed buffer zone, the study team concluded that the potential residential use of Sifton and Grandview lands was not appropriate. It was determined that the WMP would recommend that the Official Plan designations on these lands should be changed so that there would be no residential use of the property.

[100] This conclusion was communicated to Sifton and Grandview representatives, who attended a meeting with the City about the WMP in February 2010. Both Sifton and Grandview expressed concern about the recommendations of the WMP to the City. On March 8, 2010, City Council passed a resolution approving an annual allocation of \$350,000 for implementation of the WMP and "... for the acquisition, restoration and protection of waterfront lands" (Exhibit 3C, p. 1517). This was prior to finalization and adoption of the WMP. It is not clear why the City passed this resolution prior to finalization of the WMP or its adoption, but it appears that there was significant community support for the plan. Sifton appealed its application on March 17, 2010 (Exhibit 3C, p. 1527).

[101] The City continued to process the WMP and held a workshop on April 14, 2010 with property owners in attendance. Some of the content of the final WMP was contained in the workshop presentation (Exhibit 3C, p. 1557). On May 4, 2010, the Waterfront Task Force, a City committee consisting of the Mayor, members of Council and a representative of the Six Nations passed a resolution supporting the plan in principle and directed staff to explore methods of implementation for the entire WMP including, "...specifically for the Northwest portion of the Study Area, methods of land securement and or methods of implementation for the entire plan" (Exhibit 3C, p. 1639).

[102] On June 14, 2010 a report recommending approval of the WMP was considered by the City's Committee of the Whole and the WMP was approved in principle. Karl Gonnsen, of Metropolitan Consulting Inc. testified before the Board that he attended the Committee of the Whole meeting on behalf of Grandview and requested that the committee defer a decision to allow some time for consultation between representatives

of Grandview and the City. A number of individuals spoke at the meeting in favour of the WMP recommendations. The Committee of the Whole approved the WMP in principle without acceding to Mr. Gonnsen's request (Exhibit 3C, p. 1689). On June 28, 2010 Council unanimously approved the resolution of the Committee of the Whole adopting the WMP in principle. The recommendation of the Committee of the Whole as approved by Council included direction for staff to "...explore methods of implementation and land securement for the entire Waterfront Master Plan , and present these results to Council for consideration..." (Exhibit 3C, p. 1705). Grandview appealed its applications on July 12, 2010 and July 29, 2010.

[103] On August 23, 2010, at a special in-camera City Council meeting, the City passed a multi-part resolution that included the following:

"...B. That the Planning Partnership and Plan B Natural Heritage, BE RETAINED to prepare the necessary report and supporting documentation to support the findings, conclusions and recommendations of the City's Waterfront Master Plan only as the recommendations apply to future Official Plan land use designation and policies, and zoning, for the lands referred to as 277 Hardy Road and 125 Golf Road, owned by Sifton Properties Ltd. and Grandview Ravines Inc. respectively, IN ADVANCE of the implementation of the full Master Plan as directed at the June 28, 2010 Council Meeting; and...D. That the City's Legal Department RETAIN the Planning Partnership, Plan B Natural Heritage and outside Legal Counsel to represent the City in its defense against the Ontario Municipal Board's appeals filed by Sifton Properties Ltd. and Grandview Ravines Inc.; and E. That the costs attributed to the on-going Ontario Municipal Board's proceedings, and for the implementation of the recommendations of the Waterfront Master Plan solely as they relate to the designation and zoning of these two properties, BE INTERPRETED as "protection of waterfront lands in accordance with Council's funding resolution of March 8, 2010..." (Exhibit 3D, p. 1775)

[104] On September 7, 2010, City Council passed an ICBL for the Sifton and Grandview lands (Exhibit 3D, p. 1795). The City's evidence is that the purpose of the ICBL was to create some breathing space for the Sifton and Grandview applications considering that the applications had been appealed to the Board. The ICBL would also allow time for the City to undertake a more detailed study or review to determine if the re-designations should move forward. The purpose of retaining Plan B, referred to in the above paragraph, was in part to undertake a more detailed study of the natural heritage system affecting the Sifton and Grandview lands. Mr. Reniers' evidence was that no

decisions had been made regarding the re-designation of the Sifton and Grandview lands at that time. Both Sifton and Grandview appealed the ICBL.

[105] The conclusion of the more detailed study, the Natural Heritage Analysis (“NHA”), carried out by Plan B was that there should be no residential development of the lands. Consequently the City held a ward meeting and the statutory public meeting to consider the Official Plan Amendment and the Zoning By-law Amendment for the Sifton and Grandview properties. On February 22, 2011 City Council approved OPA No. 166 and Zoning By-law Amendment No. 23-2011 to redesignate the Sifton and Grandview lands to Grand River Heritage Waterfront and rezone the lands to Grand River Heritage Waterfront Zone.

[106] It should be noted that the applications for the Sifton and Grandview plans of subdivision had been in process since 2004 and had undergone a number of rounds of review by the City and relevant agencies. A number of iterations of both plans were prepared in response to City and agency comments. While many concerns were identified through the review process, the Board was not provided with any City or agency comments on the plans that stated the opinion that residential development of the lands was not appropriate. Furthermore, two studies for the area which included the Sifton and Grandview lands had been undertaken by a developer’s group and both anticipated residential development of the Sifton and Grandview properties. These were the CER (Exhibit 63) which considered the potential impacts on the environmental features in the area and the Northwest Master Plan (Exhibit 4B, Tab 12) which included potential servicing and transportation routes to serve the properties. The latter was adopted by City Council in principle in 2001 and the former, at least for a period of time, was used as a guide by City staff and the Grand River Conservation Authority (“GRCA”) in its consideration of development in the area.

[107] The Board heard that the City planner responsible for the two subdivision proposals, who is no longer with the City and did not testify at the hearing, was intending to bring forward a report to Council in March 2010 on the two plans. However,

it appears that once the recommendation came forward that there should be no residential development the intent to bring a report to Council on the plans was abandoned.

OPA No. 166 and Zoning By-law No. 23-2011

[108] As noted earlier, the current designation of the Sifton and Grandview properties designates approximately half of each property as residential. All of the residential area on the Sifton property and a portion of the residential area on the Grandview property are identified as Environmental Control Policy Areas. The areas identified as Environmental Protection Policy Areas effect mainly the southern parts and wetland areas on each site. These areas are generally designated as Open Space and are intended to contain the most significant natural heritage features. The zoning of the lands generally coincides with the designations where the R1 residential zoning applies to the areas designated as residential and an Open Space Zoning applies to the areas designated as Open Space. A holding zone also applies to the area with the residential zoning.

[109] The WMP process described above resulted in the adoption of OPA No. 166 (Exhibit 4C, Tab 20, Revised in Exhibit 188) and Zoning By-law No. 23-2011 (Exhibit 4C, Tab 21, Revised in Exhibit 189). OPA No. 166 re-designates the whole of the Sifton and Grandview properties as Grand River Heritage Waterfront. Zoning By-law No. 23-2011 places the whole of the Sifton and Grandview properties in the Grand River Heritage Waterfront zone. Both the proposed designation and zoning would only permit passive recreational uses, some public transportation and utility uses, as well as measures required for flood and erosion control and stormwater management. Also, it was acknowledged through the evidence that the existing agricultural uses of the properties could continue and potentially expand under OPA No. 166 and Zoning By-law No. 23-2011. No residential uses are permitted through OPA No. 166 and By-law No. 23-2011.

[110] There was considerable discussion at the hearing about permissions in By-law No. 23-2011 to potentially allow 15% coverage for buildings which could be constructed in association with the recreational use. Height provisions in the By-law would allow for 6 metre (“m”) buildings (Exhibit 189). The Appellants contended that this would be excessive, and could be permitted without any requirement for an EIA.

[111] Mr. Reniers addressed the concerns about By-law No 23-2011 in his oral reply evidence recommending that the By-law should be amended to limit the height of buildings to one storey and the area of buildings to 100 square metres. He also recommended that a holding zone be applied to the lands to require an EIA prior to any development activity under By-law No. 23-1022.

[112] The City had attempted to enter into the evidence a revised version of By-law No. 23-2011 the intent of which, the Board understands, was also to address the above issues. However, after hearing the objections of Mr. Cheeseman and after considering the potential extent of changes that may be contemplated in the revised By-law, and in view of the need to maintain an efficient hearing, the Board ruled that it would not allow a revised By-law to be entered into evidence. The Board indicated it would consider the testimony of Mr. Reniers and other witnesses and, if it determined that the By-law should be approved, enact any changes that might be appropriate.

[113] The Board heard considerable evidence on the merits of OPA No. 166 and Zoning By-law No. 23-2011. Planning evidence on behalf of the City was provided by Mr. Reniers and by Ron Palmer of the Planning Partnership. Mr. Bricker, Principal of Plan B provided natural heritage evidence. Mr. Pigeon, a Principal with GSP Group Inc. provided planning evidence on behalf of Sifton. Robert Dragicevic, a Principal of Walker, Nott, Dragicevic provided planning evidence on behalf of Ferrero Canada Ltd. Chief William Montour and Lester Green provided evidence on behalf of the Haudenosaunee, Six Nations and Sago Yesahta.

[114] Grandview did not provide any direct evidence in this phase of the hearing, but adopted the evidence provided on behalf of Sifton. In addition, the Board had already heard extensive planning and natural heritage evidence for the Sifton and Grandview properties in the earlier phases of the hearing.

[115] The Board received considerable evidence from the participants who were all in support of the WMP and the resulting planning instruments. The reasons for supporting the planning instruments were similar to those of the City, expressing the desire to protect the natural and cultural heritage features and promote the recreational and open space value of the waterfront.

[116] The Board has fully considered the evidence related to OPA No. 166 and By-law No. 23-2011 and that provided for the Sifton and Grandview subdivisions. This includes the WMP and the NHA, the EIA's undertaken by AECOM and Savanta and the testimony of the various witnesses and the numerous documents submitted by the parties. The Board has also considered all authorities submitted by the parties.

[117] In considering OPA No. 166 and Zoning By-law Amendment No. 23-2011, the Board must ensure that they meet the applicable requirements of the Act, they must be consistent with the 2005 PPS and they must have regard for the Growth Plan. In addition, the Official Plan Amendment should comply with the goals and objectives and relevant policies of the Official Plan and the Zoning By-law Amendment must comply with the Official Plan. The Board has considered the above-noted provisions and all of the specific issues raised by the parties which were included on the issues list for this hearing related to these planning instruments.

[118] After reviewing the evidence, the Board has concerns for the process used by the City to conclude that residential development is not appropriate for the Sifton and Grandview properties. It is understood that the WMP was not undertaken under provisions of the Act and the evidence shows that there was considerable effort to involve the public, but there was no direct effort to engage the landowners whose

interests might be substantially affected by the WMP process. While Sifton was aware of the WMP from the early stages and Ms. Zunti participated in the process, it is clear from the evidence and Ms. Zunti's testimony that she did not anticipate the recommendation coming forward that would remove completely the residential designation on the Sifton lands. The evidence of Mr. Gonnens was that Grandview did not become aware of the WMP until February 2010. By that time, the recommendation had already come forward from the study team that there should be no residential development of the Sifton and Grandview lands.

[119] While it appears that the notice requirements under s. 17 of the Act were met in relation to the adoption of OPA No. 166, there was no effort to directly contact potentially affected property owners in the preparation of the WMP. Furthermore, it appears from the evidence that Council was committed at an early stage to follow through with the recommendations of the WMP. The reasons for this are not clear, but it is apparent that there was considerable support for the recommendations from those involved in the WMP process.

[120] The Act sets out a public process for the consideration of Official Plan Amendments and Zoning By-law Amendments. The intent of the process is to ensure that every individual, corporation and public body that has an interest in a planning matter can express their interest to the planning authority making the decision so that all interests are given full consideration. Furthermore, the proposed Official Plan Amendment and Zoning By-law Amendment caused a fundamental change in the Official Plan designation and zoning for the Sifton and Grandview properties through the complete removal of the residential designation and zoning. In order for the Board to approve this change and conclude that the planning instruments are appropriate, the documentary and oral evidence must establish that the residential designation should be completely removed from each property. It is not sufficient for the evidence to identify portions of the subject properties where residential development may not be appropriate or to identify constraints that could be overcome through some adjustment to the boundaries of the residential designation.

[121] As noted earlier, the Act and PPS call for a balancing of economic, environmental and social interests. It may well be that the City considered the environmental and cultural value of the Sifton and Grandview properties to be so significant to the City that it should outweigh any other interests. However, in the Board's view, the purpose of the notice and public consultation requirements in the Act is to ensure the full consideration of all legitimate interests. In this case, the process would have benefitted if representatives of Sifton and Grandview had been actively engaged so that their concerns, and the most up to date natural heritage information in their possession, could have been expressed at all stages of the WMP process and weighed fully by the consultants, City Staff and Council in making decisions about the lands.

[122] The Haudenosaunee also raised the lack of direct consultation in the preparation of the WMP as a major issue. This concern is dealt with later in this decision.

[123] However, the more critical concern in the Board's determination regarding OPA No. 166 and Zoning By-law No. 23-2011 involves the analyses used to substantiate the conclusion that the lands should not support residential development.

[124] In the Board's view, the provisions of the Official Plan contemplate some residential use on the Sifton and Grandview properties. However, the policies of the Official Plan recognize that the extent of the residential use may not coincide with the limits of the residentially designated area. The intent of the s. 8 policies of the Official Plan is to ensure through the Environmental Protection Policy Area provisions that the most significant natural heritage features are generally avoided and then through the Environmental Control Policy Area provisions to ensure, through the completion of an EIA, that residential development of the lands will not have a negative impact on the natural heritage features and functions. The limits of the residential development may be reduced from the area designated as residential because of the findings of the EIA. These policies are consistent with the relevant provisions of the PPS. The policies of both the Official Plan and the PPS establish the assessment of impacts on other

identified natural heritage features and functions as the mechanism for determining the extent of residential development of the lands. Of course, through this assessment additional features could be identified which would prohibit development on portions of the residentially designated area.

[125] The presence of significant natural heritage features on the Sifton and Grandview properties has been recognized at least since the early 1990's. In view of the process established through the Official Plan and PPS, the existing residential designations on portions of the properties, their location within the urban area of the City, the studies either adopted or used by city staff which recognize some residential use of the properties, and the planning and review effort that has already occurred for the subdivision proposals, the Board finds that there must be a clear basis established through the relevant policies and there must be substantive evidence to remove all potential residential use of the properties.

[126] Given the amount of study that has already been undertaken in the area, a substantive and rigorous analysis is required in order to assess the impact of potential development of the lands on the natural heritage features and functions. The evidence must clearly establish that development would encroach into areas where it is prohibited by the 2005 PPS or Official Plan, that there would be unavoidable negative impacts to significant natural heritage features and functions, or that in some way the natural heritage system would not be maintained. However, the evidence provided at the hearing indicated that the environmental work in the WMP was a high level analysis based mainly on existing information with little field investigation of the natural heritage system. The NHA provided more detail, but did not involve extensive field work and gave only cursory consideration to the development plans for the properties.

[127] Through this hearing the Board received detailed EIA's for the Sifton and Grandview properties. The testimony of numerous expert witnesses, their witness statements, and the submission of relevant documents has provided a substantial amount of evidence on the natural heritage features and functions of the properties and

surrounding area. After giving the submissions careful consideration, the Board cannot agree with the conclusions of the NHA that residential development of the properties would necessarily have negative impacts on natural heritage features and functions. The detailed evidence provided for the Sifton and Grandview site establishes that some residential development of the properties can occur. The reasons for coming to these conclusions are provided in the remainder of this decision.

Features Protected Under S. 2.1.3 of the 2005 PPS and S. 8.2.1 of the Official Plan

[128] Development is prohibited in the habitat of PSW's and significant habitat of endangered and threatened species through the 2005 PPS and it is virtually prohibited in the areas identified as Environmental Protection Policy Areas in the Official Plan. Furthermore, in adjacent land it must be demonstrated that development will cause no negative impacts on the natural heritage features or their ecological functions.

[129] Section 8.2.1 of the Official Plan includes some additional natural heritage features, beyond those specified in s. 2.1.3 of the 2005 PPS, which require the highest level of protection. The provisions of s. 8.2.1 could be interpreted as applying only to the area identified in Official Plan Schedule 3-1. However, in recognition that s. 8.2.1 is identifying the most significant features in the City; the Board concludes that it is appropriate to apply the requirements even if the features are identified outside of the area delineated on Schedule 3-1.

[130] The environmental features and functions identified in the WMP and the NHA prepared by Plan B are largely those that were already documented in existing information sources. After reviewing the evidence, the Board has concluded that except for some potential minor issues involving the PSW, neither the WMP nor the NHA identified the presence of the types of features which would preclude development through the policies of the PPS or the Official Plan, in those areas where Sifton and Grandview are proposing residential development. There is some more detailed delineation of the PSW provided in the NHA which shows that it potentially extends into

the residentially designated area (Exhibit 5A, Tab 10, p. 565). However, the evidence provided by Sifton and Grandview includes field delineation of the PSW and the developments avoid the PSW except for some minor intrusion of proposed roads which can be eliminated through redesign of the plans and is dealt with later in this decision.

[131] Portions of the PSW that are within the residentially designated area are protected as Environmental Protection Policy Areas. Parts of the PSW are also designated as Open Space. The evidence provided in relation to the specific plans of subdivision demonstrates that development will for the most part avoid all areas containing features protected under s. 2.3.1 of the PPS and identified as Environmental Protection Policy Areas except for the above-noted minor intrusion into the PSW.

[132] Both the WMP and NHA refer to the presence of habitat for endangered and threatened species on the Sifton and Grandview properties. The PPS prohibits development in “significant” habitat of endangered and threatened species. The definition in the 2005 PPS which applies to the City’s planning instruments and is reproduced earlier in this decision indicates that “significant” habitat is that “as approved by the Ontario Ministry of Natural Resources”.

[133] From the evidence, the Board finds that the only identified habitat of endangered or threatened species on the two properties that requires protection because it falls within the PPS definition of significant habitat is one abandoned American Badger den on the Sifton lands which MNR is satisfied will be protected in the subdivision plan. This occurrence of significant habitat was identified through the Environmental Impact Study prepared by AECOM for the Sifton proposal, not by the WMP or NHA. While the NHA refers to some individual occurrences of endangered and threatened species, many of these are off site and none fall into the category of significant habitat, as approved by MNR.

[134] Section 8.2.1 of the 2004 Official Plan includes Provincially Significant Habitat of Endangered and Threatened Species in Environmental Protection Policy Areas and

severely limits development in these areas. The 2012 Official Plan drops the term “Provincially Significant” and simply indicates that the habitat of endangered and threatened species is included in Environmental Protection Policy Areas. No definition of “Provincially Significant” is provided. However, the Board heard no evidence that the removal of the words “Provincially Significant” influenced the determination of areas that should be considered the habitat of endangered and threatened species. The majority of the evidence and the documentation in the relevant sections of the NHA are directed toward satisfying policy 2.1.3 of the 2005 PPS.

[135] The WMP and NHA do not identify any habitat of endangered and threatened species in areas proposed for development on the Sifton and Grandview properties. In considering s. 2.1.3 of the 2005 PPS, with regard to the Sifton property, the NHA states, “The oak woodland on the Sifton lands supports several provincially ranked S1 and S2 plant species, some of which may be protected under the *Endangered Species Act*. The existing habitat of rare species should be protected with their respective habitat guidelines, as determined by OMNR. Given the potential for the site to sustain rare species, the existing wetland, woodland and cultural habitat on the property should be protected.” (Exhibit 5A, Tab 10, p. 550-551). With regard to Grandview, the NHA states, “S1 and S2 ranked plant species are reported from the vicinity of the extreme south end of the Grandview Ravines property to the northwest, near the existing railway line prairie.... Given the potential for the site to sustain rare species, the existing wetland, woodland and cultural habitat on the property is recommended for protection.” (Exhibit 5A, Tab 10, p. 551).

[136] The Board finds that these statements do not establish the presence of the habitat of endangered and threatened species. The Board requires more definitive evidence than reports of S1 and S2 ranked species to establish that habitat of endangered and threatened species exists. Have the species been determined to be endangered or threatened, and are they simple sightings of fauna or individual occurrences of flora, or has habitat been confirmed as being established on the properties? Furthermore, are the reported species in areas where development is

proposed? In addition, from the evidence provided by Sifton, the oak woodland will be protected in an open space area.

[137] The observations in the NHA do not establish the presence of habitat approved by the Ontario Ministry of Natural Resources (“OMNR”) as required in the 2005 PPS definition. From the evidence, the Board cannot conclude that the observation of some S1 and S2 species and the potential of portions of the properties to support rare species establish the existence of habitat.

[138] The NHA also notes a number of endangered and threatened species associated with the entire WMP study area (Exhibit 5A, Tab 10, p 441). These species are not specifically associated with the Sifton and Grandview properties, except for the American Badger den on the Sifton lands which is being dealt with to the satisfaction of MNR. There is reference to the Bald Eagle, a species of special concern, using the “forested slopes of the Grand River for winter roosting habitat (Exhibit 5A, Tab 10, p. 539). However, the evidence is that the Bald Eagle uses this portion of the Grand River generally and no evidence was provided that the forested areas on the Sifton and Grandview properties would be substantially removed or impacted by the development proposals.

[139] The more detailed natural heritage analyses provided by the Appellants do identify occurrences of some endangered and threatened species on the properties, but they do not identify habitat other than that of the badger. The AECOM study found some specimens of the common hoptree on the Sifton property. A number of individual trees have been observed in the fallow north western agricultural field that is proposed for development. One tree was inadvertently removed by agricultural activity, but the Board heard that Sifton has filed an application under the ESA and is working with MNR to develop an appropriate approach to relocate the hoptrees on the property. Two species of special concern have been observed on the Sifton property (Exhibit 13, Tab 3, p. 33 of EIS). A snapping turtle was observed within the southern wetland area that is not

proposed for development. Also monarch butterflies were observed in the prairie communities which are also not proposed for development.

[140] The Savanta study for the Grandview lands noted that a pair of Eastern Meadowlark had nested on one of the northern agricultural fields in the past. However, in recent years there was no record of this pair nesting. The study also identified some individual specimens of rare plants. However, in the Board's opinion, these observations do not establish the presence of habitat.

[141] Based upon the evidence and a review of the relevant policies, the Board cannot conclude that there is anything that can be classified as habitat of endangered and threatened species on the Sifton and Grandview properties, except for the abandoned American Badger den on the Sifton property, in areas where development is proposed. The abandoned American Badger den is the only feature that could meet the 2005 PPS definition of "significant habitat" and MNR has agreed with proposed measures to protect the American Badger den within the context of the development. The evidence has not established that the other occurrences of endangered and threatened species should be classified as habitat. Clearly, the Board cannot consider them to be significant habitat under the 2005 PPS. Furthermore, even if some of these features were to be considered habitat, their presence does not completely negate development of the Sifton and Grandview properties. Through the provisions of the Official Plan and 2005 PPS appropriate measures could be agreed upon to avoid and protect the habitat in consultation with MNR.

[142] The Environmental Protection Area Policies of the Official Plan include additional natural heritage features beyond those included in s. 2.1.3 of the 2005 PPS that are intended to be provided with the highest level of protection. Environmental Protection Policy Areas are delineated on Schedule 3-1 (Exhibit 4A, Tab OP-2012). These areas include significant ANSI's, habitat of endangered and threatened species, provincially significant savannahs, PSW's, ravines with watercourses, significant forested areas, the Regulatory Floodplain of the Grand River, D'Aubigny Creek and the tributaries of

Fairchild Creek, a vegetative buffer zone along its course and areas of significant groundwater discharge.(Exhibit 4A, Tab OP-2012, p. 8-3). Policy 8.5.2 the Official Plan prohibits development in PSW's. Through other policies in s. 8.2.1, the plan provides the highest level of protection to the other features included in the Environmental Protection Policy Areas and may only permit passive recreation, public transportation and utilities, erosion and flood control and stormwater management uses.

[143] Unlike the 2004 Official Plan, provincially significant prairies are not included in the Environmental Protection Area Policies in the 2012 Official Plan. The 2012 Official Plan does include significant forested area in the Environmental Protection Policy Area policies, and includes significant woodlands in the Environmental Control Policy Area policies. While the term significant is defined in the 2005 PPS in relation to woodlands, it is not defined in the Official Plan. The term "significant forested area" is not defined in the Official Plan either.

[144] From the evidence, the Board cannot conclude that any part of the Sifton and Grandview properties would fall under the provisions of the Environmental Protection Policy area as a "significant forested area". Portions of both the Sifton and Grandview properties are identified as significant woodland in the WMP and NHA as well as in the EIA's completed by the Appellants. The proposed plans of subdivision will generally avoid the areas identified as significant woodland. There is some removal of the wooded area along the stream on the Sifton property to facilitate the construction of a road and stream crossing. The evidence of AECOM is that there will be minimal removal of trees and in those that will be removed are not significant. Some removal of trees is proposed in the northern part of the Grandview lands. There was some dispute about the significance of this area which was classified in the Savanta work as a cultural thicket and was classified in the Plan B work as significant woodland. However, it has not been classified as a "significant forested area". Recognizing that "significant forested area" is not a defined term, the Board expects that these areas are distinct from significant woodlands and would be larger and likely contain different species

composition. Therefore, the Board cannot conclude that this area should fall under the provisions of the Environmental Protection Policy Areas in the Official Plan.

[145] With regard to other features identified in s. 8.2.1 of the Official Plan, where they may be located on the subject properties, the evidence provided to the Board demonstrates that they are either protected through the development proposals or can be protected with some minor revisions to the plans of subdivision.

Other Significant Natural Heritage Features

[146] The majority of the other significant natural heritage features located on the properties are subject to the “no negative impact” test through the provisions of s. 2.1.4 and 2.1.6 of the 2005 PPS and s. 8.3.1 of the Official Plan. Development is not prohibited within these features. Rather it must be demonstrated that development within these features or on adjacent lands will not cause “... degradation that threatens the health and integrity of the natural heritage feature or its ecological function.” Furthermore, nothing in the provisions of the 2005 PPS or Official Plan prevent consideration of measures to mitigate impacts when assessing if a proposal will cause negative impacts. In fact s. 8.3.1 of the Official Plan specifically allows the consideration of “an appropriate compensation or remedial strategy....” (Exhibit 4A, Tab 2004 OP, p. 8-5)

[147] The WMP and NHA contain very little analysis or description to demonstrate that there would be negative impacts on natural heritage features and functions identified in s 2.4.1 of the 2005 PPS or s. 8.3.1 of the Official Plan. Regarding the Sifton property, the NHA states:

The Sifton property is located wholly within a significant valleyland which contains significant woodland, wetland and wildlife habitat features and functions, as well as the Tufa Mound Earth Science ANSI. Development of the subject property would, in the long-term, result in irreversible negative impacts to the natural heritage features and their ecological functions. (Exhibit 5A, Tab 10, p 552)

[148] For the Grandview property, the NHA states:

The Grandview Ravines property contains significant woodland and wildlife habitat function. The wetlands and woodlands on the subject property are part of a larger natural area on the Moffat Moraine which supports significant wetland, woodland and wildlife habitat functions (deer wintering areas). The moraine forms part of the headwaters of several tributaries to the Grand River and is an important groundwater recharge area in the context of maintaining natural areas such as wetlands and streams but also from a Source Protection standpoint and Brantford's Municipal drinking water supply.... Development of the subject property would, in the long-term, result in irreversible negative impacts to the existing natural heritage features (on and adjacent to the site) and their ecological functions. (Exhibit 5A, Tab 10, p. 552)

[149] The evidence provided for the plans of subdivision indicate that there will be virtually no removal of any of the significant features with the exception of the location of the developments within the Grand River valley, which the City considers to be a significant valleyland in the vicinity of the subject properties. Tom Hilditch disputed the classification of the Grand River valley on the Grandview property as significant valleyland. He maintained that the valley of the tributary which traverses the Grandview property is a significant valleyland and it should be protected. The Grandview plan of subdivision generally avoids the valley of the tributary. However, portions of both the Sifton and Grandview developments are proposed to be located beyond the main break in slope of the Grand River valley.

[150] While saying this, the NHA does not document the negative impacts that would result from locating portions of the development within the Grand River valley. The NHA simply indicates that development within the valley would result in negative impact, and that this is a reason for not permitting the proposal. Based upon the NHA, the WMP and the more detailed evidence provided for the Sifton and Grandview proposals, the Board cannot conclude that development within portions of the Grand River valley would cause negative impact as defined in the 2005 PPS, that is, "degradation that threatens the health and integrity of the natural heritage feature or its ecological function". The Grand River valley covers a large area within the City and as noted earlier it contains substantial portions of the urban area of the City. From the evidence provided on specific subdivisions plans, extensive areas of the Grand River valley will be protected through the plans of subdivision and potentially placed in public ownership. The NHA

does not address how the development of an additional portion of the valley will threaten the health and integrity of the valley or its ecological function. Even if the Board were to agree with the City's position that the portion of the Grand River valley on the Appellants' lands is significant valleyland, it is simply not clear from the evidence that the proposal will cause negative impacts. Furthermore, it appears that the potential for using mitigative measures, compensation or remedial strategies as can be permitted through s. 8.3.1 of the Official Plan, has not been considered in the determination of impacts in the NHA.

[151] Significant valleylands, significant woodlands and significant wildlife habitat are all subject to the "no negative impact" test. The NHA references concern for the Tufa Mounds ANSI, but the plans for the Sifton property place the ANSI in an open space block. There is no detailed identification and description of negative impacts on natural heritage features and functions in the WMP or NHA. There is no indication of the extent of loss of the features that would be expected or a description of the types of negative impacts expected. In Mr. Bricker's testimony he indicated that the plans of subdivision were overlaid on the mapping of the natural heritage features, but it appears that this did not lead to a detailed identification of negative impacts.

[152] Significant prairies are included in the Environmental Control Policy Area provisions of the 2012 Official Plan and are therefore subject to the no negative impact test. While the evidence indicates that some individual specimens of prairie indicator species have been found at the north end of the Grandview property, there is no evidence that this has been identified as a prairie or that it has been determined to be provincially significant. There are two prairies on the Sifton property which will be protected through the proposed plan of subdivision. No evidence was provided to the Board to indicate that they are provincially significant. In fact the northerly prairie is one that was recently planted under the supervision of MNR with the co-operation of Sifton.

[153] Further discussion about the evidence related to natural heritage features is provided in subsequent sections of this decision dealing with the plans of subdivision.

Significant features which have not been dealt with in the above, such as fish habitat and surface and ground water features are discussed in those sections. However, based upon a review of all of the evidence, the Board cannot conclude that development of the Sifton and Grandview properties would result in negative impacts to the significant natural heritage features and functions.

Other Considerations

[154] In the NHA and through his testimony, Mr. Bricker did not rely strictly on the provisions of s. 2.1.3 to 2.1.6 of the 2005 PPS, but he also referenced s. 2.1.1 and 2.1.2. These sections require that the natural heritage system be protected in the long term and that it should be maintained, restored, and where possible improved. Section 2.1.2 also recognizes the connectivity of the system and linkages between natural heritage, surface and groundwater features.

[155] Mr. Bricker contended that these sections require protection of not only the features and functions in the area, but of the entire natural heritage system. He identified the natural heritage system which includes that Sifton and Grandview properties as a “centre of bio-diversity” and compared it to areas like the Oak Ridges Moraine and Rouge Park in terms of its importance and the need for protection.

[156] Based upon the evidence, the Board cannot declare the subject area to possess a similar degree of significance as the Oak Ridges Moraine or Rouge Park. The Board heard no comparative evaluation of the areas or other detailed evidence to establish that the subject area is similar to these other areas. It should be noted that the Oak Ridges Moraine and Rouge Park were protected after their value was recognized by senior levels of government. The Board is not aware of a similar type of recognition occurring for the subject area. Furthermore, the province is not a party to these proceedings and has not expressed that the subject area merits a similar degree of protection as the Oak Ridges Moraine and the Rouge Park.

[157] Furthermore, the Board concludes from reviewing s. 2.1.1 and 2.1.2 of the 2005 PPS, that these sections do not inherently impose any extra degree of protection on the environmental system in the subject area. They require that consideration be given to diversity, connectivity, the long term ecological function and biodiversity of the natural heritage system and that they should be maintained, restored and where possible enhanced.

[158] Policy 2.3.3 of the 1997 PPS includes many of the elements of policy 2.1.2 of the 2005 PPS in requiring, maintaining and where possible improving the diversity of natural heritage features and the connections between them. Furthermore, consideration of the natural heritage system is integrated into both versions of the PPS through the requirements of considering impacts from development of adjacent lands and the requirement to maintain natural heritage functions. These provisions require any natural heritage analysis to move beyond simple consideration of features and into the way that the system functions and the connections that sustain the system.

[159] These matters have been considered in the natural heritage evidence provided by Sifton and Grandview. The Board has conflicting evidence from the natural heritage experts on whether the natural heritage features and functions can be protected. Mr. Bricker and other experts testifying on behalf of the City contended that the proposed developments will have negative impacts on the natural heritage system. The evidence of Gary Epp, the natural heritage expert called by Sifton and Mr. Hilditch and Sean Geddes, the natural heritage experts called by Grandview, is that the natural heritage features, their ecological function and the natural heritage system will be maintained and protected. They contend that with appropriate buffers and the implementation of mitigation measures, the properties can be developed for residential purposes, that the natural heritage system will be protected for the long term, and there will be no negative impact on the natural heritage features or their ecological functions.

[160] While the City's evidence contends that the natural heritage system will best be protected if there is no residential development of the properties, the Board heard that

existing agricultural uses of the lands can continue and possibly be expanded. However, if limited development of the land is permitted, the portion of the lands with the most significant features and functions will be protected and potentially placed in public ownership. In the Board's view, this should be a successful strategy for protecting the natural heritage system in the long term.

[161] Based upon the detailed evidence provided by the parties, the Board concludes that the natural heritage system with appropriate mitigation measures will be protected and maintained in the long term through the Appellants' proposals as amended through the requirements of this decision.

Conclusions

[162] The WMP and NHA provide a broad-based analysis of natural heritage features and functions of the subject properties and surrounding area. In considering these documents and the related evidence, in conjunction with the evidence provided by Sifton and Grandview, the Board finds that they do not establish that the lands should be designated and zoned to prevent residential development as proposed through OPA No. 166 and Zoning By-law No. 23-2011.

[163] The Board acknowledges that the NHA provides a more detailed analysis than the WMP and the Board heard that approximately two days of field work was undertaken in conjunction with this study. The analysis in the NHA identifies significant features and attaches a 30 metres ("m") buffer to all of them and concludes that there is no developable area on either the Sifton or Grandview lands. However, with the exception of the PSW and the American Badger den noted above, there is no clear prohibition in the relevant policies against development in any of the identified features. The evidence has not demonstrated that negative impacts will necessarily result from the development of portions of the Sifton and Grandview lands on the other significant natural heritage features and functions. The evidence provided regarding buffer zones is that they should be established based upon the features and functions that will be

protected. The Board is not convinced that 30 m buffers are required around all natural heritage features.

[164] It may well be that some changes are required to the Sifton and Grandview plans to ensure that negative impacts do not occur. Lotting patterns may need to be changed, buffers increased and roads relocated. However, the Board heard that, in preparation of the NHA, there was only minimal consideration of the Sifton and Grandview plans and no consideration of potential alternatives. The Board recognizes that it is the responsibility of the proponents, not the City to carry out EIA's for the development proposals. However, the NHA does not provide sufficient analysis that would lead the Board to conclude that all reasonable schemes for development of the lands should be refused. It should be noted that MNR, in its June 6, 2012 comments on OPA No. 166 and Zoning By-law No. 23-2011, while indicating some general support for the intent of the planning instruments also expressed a desire for more detailed analysis (Exhibit 2, Tab 1A). Furthermore, based upon the more detailed evidence provided by all parties in relation to the development proposals, including the AECOM and Savanta EIA's, the Board finds that some residential development of the lands is possible with if appropriate mitigation measures are implemented. These matters are considered further in the subsequent sections of this decision dealing with the Sifton and Grandview subdivisions.

[165] The Board has found earlier in this decision that the Official Plan designations and zoning establish the principle of some residential use of the properties. The limits of residential development are to be established through the EIA carried out under s. 8.3.1 of the Official Plan. If the EIA were to determine that any residential use with consideration for mitigation and compensation measures would have an unavoidable negative impact, then the reasonable conclusion would be to completely sterilize the properties from residential uses. However, the necessity of negative impacts resulting from residential development has not been demonstrated by the NHA and the WMP. Consequently, the Board must conclude that the OPA No. 166 and By-law No. 23-2011 represent a down designation and down zoning of the Sifton and Grandview properties.

[166] There is a long line of jurisprudence comprised both of decisions of this Board and the Courts that have consistently determined that down-zoning of lands for public purposes should not be undertaken unless the appropriate authority is prepared to acquire the lands within a reasonable time.

[167] This is emphasised in the oft-quoted decision Re: *Township of Nepean Restricted Area By-law 73-76*, (1978) 9 O.M.B.R. 36 where the Board stated:

This Board has always maintained that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved. (Grandview authorities, Tab 6, p. 14)

[168] This principle that land should not be down zoned for public purposes unless the public authority is prepared to acquire the lands has been upheld by the Courts. The Board's Decision *Russell v. Toronto (City)*, (2000) 52 O.R. (3d) 9 (C.A.) set out some possible exemptions to the rule in stating:

Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well-being of the community, the municipality should have the unfettered discretion to sterilize the use of lands, without the additional burden of compensation. (City Authorities, paragraph 10)

From the evidence none of these exceptions apply in the case of OPA No. 166 and Zoning By-law No. 23-2011.

[169] While the intent of redesignating the lands for public open space uses is included in the WMP, and OPA No. 166 includes land securement policies, from the evidence, the Board concludes that the City has not attempted to acquire the lands in conjunction with the adoption of OPA No. 166 and Zoning By-law 23-2011.

[170] The Board acknowledges that development of the Sifton and Grandview sites has always been conditional on being able to satisfy the requirements of the Official Plan, in particular the Environmental Control Policy Area requirements, and on being able to remove the Holding Symbol from the residential zoning by satisfying the City's servicing and other requirements. The evidence has revealed the challenges in meeting the City's requirements, but it seems that the parties were moving toward resolving

issues. This all changed when the recommendations of the WMP came forward as a result of a parallel process outside of the Act. The City then moved through the ICBL to undertake a more detailed study and pass OPA No. 166 and By-law No. 23-2011. The process would have benefitted from a higher level of consultation with the effected property owners, but there is no evidence that the City was obligated to do so. However, the outcome of the WMP process may have been influenced.

[171] The process was not optimal, but the Board is not implying that there were ulterior motives. It appears that the City through the WMP process simply placed a higher degree of significance to the natural heritage and cultural features on the Sifton and Grandview property than they had previously been given.

[172] Based upon consideration of all of the evidence from the three phases of the hearing in relation to the OPA No. 166 and By-law No. 23-2011 and the provisions of the relevant planning documents, the Board concludes that the proposed Grand River Heritage Waterfront designation and zoning are not appropriate for the Sifton and Grandview properties and that they represent a down designation and down zoning. The Board finds that these designations should not be enacted unless there is public acquisition of the properties. Furthermore, the Board finds that the NHA and WMP have not demonstrated that residential uses are inappropriate for at least a portion of the lands.

[173] In view of the above, the Board will allow the appeals against OPA No. 166 and Zoning By-law No. 23-2011 and will not approve these instruments. The Board will also allow the appeals against the ICBL which was the implementing mechanism for these instruments. The appropriate order is provided at the end of this Decision.

[174] In coming to the above conclusions, the Board has had regard for the decisions of City Council as required in s. 2.1 of the Act. For the reasons noted above, the Board has come to a different conclusion than City Council and has found that the approval of OPA No. 166 and Zoning By-law No. 23-2011 is not appropriate.

PROPOSED SIFTON DEVELOPMENT

Introduction

[175] Having determined that the designations and zoning put in place through the ICBL are not appropriate, the Board will now turn to the Sifton and Grandview proposals which must be considered in respect to the designation and zoning in place prior to OPA No. 166 and Zoning by-law No. 23-2011. As noted in the section on the Clergy Principle, the Board considers the determinative policy documents for the review of the Sifton and Grandview plans to be the 1997 PPS and the 2004 Official Plan. The policies in these documents are very similar and in many cases identical to the 2005 PPS and 2012 Official Plan.

[176] The Board heard extensive evidence in relation to the Sifton proposal. Experts testifying on behalf of Sifton included Dr. Epp for ecology and natural heritage, Dennis Kelly for geotechnical engineering, Brian Richert for stormwater management, Robert Stratford and Peter McAllister for civil engineering, William O'Brien for transportation engineering, David Slaine for hydrogeology, Peter Timmins for archeology and anthropology, and Mr. Pigeon for land use planning. The Board also heard from Ms. Zunti and Phillip Masschelein who are employed by Sifton, but were not qualified as experts.

[177] The Board heard expert evidence on behalf of the City from Paul Christie for municipal design and infrastructure, Craig Binning for municipal finance including development charges, Daryl Cowell for karst hydrogeology and physical geomorphology, Russ Loukes for traffic and transportation engineering, Janet Engel for water resources engineering, Gregg Zwiers for hydrogeology, Tony Zammitt for aquatic and terrestrial ecology, Fred Notolochny for natural heritage and natural hazards planning, Dr. Gary Warwick for archeology, Jim Dougan for ecology, and Lucy Hives for land use planning. The Board also heard evidence from Mike Stone and Ken Corneliese who are employees of MNR and were called by the City under summons. Mr. Stone

provided expert testimony in the field of land use planning. Mr. Corneliese was not qualified as an expert, but was called to address a specific piece of correspondence (Exhibit 16) regarding proposed buffers around the ANSI on the property and the watercourse.

[178] Ms. Engel, Mr. Zwiers, Mr. Zammitt, and Mr. Notolochny are employees of the GRCA” which provides advisory services to the City with regard to a number of natural heritage, groundwater, stormwater, and watershed issues through an agreement with the City. (Exhibit 3A, p.23)

[179] The Board heard expert evidence on behalf of Ferrero Canada Ltd. from Paul Complin in the area of air quality engineering specializing in odours and Mr. Dragicevic in the area of municipal planning.

[180] The Board heard evidence on behalf of the Haudenosaunee, Six Nations and Sago Yesahta from Chief Montour, Mr. Yesahta, and Mr. Green.

[181] The Board also heard evidence from a number of participants who testified in this phase of the hearing. A complete list of witnesses is provided in Appendix 1.

[182] The Board has considered all of the evidence and submissions related to the Sifton proposal. The Board has reviewed proposed conditions of draft approval submitted by the City in the event that the Board determined that development should be approved. The Board has reviewed the Sifton Plan of Subdivision (Exhibit 12, p. 197). The Board has also reviewed Sifton’s final versions of the proposed Official Plan Amendment, Zoning By-law Amendment and conditions of draft plan approval which are contained in Exhibit 140.

[183] After considering all of the evidence, the Board concludes that some residential use of the Sifton lands is appropriate and would meet the applicable requirements of the Act, the 1997 PPS, the City’s Official Plan and the City’s Zoning By-law. Development of the lands is restricted because of the presence of natural and cultural heritage features.

The evidence resolved most natural and cultural heritage issues, but the Board is requiring some adjustments to the proposal to ensure protection of natural heritage features and functions. In addition, there are some servicing and access issues which remain unresolved. The final resolution of these issues may reduce the amount of developable area from that which is designated as residential, to the extent where it may not be economical for Sifton to develop the lands. However, the economic viability of the proposed development is not a matter that enters into the Board's consideration. The Board must base its decision on the suitability of the proposed land use for the subject lands based upon the provisions of the relevant polices and planning documents.

[184] If adjustments are made to the proposal as directed by the Board, modified versions of the Official Plan Amendment and Zoning By-law can be approved. However, until a number of issues are resolved, the Board considers the plan of subdivision to be premature and it cannot be approved. The reasons for arriving at these conclusions are provided in the remainder of this section.

Proposed Development

[185] As noted earlier, the Sifton property consists of 42.49 ha on the south side of Hardy Road in the western part of the urban area of the City. The property is located south of Hwy. 403 and has the Grand River as its southern boundary. To the west of the property are lands owned by TCA which currently contain a gravel extraction operation. During the course of the hearing, the Board heard that a subdivision application has been filed by TCA proposing industrial and residential use of its property. To the northwest of the Sifton lands is the City's North West Industrial Park. On the north side of Hardy Road, across from the Sifton property are lands owned by 1272274 Ontario Inc. In Trust and Goldie Davidovits ("Davidovits").

[186] To the east of the Sifton lands is the property of Samuel Rizzo Estates Inc. ("Rizzo"). Both Davidovits and Rizzo are parties to the appeal, but did not present

evidence at the hearing. Also located on the south side of Hardy Road is a lot owned by Jerry Klievik, a participant in this appeal. The Sifton lands border Mr. Klievik's lands on the east, south and west sides. The Grandview lands are located on the north side of Hardy Road to the northeast of the Sifton property.

[187] The plan of subdivision proposes 121 single detached lots and a medium density block that is intended to contain between 62 and 93 residential units (Exhibit 12, p. 197). The Official Plan Amendment proposed by Sifton will change the designation of approximately 2.97 ha of the property from Low Density Residential to Medium Density Residential (Exhibit 140, Tab 1). The area proposed for single family lots can remain in the Low Density Residential designation. In addition portions of the property that are not intended for development are proposed to be redesignated from Low Density Residential to Major Open Space and included in the Environmental Protection Policy Area. The Official Plan Amendment also proposes to delete the Environmental Control Policy Area and Environmental Protection Policy area indications from the areas that are intended for development.

[188] The Zoning By-law Amendment proposed by Sifton will re-zone the area intended for single detached lots from H-R1B to H-R1C and the area proposed for medium density from H-R1B to H-R4A (Exhibit 140, Tab 2). In addition, some areas are proposed to be placed in the Open Space 3 zone.

[189] According to the draft plan of subdivision, of the 42.49 ha approximately 13.34 ha is proposed to be developed (Exhibit 12, p. 197). The remainder of the lands are parks and open space within the plan of subdivision, and "other lands owned by the applicant" which contain the Grand River floodplain, the PSW, and other natural and cultural heritage features. Sifton proposes to dedicate the entire remaining area to either a public authority or the Haudenosaunee.

[190] Four main areas of the property are intended to be developed. The Medium density units will be located at the northeastern corner, adjacent to Hardy Road. Single

detached lots are proposed in the southeastern part of the subdivision, in the central part, and in the northwestern part.

[191] The main access into the subdivision (Street A) is proposed to travel south from Hardy Road running parallel to a small watercourse that originates to the north of Hardy Road. A row of lots is proposed to the west of Street A, backing onto the watercourse.

[192] Street A connects with the other streets in the subdivision through a proposed roundabout. Two crossings of the watercourse are proposed, one at the northern end of the plan by Street B which runs west from the roundabout and joins streets in the western part of the plan. The other stream crossing is at the southern end of the plan where Street B turns east and joins streets in the eastern part of the plan.

[193] The proposed development is generally restricted to areas that are currently agricultural fields. A number of significant natural heritage and cultural heritage features are located on the property. They are generally avoided by the proposal except for two crossings of the watercourse and for proposed encroachment on one corner of the PSW.

[194] As noted earlier, more than half of the property is designated Residential-Low Density which comprises the north part of the site where development is proposed. The southern part of the property which contains the Grand River floodplain is designated Major Open Space. These designations have generally persisted since the 1980's when the lands were annexed from the Township of Brantford, except for a short period of time in the 1980's when the lands were designated as general industrial (Exhibit 13, Tab 4, p. 3 Planning Justification Report). These designations continue today and were maintained in the 2012 version of the Official Plan. The majority of the residentially designated area is also subject to the Environmental Control Policy Area provisions of the Official Plan. The Open Space area and portions of the PSW that encroach into the residentially designated area are subject to the Environmental Protection Policy area provisions.

[195] In order to satisfy the Environmental Control Policy Area and Environmental Protection Policy Area provisions of the Official Plan, the CER (Exhibit 63) was prepared in 2001 on behalf of a group of property owners. The intent of the CER was to "... provide a framework for decisions about urban development and protection of the environment and set limits for development." (Exhibit 63, p. 1). The CER set out proposed development areas on the Sifton property as well as areas that required protection. A conceptual scheme for servicing the lands was also identified (Exhibit 63, Figure 6.2). Through the testimony, the Board understands that for a period of time the CER was used as a guide for the approach to development in the area by the GRCA and by City staff. It required that for the individual development proposals scoped Environmental Impact Statements ("EIS's") should be submitted before development could be allowed.

[196] For the Sifton and Grandview properties, scoped Environmental Impact Statements were initially prepared by Howes-Jones and Associates Inc. in 2004 for the previous owners. The scoped EIS's were peer reviewed by Dougan Associates for the City who produced a draft report initially and then a final report in 2008 (Exhibit 5A, Tab 11). After Sifton took ownership, AECOM was retained initially to undertake an Environmental Management Plan for the property. After the appeal was filed, AECOM undertook an Environmental Impact Study for the proposal (Exhibit 13, Tab 3, Appendix B-1).

[197] There was some disagreement at the hearing regarding whether or not the AECOM study met the requirements of an Environmental Impact Study. In the Board's view, the environmental studies assessing potential impacts on natural heritage features and functions for the Sifton and Grandview properties must address the provisions of Appendix III of the Official Plan for Environmental Impact Assessments and also address the PPS provisions requiring an analysis to determine if there are negative impacts. The AECOM study addresses these requirements and the Board considers it to be an EIA under the Official Plan.

[198] It should be noted that at times in this decision the AECOM study and the study prepared by Savanta for the Grandview property are referred to as “EIS’s” rather than “EIA’s”. For the purposes of this decision the terms are interchangeable in reference to these two studies.

Issues, Analysis and Findings

[199] The Board heard a large quantity of evidence related to the Sifton proposal. The Board has considered all of the evidence and all issues on the issues list that was adopted through the procedural order even though specific issues might not be mentioned in this decision.

[200] Only the evidence and issues which are critical to the Board’s decision are discussed in the following sections. The Board’s findings are provided where appropriate.

Davisville Swamp (“PSW”)

[201] Portions of the Davisville Swamp, which is classified as a PSW, are located on the Sifton property. The PSW occupies a large part of the Grand River floodplain portion of the property. In addition, two other arms of the PSW are located on the property, one in the western part to the south of Street C and the other in the eastern part of the property between the proposed medium density block and Street G (Exhibit 12, p. 197). The Board heard that the wetland boundary was confirmed in the field by MNR staff on a site visit with AECOM.

[202] After reviewing the evidence, the Board is generally satisfied that the wetland will be protected in conjunction with the proposed development. However, the Board has two main concerns about potential impact of the development on the PSW. First, the proposal involves encroachment of Street E into a corner of the PSW, and second, the Board is not convinced that a 20 m buffer is sufficient to protect the PSW from the development.

[203] With regard to the encroachment into the PSW, Dr. Epp's evidence was that the vegetation in this area of the PSW does not contribute significantly to the wetland. The amount of PSW proposed to be removed will be replaced by expanding the PSW to the south of where the encroachment is proposed. Dr. Epp maintained that this would provide a net benefit to the PSW feature and function.

[204] In addition, the Board heard that a previous version of the Sifton plan had proposed crossing the central portion of this part of the PSW. Sifton maintained that the proposed encroachment in the current plan represents an improvement over the previous proposal. Furthermore, the Board heard that in 2006 the GRCA had approved an application for a wetland crossing through the centre of this part of the PSW (Exhibit 26). While the proposed crossing had been approved, the permit for the crossing was never issued. The Board heard that the old approval had expired and Sifton would need to re-apply to the GRCA for encroachment into the PSW. A factor in the GRCA's approval had been that a road crossing of the wetland was identified in the CER. GRCA policies in force at the time permitted some encroachment into wetlands if a comprehensive plan demonstrated that the encroachment was unavoidable and alternatives had been considered (Exhibit 27, p. 2). The GRCA policies have changed since the 2006 approval and under current policies, intrusion into the PSW can only be permitted for public infrastructure projects where an Environmental Assessment or comprehensive plan demonstrates that all alternatives have been considered and that wetland loss will be minimized (Exhibit 27, p. 5).

[205] Through the evidence of Mr. Pigeon, Sifton provided examples of some cases where encroachment into PSW's had been allowed in other jurisdictions (Exhibits 28 A, B and C). All of these examples are cases of infrastructure projects (specifically roads) under the *Environmental Assessment Act*. The Board notes that the definition of development in the PPS excludes activities that "...create or maintain infrastructure authorized under an environmental assessment process" (Exhibit 4A, Tab 7, p. 229).

[206] The Board has noted earlier in this decision that s. 2.3.1(a) of the PPS prohibits development in PSW's. The City's Official Plan through policy 8.5.2 also prohibits development in PSW's. In considering the proposed encroachment, the Board cannot rely on past approvals that are no longer in effect and the Board was not presented with evidence of Environmental Assessment approvals for the encroachment of Street E into the PSW that would exempt the proposed encroachment from the PPS definition of development.

[207] The Board recognizes that the CER shows the road crossing of the wetland on the Sifton lands. The Northwest Master Plan also shows a collector road in this general location (Exhibit 4B, Tab 12, p. 519). However, these documents show the road only in a conceptual way and they recognize that further detailed studies are required.

[208] The CER and Northwest Master Plan show roads and servicing corridors crossing the PSW on both the Sifton and Grandview properties. The Board expects that these types of projects would have been necessary public infrastructure projects of the type that would be required to undergo an environmental assessment process and could be exempt from the development provisions in the PPS. However, the Board cannot conclude from these documents that a local road encroaching into the PSW to service a single subdivision should be permitted.

[209] Furthermore, in examining the proposed plan of subdivision, it appears that Street E can be moved to the west to avoid the PSW. This may result in the loss of some proposed lots on the west side of Street E.

[210] The Board has considered the direction that was in the Act for the 1997 PPS which required planning authorities and the Board to "have regard for" the PPS policies. The Board has also considered the related authorities provided by the parties. The Board acknowledges that the "have regard" provision may allow somewhat greater flexibility than the "be consistent with" direction in the current Act. However, in the Board's view, having regard for a policy in the PPS involves applying it in almost all

circumstances and potentially allowing some variation to the policy if there is a compelling public interest that takes precedence over the policy. In the current case, s. 2.3.1(a) of the 1997 PPS provides a clear prohibition against development in PSW's (as does the City's Official Plan), the proposed street has not been approved through an environmental assessment process and the Board understands that as currently proposed, it does not fall under that process. Furthermore, there are no in-force approvals for the street, it appears that its encroachment into the PSW is not essential, and no compelling public interest has been established for the proposed location of Street E.

[211] Based upon these considerations, the Board finds that the proposed encroachment of Street E into the PSW is not acceptable and it should be eliminated from the plan. If the road were part of a public infrastructure project that was subject to the Environmental Assessment process, the Board might arrive at a different conclusion.

[212] With regard to the proposed 20 m buffer adjacent to the PSW, the Board heard opinions from a number of expert witnesses that a larger buffer should be provided. This is consistent with the Board's experience in dealing with buffers adjacent to other PSW's.

[213] Dr. Epp maintained that using standard buffer distances eliminates site specific considerations. He contended that in establishing a buffer, consideration should be given to the type of feature being protected by the buffer and the specific functions that the buffer must perform. In considering the topography of the site, the surrounding land use, edge species composition, wildlife habitat and landscape connectivity, he determined that a 20 m buffer from the wetland boundary is sufficient (Exhibit 13, Tab 3, EIS p. 63).

[214] Standard buffer widths are not provided in the 1997 PPS or in the 1999 version of the Natural Heritage Reference Manual ("NHRM") which is a provincial document

intended to act as a guide for implementation of the natural heritage provisions of the PPS. However, the 1999 NHRM recommends 120 m as the extent of adjacent lands for PSW's (Exhibit 4C, Tab 23, p. 1237). This is the extent of the area which should be studied to determine if natural heritage features or ecological functions may be impacted by development. The same extent of adjacent lands for PSW's has been carried through into the 2010 version of the NHRM. The more recent version of the NHRM also provides some guidance regarding buffer widths adjacent to PSW's noting that buffer widths as little as 10 m can be effective in attenuating nitrates and phosphorus in runoff, while 30 m buffers are typically required to protect the edge function of trees (Exhibit 4C, Tab 24, p. 1573).

[215] Mr. Zammitt of the GRCA noted in his testimony that 30 m is generally the minimum buffer required to maintain the hydrogeological functions of PSW's. He referred to the annotated bibliography included in the 2010 NHRM which includes a number of references to 30 m buffers being required to prevent impacts on PSW's, particularly if there is substantial slope of the land toward the wetland (Exhibit 4C, Tab 20, p. 1504 to 1507). The EIS indicates that there is a substantial slope from the table land to the northerly wetland of 32 and 45 degrees over a distance of 30 m (Exhibit 13, Tab 3, p. 62 of EIS).

[216] In reviewing the references and from his experience, Mr. Zammitt concluded that a 30 m buffer is the minimum required in the current case. From Mr. Dougan's evidence which compared the performance of differing buffer widths, the Board notes that a number of additional environmental benefits are likely to be provided by a 30 m buffer compared to smaller ones (Exhibit 80).

[217] Based upon the evidence, the Board finds that the proposed 20 m buffer adjacent to the PSW is not sufficient. PSW's are significant features and the Board must be assured that appropriate measures are put into place to protect them. Furthermore, the evidence has demonstrated that the Davisville Swamp is a highly valued feature of the Grand River waterfront area. The Board directs that the proposed Official Plan

Amendment and Zoning By-law should be revised to provide a minimum 30 m buffer from the wetland edge to the limit of development. A reduced buffer may be permitted adjacent to proposed Street E which must be realigned to avoid encroachment into the PSW.

Coldwater Stream

[218] The Board heard that a small coldwater stream bisects the Sifton property from north to south, originating north of Hardy Road and emptying into the Grand River at the south limit of the property. Dr. Epp indicated that the stream supports a brook trout population. Dr. Epp's evidence was that there was some variability in stream condition in distinct reaches of the stream moving from north to south (Exhibit 13, Tab 3, p. 12 to 13 of EIS). Dr. Epp indicated that in some areas the riparian zone has been degraded due to past agricultural practices and a number of invasive plant species are present. However, he provided little rationale in the EIS or through his testimony for the proposed 15 m buffer distance.

[219] Coldwater streams are significant natural heritage features which fall under the provisions of s. 2.3.1(b) of the 1997 PPS and s. 8.3.1 of the City's Official Plan. Generally, coldwater streams provide clean sources of water to receiving watercourses, in this case the Grand River, and provide critical habitat for valuable sport fish species.

[220] The plan of subdivision proposes two crossings of the stream, by Street B in the northern part of the plan and by Street G in the southern part. The Board has no major concerns for these crossings. One is in a location that has experienced some disturbance where an old box culvert is located in the creek and the other has been sited to minimize the removal of vegetation (Exhibit 13, Tab 3, p. 52 of EIS). Through the imposition of appropriate conditions and review by approval agencies, any impacts can be mitigated in a satisfactory manner.

[221] However, the Board is concerned about the proposal for a 15 m buffer from the proposed lots to the watercourse. Mr. Zammitt maintained that the proposed buffer is

not adequate and that it should be a minimum of 30 m. Mr. Dougan indicated that since the early 1990's, it has been determined that coldwater streams require a 30 m buffer.

[222] There was some confusion in the evidence about whether or not MNR had endorsed the 15 m buffer in this area. This was clarified through the testimony of Mr. Corneliese who indicated that an e-mail message that he sent to Dr. Epp (Exhibit 16) was referring to the buffer for the ANSI on the property in the vicinity of the coldwater stream, not the proposed buffer from the stream.

[223] The 1999 NHRM does not provide guidance regarding the size of the buffer for coldwater streams. The 2010 NHRM provides some guidance indicating that the size of the vegetated riparian zone should be 30 m (Exhibit 4C, Tab 24, p. 1474).

[224] The Board has considered the submissions. The evidence of the expert witnesses supports a larger buffer adjacent to the coldwater stream. As noted above, coldwater streams are significant natural heritage features and in the current case it adds to the complexity and biodiversity of a highly significant natural system on the Grand River waterfront. The 30 m buffer zone suggested in the City's evidence is consistent with the Board's past experience. Furthermore, the rationale in the AECOM EIS is not sufficient to support a 15 m buffer adjacent to the coldwater stream.

[225] In view of the above, the Board finds that the buffer adjacent to the coldwater stream should be a minimum of 30 m on each side except where roads are proposed to cross the stream.

Endangered and Threatened Species

[226] The AECOM EIS discusses a number of species at risk including some endangered and threatened species, which have been sighted in the vicinity of the Sifton property. There are some minor differences in the provisions of the 1997 PPS and 2005 PPS for endangered and threatened species. The 1997 PPS indicates that development is prohibited in "significant portions of the habitat of endangered and

threatened species”. The 2005 PPS prohibits development in “significant habitat” of endangered and threatened species. In the 2005 PPS, the term “significant” has a specific definition in relation to endangered and threatened species whereby it is habitat “as approved by OMNR”. There is no specific definition in the 1997 PPS for the term “significant” as it applies to endangered and threatened species. A definition is provided that is intended to apply to a range of significant natural heritage features other than PSW’s.

[227] After considering these provisions and the evidence, the Board finds that the differences between the two versions of the PPS are minor and are similar in intent. It is clear through the evidence that MNR has the responsibility for identifying significant habitat of endangered and threatened species. They carry out this responsibility through the administration of the ESA. However, the other agencies also rely on MNR to confirm habitat of endangered and threatened species in the plan review and approval process. The Sifton and Grandview applications are being reviewed under the provisions of the 1997 PPS, but the Board finds that this does not affect the application of the PPS provisions regarding endangered and threatened species. While the 1997 PPS does not refer to “habitat as approved by OMNR” in identifying significant habitat, as the provincial agency responsible for the ESA and for designating species as threatened or endangered, the Board concludes that MNR has the responsibility for determining that habitat or significant portions of habitat are present on the subject properties.

[228] As noted earlier, from considering the evidence, the Board concludes that the habitat of only one endangered or threatened species has been confirmed to be present on the Sifton lands that is the abandoned den of an American Badger, a threatened species, which is located in the northwest development area. The Board heard that a 5 m buffer has been established between the den and proposed lots. Furthermore on the draft plan the area to the northwest of the American Badger den has been set aside as an open space block. From the evidence, the Board understands that MNR is satisfied with this approach.

[229] Also as noted earlier there is an occurrence of the common hoptree, another threatened species, on the property. At the time of the hearing, the common hoptree had species protection and not habitat protection. The Board understands that this means that suitable measures must be enacted to protect the individual trees. A number of individual trees have been identified in the northwest agricultural field which will be developed if the draft plan is approved. Sifton's evidence is that an application has been filed with MNR under the ESA in order to relocate the trees to a suitable portion of the property that will not be developed (Exhibit 13, Tab 3, p. 35 of EIS). The Board's conclusion from the evidence is that MNR does not require protection of habitat for the common hoptree and habitat for the common hoptree has not been identified by MNR on the Sifton property.

[230] During Mr. Stone's testimony he emphasized that although the application had been filed under the ESA, approval was not guaranteed. The proposed relocation must undergo a detailed review process by MNR.

[231] Mr. Stone also noted that a second breeding bird survey had been undertaken by AECOM (Exhibit 15), the results of which were not included in the EIS due to the timing of production of the report. A threatened bird species, the barn swallow, was identified in this survey as a "fly over". Mr. Stone stated that the barn swallow has both species and habitat protection under the ESA and that an additional assessment is required to determine if habitat exists on the property.

[232] The EIS indicates that two threatened bird species have been identified on the Sifton property in the past. The red-headed woodpecker tends to use heavily forested areas and it was observed on the Sifton property in 1995. In August 2010, AECOM staff observed a number of chimney swifts feeding over one of the agricultural fields on the Sifton property and over the Grand River (Exhibit 13, Tab 3, p. 26 of EIS). According to Dr. Epp's evidence, no habitat for either species has been confirmed on the Sifton property.

[233] Other significant bird species such as the Bald Eagle and Caspian Tern may use portions of the lands adjacent to the Grand River. However, no evidence of nesting of either species as been recorded for the Sifton lands (Exhibit 13, Tab 3, p. 26-27 of EIS). From the evidence it appears that these species use extensive sections of the Grand River valley for feeding and roosting.

[234] According to the EIS, species of special concern have also been identified on the property. A snapping turtle was found in the south wetland. Also monarch butterflies have been found in the prairie portions of the property. In addition a number of significant plant species and vegetation communities which have been found on the property are listed in the EIS (Exhibit 13, Tab 3, p. 37-38 of EIS).

[235] Reference was also made in the City's evidence to the identification of an eastern hognose snake, a threatened species, which was found dead on the waterfront trail which runs along the Grand River and traverses the southern part of the Sifton property. However, the Board heard that the sighting of the snake occurred a number of years ago (2009) and that it occurred approximately 1 km from the Sifton property. (Exhibit 2, Tab 1A, p. 5)

[236] Most of the significant species and communities documented in the EIS and other studies for the Sifton property are located in areas that will not be developed through the plan of subdivision, so they will not be directly impacted. Measures to mitigate any impacts on these species and their habitat are set out in s. 6 of the EIS including proposed enhancement of monarch butterfly habitat and nesting opportunities for the snapping turtle. (Exhibit 13, Tab 3, p. 75 of EIS)

[237] After reviewing these measures and the evidence, the Board finds that the measures are appropriate to mitigate the impacts of development on these species and their habitat.

[238] However, the Board is concerned that the method of dealing with the common hoptree under the ESA has not been determined and that there may be a further

requirements for dealing with the barn swallow. In order to be assured that these species are being dealt with appropriately under the provisions of the 1997 PPS and the Official Plan, the Board will require confirmation that MNR has been satisfied. The resolution of these issues should not affect approval of the Official Plan Amendment or Zoning By-law, but could affect the amount of area suitable for residential use. If areas need to be restricted because of MNR requirements to protect the common hoptree or the barn swallow, these areas should be removed from the proposed residential area in the Official Plan Amendment and Zoning By-law.

Servicing Issues

[239] Sifton proposes to provide sanitary services to the property through the use of gravity sewers which will take sewage to a pumping station proposed to be located at the south end of the development adjacent to Street B. A forcemain is proposed to take the sewage north and then west along Hardy Road to an existing trunk sewer on Oak Park Road. Proposed servicing of the property is set out in the Preliminary Servicing Report prepared by AECOM (Exhibit 13, Tab 7).

[240] The trunk sewer that runs under Oak Park Road services the North West Industrial area and has been designed to accommodate the sanitary flow for the Sifton and Grandview lands. It had been anticipated that servicing for the northwest residential lands would be routed to a pumping station on the Sifton lands, in the approximate location that is proposed, and go to the Oak Park Road sewer through the TCA property. This route is shown conceptually in both the North West Master Plan and the CER. There also at one time was an agreement between the previous owners of the lands and the City for an easement for the services through the lands now owned by TCA (Exhibit 3A, p. 1-11). The easements were never granted and it was not clear through the evidence that this agreement has any current validity. Potential servicing through the TCA property was also shown on previous draft plans of subdivision submitted for the Sifton property.

[241] In its filings for this hearing, Sifton changed the plan to service its property through the TCA lands and now proposes to provide sanitary service for its lands only, through the pumping station and forcemain which would run along Hardy Road.

[242] The City expressed concern for this proposal through the evidence of Mr. Christie and Mr. Binning. The Board heard that there are concerns about the depth required for the forcemain along Hardy Road because of the elevations of the road.

[243] However, the more significant concern for the Board was expressed by Mr. Binning who noted that it is City policy that new infrastructure to service private development must not place a long term financial burden on the City. While the capital cost of the pumping station and sewers on the Sifton property will be constructed and paid for by Sifton through development of the subdivision, the City requires that the operation and replacement costs need to be recouped through the water and sewer rates that will be collected from people that benefit from the new services. Mr. Binning provided a financial analysis which demonstrated that the operation and replacement cost of the sewers, pumping station and forcemain could not be covered by the water and sewer rate charges to the future residents of the Sifton subdivision (Exhibit 6, p. 35). Mr. Binning calculated an annual deficit of approximately \$71,933. This calculation was based upon the current servicing plan which would not accommodate additional areas beyond the Sifton lands. The Board heard that City policy would not permit the construction of services that would place a financial burden on its citizens.

[244] After considering the evidence, the Board finds that the matter of sanitary servicing is critical for the development of the lands. While the policy of ensuring that new infrastructure is "cost-effective" is not specifically imbedded in the Official Plan, the Board finds that, in principle, it is a reasonable policy and its objectives are in the public interest.

[245] However, in the Board's opinion, there may be options to satisfy the requirements of this policy that may not have been fully explored by the parties that would meet the City's needs and provide the required service.

[246] It is not clear that the option of servicing through the TCA lands has been completely eliminated. Furthermore, the Board understands that there may be potential for the Grandview site and other lands to eventually be serviced through the Sifton pumping station. The use of one of these options could make the proposal for servicing the Sifton lands more economical.

[247] The parties raised the previous Board decision of former Vice-Chair Granger where the Board determined that as presently configured the Sifton pumping station is a local service and should not be included in the development charges by-law (Exhibit 3D, p. 1821-1825). However, nothing in that decision would constrain Sifton from changing its plans to include a larger area to be serviced by the pumping station.

[248] The Board also notes that Sifton originally had included a potential condition of draft approval through which the City would be compensated for the shortfall in the estimated operation and replacement cost for a period of time (Exhibit 36, condition 22). The City did not accept this condition and maintained that the compensation would be required in perpetuity. In revised draft plan conditions submitted with Sifton's reply evidence, this proposed compensation was removed (Exhibit 138). It is possible that this matter can be resolved through determination of an appropriate amount of compensation.

[249] Other options, such as a special charge to the residents of the Sifton plan of subdivision or a special sewer rate for those residents which would cover the shortfall could also be explored.

[250] Sanitary servicing of the property is fundamental to the development of the site. The parties have proposed conditions of draft approval to deal with this matter. The City's condition No. 22 (Exhibit 92) would require Sifton to compensate the City for the

shortfall in the amount of \$70,000 annually until the number of dwelling units in the pumping station catchment area supports the operating cost of the station. Sifton has indicated that they are not prepared to accept this type of open-ended commitment, and as noted above, in the final version of proposed draft conditions, they eliminated a condition that would have provided compensation for a more defined period of time.

[251] The Board did not hear evidence of the City's willingness to explore other options to recoup the operation and replacement costs. It may be that the City's opposition to the development prevented exploring these options. The City and Sifton may be in a position to consider some of these options after the release of this decision.

[252] In the Board's view, this issue cannot be resolved through a condition of draft plan approval at this time. It is well established that there must be a reasonable expectation that conditions of draft approval can be fulfilled within the term of draft plan approval. At present, the Board is not confident that an appropriate condition can be placed on the draft plan approval which can be fulfilled before the draft approval expires.

[253] Since there is currently no resolution to this issue, the Board finds that the draft plan of subdivision is premature. Also, since s. 16.5.4 of the Official Plan requires servicing issues to be resolved before holding zones can be lifted, the Holding provision must remain on the lands until an approved sanitary servicing method is determined. However, since capacity is available in the Oak Park Road sewer, the property is within the urban boundary and within an area where municipal services had been planned, and in view of the Board's consideration of the remaining issues regarding the Sifton plan, the Board considers it appropriate to approve the designations proposed in the Sifton Official Plan Amendment (Exhibit 140, Tab 1) and the zoning proposed in the Sifton By-law (Exhibit 140, Tab 2) as revised through the direction in this decision. Development cannot occur until the final servicing method is determined, a plan of subdivision is approved for the lands and the holding zone is lifted.

Secondary Access and Roads

[254] The Preliminary Servicing Report by AECOM also sets out proposed road locations and widths. The plan of subdivision proposes a single access along proposed Street A from Hardy Road which connects with the other streets in the subdivision through a roundabout located at the northwestern edge of the eastern PSW area and at the western limit of the medium density block. An emergency access is proposed to run from Hardy Road through the medium density block and connect into the eastern end of the roundabout. Sifton is also proposing to construct Street A as a divided street with a centre boulevard to the roundabout so that if one lane is blocked for any reason, the other lane will be available.

[255] After hearing the testimony and considering the submissions, the Board has two main concerns for the proposed roads in the plan of subdivision. First, City policy requires that no areas within the subdivision can be more than 250 m from the primary access into and out of the area without provision of a secondary access. While this is not a written City policy, it has been consistently expressed in the comments on previous drafts of the plan of subdivision for the Sifton property since 2004 (Exhibit 3A, p 235). The Board heard that large areas of the subdivision have not been provided with a secondary access.

[256] While Sifton is proposing a road through the medium density block that is intended to serve as an emergency access, the City raised a number of issues regarding this road including its reduced width, it is not proposed as a municipal road, and it will not function as a full secondary access.

[257] After considering the submissions in relation to this issue, the Board accepts the evidence of Mr. Christie, Mr. Loukes and others that providing secondary access to all areas of the subdivision more than 250 m from the primary access is sound engineering practice. The Board understands that the intent of this policy is not only to ensure a second access route in case of emergencies but it is also intended to facilitate efficient

functioning of access to the subdivision for the convenience of the residents. If the primary access is blocked for whatever reason, residents will still be able to move in and out of their homes if a secondary access is provided.

[258] Unfortunately, with the abandonment of the servicing route through the TCA lands, Sifton also removed one potential secondary access since a road was also proposed along the same alignment as the services. It is not clear from the evidence if there is still some potential for access through the TCA lands. The Board notes that the proposed TCA plan of subdivision does not provide for this route.

[259] The emergency access through the medium residential block seems to be constrained by a section of the PSW to the south and the Klievik's lands to the north. It appears that these constraints limit the right-of-way width and may prevent it from being used as a secondary access, if this were proposed. Furthermore, it is not clear that the proposed emergency access will bring all areas of the subdivision to within the 250 m distance requirement.

[260] The proposal to construct Street A as a divided road with a centre boulevard does not provide the full function of a secondary access. It may provide some relief in emergencies if one lane is blocked, but does nothing to facilitate ease of access for residents of the subdivision.

[261] In consideration of the above, the Board finds that the emergency access through the medium density block and the proposal to construct Street A as a divided road do not satisfy the City's requirement for secondary access.

[262] Without secondary access, development on the Sifton lands will essentially be limited to areas within 250 m of Hardy Road along Street A, assuming that a separate access will be provided into the medium density block, to within 250 m from Hardy Road within this block.

[263] In consideration of the above, the Board finds until Sifton can satisfy the City's requirements for secondary access, development of the Sifton property must be limited to those areas within 250 m of Hardy Road both along Street A and in the medium density block.

[264] The second concern for the Board related to the subdivision roads involves their proposed width. The Board heard that the rights-of-way for the proposed roads range in width from 15 m to 20 m. Section 11.2.10.2 of the 2004 Official Plan requires that local roads have a minimum right-of-way of 20 m. This section also recognizes cases where local roads with lesser right-of-way widths exist and that it may not be achievable in some cases to achieve the standard right-of-way. The policy allows for lesser widths where it is demonstrated that the standard 20 m width is not achievable (Exhibit 4A, Tab OP-2004, p. 11-4). The standard has been relaxed in the 2012 Official Plan with regard to policies for the West of Conklin Secondary Plan can permit local roads with 16 m rights-of-way (Exhibit 4A, Tab 2004-OP, p. 19-36).

[265] It is clear from these policies that the City may exercise some discretion in determining right-of-way widths. However, the City maintains that it generally has not allowed new local roads with rights-of-way less than 20 m except in the West of Conklin area. Furthermore, no evidence has been provided that the City has allowed rights-of-way as narrow as 15 m for local roads.

[266] As noted in policy 11.2.10.2, if narrower rights-of-way were to be allowed, Sifton must demonstrate that the standard 20 m width is not achievable. In the Board's view, Sifton has not demonstrated that the narrower right-of-way widths are appropriate.

[267] The Board notes that the Northwest Master Plan recommends that it may be appropriate to apply alternative engineering standards to residential developments in the northwest area (Exhibit 4B, Tab 12, p. 515). The Board understands that the intent of this recommendation is to protect the significant environmental features of the area and this may be a valid rationale for reducing some of the road widths in the Sifton plan.

However, the reduced road widths are not appropriate to simply fit more lots into the plan. At present, the Board will not approve a policy for reduced road widths in the Official Plan Amendment.

[268] The Board recognizes that the requirement for 30 m buffers adjacent to the coldwater stream and the PSW may constrain the location of Street E. It is not clear from the evidence that Street E can maintain these separation distances and still fit in its proposed location.

[269] The City raised a number of concerns about the design of the roundabout, including difficulty with it accommodating busses and emergency vehicles. The Board finds that the City's concerns are valid and that the intersection should be redesigned.

[270] In addition, some issues were raised regarding traffic and the need for an update to the traffic study and the addendum prepared by Mr. O'Brien of Paradigm Transportation Solutions Ltd. (Exhibit 13, Tab 9). However, the traffic issues were generally not in dispute among the parties.

[271] The Board has determined that the plan of subdivision is premature until sanitary servicing issues are resolved. The access issues discussed above should be addressed in any redesign of the subdivision plan and through conditions of draft approval that may come forward once the servicing issues are resolved. In approving the proposed Official Plan Amendment, the Board will direct that a policy be included indicating that road access shall be carried out to the satisfaction of the City for those portions of the site where development is permitted. This should deal with concerns for secondary access and the location of Street E.

Water, Geological and Hydrogeological Issues

[272] Sifton characterised the surficial geology and hydrogeology of the site through the Hydrogeological Investigation Revised Report undertaken by LVM Inc. ("LVM") (Exhibit 13, Tab 5). The LVM study reviewed previous studies for the area and well

records. Additional boreholes, test pits and monitoring wells were installed in order to assess soil composition, hydraulic conductivity and groundwater levels.

[273] The study identified surficial materials on the property as being composed of mainly sand and gravel. The study noted two ridges, one in the northwestern part of the property and the other in the middle portion with plateaus located at the bottom of each ridge which will provide the proposed locations of the houses.

[274] Mr. Kelly, who supervised the LVM study, indicated that ground water generally flows through the site in a north to south direction toward the Grand River. He stated that groundwater levels in the northern part of the property are generally 5 m to 6 m below the surface. At the south end of the property the water table is approximately 1 m to 2 m below surface. In the vicinity of the south part of the coldwater stream, groundwater elevations were above the water elevation in the creek indicating a groundwater discharge condition. The LVM study also noted the presence of tufa deposits in some parts of the property.

[275] The conclusion of the hydrogeological study was that the property is generally suited for the proposed residential use and that measures can be implemented to protect the water dependent features.

[276] Witnesses for the City raised concerns about the adequacy of the characterisation of the hydrogeology of the property. In addition, Mr. Cowell expressed concern about the protection of the tufa formation. He explained that tufa is a type of karst formation where calcium carbonate is precipitated after it flows through the carbonate rock formations. The presence of tufa on the site has been recognized for a number of years. An ANSI was established by the province in 2005 to recognize and protect the existence of tufa formations on the property. Mr. Cowell prepared the report that formed the basis for the ANSI designation (Exhibit 5A, Tab 4, p. 215).

[277] Mr. Cowell also provided evidence of an extensive deep bedrock regional aquifer. He contended that the deep bedrock groundwater feeds a number of springs in

the area. He maintained that the tufa is an indication of major bedrock groundwater discharge. The above-noted report refers to the occurrence of a 10 ft. high water spout on the Sifton property observed in the vicinity of the ANSI in 1994 (Exhibit 5A, Tab 4, p. 222). Also Mr. Cowell provided visual evidence of flooding of the field on the west side of the creek occurred as a result of groundwater discharge (Exhibit 54, p. 21 and 22).

[278] Mr. Cowell contended that the tufa formation, the water spout and the observed flooding in the field may have resulted from discharge of the extensive bedrock aquifer. In his opinion, the hydrogeology of the property is more complex than described in the LVM hydrogeological study.

[279] Mr. Cowell maintained that the potential for groundwater discharge to the surface in the area represents a hazard under s. 3.1.1(c) of the 1997 PPS. His opinion is that the hydrogeology of the area is complex requires further study so that it can be characterized accurately to avoid potential impacts. He also raised the possibility of impacts on future houses due to groundwater mounding under foundations.

[280] Mr. Slaine reviewed the concerns for bedrock groundwater surfacing on the property and the potential for flooding. He indicated that he found no evidence of a strong upward gradient in the monitoring wells and that there was no strong evidence of artesian conditions on the site. He also stated that the cemented sands and gravel found in some of the boreholes are permeable and should not cause upwelling. He proposed a ditch on the west side of Street B to deal with any flooding issues resulting from groundwater discharge. Furthermore, the contention that groundwater discharge could be a flooding hazard under the PPS was not supported by the testimony of Ms. Engel and Mr. Notolochny of the GRCA who considered it to be local issue.

[281] The main concern for the Board in reviewing the evidence related to the hydrogeology of the property and potential effects on ground and surface water flows is to ensure that significant water dependent features are protected. Although there are some properties in the area on private services, there was no suggestion in the

evidence that wells could be affected. The Board understands that these properties are generally up gradient of the proposed development.

[282] The parties agreed that in order to avoid negative impacts on the significant water dependent features, the amount of surface and groundwater flows, and water quality to the features must be maintained. The mitigative measures described in the EIS related to groundwater and surface water impacts are generally intended to ensure pre-development ground and surface water flows are maintained after development in the approximately the same volume, frequency and duration (Exhibit 13, Tab 3, p. 54 and 55).

[283] Various methods are proposed to maintain surface and groundwater quality and quantity including lot level controls to promote infiltration, a third pipe system to convey water from roof leaders and foundation drains directly to the eastern PSW and a “treatment train” system which is intended to remove sediment (along with some contaminants) from stormwater and convey filtered water to the westerly and southerly wetlands and the ANSI. The treatment train consists of a combination of grading, oil girt separators and bioswales which are intended to improve the quality of the stormwater and also to provide a stormwater quantity control function. These methods are documented in the EIS, the Hydrogeological Investigation, the Stormwater Management Report by AECOM (Exhibit 13, Tab 6), and the Preliminary Servicing Report by AECOM (Exhibit 13, Tab 7).

[284] The City’s witnesses questioned the use of the proposed measures for the intended purposes. The Board heard concerns about the maintenance of the third pipe system, portions of which would be located on private property, and about the quality of water that would be coming through the roof leaders. Concerns were also expressed about the use of the treatment train rather than a normal wet pond to deal with water quality. In addition, the Board heard that bioswales are not an appropriate or approved means of dealing with stormwater quantity issues. Mr. Richert and Mr. McAllister

contend that the measures identified in the AECOM studies are appropriate and will mitigate potential impacts.

[285] The Board also heard that the proposed grading and filling of the site and installation of services could impact groundwater flows to water dependent features.

[286] After considering the evidence, the Board concludes that the concerns raised by the City are technical issues which can be resolved through appropriate conditions of draft plan approval when a revised draft plan comes forward. The Board finds that these issues do not affect the principle of development of the lands.

[287] While Mr. Kelly maintained that the northerly wetlands were maintained primarily through surface flow, no detailed characterization of the hydroperiods of the wetlands was provided in the evidence. Fluctuations in water levels can be a significant factor in maintaining the health of wetland habitat.

[288] The Board has no objection in principle to the proposed methods of dealing with stormwater quality issues provided flows to the water dependent features are maintained in approximately the same quality, volume, frequency and duration. This will require further characterisation of the groundwater contribution to the ANSI, coldwater stream and PSW to ensure that pre-development conditions are maintained. This further characterisation must include determination of the hydroperiods of the sections of PSW on the Sifton property. After this characterisation has been completed, adjustments may be required to the proposed infiltration methods, treatment train and third pipe system to ensure that pre-development conditions are maintained.

[289] If a revised plan comes forward, conditions of draft approval must ensure the long-term maintenance of flows to water dependent features. There must be clarity about ownership and maintenance responsibility of the third pipe prior to final approval of the plan. Furthermore, documentation must be submitted confirming that the bioswales will meet all Ministry of the Environment requirements, and any GRCA

requirements for quantity control or that an alternative approved method for quantity control will be provided.

[290] This also applies to concerns expressed by the City regarding potential effects of grading, filling and servicing of the site on groundwater flows. Adjustments may be required to grading and servicing plans in order to ensure that significant water dependent features are not impacted.

[291] With regard to the bedrock aquifer, the evidence indicates that it should not affect the water dependent features on the Sifton site. The Board relies on Mr. Slaine's evidence regarding potential flooding issues resulting from bedrock groundwater discharge. The proposed swale should deal with this in a satisfactory manner and any issues regarding capacity and elevation of the swale can be dealt with in the design phase.

[292] The City provided evidence that the proposal is within the City's Drinking Intake Water Protection Zone. The Sifton property is upstream of the main water filtration plant intake from the Grand River. However, the Board notes that the North West Industrial area is upstream of the site and the Oak Park Road trunk sewer crosses the river, a relatively short distance upstream of the Sifton lands. The risk of a sewage spill on the Sifton lands is not significantly greater than one occurring upstream. The City also raised concern about a potential sewage spill at the proposed Sifton pumping station. However, this is a matter to be dealt with in the design and approval of the pumping station. The Board is confident that the relevant approval agencies will ensure that measures are incorporated into the design to prevent a potential sewage spill from entering the river.

[293] The Board has found that draft approval of the plan of subdivision is premature. If servicing issues are resolved and draft approval is pursued, Sifton should provide additional information to address the issues noted above, including documentation of the hydroperiods of the PSW, to demonstrate to the satisfaction of the GRCA that pre-

development groundwater and surface water conditions will be maintained for the PSW and coldwater stream after development of the subdivision. In addition, since water dependent features require that the proposed measures, such as the third pipe must function in the long term, the long term maintenance of these measures be addressed in a satisfactory manner.

[294] Furthermore, Sifton should provide information to the satisfaction of the GRCA that the treatment train system or acceptable alternative measures will control stormwater quantity in a satisfactory manner.

[295] The Board considers the above matters to be technical issues that may require adjustments to the proposed measures to maintain pre-development ground and surface water conditions. The resolution of these issues does not affect the principle of development and can be dealt with through conditions of draft approval if a revised plan of subdivision comes forward in the future.

Cultural Heritage

[296] The Board heard evidence on the archeological and cultural significance of the property from two experts, Dr. Timmins on behalf of Sifton and from Dr. Gary Warrick on behalf of the City.

[297] Archeological work on the Sifton property and in the northwest part of the City identified a number of significant archeological features. The Sifton property contains three pre-contact archeological sites located above the Grand River floodplain. The Board heard that these sites were excavated as part of a phase 4 archeological investigations in 2004 and artifacts were sent to the University of Western Ontario for long-term curation. The Ministry of Tourism, Culture and Sport issued a letter in 2004 indicating that it is not necessary to impose conditions on development or to curtail agricultural use of the property because of these sites.

[298] Further, work in the area discovered eight nineteenth century sites related to the historic Davisville community, six of which are on the Sifton lands. Five of these are in the floodplain of the Grand River and one (the Hardy Road site) is located further north, at the southern end of the area proposed to be developed in the Sifton plan of subdivision.

[299] According to the evidence these sites were part of a dispersed settlement of Methodist Mohawks and most were occupied between 1800 and 1835 (Exhibit 13, Tab 8, p. 3 witness statement). The Hardy Road site is expected to have been occupied slightly later from 1830 to 1840. For a one year period, between 1825 and 1826, the area was also occupied by Mississaugas of the Credit River area.

[300] Sifton is proposing to protect all of the Davisville sites located on the property. The five sites located in the floodplain will be protected and there is no proposed development in the floodplain area. The Hardy Road site is included in a park block with a 10 m buffer established around it and Sifton proposes to dedicate it to the City.

[301] Sifton is also proposing a condition of draft plan approval which requires that a plan be prepared that is acceptable to the Ministry of Tourism, Culture and Sport for the protection of all archeological sites on the property (Exhibit 140, Tab 3, condition 59).

[302] Dr. Timmins maintained that the three pre-contact sites have been dealt with appropriately and the Ministry responsible for cultural heritage has indicated that nothing further is required in conjunction with development of the lands. He also maintained that the relevant provisions of the Act and the relevant sections of the 1997 PPS will be satisfied by manner in which these sites have been dealt with in the relation to the Sifton proposal.

[303] The City did not dispute the work that has been completed for the identification and protection of the archeological sites. However, through the evidence of Dr. Warrick, the City's position was that the Davisville sites, the natural heritage features, and agricultural fields, should be designated as a cultural heritage landscape and receive a

greater level of protection under the PPS. Dr. Warrick maintains that the Grandview property could also be included in the cultural heritage landscape.

[304] Dr. Timmins agreed that Davisville represents an important aboriginal community. However, he contended that the significant archeological community is confined to the floodplain and the Hardy Road site. In his opinion it does not include the pre-contact sites, the natural heritage features or the agricultural fields.

[305] Section 2.5 of the 1997 PPS deals with cultural heritage features and s. 2.5.1 and 2.5.2 are identical to s. 2.6.1 and 2.6.2 of the 2005 PPS. Cultural heritage landscapes are defined as a group of related features and under s. 2.5.1 they must be conserved. However, in the Board's opinion, no definitive evidence has been provided to establish that the Sifton property is part of a cultural heritage landscape. Even if parts of the property were considered to be a cultural heritage landscape, there is not conclusive evidence that it should include the entire property.

[306] After considering the evidence, the Board finds that the measure proposed by Sifton to protect the cultural heritage and archeological features of the site are appropriate and are consistent with the requirements of the PPS and comply with the requirements of the Official Plan. The Board agrees with Dr. Timmins's opinion that the most significant remaining cultural features are the Davisville floodplain and Hardy Road sites which are being protected or in the case of the pre-contact sites have already been dealt with appropriately. It is simply not clear from the evidence that the natural heritage features on the property and the agricultural fields are necessarily connected to the Davisville sites and that the whole property should be considered as part of a cultural heritage landscape.

[307] Based upon the above, the Board finds that the cultural heritage and archeological features of the property will be protected in a manner consistent with the requirements of the PPS and in compliance with the provisions of the City's Official Plan.

Significant Valleylands

[308] Some City witnesses contended that the entire Sifton property should be considered significant valleyland from the first break in slope at the northwestern part of the property. Dr. Epp maintained that not all of the site constituted significant valleyland and that the significant portions of the valley on the property will be protected through the plan of subdivision.

[309] As noted earlier, the 1997 PPS does not prohibit development in significant valleylands, rather through s. 2. 3.1 (b) they are subject to the no negative impact test. The Board is satisfied, through the submissions of Dr. Epp, that the entire property should not be considered significant valleylands and that through the protection and proposed dedication to a public authority of portions of the valley through the plan of subdivision, the no negative impact test as required in the PPS will be met.

Other Issues

[310] A number of other issues were raised by the parties and participants regarding the Sifton proposal. Issues raised by Ferrero are discussed later in this decision in conjunction with both the Sifton and Grandview proposals.

[311] The Board has considered evidence regarding off-site infrastructure requirements, concerns about the grading plan, protection of the ANSI, possible conflict resulting from periodic burning of the prairies, and a number of other issues.

[312] The Board finds that resolution of these issues would not affect the principle of use of the property and can be dealt with through conditions of draft plan approval if a revised draft plan comes forward in the future. The Board will not provide detailed findings about these issues.

Official Plan Amendment, Zoning By-law Amendment, and Plan of Subdivision

[313] Resolution of the above issues will deal with most of the requirements in the applicable planning documents for the proposed residential development of the lands.

[314] Apart from the above issues, the planning evidence indicated that the low density housing was generally appropriate for the areas designated as Low Density Residential and meets the requirements of s. 7.2.2 of the Official Plan.

[315] Mr. Pigeon contended that the medium density block conforms to the provisions of s. 7.2.3 of the Official Plan which sets out the requirements for medium density housing (Exhibit 4A, Tab 2004 OP, p. 7-11). He maintained that all tests for medium density residential development in s. 7.2.3.3 are met by the proposal. Ms. Hives acknowledged that a number of these tests are met, but that the lands are more than five minutes from a commercial facility which would be contrary to s. 7.2.3.3.2. Mr. Pigeon noted that there is a convenience commercial facility close by.

[316] After reviewing the evidence, the Board concludes that the proposed medium density development is appropriate and that the issue of proximity to commercial facilities should not be a major constraint. The Board finds that the medium density proposal conforms to the provisions of the Official Plan.

[317] The Board also agrees with the evidence provided by the City that it is not appropriate to remove the Environmental Protection Policy Area and the Environmental Control Policy Area delineations from the property. As noted elsewhere in this decision, the Board considers these provisions to be policies rather than designations. The evidence provided in the AECOM EIS has addressed the requirements of these policies for the proposed development. However, the policies serve to protect the natural heritage features and functions and should remain in place to deal with potential changes to proposal and any future development proposals.

[318] The Board has no difficulty with the remainder of the Official Plan Amendment subject to the direction provided in this decision. The Official Plan Amendment should be revised to include the increased buffers in the area to be designated as open space and to include the provision about access. The Board is prepared to approve an Official Plan Amendment for the proposal revised according to the direction noted above.

[319] The final By-law Amendment submitted by Sifton proposes changing the zoning for the area proposed for single family housing from H- R1-B to H-R1-C. Mr. Pigeon indicated that the change will capture the reduced lot sizes that are proposed. Ms. Hives raised a number of concerns about the proposed By-law Amendment. She indicated that there may be difficulty locating lots adjacent to the bioswales and significant features and that there should be confirmation that proposed setbacks can be met. She also noted that no rationale was provided for the proposed reduced standards, and that the maximum number of units permitted in the medium density block should be specified. She supported retaining the holding zone, but indicated that the requirements for lifting the Holding Symbol should be included in the By-law Amendment.

[320] The Board has considered the submissions and finds that the proposed By-law Amendment is generally acceptable. Further to the above findings, the By-law Amendment should be revised to include increased setback distances from the PSW and coldwater stream which should be included in the OS-3 zone. The location of Street E adjacent to the PSW should also be revised to accommodate the setback and it should be realigned if it does not fit in this location.

[321] The Board also agrees with Ms. Hives submission that the maximum number of units, that is 93, should be specified for the medium density block. Also, the Board agrees that the requirements for lifting the holding zone should be included in the By-law.

[322] If these changes are incorporated, the Board is satisfied that the proposed By-law Amendment will conform to the City's Official Plan and all other applicable provisions.

[323] In the discussion above, the Board has gone into considerable detail in reviewing the various components of the proposed plan of subdivision. The intent has been to confirm that the Official Plan Amendment and Zoning By-law Amendment, with some revisions, are appropriate and that some residential development of the lands can occur in an acceptable manner.

[324] However, in reviewing the plan of subdivision, the Board has found that there are substantial requirements that are outstanding. Given the uncertainty of Sifton being able to meet these requirements within a reasonable period of time, the Board considers the entire plan to be premature and will not approve it in whole or in part.

Conclusion

[325] Since the Board is satisfied that the evidence has established that the principal of the proposed use of the property is appropriate and meets the requirements of all relevant provincial planning policies and the Official Plan, the Board is prepared to approve revised versions of the Official Plan Amendment (Exhibit 140, Tab 1) and Zoning By-law Amendment (Exhibit 140, Tab 2) which reflect the above findings.

[326] Sifton should provide versions of these documents which have been revised to expand the buffers to the coldwater stream and PSW to 30 m as noted in this decision. The buffer should be provided adjacent all areas of the PSW including the location where Street E had been proposed to encroach into the tip of the PSW.

[327] The documents should also be revised to remove from the proposed development, any areas that may be restricted from development due to any findings of MNR regarding endangered and threatened species.

[328] The expanded buffer areas and any areas that may be identified by MNR should be included in the proposed Open Space designation and with the Environmental Protection Policy Area identification. These areas should be included in the Open Space 3 zoning in the By-law Amendment. Policies should be included in the Official Plan Amendment to ensure that buffer areas are not disturbed by development activities and that fills slopes do not encroach into the buffers. Furthermore, since the method of sanitary servicing of the site has not been resolved and secondary access issues are outstanding, the holding zone should remain on the lands.

[329] The City requested that the Grand River Heritage Waterfront designation and zoning should be applied to the areas that are to be designated and zoned Open Space. However, the permissions that will be allowed under this designation and zoning are unclear in view of the evidence. The Board finds that the Open Space designation and zoning are appropriate and should be applied as indicated in the proposed Sifton Official Plan Amendment and Zoning By-law.

[330] The Official Plan Amendment proposes removing the Environmental Control Policy Area restrictions from the portion of the lands designated low and medium density residential. The Board is satisfied that the AECOM EIS and other submissions provided by Sifton, address the Official Plan requirements for Environmental Control Policy Areas. However, since some time may pass before these lands are developed, due to the need to resolve the servicing issue and since portions of the lands may remain undeveloped due to the need for secondary access, the Board finds that it is not appropriate to remove the Environmental Control Policy Area indication since there may be a need for an updated EIA by the time it develops.

[331] As noted earlier, a policy should be included in the Official Plan Amendment indicating that access shall be carried out to the satisfaction of the City to those portions of the property where development may be permitted.

[332] Detailed direction about required changes to the Official Plan Amendment and Zoning By-law Amendment is provided at the end of this decision.

[333] However, in view of the findings above and the outstanding requirements that must be met before development can occur, the Board will not approve the plan of the subdivision.

[334] The Board, through this Decision, is verifying the principle of development of the Sifton lands. It should be noted that the City in its comments on the various iterations of both the Sifton and Grandview plans, never indicated that the property is not suitable for development. Rather, the comments were always directed at redesigning the proposals and identifying appropriate solutions for issues. However, the Board heard from a number of the City's witnesses that when the WMP recommendations came forward, "Council decided to go in another direction." This decision has not resolved all issues regarding the Sifton lands, but it does reflect the apparent approach of City staff prior to adoption of the WMP, that is, contingent upon the resolution of issues, some development of the lands should be permitted.

PROPOSED GRANDVIEW DEVELOPMENT

Introduction

[335] After carefully considering all of the oral and written evidence regarding the Grandview proposal, the Board has come to a similar conclusion to that reached regarding the Sifton applications. Residential use is appropriate on a portion of the Grandview lands and would meet the applicable requirements of the Act, the 1997 PPS, the City's Official Plan and the City's Zoning By-law. Development of the lands is restricted because of the presence of natural and cultural heritage features and because of servicing and access issues. Resolution of these issues may affect the amount of developable area.

[336] The Board has come to this determination based upon the suitability of the proposed land use for the subject lands in view of the provisions of the relevant policies and planning documents. Until a number of issues are resolved, the Board considers the majority of the development to be premature. However, based upon the evidence, the Board is prepared to approve the development of 15 lots adjacent to Golf Road, subject to a number of conditions. The reasons arriving at these conclusions are provided in the remainder of this section.

[337] As with Sifton, the Board heard extensive evidence in relation to the Grandview proposal, and from some of the same expert witnesses. Experts testifying on behalf of Grandview included Mr. Gonnson for engineering and land use planning evidence, Mr. Hilditch for terrestrial ecology, Mr. Geddes for aquatic biology, John Parrish for fluvial geomorphology, Dave Naylor for civil engineering, Mr. Slaine for karst hydrogeology, Chris Helmer who was qualified as a groundwater scientist in the field of hydrogeology, Frank Westaway for noise and vibration, John Trought in the areas of air and odour, Paul Racher for archeology, Mr. O'Brien for transportation engineering, Chris Povell for engineering evidence in the areas of sanitary capacity, functional servicing and stormwater management, and Mr. Walters for land use planning.

[338] It should be noted that the Board qualified Mr. Helmer as a groundwater scientist in the field of hydrology after hearing objections from the City and receiving submissions from the parties. At the time of Mr. Helmer's testimony, he was not certified as a Professional Geoscientist (P. Geo.) and Mr. Lord raised the concern that the *Professional Geoscientists Act* requires individuals who imply or represent that they are qualified to practice geoscience in the province to be so certified. After hearing submissions and considering authorities, the Board issued a ruling on February 4, 2013 qualifying Mr. Helmer as an expert on the basis that he has academic qualifications in the field of hydrology, he has a number of years of experience, his study was supervised by a professional engineer, Mr. Naylor who is exempt from requiring certification under the *Professional Geoscientists Act*, the firm that employs Mr. Helmer (LVM Inc.) is registered with the Professional Geoscientists Association, and Mr.

Helmer's application for certification was in process. The complete ruling and more detailed reasons are provided in Appendix 2.

[339] The Board heard expert evidence on behalf of the City from Mr. Christie for municipal design and infrastructure, Mr. Binning for municipal finance including development charges, Mr. Cowell for karst hydrogeology and physical geomorphology, Mr. Loukes for traffic and transportation engineering, Ms. Engel for water resources engineering, Mr. Zwiers for hydrogeology, Mr. Zammitt for aquatic and terrestrial ecology, Mr. Notolochny for natural heritage and natural hazards planning, Dr. Warwick for archeology, Mr. Dougan for ecology, and Ms. Hives for land use planning.

[340] The Board heard evidence on behalf of Ferrero Canada Ltd. in this phase from Mr. Complin in the area of air quality engineering specializing in odours and Mr. Dragicevic in the area of municipal planning.

[341] The Board heard evidence on behalf of the Haudenosaunee, Six Nations and Sago Yesahta from Chief Montour, Mr. Yesahta, and Mr. Green related to the Grandview proposal.

[342] The Board heard evidence from Ms. Joniec.

[343] The Board also heard evidence from a number of participants who generally expressed opposition to the proposal.

The Proposed Development

[344] The Grandview property consists of approximately 35.3 ha. of land at the northwest corner of Hardy Road and Golf Road. The property is bounded on the north by Hwy 403 and the Canadian National ("CN") railway corridor. The Davidovits lands border the property on the west and further to the west are the Ferraro Canada Ltd. lands which are part of the North West Industrial Park.

[345] The property consists of a combination of agricultural fields, forest, wetlands and valleylands and slope generally from north to south. A number of branches of a small watercourse converge on the property and run through a culvert under Hardy Road, eventually emptying into the Grand River. Sections of the Davisville Swamp PSW are located adjacent to the tributary watercourses and occupy much of the southern third of the property.

[346] The central and northern portions of the property are designated Residential-Low Density in the City's Official Plan. Much of this area is also identified as Environmental Control Policy Area. The central and northern parts of the property are zoned Holding-Residential 1B in the City's Zoning By-law.

[347] The southern part of the property is designated Major Open Space and zoned Open Space 1. This area and the entire PSW on the Grandview lands are identified as Environmental Protection Policy Area in the Official Plan.

[348] As was the case with the Sifton proposal, the intended residential development is concentrated in the agricultural fields. The majority of development is intended to occupy the northerly field, proposed to contain 97 single detached lots and a maximum of 93 single detached and/or semi-detached and/or street townhouses (Exhibit 102, Tab 4, p. 277). The proposed higher density development (semi-detached and townhouses) is intended for Blocks 114 and 115 in the most northerly part of the site abutting Hwy. 403 (Exhibit 109). The southeasterly field abuts Golf Road and is proposed to contain 15 single detached lots. The southwesterly field will not contain any residential units, but is proposed to contain a stormwater management facility.

[349] The area proposed to be developed constitutes approximately 12 ha of the total site. The remainder of the area is proposed to be conveyed to the City through approval of the subdivision.

[350] Revised versions of the Official Plan Amendment (Exhibit 202), the Zoning By-law Amendment (Exhibit 201) and the conditions of draft plan approval (Exhibit 200)

were filed toward the end of the Grandview phase of the hearing. The Board understands that it is these revised instruments for which Grandview is seeking approval and they provide the basis for the Board's consideration of the proposal.

[351] The Official Plan Amendment proposes re-designating part of the central portion of the property from Residential to Major Open Space. This area contains portions of the PSW and watercourse and is identified as either Environmental Control Policy Area or Environmental Protection Policy Area in the Official Plan. The Official Plan Amendment also includes Modified Policy Areas to allow street townhouses in sections of the northern part of the property and to limit the range of permitted uses in the Open Space areas.

[352] The Zoning By-law Amendment proposes to lift the holding zone on the property. The northern portions of the property where townhouses are proposed will be zoned Residential Type 3 Exception in order to permit the townhouses. The Areas where single detached dwellings are proposed will be rezoned from H-R1B to Residential Type1C-Exception and the By-law will extend the Open Space zoning to coincide with the area proposed to be designated as Major Open Space.

Issues, Analysis and Findings

[353] After considering all of the evidence and submissions related to the Grandview proposal, the Board considers the issues discussed in the following sections to be critical to the Board's determination in this matter. While they may not be specifically mentioned, all issues on the issues list attached to the procedural order for the hearing have been considered.

Davisville Swamp and Proposed Secondary Access

[354] Portions of the Davisville Swamp PSW are located on the Grandview property. It occupies much of the southern half of the property, and it is also located adjacent to branches of the watercourse which enter the property from the east and west. The

proposed development avoids majority of the PSW. However, Grandview is proposing an emergency access to run from the northern development area which would go south and provide a maintenance access to the proposed stormwater pond in the southwest field and also turns east along an existing gravel laneway to connect with Golf Road (Exhibit 109).

[355] The Board heard that the emergency access will encroach into portions of the PSW. Mr. Hilditch estimated that the encroachment will remove approximately 0.5 ha of the PSW. The Savanta EIS documents the locations where there will be encroachment and the types of vegetation that will be directly impacted (Exhibit 102, Tab 12, p. 789-790). The EIS states that the encroachments are minor.

[356] The City maintained that the encroachment constitutes development in a PSW which is prohibited by the 1997 PPS and the Official Plan.

[357] The Board has similar concerns for removing portions of the PSW on the Grandview site as those expressed for the Sifton property. The Board agrees with the City's submissions that the 1997 PPS prohibits development in PSW's as does policy 8.5.2 of the Official Plan.

[358] Mr. Walters contended that the Board should exercise discretion in this case and allow the encroachment through the "have regard" provision in the Act for the 1997 PPS. However, as noted earlier in this decision, the PPS provides a clear prohibition against development in PSW's except in cases of public infrastructure projects approved through an environmental assessment process. The case may be made that some relief should be provided to the policy if there is a clear public interest. However, the emergency access is not a public infrastructure project for which there has been an Environmental Assessment. Grandview has not demonstrated a clear public interest for the emergency access which would justify removal of part of the PSW. It appears that the emergency access will simply serve Grandview's interest to facilitate the development.

[359] The Board acknowledges that some intrusion into the PSW had been contemplated in some planning documents. The Board heard that previously the transportation schedule of the Official Plan had shown a minor collector going through a portion of the PSW on the Grandview Lands. The Board heard that this was removed through an Official Plan Amendment prior to Grandview's ownership of the property. The Board also notes that potential roads and/or servicing corridors are shown conceptually within the PSW in the Northwest Master Plan, Phase 3 (Exhibit 4B, Tab 13, Figure 17) and the CER (Exhibit 63, Figure 6.1).

[360] However, these concepts never reached a detailed stage in the planning process where they had been approved by the responsible agencies. The Board cannot conclude that relief should be provided to the prohibition on development in PSW's based upon earlier conceptual plans.

[361] The Board also has concerns about the design of the emergency access. It is proposed to have a width of 4 m and in some locations it is elevated approximately 4 m above grade with 1:1 side slopes. The emergency access is also proposed to be fenced on both sides with 1.5 m fencing. An open ditch is proposed along part of the emergency access to carry stormwater to the stormwater pond in the southwest field (Exhibit 102, Tab 8, p. 460).

[362] The steep side slopes, height, and narrow width are required in part to minimize intrusion into the PSW and to provide suitable grades. However, the Board heard concern about the emergency access impeding wildlife movements. The Board also heard concerns about the ability of emergency vehicles to use the route because of the narrow right-of-way and steepness of the embankments.

[363] Mr. Hilditch contended that the road would not present a serious obstacle to wildlife and Mr. Povell maintained that it will function for its intended purpose. However, as noted earlier in this decision, the City's requirement is for a secondary access, not for a road that will only function as an emergency access. Golf Road ends at the CN

railway to the north. Mr. Christie noted that all of Golf Road, north of St. Andrews Drive should be considered a *cul de sac* that does not have secondary access. Therefore the City requires a secondary access on Golf Road in the vicinity of the St. Andrews Drive intersection to service all of the northern field of the Grandview proposal. The proposed emergency access will not meet the City's requirement for a secondary access. To build it to municipal standards as a local road with even a reduced 16 m right-of-way would expand the area of PSW that would be removed and undoubtedly increase the impact.

[364] Grandview also suggested constructing the northern part of Golf Road as a two lane divided road with a boulevard. However, in the Board's view this does not serve the full purpose of a secondary access. As noted in the Sifton part of this decision, the intent of a secondary access is not only to function in times of emergency, but also to provide an alternative route for the convenience of residents and for efficient functioning of the subdivision. Reconstructing Golf Road with a centre boulevard will not serve this purpose.

[365] Based upon the above considerations, the Board finds that the proposed encroachment into the PSW is not permitted under the 1997 PPS and s. 8.5.2 of the Official Plan. Furthermore, the plan does not provide secondary access to proposed development in the northern field. In the absence of a public infrastructure proposal whereby some encroachment into the PSW could be allowed, or until some alternative way of fulfilling the City's policy is determined, the Board considers the proposed development of the northern field to be premature. The Board acknowledges that this affects the majority of the proposed units.

[366] At present, the lack of secondary access to the northern field, makes development of this area premature. However, it does not make the northern field undevelopable. There may be other options for achieving the objectives of the City policy which have not been fully explored. In addition, the Board heard that discussions between the City and Brant County about annexing an area north of Hwy. 403 have been revived which may, in the long term, open up some new possibilities.

[367] There is no issue of secondary access for the southeastern field adjacent to Golf Road since it is close to the intersection of St. Andrews Drive which provides a second access route.

[368] Based upon the evidence discussed in the remainder of this decision, the Board considers portions of the northern field suitable for the proposed development. However, until there is resolution to the issue of providing secondary access to the northern field, development of this area must be considered premature.

Buffers to PSW, Coldwater Stream and Woodland

[369] The parties acknowledge that the Grandview property contains a number of significant natural heritage features in addition to the Davisville Swamp, including significant woodlands, endangered and threatened species, fish habitat, significant valleylands and significant wildlife habitat. The proposed development generally avoids these features with the exception of the above-noted encroachment into the PSW. Grandview is also proposing to remove a small wooded area in the northern field and to develop in an area where the Eastern Meadowlark, a threatened species, has been observed breeding in the past. There was some debate at the hearing about whether the wooded area should be considered significant woodland and about the appropriateness of developing the area where Eastern Meadowlark were observed.

[370] The Savanta EIS proposes buffers to a number of the significant features as one measure to help mitigate the impacts of the proposed development. Savanta is proposing a 30 m setback adjacent to all coldwater streams, a 15 m or 30 m buffer adjacent to the PSW depending upon wetland characteristics and a variable buffer of between 5 m and 30 m from the dripline of forest communities depending upon edge characteristics and conditions (Exhibit 102, Tab 12, p. 795). The proposed buffers are illustrated on Figure 4 of the Addendum to the EIS (Exhibit 102, Tab 13, p. 925).

[371] Mr. Zammitt questioned the adequacy of the buffers, noting that basing the size of buffers on edge conditions is not adequate and a more detailed analysis should be

undertaken. Mr. Dougan also expressed concern about the adequacy of the buffers. He contended that a more detailed analysis is required, taken into account factors such as the relationship of ground and surface water to the feature and elevation of the lands.

[372] The Board has considered the evidence regarding buffers with regard to the Grandview proposal and during the other phases of the hearing. With regard to the wetland buffers, the Board considers 30 m to be the minimum buffer required to be assured that there will be no negative impact from uses on adjacent lands. The Board was not presented with any clear evidence that buffers larger than 30 m adjacent to the PSW on the Grandview site are required to maintain any wetland functions. The Board also notes that most of the forested area of the property and much of the south portion of the property to Hardy Road will be protected through the proposal. These areas will remain available for any function that wildlife using the PSW may depend upon including foraging and breeding.

[373] The Board finds that a minimum buffer of 30 m should be provided adjacent to the PSW from any area proposed for development. While the majority of the wetland boundary has been determined there is an area adjacent to lots 7 to 15 in the southeast field, where it seems that wetland boundary has not been shown on Figure 11 of the Savanta EIS and Figure 4 of the EIS Addendum (Exhibit 102, Tab 13, p. 925). If the wetland boundary has not been determined for this area, it should be staked and confirmed by MNR prior to approval of the planning instruments for this area and used as the basis for delineating the 30 m buffer.

[374] The Board heard no strong concern expressed about the proposed adequacy of the 30 m buffer adjacent to the coldwater streams. The only major issue raised by the City was with regard to ensuring that the watercourses are located accurately on plans so that the buffer areas could be accurately determined and plotted. The Board notes that there are some discrepancies in the various expert reports regarding the locations of some watercourse tributaries. Prior to approval of the proposed planning instruments, the surveyed location of watercourses should be used for determination of buffer areas

and the limits of development on the property and these should be incorporated into the planning instruments including the draft plan for the 15 lots approved through this Decision.

[375] With regard to the proposed buffer from forested areas, the Board accepts Savanta's position that the depth of buffer can be appropriately determined by reviewing the conditions of the forest in the vicinity. In this regard 5 m can be appropriate adjacent to more disturbed or cultural woodlands, whereas larger buffers are required for more mature woodland communities. However, there was some dispute at the hearing about whether or not the dripline had been determined accurately. Mr. Hilditch acknowledged that the dripline had been surveyed by Savanta, but had not been confirmed by the GRCA or MNR.

[376] The Board finds that the dripline of the forested area should be surveyed in the field in conjunction with MNR and the GRCA and appropriate setbacks should be taken from the surveyed dripline of the trees prior to draft approval of the plan of subdivision.

[377] If buffers are implemented adjacent to these features as recommended in the Savanta EIS and as modified by the above direction, the Board is satisfied that these features will be protected.

[378] It should be noted that it may be necessary to construct a stormwater outfall within one of the buffer areas. If required the Board understands that this will involve temporary disturbance of a limited amount of one of the features and this matter can be left to the responsible agencies to ensure that significant features and functions are not negatively affected.

Endangered and Threatened Species

[379] The Savanta report documents a variety of plant and animal species which use the Grandview property. Only one threatened species, the Eastern Meadowlark has been confirmed as having used the property. A breeding pair was identified in the

northern field on the property during the summer of 2011. Two other threatened bird species were identified during follow-up work to the EIS and were documented in the EIS Addendum (Exhibit 102, Tab 13). A barn swallow was observed foraging over the property and a Bobolink was observed flying over the property during surveys in 2012. No other endangered or threatened plant or animal species have been identified as occupying or using portions of the property.

[380] According to the Savanta EIS, the presence of the Eastern Meadowlark is not an indication that “significant habitat” for the species exists on the property under the PPS since habitat for the Eastern Meadowlark has not been defined by MNR (Exhibit 102, Tab 12, p. 778). Furthermore, Savanta contends that the observations of barn swallow and Bobolink are not an indication of breeding habitat on the property and that these birds should only be considered as visitors (Exhibit 102, tab 13, p. 909).

[381] The City’s witnesses contend that these observations warrant further investigation. There may be a need to prevent development on portions of the property in order to protect these species.

[382] After reviewing the evidence, the Board concurs with the evidence provided by Savanta. No significant habitat of endangered or threatened species has been identified on the Grandview property. As noted earlier, the Board considers it to be the responsibility of MNR to confirm the presence of “portions of significant habitat” of endangered or threatened species to exist on the property. The Board heard that Savanta intends to work with MNR to comply with any requirements for the Eastern Meadowlark under the ESA.

[383] However, since the Eastern Meadowlark was noted in the northern field which is an area where significant development is proposed, the Board considers it prudent that requirements under the ESA for this species and others, if MNR determines it to be appropriate, should be addressed prior to development of the area being approved.

[384] Therefore, prior to approval of the proposed Official Plan Amendment and Zoning By-law, Grandview should provide confirmation that requirements of MNR with regard to endangered and threatened species have been determined and will be fulfilled. If this requires changing the proposed designation and zoning of areas proposed for residential development, the Official Plan Amendment and By-law should be revised accordingly.

Significant Valleylands

[385] The Savanta EIS identified the valley of the tributaries and small watercourse as significant valleyland. The EIS references use of the criteria in the 2010 NHRM for making this determination. The City contended that most of the property should be classified as significant valleyland. Mr. Cowell maintained that the entire property south of the main slope in the north field should be considered significant valleyland. Mr. Zammitt indicated that the criteria in the 2010 NHRM for significant valleylands appear to be met by the majority of the property.

[386] The Board has dealt with this issue previously in the context of the WMP and the Sifton lands. The Board has also reviewed the criteria for determining significant valleylands in the 2010 NHRM (Exhibit 4C, Tab 24, p. 1443–1447) since Savanta used these criteria.

[387] After considering the evidence, the Board agrees with Savanta's analysis, that the valleylands of the tributaries meet the criteria for significance. The criteria in the NHRM include surface and groundwater functions, distinctive geomorphic landforms, degree of naturalness, community and species diversity, unique communities and species, habitat value, linkage function, restoration potential and value. The valleylands of the tributaries contain the majority of the forest, all of the fish habitat and PSW located on the Grandview property. Consequently, in the Board's view, the tributary valleys contain all of the surface water function and much of the groundwater function on the property. They also contain the majority of natural area, the area of community

and species diversity, the unique communities, and the area of species and habitat value.

[388] While the slope in the northern field may represent the definition of the main Grand River valley, as noted earlier in this decision, large sections of the urban area of Brantford are within this valley area. The Board agrees with the evidence provided by Savanta, that significant valleylands should be identified by the presence of features discussed above.

[389] From the evidence presented at the hearing, the Board finds that identifying all of the property from the main slope in the north field as significant valleyland of the Grand River, is not justified.

[390] The Board concurs with the conclusions of Savanta, that the tributary valleylands will not experience negative impacts from resulting from the development as long as mitigation measures proposed in the EIS as may be altered by this decision, are implemented.

Significant Woodlands and Significant Wildlife Habitat

[391] The Savanta EIS identified all of the wooded area on the property associated with the watercourse and PSW as significant woodlands. As discussed earlier setbacks are proposed from the woodland dripline and with the exception of some tree removal proposed for the emergency access, no encroachment into the significant woodland is being proposed.

[392] There was considerable debate at the hearing about whether the wooded area in the middle of the northern field should be considered as significant woodland. The Savanta EIS classified this area as Dry Fresh Black Walnut – Manitoba Maple Cultural Woodland (CUW1-3) and does not include it as part of the significant woodland on the property.

[393] The City presented evidence that there is a wooded connection between this area and the significant forest associated with the tributary watercourse at the western limit of the property and that MNR had identified portions of the cultural woodland and connecting area as significant woodland (Exhibit 6, p. 129). Part of the wooded connection is identified as CUT-1 Cultural Thicket on the Savanta figures (Exhibit 102, Tab 12, p. 814), but it does not appear to extend all the way to the cultural woodland. The Board heard this is a result of Savanta using older aerial photography for its base mapping.

[394] If Savanta's characterisation of the cultural woodland is accurate the Board has difficulty concluding that it is significant woodland. Savanta indicates that this woodland is a cultural community with a high proportion of non-native species (Exhibit 102, Tab 12, p. 790). However, the Board notes that Savanta has identified two locally significant plant species, Sky-blue aster and Butterfly-weed, in the cultural woodland. The Board also notes that a considerable amount of wildlife usage was recorded in the area during winter wildlife surveys including usage by deer and wild turkey (Exhibit 102, Tab 12, p. 875).

[395] The Savanta EIS has determined portions of the property to be significant wildlife habitat. These include deer and wild turkey wintering areas which have been identified in the forested areas associated with the tributary watercourses and PSW (Exhibit 102, Tab 12, p. 818), amphibian movement areas in the southern portion of the property, and the habitat of species of special concern including the Eastern Meadowlark, Monarch Butterfly, Snapping Turtle, Southern Cloudywing, Green Milkweed and Pignut Hickory. The Board is satisfied with the approach identified in the Savanta EIS for ensuring that there is no negative impact regarding this habitat.

[396] However, based upon the above considerations, prior to development of the northern field further information should be provided regarding the functioning of the cultural woodland and thicket and the adjacent areas to determine if these areas perform critical wildlife habitat functions and to ensure that proposed development in

this area will have no negative impact. It may be necessary to exclude a portion of this area from development if it is determined that habitat requires protection

[397] This issue does not affect the principle of development of the area and the approval of the Official Plan Amendment and By-law Amendment, but may affect the future lotting and road pattern in the northern field. This matter can be dealt with when a revised proposal for development of the northern field comes forward.

[398] The City provided two articles which discussed the impacts of domestic cats on bird populations (Exhibit 173 and 174). Mr. Dougan noted that the articles contend that an extremely large number of birds are killed by cats each year and he maintained that this could be a negative impact of the proposed development. However, the Board notes that if the articles are accurate the impacts that are predicted could occur with any residential development. In the Board's view this issue is best dealt with through municipal measures to control pets roaming outdoors. The Board is confident that the City will apply the appropriate measures if deemed necessary.

Water, Geological and Hydrogeological Issues

[399] As was the case with the Sifton proposal, the Savanta EIS requires that pre-development surface and groundwater flows and conditions must be maintained during the post development stage in order to avoid negative impacts on a number of the natural heritage features on the property.

[400] The soil materials and groundwater characteristics of the property were investigated in the Hydrogeology Study Report prepared by LVM for the Grandview property (Exhibit 103, Tab 27). The study reviewed existing information sources and well records. LVM also installed 17 boreholes on the property to determine subsurface soil and groundwater conditions. Monitoring wells were installed in the boreholes to assess groundwater levels and quality.

[401] The study found extensive sand deposits underlain by silt/sand till in the northern part of the property, varying areas of sand and silt in the central part of the property and sand interlayered with silt deposits in the southern part of the property (Exhibit 103, Tab 27, p. 1337-1338). The study concluded that groundwater flows through the site generally in a north to south direction. Groundwater elevations in the north part of the site are well below the surface (approximately 12 m to 16 m), while in the central and southern part of the property, groundwater is generally less than 2 m below surface.

[402] After reviewing the characteristics of the site, the study calculated the expected hydraulic conductivity of the soil and determined the expected pre-development infiltration and runoff which needs to be matched in the post development condition.

[403] The LVM study concludes that groundwater supports the wetlands and surface water features on the property and maintenance of pre-development infiltration levels and spatial distribution as well as water quality will be of prime importance (Exhibit 103, Tab 27, p. 1341). A water balance by sub-catchment area is provided in the Addendum to the Hydrogeological Study (Exhibit 103, Tab 28, p. 1494D).

[404] The Functional Servicing and Stormwater Management Report for the property undertaken by Metropolitan Consulting Inc. propose to compensate for infiltration that will be reduced by impervious surfaces of the development through the construction of soakaway pits and infiltration trenches (Exhibit 102, Tab 8, p. 19 and 20). The study also proposes directing clean surface runoff to the wetlands on the property by grading some rear yards so that runoff flows into the PSW and by discharging a portion of roof runoff into the PSW through a third pipe system.

[405] The City maintained that the groundwater system is more complex than described in the studies. Mr. Cowell pointed to evidence of an upward gradient in groundwater levels and indicated that the regional bedrock aquifer may be influencing groundwater conditions on the property and he called for a more comprehensive hydrogeological analysis.

[406] Mr. Helmer maintained that the hydrogeological analysis is appropriate and that a more comprehensive analysis is not required. Mr. Slaine addressed Mr. Cowell's concern that there may be karst features on the property by determining that soils at the bottom of the ice pond were not marl.

[407] Mr. Zwiers raised a number of issues about the method used by LVM in the hydrogeological study. His concerns were largely addressed through cross-examination.

[408] In reviewing the evidence related to hydrogeology and surface water features, the Board cannot conclude that there are any great deficiencies in the studies or that there would be substantial benefit in undertaking a more comprehensive study. The Board's main concern, as with the Sifton proposal, is to ensure that pre-development ground and surface water flows, patterns, duration and quality are maintained to water dependent features. This includes the wetlands and the tributary watercourses.

[409] The Board agrees with the testimony of Ms. Engel and Mr. Zwiers that duplicating pre-development conditions will require careful planning and setting aside areas for infiltration in the proper locations. Further submissions are required to demonstrate that the proper quantity and duration of flow will enter the water dependent features to mimic what they would receive in pre-development conditions. Since wetlands can be highly sensitive to water level fluctuations, the hydroperiods of the wetland areas also need to be factored in to the analysis.

[410] As noted in this decision regarding the Sifton proposal, the Board is also concerned about the long-term maintenance of infiltration measures and the third pipe. There was a suggestion during the hearing that infiltration trenches could be located on boulevards which would partially resolve this concern. However, maintenance of the third pipe system needs to be clarified.

[411] The hydrogeological report has identified two shallow overburden wells to the east of the property and wells apparently located on the golf course to the east (Exhibit 103, Tab 27, p. 1340-1341). The report concludes that these wells will not be impacted

if pre-development groundwater conditions are maintained in the post development phase. Furthermore, the Board is satisfied that these wells will be protected and that Grandview will be responsible for dealing with any issues if a condition of draft approval proposed by Grandview is adopted (Exhibit 200, proposed Grandview condition 4 (o)).

[412] The Board is generally satisfied that hydrogeological concerns will not prevent development of the property. The Board is prepared to approve revised Official Plan Amendment and Zoning By-law based upon the submissions, However, in view of the above considerations, prior to any approval of development in the northern field, Grandview should submit further information to demonstrate that pre-development ground water and surface water quantities, quality, duration of flow and locations will be maintained. This analysis should demonstrate that the hydroperiods of wetlands will be maintained. Since this may involve setting aside additional areas for infiltration, this matter should be resolved before draft approval of the plan for development of the northern field.

[413] Issues related to maintaining infiltration measures and the third pipe and with regard to wells can be dealt with through appropriate conditions of draft plan approval.

Flooding and Stormwater Management

[414] The Functional Servicing and Stormwater Management Report identify a stormwater management approach for the development and also calculate floodlines for both existing and proposed conditions using the HEC-RAS model. Ms. Engel indicated that the model takes peak flows to determine Regional Storm floodlines, but does not take into account the combined effect of peak flows from different subwatershed areas. Consequently, she maintained that the floodline calculations may be inaccurate.

[415] After reviewing the evidence, the Board agrees that the floodplain modelling should be revised to meet the GRCA's requirements.

[416] The stormwater management approach described in the above report proposes two pond facilities to provide stormwater control. The main facility has been designed to control post-development stormwater flows to pre-development levels for all storms from the 2 year to the 100 year event and to convey the Regional Storm flow safely. The facility is intended to function as an extended detention pond that will also provide water quality control (Exhibit 102, Tab 8, p. 462).

[417] The proposed pond is intended for the southwest field with maintenance access proposed from the emergency access road. This facility is intended to service all of the north field area, that is, lots 16 to 113 and blocks 114 and 115. This comprises the main part of the development.

[418] The Board has no difficulty in principle with this facility. However, if the proposed emergency access is eliminated because of the above findings of the Board, construction of the proposed ditch or pipe to convey stormwater to this facility will need to be redesigned.

[419] The Board also heard that the proposed outlet from this facility may encroach into the PSW. This requires further design work to identify an appropriate location to outlet stormwater flow.

[420] The other stormwater management facility proposed to service the development is through an existing pond on the east side of Golf Road known as the Ava Pond. This facility provides stormwater quantity control for a residential area east of Golf Road by controlling all stormwater flows from the 5 year to the 100 year storm to the 5 year storm level. Grandview is proposing to upgrade this facility to service lots 1 to 15 which are located in the southeast field adjacent to Golf Road. The facility will provide its current level of stormwater quantity control for this portion of the Grandview site as well as for the area it currently services. The upgraded facility will also provide stormwater quality control for its proposed catchment area. A stormceptor is also proposed to provide quality control for a small portion of Golf Road.

[421] The Board heard concerns about the proposal from the City's witnesses, particularly with regard to the capacity of the ditch that serves as the outlet for the Ava Pond and regarding the reduced level of proposed stormwater controls. The Board also heard concerns about using the HEC-RAS model to determine flood levels downstream of this facility. However, Grandview maintains that the proposal will provide an overall benefit by providing stormwater quality controls to an area where currently there is none.

[422] After hearing the evidence, the Board has no objection in principle to the stormwater management proposal. Through this decision the Board is approving proposed lots 1 to 15 and will provide appropriate conditions to deal with stormwater management. The Board will be adopting proposed City draft conditions # 30 and 31 in Exhibit 183 which will require that the stormwater design must be approved by Ministry of Environment ("MOE") and the GRCA. Through draft approval, the Board expects that the GRCA will ensure that the hydrologic and hydraulic modelling is appropriate. The Board is confident that concerns about the design can be resolved in the course of these approvals and that it is appropriate to deal with this matter through conditions.

[423] The Board heard concerns about proposed culvert replacements. The Fluvial Geomorphologic Erosion Risk and Stream Crossing Assessment prepared by Parish Geomorphologic (Exhibit 103, Tab 16) reviewed existing culvert sizes and made recommendations for improvements based upon stream geomorphology. The Savanta report also indicated that there would be some benefit to fish movement if an existing culvert were to be removed. The Functional Servicing Report provided the proposed design for culvert crossings. There was some debate at the hearing about the appropriate sizing of culverts and possible impacts of replacing these.

[424] The Board expects that the need to replace culverts will be revisited if the emergency access road is eliminated. Concerns expressed about larger culvert sizes effecting water levels is a matter that needs to be considered in the design of the

culverts. If water is ponding behind the existing structures which maintain the PSW area, then measures should be incorporated to allow the ponding to continue.

[425] There was also some debate about the need to replace the culvert at Hardy Road. The Functional Servicing and Stormwater Management Report found no change in flood levels at Hardy Road in the post-development condition. The Board will not make a finding about this, other than up grading the culvert does not need to be considered at this time. When the northern field comes forward for development this issue can be considered further by the relevant parties.

Sanitary Servicing

[426] A major concern for the Grandview development is the proposed means of providing sanitary services to the site. Servicing of the Sifton property has already been discussed extensively in this decision.

[427] The Board heard that there are three options for providing sanitary service to the Grandview site which are discussed in the Minutes of Settlement between Grandview and the City which settled Grandview's appeal to the Board of the development charges by-law for the Sifton pumping station (Exhibit 3C, p. 1691). According to the minutes, if the Sifton pumping station is constructed, the sanitary flow from the Grandview property should be taken west along Hardy Road and south to the Sifton pumping station. If the Sifton pumping station is not built, Grandview has the option to complete a capacity assessment analysis and upgrade the existing Ava Road pumping station in order to take its sewage to the east. If neither of these options is available, Grandview can build its own pumping station on its property along Hardy Road and construct a sewer west along Hardy Road to take flow through a forcemain to the Oak Park Road sewer. The Minutes of Settlement also include a provision whereby if the Sifton pumping station is constructed within a reasonable period of time, Grandview is to abandon work on another option and accommodate existing sanitary flows that go to the Ava Road pumping station into its sewers and convey the combined sewage flows to the Sifton

pumping station. The Ava Road pumping station which was built as a temporary facility could then be abandoned. The Minutes of Settlement are clear in not committing the City to any development of the Grandview lands.

[428] Grandview has prepared a Sanitary Capacity Analysis pursuant to the requirements of the Minutes of Settlement for potentially using the Ava Road pumping station (Exhibit 102, Tab 7). The analysis concludes that there is downstream capacity to accommodate the sanitary flow from the Grandview subdivision and that replacement of a section of the sewer on Ewing Drive would solve any capacity issue. Grandview has agreed to replace this section of the sewer.

[429] Through the testimony of Mr. Christie and Mr. Loukes, the City expressed a number of concerns about the analysis, including that higher population density numbers should have been used in the calculations, that townhouse developments at 24 and 40 Hardy Road were not included in the calculations, and about potential lack of pipe capacity further down in the sewage system. Mr. Christie maintained that improvements may be required on all of the sections of the sewer identified in Exhibit 6, p. 33 to ensure capacity is available.

[430] Mr. Binning provided estimates of the financial implications of servicing the Grandview property with the construction of a pumping station (Exhibit 6, p.36 and 37). The documentary evidence did not include an estimate of both Sifton and Grandview using the Sifton pumping station. However, Mr. Binning indicated in cross-examination that he had done a rough estimate that it would result in a total deficit of approximately \$80,000/year.

[431] The Board has considered the evidence provided by the parties. The Minutes of Settlement provide more flexibility for servicing the Grandview lands than are available to Sifton.

[432] Given the Board's conclusions about the Sifton pumping station and the terms of the Minutes of Settlement, there may be some attempt to resolve outstanding concerns

in order to use the Sifton pumping station. If that effort fails, then Grandview has the option of using the Ava Road pumping station. The Minutes of Settlement require that Grandview be responsible for any required upgrades if the Ava Road pumping station is used. The types of upgrades required may be in dispute. However, it appears from the evidence that there will be a servicing option available for the Grandview property.

[433] Since there is greater flexibility, the Board is satisfied that servicing issues for the Grandview plan can be dealt with through appropriate conditions of draft plan approval.

Cultural Heritage

[434] The Board heard evidence about the cultural heritage of the Grandview property from Mr. Racher, Vice-President of Archeological Research Associates Ltd. Mr. Racher testified that he prepared an archeological assessment for the property in 2003 for the previous owners which is included in the evidence in Exhibit 103, Tab 18.

[435] Mr. Racher indicated that the archeological assessment found 13 locations on the property that contained artifacts; eight were significant enough for further investigation and of these, four were identified for Stage 4 assessments. Three Stage 4 assessments were carried out and the sites were excavated. It was determined that one site, identified as MBV, would not be excavated, but would be avoided by future development and it would be protected with a 10 m buffer. The work that was done was carried out in accordance with direction of the Ministry responsible for archeological protection at the time, the Ministry of Culture. The Ministry of Tourism, Culture and Sport now has this responsibility. Site MBV is located between one of the east tributary valleys and the proposed lots 7 to 15 in the southeast field.

[436] Dr. Warrick provided evidence on behalf of the City. He indicated that he had no difficulty with Mr. Racher's archeological assessment work. However, it was his contention that all of the Grandview site, including the natural heritage sites, the agricultural fields and the locations where artifacts were discovered should be designated as a cultural heritage landscape under the PPS. He indicated that he

believed that the MBV site is connected to the Davisville settlement and that the entire area would be of significance to aboriginal people. It was his opinion that the cultural heritage landscape designation would support protection of the entire property.

[437] Mr. Racher agreed with Dr. Warrick that Davisville is a significant cultural heritage landscape. However, he did not agree that the limits of the cultural heritage landscape extended to the Grandview lands. He noted that the Davisville sites are approximately 1 km from the Grandview property and while Davisville people may have reached at times into adjacent properties, it does not make these areas significant. In Mr. Racher's opinion the significant archeological features on the Grandview property have been dealt with appropriately through the past work and through the measures required to protect the MBV site.

[438] The Board has carefully considered the evidence. While the Board respects Dr. Warrick's analysis, the Board cannot, based upon the evidence, conclude that all of the Grandview property is connected to Davisville, and that it should be declared a cultural heritage landscape under the 1997 PPS. Through the archeological assessments, three of the four sites have been excavated and the artifacts have been removed from the Grandview property. In Mr. Racher's reply witness statement, he notes evidence that site MBV was used long after Davisville was abandoned (Exhibit 102, Tab 19, p. 1122). There is no clear evidence in the submissions that the Grandview property formed a significant part of Davisville. Based upon these considerations, the Board finds that the measures undertaken by Grandview and the proposal to protect site MBV with a 10 m buffer are appropriate and they have regard for the requirements of the 1997 PPS and comply with the Official Plan.

[439] The MBV site is adjacent to the southeastern field where through this decision the Board is approving the proposed 15 lots. The Board through a condition of draft plan approval will require protection of the MBV site and the establishment of a 10 m buffer.

[440] The Board is making no finding about whether portions of either the Grandview or Sifton properties should be considered as a cultural heritage landscape under the 1997 PPS. However, the Board finds that the portions of both properties where development is proposed can be developed for residential purposes without impacting the significant cultural heritage features.

Roads and Traffic

[441] Mr. O'Brien provided evidence on the traffic impact of the proposal and submitted a Traffic Impact Study in 2010 by Paradigm Transportation Solutions Ltd. (Exhibit 103, Tab 33) for which he was responsible and he also provided an addendum to the traffic impact study (Exhibit 103, Tab 32). The Traffic Impact Study considers the impact of both the Sifton and Grandview subdivisions based upon a larger number of units proposed in the previous versions of the plans. The addendum considers the changes that would result from the reduced number of units in the current proposals.

[442] The Board heard that the City was undertaking a traffic study in the northwest area of the City and that the Paradigm study should be updated to reflect the City's numbers. Mr. O'Brien noted that the numbers in the City's study are lower than in the Paradigm study, but he agreed to provide the update.

[443] Based upon the studies, Mr. O'Brien recommended a number of improvements many of which were not in dispute. He maintained that issues could be resolved through conditions of draft approval.

[444] However, the City maintained that draft approval should not be given because of transportation issues. In particular, Mr. Loukes noted that approval of the subdivision may increase the necessity for major transportation projects including the grade separation at Ava Road and the Oak Park Road crossing of the Grand River.

[445] In addition, the City prefers a signalized intersection at Golf Road and Hardy Road. This was contemplated in the original recommendations, but in the addendum,

as a result of the reduction in the proposed number of units in the Grandview proposal, a signalized intersection at the corner of Hardy Road and Golf Road is not proposed. Mr. O'Brien indicated that based upon the warrants, a signal is not required at this intersection. Another main point of dispute involved the amount of reconstruction of Golf Road that would be required. Grandview maintained that the reconstruction was required from Gold Road's northern limit to St. Andrew's Drive, whereas the City contended that the reconstruction should extend to Hardy Road.

[446] As noted in this decision regarding the Sifton proposal, the larger infrastructure projects such as the Ava Road grade separation and the Oak Park Road crossing of the Grand River are projects on the City's long term list of capital works. In the Board's opinion, draft approval of the Grandview and Sifton plans should not be delayed because there may be an increased need for these works.

[447] Based upon the evidence, the Board concurs with Mr. O'Brien's expert opinion that a signal is not required at the intersection of Golf Road and Hardy Road. The requirement for a signal will depend upon traffic generated from the Grandview proposal. Given the Board's above findings, the number of units approved through this decision is greatly reduced from the numbers used in the estimates in the addendum to the traffic study. Furthermore, through this decision, the number of units ultimately approved for the site may also be reduced which may further reduce the need for a signal.

[448] The number of units ultimately approved for the Grandview lands may also influence the extent of Golf Road that requires reconstruction. It would be premature to make findings about this matter at this time.

[449] With regard to the 15 lots that will be draft approved through this decision, the Board will require the completion of improvements to Golf Road required to facilitate the development of these lots. This will be dealt with through a condition of draft plan approval.

[450] Another matter of dispute related to transportation involves the road widths proposed for the subdivision. All roads in the Grandview subdivision are proposed to have 18 m right-of-ways instead of 20 m as require in the City standards. Grandview raised similar arguments as were raised by Sifton for proposing 18 m rights-of-way.

[451] As the Board has already determined in this decision, it is apparent from the Official Plan that some flexibility can be exercised regarding right-of-way widths. The North West Master Plan has recommended the use of alternative standards in this area, but the Board understands that the intent is to use alternative standards to protect natural heritage features. The Board will require the standard 20 m right-of-way for Street A which services lots 1 to 15. The Board will not make any findings about right-of-way widths for the remainder of the proposed plan since the lots in this area are not being approved at this time.

Noise and Vibration

[452] Mr. Westaway provided evidence on potential noise and vibration impacts caused by sources including the CN rail line, Hwy. 403 and the industrial area to the west. He had prepared an Environmental Noise and Vibration Impact Study in 2008 (Exhibit 103, Tab 25) and a Revised Study based upon the current Grandview plan (Exhibit 103, Tab 24).

[453] The studies reviewed the potential impact of noise sources and of vibration from the railway in the context of MOE Publication LU-131. It recommended mitigation measures including an acoustical barrier, various measures to be incorporated into the construction of the proposed dwellings, and warning clauses to be placed on title. Mr. Westaway also indicated that an updated noise study should be provided prior to final approval of the plan.

[454] Mr. Westaway found no noise issues resulting from the industrial area to the west maintaining that any issues are the responsibility of Ferraro. Furthermore, he found no

vibration issues related to the railway, although CN requires a warning clause in the offers of purchase and sale of the residential units.

[455] The City raised issues about the adequacy of the studies. Ferrero raised concerns about ensuring that Grandview complies with MOE's D-6 guideline and noise resulting from Ferrero's potential expansion. However, the Board is generally satisfied with the evidence provided by Mr. Westaway, and that noise and vibration issues can be appropriately dealt with through appropriate condition of draft approval. The Board notes that Mr. Westaway's assessment considered noise from the industrial area to the west and found that, "Area industrial businesses were not audible at the proposed development area during noise monitoring" (Exhibit 103, Tab 24, p. 1171).

[456] However, the Board does not agree with Mr. Westaway's contention that noise from Ferrero is necessarily a matter for only Ferrero to deal with through its Environmental Compliance Approval. The Board has found elsewhere in this decision that the D-6 guideline places a responsibility both on the industry and those who may be developing sensitive land uses.

[457] The conditions of draft approval for lots 1 to 15 include the requirement for an updated study related to the development of these lots prior to final approval that must be approved by MOE. The Board expects that MOE will ensure that if measures are required to deal with industrial noise, they will be imposed on the development through this study and conditions of draft approval. Based upon the evidence, the Board finds that these measures are sufficient to satisfy the requirements of the applicable documents.

Other Issues

[458] With the exception of concerns raised by Ferraro regarding odour and by the Haudenosaunee which are dealt with in the following sections, other issues regarding the Grandview lands raised at the hearing do not affect the principle of development and will not be dealt with in detail in this decision.

[459] Some concern was raised by the City about whether the northern part of the site would be suitable for medium density housing. Ms. Hives noted that this area is not close to shopping, it is not currently well served by transit and it would not be a good location for affordable housing.

[460] The Board did not hear in the evidence that the intent was to build affordable housing in the area. Also, s. 7.2.3.3.3 of the Official Plan indicates that medium density development can provide a transition between low density development and non-residential uses such as major roads (Exhibit 4 a, Tab 2004 OP, p. 7-12). The proposed townhouse development would provide this transition between the single family houses and Hwy. 403.

[461] Furthermore, the Board heard that currently there is transit on Hardy Road. The Board considers it essential that the service be extended up Golf Road once the northern part of the subdivision is developed and that the subdivision roads be designed to accommodate bus service. The Board understands that it is the intent of the City to extend eventually transit service to the subdivision.

[462] Based upon these considerations, the policies of the Official Plan, Zoning By-law and other relevant planning documents, the Board finds that the proposed residential use of the property, including the proposed townhouses in the northern part of the property, is appropriate and meets all applicable requirements.

[463] The Board is satisfied that all other issues which have not been specifically addressed in this decision can be dealt with through appropriate conditions of draft approval.

Planning Instruments

[464] With regard to the proposed Official Plan Amendment and Zoning By-law Amendment to permit townhouses in the northern part of the property, concern was

raised by the City about the use of an exception to the Low Density Residential designation, rather than redesignating the area as medium density.

[465] The Board has reviewed the Official Plan Amendment (Exhibit 202) and finds that it is acceptable to treat low density area with the exception for townhouses rather than redesignate it medium density. The Board accepts Mr. Walter's opinion evidence that the medium density designation would open the area up to other uses may not be appropriate.

[466] As noted earlier in this decision, the Board is requiring a 30 m buffer adjacent to the PSW which should be clearly defined based upon a surveyed wetland boundary confirmed by MNR and removed from any area proposed to be residentially designated and incorporated into the area designated as Open Space. Furthermore, if MNR determines that a portion of the property needs to be left undeveloped for the protection of habitat of endangered or threatened species, this area should also be removed from the limits of the residential designation.

[467] The 10 m buffer from cultural heritage site, MBV should also be clearly defined and included in the area designated Open Space.

[468] The Board notes that Grandview is proposing to place an exception on the area to be designated as Open Space to further restrict the uses. The Board does not agree that this restriction is required and finds that the lands should simply remain in the current open space zoning.

[469] Based upon consideration of all the evidence, the Board finds that the proposed land uses as revised through this decision comply with all applicable planning requirements. The Board is prepared to approve the Official Plan Amendment for the Grandview property after it receives a revised copy with the above-noted changes incorporated.

[470] With regard to the proposed Zoning By-law (Exhibit 201), the Board is prepared to approve it on the same basis as the Official Plan Amendment. Areas removed from residential zoning because of the increased buffer distance, MNR restrictions regarding the habitat of endangered and threatened species and the buffer for site MBV should be added to the Open Space zone. Furthermore, the Board is not prepared to approve the exception to the Open Space zone. The By-law should be amended accordingly and submitted to the Board. The H symbol should remain on all areas. It can be removed from the southeast field where through this decision, the Board is approving the development of lots 1 to 15 after Grandview fulfils outstanding requirements to the satisfaction of the City, and after Grandview enters into a subdivision agreement with the City as required in s. 16.5.4 of the Official Plan.

[471] As was the case with the Sifton property, the City requested that the Grand River Heritage Waterfront designation and zoning should be applied to the areas that are to be designated and zoned open space. For the reasons noted earlier, the Board finds that the Open Space designation and zoning are appropriate and should be applied as indicated in the proposed Grandview Official Plan Amendment and Zoning By-law Amendment.

[472] After reviewing the evidence, the Board has concluded that the proposed development of lots 1 to 15 in the southeast field (Exhibit 109), adjacent to Golf Road, does not have significant servicing constraints and is within an area that has a secondary access. In consideration of all of the evidence and submissions, the Board finds that the development of the southeast field meets all requirements of the 1997 PPS, Official Plan and Zoning By-law and it should be approved. Furthermore, the Board has reviewed the proposed plan of subdivision for these lots in view of s. 51(24) of the Act and the evidence from the planning witnesses about conformity with this section. Based upon the evidence, the Board finds that the proposal complies with the requirements of s. 51(24). The Board is prepared to approve the plan of subdivision for the 15 lots in the southeast field only, subject to revised draft plan conditions.

[473] As noted earlier, the Board received a version of the draft plan conditions that the City requested the Board to impose if it determined that the plan of subdivision should be approved (Exhibit 183). Towards the end of the hearing, Grandview provided a final version of draft plan conditions which incorporated some of the City's requirements (Exhibit 200). Mr. Walter provided evidence in support of the conditions in Exhibit 200.

[474] If Grandview wishes to pursue approval of lots 1 to 15, the Board directs that the City's version of amended draft plan conditions in Exhibit 183 be used as a basis and that they be revised to refer only to this part of the plan and the conditions as they apply to these lots.

[475] With regard to sanitary servicing, the Board is confident from reviewing the evidence that the flow from the 15 lots can be accommodated through the Ava Road pumping station. Through conditions of draft approval, the Board will require an update to the sanitary servicing plan confirming the servicing option to be used for lots 1 to 15 and identifying any improvements that may be required if the Ava Road pumping station is used.

[476] Concern was raised by the City that the exact location of the creeks should be determined by survey and the buffers should be established using the surveyed location as a reference. Also the wetland boundary should be delineated and confirmed by MNR adjacent to lots 7 to 15. These requirements should be completed and submitted to the Board prior to draft plan approval of lots 1 to 15. Buffers in this area, including the 10 m buffer from archeological site MBV should be established using this information.

[477] City condition # 1 in Exhibit 183 should be revised to refer only to lots 1 to 15, Block 119, Street A and any other blocks, easements and widenings necessary for the development of these lots. Condition # 2 in Exhibit 183 is not in dispute. City conditions # 3 and 4 relate to the development of the northern field and are not required for the development of lots 1 to 15. The Board adopts City condition # 5 except for s. 5 (f)

which is addressed below. Condition 5(s) shall be modified to by adding the words at the end of this clause “necessary for the development of lots 1 to 15”.

[478] Since there are Minutes of Settlement signed by the City which allows three servicing options, City conditions # 25 to 28 inclusive can be eliminated and the proposed Grandview condition # 19 in Exhibit 200 can be adopted. However, the City should maintain approval over any required improvements to the system. The following sentences should be added at the end of Grandview condition # 19, “Grandview shall submit an updated sanitary sewer servicing plan, prepared by a qualified engineer, identifying the proposed means of providing sanitary services to lots 1 to 15 and the remainder of the lands. The City of Brantford is to be satisfied financially and otherwise with regard to the method of sanitary servicing used for lots 1 to 15. If the Ava Road pumping station is used to convey sanitary effluent from the site, any improvements required to the pumping station and downstream system to develop these lots shall be to the satisfaction of the City of Brantford. Additional improvements that may be required to service the remainder of the lands will be secured through future phases of the development.”

[479] City condition # 6 in Exhibit 183 shall be modified as follows, “The Owner agrees that construction of public services required for the development of lots 1 to 15 shall not be phased and must be constructed in their entirety.” The Board adopts City conditions # 7 and 8.

[480] With regard to conditions for roads and traffic, the Board does not consider it necessary for Grandview to complete all road improvements for only 15 lots and conditions related to secondary access are not necessary. Only the improvements required to service the increased traffic from the 15 lot subdivision should be required through the conditions of draft plan approval. In this regard, proposed City conditions # 5 (f), # 14, in Exhibit 183 can be eliminated. Furthermore proposed City conditions # 12, 13, 15 to 19, 22 and 23 are either not required because they relate to the need for secondary access, or the conditions proposed by Grandview are more appropriate. The

Board finds that condition # 11 proposed by Grandview in Exhibit 200 is appropriate with the words, “necessary for the development of proposed lot 1 to 15” replacing the words “necessary for the development of the subject lands” in the third line. Condition # 12 in Exhibit 200 shall be reworded as follows, “That the Owner shall agree to be responsible for constructing and implementing all necessary traffic improvements identified for the development of lots 1 to 15 in the updated traffic study to the satisfaction of the City of Brantford and at no cost to the municipality, with the timing for said construction to be completed as agreed to by the General Manager, Public Works.” The Board finds that City conditions 20 and 21 in Exhibit 183 are reasonable and should be applied to the draft approval. The Board does not have specific evidence regarding the required changes to the intersections of Golf Road with Cherry Hill Lane and St. Andrews Drive for development of only lots 1 to 15. In the absence of specific requirements, the Board trusts that the City will impose whatever is necessary for these intersections through these conditions.

[481] With regard to stormwater management, the Board will adopt condition # 30 and 31 in Exhibit 183 which are not in dispute. The Board expects that through condition # 31 the GRCA will address any modelling concerns that they might have and design issues. Condition # 32 is not required because it applies to the facility required for the development in the northern field. With regard to condition # 33, the Board does not agree that there is a need to require monitoring of the stormwater facility for a minimum of five years post development for the retrofit of the Ava Pond facility. The receiving watercourse for the Ava Pond is a roadside ditch and the Board understands that there is less concern for impact than if the pond were discharging directly into the watercourse on the Grandview site. The Board will adopt Grandview’s condition # 24 in Exhibit 200 which proposes two years of monitoring. For similar reasons, the Board will adopt proposed Grandview condition # 25 in Exhibit 200 instead of City condition # 34 in Exhibit 183. In addition, the Board will adopt condition # 35, 36 and 37 of the City’s conditions. The need to survey and stake features in condition 36 A (iii) should apply only to features on or adjacent to lots 1 to 15.

[482] The Board is satisfied with the geomorphological study and evidence provided by Mr. Parrish. The Board does not expect that the improvements recommended through this study and through the work of Mr. Povell will be required for the development of lots 1 to 15 since they are mainly required to deal with impacts of development of the northern field. Therefore, proposed City condition # 38 is not required. The Board will adopt Grandview condition # 29 in Exhibit 200 with the following change to part (b). Since the majority of the improvements recommended in the fluvial geomorphology report are required for the full development of the property, part (b) should read:

That the Owner agree to implement at their expense any recommendations contained in the Fluvial Geomorphology Erosion Risk and Stream Crossing Assessment by Parrish Geomorphics Ltd. dated April 2012 (except recommendations regarding culvert sizes) that may be required as a result of the development of lots 1 to 15 to the satisfaction of the City and the Grand River Conservation Authority.

[483] The Board will also adopt condition #30 proposed by Grandview in Exhibit 200 rather than City condition # 39 which requires a sub-regional groundwater study. As indicated earlier, the Board does not agree that this type of analysis is required.

[484] With regard to parks and open space, in view of the reduced area of development and the fact that no parks are proposed in the vicinity of lots 1 to 15, the Board will be satisfied for this phase if 5% cash *in lieu* is provided for the area to be developed. City condition # 9 is not required. The Board will adopt Grandview condition # 8 in Exhibit 200 with the deletion of reference to conveying portions of Block 117 and 118 since these Blocks do not form part of the approved plan.

[485] Furthermore, the Board will adopt proposed Grandview conditions # 31 to # 40 in Exhibit 200 as they apply to proposed lots 1 to 15. It should be noted that Block 119 forms part of the approved development area.

[486] With regard to natural heritage issues, as noted earlier, the Board is generally satisfied with the Savanta EIS. Based upon the evidence, the Board finds that the conditions # 41 to # 43 and # 45 to # 51 proposed by Grandview in Exhibit 200 are acceptable and should be imposed on the draft approval as they apply to lots 1 to 15.

Condition # 44 refers to required stream crossings and improvements which are not necessitated by the development of these lots and it is not required.

[487] The Board will not adopt City condition # 65 in Exhibit 183 which appears to require a completely new noise and odour assessment and places substantial onus on Grandview. As noted earlier, the Board interprets the D-6 guideline as placing an onus both on industry and those developing sensitive uses. The Board will adopt proposed Grandview condition # 52 in Exhibit 200 with wording as follows, "That the Owner agrees to update the Revised Environmental Noise and Vibration Impact Study by dBA Environmental Services Inc. revised March 2012, as recommended by the study. The Owner further agrees to update the Grandview Ravines Inc. Air Quality Assessment by Church and Trought Inc. dated March 2012 to include monitoring of odours on the Grandview property in the location of proposed lot 1 to 15. The Owner agrees to submit both updated studies to the Ministry of the Environment and the municipality for review. Any development of the subject lands must be in accordance with the recommendations of the said reports as they may affect the development of lots 1 to 15 and as approved by the Ministry of the Environment and to the satisfaction of the City's General Manager of Public Works." The Board has found merit in the submissions provided on behalf of Ferrero and is therefore requiring an update of the odour study. The issues raised by Ferrero are discussed later in this decision.

[488] The Board adopts condition # 66 in Exhibit 183. The Board does not consider condition # 67 necessary for the approval of lots 1 to 15 and therefore will not impose this condition. The Board will also adopt conditions # 68 to # 70 in Exhibit 183.

[489] There was some dispute about the necessity of proposed City condition # 71 in Exhibit 183. However, the Board sees no harm in requiring site plan control for the property and will adopt condition # 71.

[490] The Board will adopt condition # 72 and # 73 in Exhibit 183. The Board will also adopt City condition # 74 with the following change. The reference to infiltration

trenches should be removed from condition # 74 (b) since these are not proposed for lots 1 to 15.

[491] The Board will adopt City condition # 75 and # 76. The Board understands that a safety berm is not required for the development of lots 1 to 15. The Board directs that City condition # 77 be replaced with the following, "That the Owner shall agree to satisfy the requirements of CN with regard to the development of lots 1 to 15".

[492] The Board will adopt the remainder of the conditions that is City conditions # 78 to # 89 in Exhibit 183. The conditions referenced in conditions # 81 to # 89 should be revised to reflect the numbering of the Board approved conditions.

[493] The Board did not hear evidence on the notes, but understands they are not in dispute. The Board adopts the notes as they may apply to the development of lots 1 to 15.

[494] Based upon the evidence, the Board finds that the conditions as revised above, are appropriate and reasonable and meet the requirements of s. 51(25) of the Act.

Conclusion

[495] After reviewing all of the evidence, the Board is satisfied that some residential development is appropriate on the Grandview lands and it can occur in compliance with all relevant provisions of the Official Plan and Zoning By-law and having regard for the PPS. The Board is satisfied that if the changes directed through this decision are incorporated into the planning instruments that the Official Plan Amendment and Zoning By-law Amendment will comply with all applicable planning requirements and can be approved. However, because secondary access is not available for most of the property, it is not appropriate to approve the majority of the plan of subdivision at this time.

[496] The proposed lots 1 to 15 in the southeast field are in the area where secondary access is not required and it appears from the evidence that servicing options are

available for these lots. The creation of proposed lots 1 to 15 of the plan of subdivision, revised according to the Board's direction, meets the requirements of s. 51(24) of the Act. Therefore the Board is prepared to approve these lots subject to the submission of suitable revised conditions of draft approval as directed above.

[497] The Board acknowledges the position in the City's argument that the Board cannot order municipalities to assume roads and services and that it is not appropriate to issue a draft plan approval where services are not likely to be available. The Board has reviewed the authorities submitted by the City in this regard (City Authorities, Tab 20 and 21). However, through the Minutes of Settlement the City has agreed that one of the identified servicing options can be used. The required Sanitary Capacity Analysis has been submitted by Grandview and the Board has concluded that a viable servicing option is available. Furthermore, through the proposed conditions of draft approval, the Board is ensuring that the City must be satisfied with the sanitary servicing option. This is not a matter of ordering the municipality against its will to assume services, since it has already agreed that servicing can occur through one of the options mentioned in the Minutes of Settlement.

[498] Therefore, based upon consideration of the evidence, the Board is prepared to approve lots 1 to 15 of the plan of subdivision subject to conditions of draft approval revised in accordance with the direction provided above.

FERRERO CANADA LIMITED

[499] Ferrero provided evidence regarding the potential impact of the proposed Sifton and Grandview developments on its industrial operation. The Board heard expert evidence on behalf of Ferrero from Mr. Complin in the area of air quality engineering with a specialty in odours and from Mr. Dragicevic in the area of municipal planning matters. The Board heard expert evidence on behalf of Sifton from Mr. Pigeon, and on behalf of Grandview from Mr. Walters and from Mr. Trought who testified in the area of air quality and odours.

[500] The main issue raised by Ferrero which was supported by the City was that Sifton and Grandview must ensure that their developments do not restrict the operation of the Ferrero facility which is located in the eastern part of the North West Industrial area. Ferrero referred to the requirements of the MOE D-6 guideline which is intended to ensure compatibility between industrial facilities and nearby sensitive land uses which includes residential uses (Exhibit 4D, Tab 31). The guideline identifies categories of industries and sets out potential areas of influence and minimum separation distances for each category. The guideline also indicates that air quality studies should be provided to determine if there will be impacts.

[501] The main air quality issue raised by the parties was with regard to odours. There was an assessment for noise carried out by Mr. Westaway as noted earlier which found no issue with regard to the Ferrero site. Ferrero also provided an Acoustic Assessment Report completed in 2012 in conjunction with an expansion of its facility. It found that estimated sound levels at points of reception are below MOE requirements (Exhibit 40, p. 11). The points of reception used are existing residences which appear to be in closer proximity to the Ferrero property than the Sifton lands (Exhibit 40, Figure 1).

[502] Sifton did not complete a study but addressed the D-6 requirements through the evidence of Mr. Pigeon. He noted that the substantial separation distance from Ferrero building which is located approximately 446 m from the closest point of the Sifton property (Exhibit 6, p. 17). He also noted that an odour study carried out for Grandview found that odour issues could be dealt with through a warning clause on title of the proposed subdivision lots.

[503] Grandview addressed the odour issue primarily through the work of Mr. Trought who prepared an Air Quality Assessment (Exhibit 103, Tab 21, p. 1134-1146). Mr. Trought classified Ferrero as a Class II facility which according to the D-6 guideline has a potential area of influence of 300 m and a minimum separation distance of 70 m. According to Mr. Trought's evidence, the assessment found that there was a faint hazelnut odour detected approximately 420 m from the Ferrero property line. The Board

heard that the odour was detected by an individual who was not on the Grandview property on one day in March with moderate winds. Mr. Trought contended that potential odours should not prevent residential development, but that a warning clause should be included in the draft plan conditions (Exhibit 103, Tab 21, p. 1146).

[504] Ferrero noted that in the D-6 guideline, separation distances are to be calculated from property boundaries which could place some of the Grandview lands in the area of influence. Also, the detection of odour is subjective, and while the individual in Mr. Trought's study detected only a faint odour, others may consider the odour to be a problem and it could be considered an "adverse effect" under MOE legislation.

[505] The Board heard that Ferrero has substantial holdings and could expand further which could exacerbate any problems for residents of the Sifton and Grandview lands.

[506] The Board heard that Ferrero's interest was not to prevent development, but simply to ensure that its operations were not negatively affected. If it were determined that there were a problem then mitigation measures could be enacted by the developers to deal with the issue.

[507] After considering the evidence, the Board is concerned that no analysis was completed for the Sifton lands and that the assessment for Grandview did not include work on the subdivision site. The Board understands that there is substantial distance between the Ferrero site and the proposed subdivisions and while odours were detected in the above-noted air quality study, no evidence has been provided to the Board of odour problems from the existing operation. The Board also recognises that the D-6 guideline places responsibility on the industry as well as those proposing sensitive land uses.

[508] However, in order to be assured that the D-6 guideline has been complied with the Board will require an update to Mr. Trought's study including an assessment of odours undertaken on the Grandview subdivision lands during conditions when odours are likely to be detected. A similar assessment should be undertaken on the Sifton

subdivision lands. This can be dealt with through an appropriate condition of draft approval when a revised plan of subdivision for the Sifton lands comes forward.

[509] This is a matter that can be dealt with through conditions of draft approval for both plans of subdivision. An appropriate condition is being imposed through this decision on the approval of Grandview lots 1 to 15.

ISSUES OF THE HAUDENOSAUNEE, HODISKEAGEHDA, SIX NATIONS AND SAGO YESAHTA

Background

[510] The Board heard evidence in all phases of the hearing from the Haudenosaunee, who also provided oral and written argument (Exhibit 211B). Included in their written evidence (Exhibit 65) were a number of Court decisions and an Amicus submission prepared in relation to an Ontario Superior Court proceeding between the City and the Haudenosaunee Development Institute and a number of individuals.

[511] The Board understands from the submissions that the Haudenosaunee include the five original Nations of the Iroquois Confederacy which also comprise five of the Six Nations. The Haudenosaunee Confederacy Council of Chiefs is the designated leader of the Haudenosaunee and it has designated the Haudenosaunee Development Institute as the vehicle for consultation regarding land and development issues.

[512] The Six Nations Elected Council is responsible for governing matters within Reserve No. 40 in the City and they have identified the Haudenosaunee Confederacy Council of Chiefs as the body to negotiate land and development related issues.

[513] The position of the Haudenosaunee is that there is an established “duty to consult” with aboriginal peoples that has been enunciated by the Courts and that adequate consultation has not taken place with regard to the WMP or with regard to the Sifton and Grandview proposals. The evidence includes a letter from the Haudenosaunee Development Institute (Exhibit 65) and a letter from Chief Montour to

City Council (Exhibit 3C, p. 1701), both of which indicate that the public involvement and notice efforts through the WMP and the participation of individual members of the Haudenosaunee should not be considered as consultation.

[514] The Haudenosaunee requested that the Board refuse any development of the Sifton and Grandview properties and also refuse the WMP instruments and return the WMP planning process to its earliest stages so that proper consultation can take place and the interests of the Haudenosaunee can be addressed.

[515] The Board heard that the Haudenosaunee have an outstanding land claim regarding the Haldimand Tract which includes lands measuring six miles inland on each side of the Grand River. This would include both the Sifton and Grandview properties.

[516] The submissions of the Haudenosaunee indicate that this claim is currently before the provincial government for negotiation (Exhibit 65). However, the Province was not a party at this hearing and the witnesses from MNR that appeared at the hearing were not individuals with knowledge of the matters related to aboriginal issues.

[517] The subject properties are used by the Haudenosaunee for hunting and gathering and for traditional and ceremonial uses (Exhibit 211B). The Board heard that the lands contain traditional herbs and medicines that are of significant value to the Haudenosaunee.

[518] According to the submissions, the Haudenosaunee are not claiming clear title over the Haldimand Tract lands, but a “usufructuary right”. That is the right to use the lands for various purposes such as hunting, fishing and gathering, but without full ownership of the lands (Exhibit 211 B).

[519] In the opinion of the Haudenosaunee, if the proposed Sifton and Grandview planning instruments are approved, it will open the way for development of the lands which will cause irrevocable damage through construction of a residential development.

They also maintain that if the WMP instruments are approved, there will be potential damage to the lands through the construction of paved trails, sports facilities and parks.

[520] The City contends that all requirements for involving the Haudenosaunee in the WMP process and in the process for consideration of the Sifton and Grandview proposals have been fulfilled. The Board heard that there is an agreement that includes the City, Brant and Haldimand Counties, the Federal and Provincial governments, the GRCA, the Six Nations of the Grand River and the Mississaugas of the Credit River that provides for the notification of the various parties when specified activities are being contemplated by one of the other parties (Exhibit 3A, p. 80 – 98). The specified activities include applications under the Act, but as was noted in Mr. Reniers' testimony it does not include studies, such as the WMP. Mr. Reniers advised the Board that Ron Williamson of Archeological Services Inc. had been retained specifically to deal with aboriginal consultation for the WMP. Documentation of some of his efforts is included in Exhibit 3C, p. 1357.

[521] Mr. Reniers indicated that there had been three meetings with Six Nations staff and that there was a presentation by the WMP consulting team to Band Council after adoption of the WMP. Invitations were sent to the aboriginal groups for each of the WMP events. He stated that efforts to involve the Haudenosaunee in the WMP went above and beyond that which is required in the agreement. Furthermore, the Board understands that a staff member of the Haudenosaunee attended meetings of the Waterfront Task Force which was the body that guided the preparation of the WMP.

[522] The City provided a list of the types of involvement provided to the Haudenosaunee in its argument outline (Exhibit 212, Tab A).

[523] Sifton and Grandview maintain that they have fulfilled all public consultation requirements of the Act with regard to their proposals. The documentary evidence includes notice of the Sifton and Grandview plan of subdivision applications to the Six Nations under the above agreement (Exhibit 3A, p. 197 and 202). While these notices

are from 2004, there was no evidence provided to the Board that notice requirements under either the agreement or the provisions of the Act were not fulfilled with regard to the Sifton and Grandview applications.

Analysis and Findings

[524] The Board has carefully considered the evidence and submissions of the parties.

[525] In view of the earlier findings in this decision, allowing the appeals against OPA No. 166 and Zoning By-law 23-2011, the Board does not need to make a determination on the adequacy of the consultation regarding these instruments. However, the evidence that the Board heard in relation to the notice and consultation efforts with the Haudenosaunee regarding these instruments, as well as for the Sifton and Grandview applications, is informative with regard to any remaining duty regarding the latter applications.

[526] It is clear that despite the considerable opportunity for involvement of the Haudenosaunee during the WMP process, they are not satisfied with the type of consultation that has occurred.

[527] The type of consultation that the Haudenosaunee expect goes beyond invitation to typical public consultation events of the type conducted under the Act and beyond discussions with Haudenosaunee or Six Nations staff. As was expressed in their final argument and through the testimony of Chief Montour, the type of consultation that they expect is where the appropriate representatives of the Haudenosaunee community meet with appropriate people of the other parties and discuss issues until a final decision is reached.

[528] The Supreme Court Decision, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 which the Haudenosaunee provided in their evidence clearly affirms the Crown's duty to consult aboriginal people in regard to land claims when activities are proposed that might affect their interests prior to

determination of right or title under the claim. In paragraph 16, the Decision states: “The government’s duty to consult with Aboriginal People and accommodate their interests is grounded in the honour of the Crown.” In paragraph 39, the Decision maintains that extent of the duty to consult varies with an assessment of the strength of the claim. The decision goes on to conclude that the duty to consult rests with the provincial as well as the federal government and that no duty to consult rests with third parties.

[529] From review of the authorities, the Board concludes that in order to address the submissions of the Haudenosaunee, that it must determine a) whether the development proposals and the planning instruments before the Board give rise to the duty for the City, Sifton or Grandview to consult, and if so, b) the level of consultation that is required. . The latter determination will require the Board, in a preliminary way, to assess the strength of the claim and potential adverse impact to the Haudenosaunee. The starting point for this analysis is set out primarily in para. 36 and 37 of the above-noted *Haida* decision. The intent of undertaking this type of assessment is to uphold the honour of the Crown. In para. 17, the Supreme Court states: “The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all dealings with aboriginal people, from the assertion of sovereignty to the resolution of claims and implementation of treaties, the Crown must act honourably.”

[530] It is beyond the jurisdiction of the Board to make any specific finding regarding the legitimacy of the land claims of the Haudenosaunee. None of the parties to this proceeding asked the Board to make such a finding. However, the evidence provided to the Board, which was not contested, did establish that the land claim asserted by the Haudenosaunee over the WMP lands is the subject of on-going litigation. Based upon the evidence the Board is satisfied that the Haudenosaunee have an interest in these WMP lands. Beyond that, the Board will not comment further as to the strength of this interest or claim.

[531] In response to the first issue noted in paragraph 528 above, the Haudenosaunee in its written argument, contended that the City is an extension of the Provincial Government which is an extension of the Federal Government which represents the Crown in Canada and as a result of this relationship, it has a duty to consult.

[532] The City did not specifically address the duty to consult in its evidence or argument, but with regard to the WMP and the Sifton and Grandview plans, the City maintains that it has fulfilled its obligations with regard to contact and involvement of aboriginal peoples. Furthermore, the documentary evidence included a letter of April 16, 2009 in which City staff took the position that there is no duty to consult the Six Nations in conjunction with privately held lands in the City and that a municipality is not the Crown for the purposes of the duty to consult (Exhibit 3B, p. 981).

[533] The written argument of the Amicus filed in the Court proceeding noted above, and submitted at this hearing makes the argument that, "...because Ontario's ability to make decisions about the land is always subject to the requirement to consult with the Aboriginal people's affected, Brantford's ability to make decisions about the land is subject to the same restriction" (Exhibit 65, para. 187). However, the Board did not receive from any party a decision of the Courts that found that the honour of the Crown and this duty to consult extends to, or also rests with municipalities, or with third party proponents of development applications such as Sifton or Grandview.

[534] The authorities provided by the Haudenosaunee confirm the Crown's duty to consult, but do not specifically address if this duty arises at the municipal level. They deal with proposals where consultation is required at the provincial level.

[535] Furthermore, in a case like the current matter, where the land use designations and zoning, are in place that allow urban uses of the lands, it is not clear that the duty to consult is invoked with every application involving the lands. Approval of the Sifton and Grandview applications will simply allow development that is largely permitted under the

existing designations and zoning. This is a different circumstance that those dealt with in the authorities provided by the Haudenosaunee.

[536] Based upon the evidence provided, the Board cannot conclude that the City has a clear duty to consult resulting from the obligations to consult of the higher levels of government.

[537] The provisions of the Act set out the requirements for notice and public involvement in s. 17, 22, 34 and 51 with regard to the planning applications under consideration in this appeal. With regard to the Sifton and Grandview applications, the Board finds that the provisions of the Act regarding notice and public involvement have been met. Based upon the evidence, the Board also finds that the requirements of the above-noted agreement between the City, the Six Nations, the Federal and Provincial Governments and others have been met.

[538] The Board recognizes that these claims, if found to be legitimate, have the potential to cause conflict with future residential use of the lands that may occur with realization of the Sifton and Grandview proposals. However, the findings of this decision regarding the proposed planning instruments will cause little change in the use of the lands from the status *quo*. Through this Decision 15 lots are being approved on the Grandview property adjacent to Golf Road. Given the existence of other residential uses in the immediate vicinity, this should not significantly affect the Haudenosaunee's use of the area or their land claim.

[539] In addition, the Board is imposing condition # 78 on the draft approval which must be cleared by the Ministry of Tourism, Culture and Sport. A number of other conditions involve Provincial Ministries and require their clearance. This illustrates that a level of consultation is continuing through the draft plan of subdivision approval process. If additional consultation is required regarding these lots or the adjacent cultural heritage site MBV, the appropriate Ministry can ensure that it will occur prior to final registration of the lots.

[540] The Board's approval of the proposed Official Plan Amendments and the Zoning By-law Amendments for the Sifton and Grandview lands will cause little change to the existing situation. The lands are already designated and zoned for residential use. The aerial extent of these designations will not be increased through the proposal and the majority of both properties will be protected as open space. The major change will be the designation and zoning of a medium density block on both properties. However, this causes little material change since small portions of each property are affected in locations that are already designated and zoned for Low Density Residential use.

[541] In view of these considerations, the Board will not order further consultation with regard to the Sifton and Grandview Official Plan Amendments, the Zoning By-law Amendments and the 15 lots in the Grandview plan.

[542] However, the development of the remainder of the lands has greater potential to affect the interests of the Haudenosaunee and their land claim. For any development of the properties beyond the 15 lots, the Board expects that there will be additional consultation with the Haudenosaunee and that the consultation should take place at the provincial level through means that might include the application and/or clearance of appropriate draft plan conditions for future subdivision approvals. This is consistent with the Supreme Court's conclusion that the honour of the Crown must be understood generously and with the submissions which identify that the duty to consult rests with the senior levels of government.

[543] If new plans of subdivision come forward, there will be opportunities for this consultation to occur through the agreement noted in para. 519 above, for notice between the City, Six Nations, federal and provincial governments and others. Furthermore, the Board expects that any new plan of subdivision would be subject to conditions involving provincial ministries through which consultation could occur.

[544] The Board notes that the draft plan conditions proposed by Sifton included a condition that would dedicate the Grand River floodplain and other open space lands to

the Haudenosaunee. This would include all of the Davisville sites located on the Sifton property. If a new plan comes forward for the Sifton lands, discussions with the Haudenosaunee around having clear title to these lands could resolve some of their concerns.

CONCLUSION

[545] The Board has considered all of the evidence and submissions of the parties and participants including the authorities. The Board recognizes the value of the WMP and the intentions of the City to protect areas of natural and cultural heritage value. However, based upon the evidence, the Board has concluded that there is an intent expressed in the applicable planning documents for some residential use to be permitted on the Sifton and Grandview properties. Furthermore, the Board cannot conclude from the WMP and NHA and the evidence provide by Sifton and Grandview that no residential development should be permitted on the properties. The Board has found that OPA No. 166 and Zoning By-law No. 23-2011 are not appropriate and will allow the appeals against these instruments in the Order provided below. As the mechanism for implementing OPA No. 166 and Zoning By-law No. 23-2011, the Board will also allow the appeals against the ICBL.

[546] Mr. Lord raised the precautionary principle in his argument as a basis for approving the City's instruments and refusing development on the Sifton and Grandview lands. He also contended that there has been increasing priority on protection of the environment in provincial planning documents. The Board has reviewed the related authorities provided by the City.

[547] In the Board's view this decision is consistent with the precautionary principle and serves to protect the natural environment in the subject area. The additional measures imposed on the developments, such as increased buffer widths and ensuring that requirements are met for endangered and threatened species are being required to

protect the environmental system. These measures are also consistent with an increasing emphasis on the environment in provincial documents.

[548] The Board has found that the evidence establishes the suitability of residential use of portions of the Sifton and Grandview lands. Through these plans large portions of each property will be maintained as public open space. This factor, in conjunction with proposed mitigative measures, will serve to protect the significant natural heritage features and functions of the properties, and maintain the cultural heritage value of the lands. The Board is prepared to allow the appeals of Sifton and Grandview in part and approve revised Sifton and Grandview Official Plan Amendments and Zoning By-law Amendments according to the direction in this decision. The final order regarding the Official Plan Amendments and Zoning By-law Amendments will be withheld until appropriate revised instruments are received.

[549] As noted earlier in this decision, the plans of subdivisions are constrained by secondary access and servicing issues. In view of the options for servicing, established through the settlement agreement, these constraints have been resolved for proposed lots 1 to 15 of the Grandview plan of subdivision.

[550] Based upon consideration of all of the evidence and submissions, the Board will allow the appeals against the ICBL, OPA No. 166 and Zoning By-law No. 23-2011 through the Order below.

[551] Based upon consideration of all of the evidence and submissions, the Board is satisfied that draft approval of Grandview lots 1 to 15 is appropriate. Provided that the Board receives revised conditions of draft plan approval for Grandview lots 1 to 15, the Board will allow the appeal in part and approve the plan of subdivision for those lots.

[552] The Board is prepared to allow the appeals in part for the Sifton Official Plan Amendment and Zoning By-law Amendment and the three Grandview instruments based upon receipt of revised planning instruments as directed below. The Board will withhold its final Order on these instruments until the revised documents are received.

[553] Since the Board has found that the Sifton plan of subdivision is premature in its entirety, the Board will refuse the appeal and the plan will not be approved.

DIRECTION

[554] The Board directs Sifton to revise the proposed Official Plan Amendment (Exhibit 140, Tab 1) and Zoning By-law Amendment (Exhibit 140, Tab 2) to include the changes below and forward the documents to the Board:

1. The buffer area between the proposed development and the PSW shall be increased to 30 m from the wetland edge.
2. The location of proposed Street E shall be realigned to avoid the PSW and a 30 m buffer should be provided to the edge of the wetland in this area.
3. The buffer area between the coldwater stream and the development area shall be increased to 30 m on each side of the stream.
4. Sifton shall provide to the Board confirmation from MNR that it has been satisfied with regard to the protection of endangered and threatened species on the property. If any areas need to be removed from development to address MNR's concerns the proposed development area shall be amended accordingly.
5. The proposed Official Plan Amendment and Zoning By-law Amendment for the Sifton property shall be amended to include the expanded buffer areas and any area that MNR may determine that needs to be removed from development for the protection of endangered and threatened species in the Open Space designation and in the OS-3 zone.
6. The proposed Official Plan Amendment shall be revised so that the Environmental Protection Policy Area and Environmental Control Policy area

indications are maintained on the property as delineated in schedule 3-1 of the Official Plan.

7. The proposed Official Plan Amendment shall include policies to prevent encroachment of development activities and fill slopes into buffer areas.
8. The proposed Official Plan Amendment shall contain a policy indicating that road access shall be provided to those portions of the site in which development is permitted to the satisfaction of the City.
9. The proposed By-law amendment shall state that 93 units is the maximum allowed in the medium density block.
10. The proposed By-Law Amendment shall include a clause indicating that the holding zone shall not be removed from all or portions of the lands until outstanding requirements, including access and sanitary servicing issues, are resolved to the satisfaction of the City, until required subdivision and development agreements with the City have been entered into, and other City requirements have been met.

[555] The Board directs Grandview to revise its proposed Official Plan Amendment (Exhibit 202) and Zoning By-law Amendment (Exhibit 201) to include the changes below and forward the documents to the Board:

1. The buffer area between the proposed development and the PSW shall be a minimum of 30 m from the wetland edge. In areas where the wetland boundary has not been delineated it shall be determined by survey and confirmed by MNR and the 30 m buffer shall be measured from the surveyed limit.
2. The location of all creeks shall be determined by survey and the required 30 m buffers on each side shall be delineated based upon the surveyed locations of the creeks.

3. The 10 m required separation distance between the MBV site and the proposed development area shall be clearly delineated and incorporated into the buffer area.
4. Grandview shall provide to the Board confirmation from MNR that it has been satisfied with regard to the protection of endangered and threatened species on the property. If any area needs to be removed from potential development to address MNR's concerns, the proposed development area shall be amended accordingly.
5. The proposed Official Plan Amendment (Exhibit 202) and Zoning By-law Amendment (Exhibit 201) shall be revised to include the expanded buffer areas noted above, any changes to buffer areas resulting from the above-noted surveys, and any area that MNR may determine needs to be removed from development for the protection of endangered and threatened species and these buffer areas shall be placed in the Open Space designation and in the OS-1 zone.
6. The proposed Official Plan Amendment shall contain a policy indicating that road access shall be provided to those portions of the site in which development is permitted to the satisfaction of the City.
7. The proposed Official Plan Amendment shall be revised to remove language which intends to apply further restrictions in the area designated as Open Space beyond those uses permitted in the Official Plan. Furthermore, proposed policy statement 1.2 on p. 3 of Exhibit 202 which places further restrictions on uses in the Open Space designation of the property shall be deleted as well as the indication of modified policy area XX2 on the schedule attached to Exhibit 202.
8. The proposed Zoning By-law Amendment (Exhibit 201) shall be revised to include within the OS-1 zone the expanded buffer area and any area that

MNR determines should be removed from development for the protection of endangered and threatened species.

9. The proposed Zoning By-law Amendment shall be revised to eliminate the text amendment 2.3 (Exhibit 201, p. 5) which places further restrictions on uses in the OS-1 zone on the property. Other references to the Open Space exception zone in the By-law shall also be removed.
10. The proposed Zoning By-law Amendment shall be revised to retain the Holding Symbol on all areas where it currently is applied. In the area of proposed lots 1 to 15, the By-law shall include wording to indicate the H symbol can be lifted after the servicing requirements for the lots have been determined to the satisfaction of the City, after a subdivision agreement with the City has been entered into, and after other requirements have been satisfied.

[556] The Board directs Grandview to submit revised conditions of draft plan approval to include the following:

1. From Exhibit 183, City conditions Nos. 2, 7, 8, 20, 21, 30, 31, 35, 37, 66, 68, 69, 70, 71, 72, 73, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88 and 89 in their entirety. References to conditions shall be revised to reflect the numbering of the Board's conditions.
2. From Exhibit 183 City condition # 1 as revised to refer only to lots 1 to 15, Block 119, Street A and any other blocks, easements and widenings necessary for the development of only these lots.
3. City condition # 5 in Exhibit 183, except for condition 5 (f), and 5(s) shall be included and modified by adding the words at the end of this clause "necessary for the development of lots 1 to 15".

4. City condition # 6 in Exhibit 183 shall be included and modified to read as follows, “The Owner agrees that construction of public services required for the development of lots 1 to 15 shall not be phased and must be constructed in their entirety.”
5. City condition # 36 in Exhibit 183 shall be included and modified so that part 36 A (iii) shall read “Staked and surveyed limits of Significant Natural Heritage features adjacent to lots 1 to 15 as verified by the City, the GRCA and/or the MNR should be plotted and labelled on detailed lot grading and drainage plans.”
6. City condition # 74 in Exhibit 183 shall be included and revised to remove the reference infiltration trenches in part (b) since these are not proposed for lots 1 to 15.
7. City condition # 77 shall be reworded as follows, “The Owner agrees to satisfy the requirements of CN with regard to the development of lots 1 to 15”.
8. From Exhibit 200, Grandview conditions # 24, 25, 30,
9. From Exhibit 200, Grandview condition # 8 with deletion of the reference to conveying blocks 117 and 118, and conditions # 31, 32, 33, 34, 35,36,37,38,39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50 and 51 shall be included as they apply to lots 1 to 15.
10. Grandview condition # 19 from Exhibit 200 shall be included with revised wording as follows: “That the Owner agrees to implement sanitary servicing improvements for the development of the subject lands as contained in the Minutes of Settlement regarding appeals to Development Charges By-law No. 54-2009, between the Corporation of the City and Grandview Ravines Inc., dated June 21, 2010. Grandview shall submit an updated sanitary sewer servicing plan, prepared by a qualified engineer, identifying the proposed

- means of providing sanitary services to lots 1 to 15 and the remainder of the lands. The City is to be satisfied financially and otherwise with regard to the method of sanitary servicing used for lots 1 to 15. If the Ava Road pumping station is used to convey sanitary effluent from the site, any improvements required to the pumping station and downstream system to develop these lots shall be to the satisfaction of the City. Additional improvements that may be required to service the remainder of the lands will be secured through future phases of the development.”
11. Grandview condition # 11 in Exhibit 200 shall be included with the words, “necessary for the development of proposed lot 1 to 15” replacing the words “necessary for the development of the subject lands” in the third line.
 12. Grandview condition # 12 in Exhibit 200 shall be included and reworded as follows, “That the Owner shall agree to be responsible for constructing and implementing all necessary traffic improvements identified for the development of lots 1 to 15 in the updated traffic study to the satisfaction of the City and at no cost to the municipality, with the timing for said construction to be completed as agreed to by the General Manager, Public Works.”
 13. Grandview condition # 29 in Exhibit 200 shall be included with revisions to part (b) which should read, “That the Owner agree to implement at their expense any recommendations contained in the Fluvial Geomorphology Erosion Risk and Stream Crossing Assessment by Parrish Geomorphoc Ltd. dated April 2012 (except recommendations regarding culvert sizes) that may be required as a result of the development of lots 1 to 15 to the satisfaction of the City and the Grand River Conservation Authority”.
 14. Grandview condition # 52 in Exhibit 200 shall be included with revised wording as follows, “That the Owner agrees to update the Revised Environmental Noise and Vibration Impact Study by dBA Environmental

Services Inc. revised March 2012, as recommended by the study. The Owner further agrees to update the Grandview Ravines Inc. Air Quality Assessment by Church and Trought Inc. dated March 2012 to include monitoring of odours on the Grandview property in the location of proposed lots 1 to 15. The Owner agrees to submit both updated studies to the Ministry of the Environment and the municipality for review. Any development of the subject lands must be in accordance with the recommendations of the said reports as they may affect the development of lots 1 to 15 and as approved by the Ministry of the Environment and to the satisfaction of the City's General Manager of Public Works."

ORDER

[557] The Board orders that the appeals against the City of Brantford Interim Control By-law No. 99-2010 are allowed and the Interim Control By-law is repealed.

[558] The Board orders that the appeals against the City of Brantford Official Plan Amendment No. 166 and Zoning By-law Amendment No. 23-2011 are allowed and Official Plan Amendment No. 166 is not approved and Zoning By-law Amendment No 23-2011 is repealed.

[559] The Board orders that the appeal regarding the Sifton Plan of Subdivision is dismissed and the plan of subdivision is not approved.

[560] The Board orders that subject to the changes directed through this decision, the appeals of the Sifton Official Plan Amendment and Zoning By-law Amendment, the Grandview Official Plan Amendment and Zoning By-law Amendment, and for lots 1 to 15 of the Grandview plan of subdivision are allowed in part;

[561] In all other respects the appeal regarding the Grandview plan of subdivision is dismissed;

[562] The Board will withhold its final Orders on the Sifton Official Plan Amendment and Zoning By-law Amendment, the Grandview Official Plan Amendment and Zoning By-law Amendment and lots 1 to 15 of the Grandview plan of subdivision pending the receipt of planning documents and the draft plan conditions revised according to the Board's direction included in this Decision.

"C. Conti"

C. CONTI
MEMBER

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario

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

APPENDIX 1***List of Witnesses***

The following witnesses presented evidence at the hearing. For witnesses that were qualified by the Board to give opinion evidence, the area of expertise in which each was qualified is identified.

Sifton

1. Maureen Zunti, Project Manager for Sifton Properties Limited,
2. Phillip Masschelein, Vice-President, Neighbourhood Developments, Sifton Properties Limited,
3. Dr. Gary Epp, a manager of ecological services and senior ecologist with AECOM. Dr. Epp was qualified to give opinion evidence in the area of ecology,
4. Christopher Pigeon, Principal with GSP Group Inc. was qualified to give opinion evidence in the area of land use planning,
5. Dennis Kelly, Consulting Engineer and Department Manager with LVM Inc. was qualified to give opinion evidence in the area of geotechnical engineering,
6. Brian Richert, Project Engineer with AECOM, was qualified to give opinion evidence in the area of stormwater management,
7. Peter McAllister, Senior Project Manager, Water with AECOM, was qualified to give opinion evidence in the area of civil engineering,
8. Dr. Peter Timmins, Principal, Timmins Martelle Heritage Consultants Inc. was qualified to give opinion evidence in the area of archeology and anthropology,
9. William O'Brien, Senior Transportation Consultant was qualified to give opinion evidence in the area of transportation engineering,

10. Robert Stratford, consulting engineer with R.W. Stratford Consulting Inc. was qualified to give opinion evidence in the area of civil engineering,

11. David Slaine, President and Principal with Terra-Dynamics Consulting Inc. was qualified to give opinion evidence in the area of hydrogeology.

Grandview

1. Karl Gonnsen, President of Metropolitan Consulting Inc. was qualified to give opinion evidence in the areas of engineering and land use planning,
2. Robert Walters, Senior Planner with Metropolitan Consulting Inc. was qualified to give opinion evidence in the area of land use planning,
3. Chris Povell, Senior Consultant with Metropolitan Consulting Inc. was qualified to give engineering opinion evidence in the areas of sanitary capacity, functional servicing and stormwater management,
4. Tom Hilditch, President, Savanta Inc. was qualified to give opinion evidence in the area of terrestrial ecology,
5. Sean Geddes, Aquatic Ecologist with Savanta Inc. was qualified to give opinion evidence in the area of aquatic biology,
6. John Parish, Director and Senior Fluvial Geomorphologist with Parish Geomorphic Ltd. was qualified to give opinion evidence in the area of fluvial geomorphology,
7. Paul Racher, Vice-President, Operations with Archeological Research Associates Ltd. was qualified to give opinion evidence in the area of archeology,
8. John Trought, President of Church and Trought Inc. was qualified to give opinion evidence in the areas of air and odour,
9. Frank Westaway, President/Owner of dBA Environmental Services Inc. was qualified to give opinion evidence in the areas of noise and vibration,

10. Chris Helmer, Project Manager with LVM Inc. was qualified as a groundwater scientist to give opinion evidence in the area of hydrogeology,
11. Dave Naylor, Department Director and Project Engineer with LVM Inc. was qualified to give opinion evidence in the area of civil engineering,
12. William O'Brien, Senior Transportation Consultant was qualified to give opinion evidence in the area of transportation engineering,
13. David Slaine, President and Principal with Terra-Dynamics Consulting Inc. was qualified to give opinion evidence in the area of karst hydrogeology.

City of Brantford

1. Matt Reniers, Director of Planning for the City of Brantford was qualified to give opinion evidence in the area of land use planning.
2. Daryl Cowell, Consultant, was qualified to give opinion evidence in the area of karst hydrogeology and physical geomorphology.
3. Gregg Zwiers, Senior Hydrogeologist with the Grand River Conservation Authority was qualified to give opinion evidence in the area of hydrogeology.
4. Janet Engel, Water Resources Engineer with the Grand River Conservation Authority was qualified to give opinion evidence in the area of water resources engineering.
5. Tony Zammitt, Aquatic and Terrestrial ecologist with the Grand River Conservation Authority was qualified to give opinion evidence in the area of aquatic and terrestrial ecology.
6. Dr. Gary Warrick, Associate Professor at Wilfred Laurier University was qualified to give opinion evidence in the area of archeology.
7. Paul Christie, Manager Design and Construction with the City of Brantford was qualified to give opinion evidence in the area of municipal design and infrastructure.

8. Russ Loukes, Director of Engineering Services with the City of Brantford was qualified to give opinion evidence in the area of traffic and transportation engineering.
9. Fred Natolochny, Supervisor of Resource Planning with the Grand River Conservation Authority was qualified to give opinion evidence in the area of natural heritage and natural hazards planning.
10. Jim Dougan, Senior Ecologist with Dougan Associates was qualified to give opinion evidence in the area of ecology.
11. Lucy Hives, Manager, Current Planning with the City of Brantford was qualified to give opinion evidence in the area of land use planning.
12. Craig Binning, Partner with Hemson Consulting Ltd. was qualified to give opinion evidence in the area of municipal finance including development charges.
13. Brad Bricker, Principal with Plan B Natural Heritage was qualified to give opinion evidence in the area of ecology and arboriculture. It is noted that he was not qualified to give opinion evidence in the area of fisheries biology.
14. Ron Palmer, Partner with the Planning Partnership was qualified to give opinion evidence in the area of land use planning.
15. Mike Stone, a District Planner with Guelph District of the Ministry of Natural Resources testified under summons and was qualified to give opinion evidence in the area of land use planning.
16. Ken Corneliese, Water Resource Coordinator with Guelph District of the Ministry of Natural Resources testified under summons.

Ferrero Canada Limited

1. Paul Complin, Principal, Air Compliance and Permitting with Ortech Environmental was qualified to give opinion evidence in the area of air quality engineering specializing in odours.

2. Robert Dragicevic, Senior Principal and Executive Vice-President of Walker, Nott, Dragicevic Associates Limited was qualified to give opinion evidence in the area of municipal planning.

Haudenosaunee

1. The Board heard evidence from Chief William Montour, from Sago Yesahta, and from Lester Green.

Lucia Joniec, Rose Kendra, Janine Heather, Susan Hardy

1. The Board heard evidence on behalf of the above party from Ms. Joniec.

Participants

The Board heard evidence from participants in all three phases of the hearing. The participants raised concerns about potential impact of the development proposals on the natural and cultural heritage features, about disturbance of the area caused by the increased population, and about the potential cost and burden on the City of infrastructure required to service the properties. The participants also generally supported the WMP and the City's planning instruments.

The following participants provided evidence either on their own behalf or on behalf of The Hardy Road Area Citizens Committee (THRACC):

1. Jerry Klievik, Mary Ellen Kay, Mary Lou Knechtel, Neil and Gloria Campbell, Louise Dearling, Marlene and Doug Graham, Peter and Patti Kunashko, Dr. Mary Laurie-Pile, Ingrid and Joe Masters, Arthur Meens, Bill and Faye Merritt, Layla Protopapa, Brian Van Tilborg, Elaine Wilson, Garth Pottruff, Heidi Nanda, Fred Marks, Dr. Mark and Jennifer Jones, Margaret Forrest, Bill Campbell, Dorothy Campbell.

APPENDIX 2

Major Rulings Provided During the Hearing

The Board made numerous rulings during the course of the nineteen week hearing and brief reasons were given orally at the time.

For the purpose of providing a better understanding of the Board's reasons a fuller discussion of two of the major rulings is provided below.

Representative of the Haudenosaunee

Mr. Cheeseman raised a concern about Ms. Draper acting as agent for the Haudenosaunee. He noted that the By-laws of the Law Society of Upper Canada require that in order for an individual to provide legal services that person must be authorized by the Law Society which requires that they must be Counsel or a paralegal licensed by the Law Society. Ms. Draper is neither Counsel nor a licensed paralegal and therefore Mr. Cheeseman indicated that he had a concern about her function at the hearing. Mr. Card supported Mr. Cheeseman's position.

Mr. Lord raised a concern about Ms. Draper acting both as advocate and also in the capacity of providing evidence to the Board.

The Board considered the submissions of Council and reviewed By-law No 4 of the Law Society of Upper Canada. Part V of the By-law provides a number of exceptions for the above requirement. Section 30(1)5 sets out criteria for allowing exceptions for individuals acting for a friend or neighbour. The criteria included in this section are as follows:

1. The occupation of the individual must not include the provision of legal services or the practice of law,

2. The individual must provide legal services only on behalf of a friend or neighbour,
3. The individual must not provide legal services for more than three matters a year,
4. The individual must not expect and must not receive any compensation for providing the services including a fee, gain or reward, direct or indirect.

The Board questioned Ms. Draper with regard to whether she met the above requirements. She confirmed that she was not receiving any compensation for performing her functions at the hearing and that she met all of the other requirements. She also indicated that she would not be providing evidence at the hearing, but was only acting as an unpaid agent for the Haudenosaunee and Mr. Yesahta.

After considering the submissions and based upon the above, the Board ruled that Ms. Draper could continue to act as Agent for the Haudenosaunee and Mr. Yesahta.

Qualification of Mr. Helmer as an Expert

Mr. Lord raised an objection to Mr. Helmer being qualified to give opinion evidence in the area of hydrogeology. He indicated that he had no difficulty with Mr. Helmer's academic qualifications or professional experience in hydrogeology, but that he raised the concern because of the requirements of the *Professional Geoscientists Act* which requires that individuals who practice geoscience or imply or represent that they are qualified to practise geoscience must be a member of the Association of Professional Geoscientists of Ontario ("Association"). Mr. Lord provided a number of authorities to support his position.

Mr. Cheeseman argued that Mr. Helmer should be qualified as a hydrogeologist in spite of his lack of membership in the Association. Mr. Cheeseman indicated that he had only recently become aware of this issue and that it could have been raised weeks earlier after the witness statements were filed. He noted that Mr. Lord did not dispute Mr.

Helmer's professional experience or academic training. Mr. Cheeseman maintained that Mr. Helmer had all the necessary qualifications for membership in the Association and had applied, and was simply waiting for his application to be approved. He maintained that it is within the Board's discretion to determine who is qualified to give opinion evidence, that the Board should receive the best evidence possible. The matter of Mr. Helmer's membership is a separate issue that can be dealt with by the Association if required. Therefore Mr. Helmer should be qualified to give opinion evidence in hydrogeology.

The Board considered the submissions and reviewed *Professional Geoscientists Act* and the authorities.

A number of key factors weighed into the Board's ruling on this issue based upon provisions of the *Professional Geoscientists Act*, the testimony from Mr. Helmer regarding his experience and the study process undertaken to complete the hydrogeological study for the Grandview property.

The *Professional Geoscientist Act* sets out a number of exceptions to the requirement for membership in the Association in s. 3 (3) including an exception for professional engineers who by virtue of training and experience are competent to engage in practices that would constitute professional geoscience.

Section 4 of the above Act requires corporations that engage in the practice of professional geoscience to have a certificate of authorization and to practice in accordance with the certificate.

Mr. Helmer testified that the hydrogeological study undertaken for the property (Exhibit 103, Tab 27) was supervised by Mr. Naylor. At the hearing Mr. Naylor was called to testify alongside Mr. Helmer in a panel and Mr. Naylor signed the Hydrogeological Report. Mr. Naylor is not a member of the Association, but he is a professional engineer and by virtue of s. 3.(3) of the above Act he is exempt from the membership requirement. The Board interpreted the exemption for engineers provided through s. 3

(3) as acknowledgement that professional engineers with appropriate experience do not require membership in the Association because they already have the necessary expertise that would be verified through the membership. From the evidence, the Board concluded that Mr. Naylor possessed the appropriate engineering experience.

Furthermore, the Board heard through the testimony of Mr. Helmer that LVM Inc. which is the company for which he completed the hydrogeological work has a certificate of authorization under s. 4 of the legislation.

From the evidence the Board understands that Mr. Helmer had nine years of experience working in the hydrogeological field and he meets all of the academic and professional experience requirements to obtain membership in the Association.

Based upon the above, the Board concluded that the procedure followed in completing the hydrogeological study in a number of ways complied with the intent of the above Act in that the study was supervised by an engineer who has the necessary qualifications under the Act and it was prepared for a company with certification under the Act

Furthermore, the Board considered the potential significance of the hydrogeological evidence for the Grandview proposal. The evidence of Mr. Helmer could have been a determinative factor in the Board's decision. Failing to qualify Mr. Helmer as an expert in hydrogeology could have resulted in a significant gap in the evidence for the Grandview appeal. Alternatively, it could have resulted in a substantial adjournment until another expert could be found or an additional hydrogeological analysis could be completed.

Furthermore, none of the submitted authorities specifically refused to qualify an expert or hear evidence because the individual was not a member of the Association.

After considering all of the submissions the Board concluded that Mr. Helmer's lack of membership in the Association would make little material difference in the quality of his evidence. He had all of the necessary knowledge and experience in the field. His work was presumably vetted by Mr. Naylor, a professional engineer who does not need

membership in the Association. Mr. Helmer wanted to provide his evidence to the Board. If there were issues with the Association, they could be dealt with outside of the Board process. Furthermore, the Board could deal with any concerns that might arise about the quality of Mr. Helmer's evidence by giving it the appropriate weight in the Decision.

In consideration of all of the above, the Board made the following ruling:

"The Board has carefully considered the submissions of the parties. In hearing any appeal the Board has the obligation to consider all evidence brought before it that may be relevant and it is clear that the hydrogeological evidence of the Appellant falls into this category. Furthermore, it is clear that Mr. Helmer;

1. Has a level of academic and professional training and experience in the field of hydrogeology,
2. Carries out hydrogeological investigations for a company that has a certificate under the *Professional Geoscientists Act*,
3. Works under a professional engineer who is exempt from requiring a certificate under the act,
4. Has applied for his certificate.

The Board agrees with the submissions of the Appellant that the test for determining if one can be qualified as an expert is the knowledge and experience of the individual. The parties agree while he does not have his certification, that Mr. Helmer has knowledge and experience in the field of hydrogeology. Therefore based upon his experience, the Board will qualify Mr. Helmer as a groundwater scientist capable of giving opinion evidence in the field of hydrogeology. The qualifications and experience of Mr. Helmer will be assessed and the appropriate weight will be given to his evidence.

In making this decision the Board is in no way authorizing or encouraging contravention of the *Professional Geoscientists Act*. The matter of Mr. Helmer's practice as a geoscientist will be left to other jurisdictions, but it is noteworthy that no evidence has been raised of any action taken against Mr. Helmer by the Professional Geoscientist Association or any other body.

This matter will be dealt with in greater detail in the decision resulting from this hearing."