

ISSUE DATE:

Jan. 11, 2008



PL041188

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

Trinison Management Corporation, Danigire Holding Incorporated, Star Oak Developments Limited *et al* have 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 refusal or neglect to enact a proposed amendment to the Official Plan for the Town of Oakville to establish the North Oakville East Secondary Plan for the land in the general area bounded by Dundas Street, Sixteen Mile Creek, Highway 407 and 9th Line  
Approval Authority File No.42.121.11  
OMB File No. 0040214

**APPEARANCES:**

**Parties**

**Counsel**

**North Oakville Management Inc.- Settled**

Star Oak Developments Ltd. and Mel-Oak Developments Inc.

R. Cheeseman

Osmington Inc.

I. Kagan

Oakville 23-2 Inc.

R. Beaman

Argo (North Oakville 1) Ltd. and Argo (North Oakville II) Ltd.

P. Harrington

Belmont Properties Inc.

M. Flowers

Trinison Management Corp.

R. Smith

Timsin Holding Corp.

R. Smith

Eno Investments Ltd., Mattamy Development Corporation, Bressa Developments Limited and North Oakville Community Park Inc. (taking over from Danigire Holding Incorporated)

R. Beaman

Green Ginger Developments

C. Barnett

**Other North Oakville Landowners**

Diam Contractors Limited, Antonio Capobianco, In Trust, A. Capobianco and Sons Ltd. and Joshua Creek Community Developments

R. Webb

Memorial Gardens Canada Limited

T. Barlow

Leo and Sybil Rampen

A. Fernandez (absentia)

Redthorn Co.

M. Melling (absentia)

Shell Canada Products Ltd.

B. Taylor

Ontario Realty Corporation

K. Sliwa

Jim and Diane McGowan

M. McQuaid

Canada Lands Company Limited

J. Fleischmann

St. Peter and Paul Serbian Orthodox Parish of Oakville and Mississauga

Other Parties

Town of Oakville

C. Lyons and R. Howe

Halton Catholic District School Board

P. Patterson

Halton District School Board

W. Thatcher

Region of Halton and Halton Region Conservation Authority

F. Coburn

Participants

Ministry of Municipal Affairs and Housing

S. Lockwood

David Bazar and Marie Monique Deguire

Residents Association of North Dundas

L. Knowlton, president (agent)

Taras H. Shevchenko Museum and Memorial Park Foundation

G. Morris, planner (agent)

## **DECISION DELIVERED BY SUSAN B. CAMPBELL AND ORDER OF THE BOARD**

### **Background/Chronology**

On June 2, 1998, Regional Official Plan Amendment No.8 ("ROPA 8") was approved by Council of the Regional Municipality of Halton (the "Region"). ROPA 8 (Exhibit #6a, TAB 1) sets out proposed expansions to the existing urban area of the Region to accommodate the projected residential and employment growth which could not be accommodated within existing urban areas. Included in this expanded area were lands in the Town of Oakville (the "Town") known as the "North Oakville Lands", that is, lands south of Highway 407, north of Dundas Street West, west of Ninth Line and east of Tremaine Road. It is intended that these lands will eventually accommodate 50,000 residents.

On May 29, 2002, Council of the Town approved Official Plan Amendment No. 198 ("OPA 198"), which incorporated approximately 3,000 hectares of land in the area bounded by Highway 407, Dundas St.W., Ninth Line and Tremaine Rd. (the "North Oakville Lands" into the Town's urban area. OPA 198 was eventually approved by the Board on September 12, 2003.

The lands which are the subject of these appeals are within the North Oakville lands. They are termed the "North Oakville East Lands", as they include the above lands, east of Sixteen Mile Creek.

In January 2002, the North Oakville Creeks Subwatershed Study (the "Subwatershed Study"), was initiated "to provide guidance for the future management of the North Oakville Creeks Subwatershed, and specifically to meet the goals and objectives within the context of future land use and other activities within the watershed. The guidance provided reflects the goals and objectives set for the area and the characteristics of the watershed" (Exhibit #9(c)). The Subwatershed Study considered in this hearing, and which vitally informs the Board's decision on the boundaries of the Natural Heritage System (the "NHS") is contained in Exhibits #9(c)-(h), the Characterization Report, the Management Report, the Implementation Report, two volumes of appendices, an addendum (figures) and an addendum (text). The

Subwatershed Study is a comprehensive document, which reflects six years of intensive work, by a broad group of experts. It will be more fully considered below.

Following the initiation of the Subwatershed Study, the Town opened a competition to select consultants to prepare a secondary plan for North Oakville East. In February 2003, Macauley Shiomi Howson were retained. Ms Howson provided expert land use planning evidence on behalf of the Town in this hearing.

In May 2003, the Town determined that an Inter-Agency Review ("IAR") process should be involved in the development of the Secondary Plan. This resulted from the fact that, "the Town has placed a priority on the development of a linked natural heritage/open space system for North Oakville. This priority is reflected in the fact that the North Oakville Natural Heritage Inventory and Analysis Study was the first background study initiated by the Town with respect to North Oakville. Further, the Town is in the process of preparing a Subwatershed Study for North Oakville, a study that, together with the Secondary Plans for this area, is intended to establish a linked natural heritage/open space system" (Exhibit #6(b), TAB 3, Staff Report, May 16, 2003).

The IAR allowed for input during the development of the Secondary Plan from the Province, through the Ministry of Municipal Affairs and Housing and the Region. The IAR was intended to allow the Town, the Region and the Province "to develop options for a common policy framework with respect to the potential elements of the natural heritage/open space system which would be suitable for the urban context of North Oakville..." Conservation Halton and the Ministry of Natural Resources ("MNR") were also participants in the IAR. The work of the IAR will be considered below.

During 2003, draft Subwatershed Study Analysis Reports were released. On February 10, 2004 a Preliminary Draft North Oakville Subwatershed Management Strategy, Preliminary Draft Natural Heritage/Open Space Official Plan Amendment, and Preliminary Draft East and West Secondary Plans/Official Plan Amendments were released. In March 2004 a number of North Oakville landowners, collectively referred to as North Oakville Management Inc. ("NOMI") filed an application for a proposed official plan amendment to establish a North Oakville East Secondary Plan. Therefore, two separate Secondary Plans had been put forward for consideration. In November 2004, NOMI commenced the subject appeal.

## **The Settlements**

By August 14, 2007, after an extended period of successful mediation and negotiation, the Board was informed that a comprehensive settlement endorsed by Town Council and most of the NOMI landowners had been reached. During the course of this hearing further settlements were reached.

The Board heard the uncontradicted evidence of Ms Howson on the planning merits of the Settled Official Plan Amendment No. 272 ("OPA 272"), Exhibit #5 and on further amendments with respect to lands owned by Shell Canada Products Ltd., the Taras H. Shevchenko Museum and Memorial Park Foundation and Joshua's Creek Community.

Having considered the evidence of Ms Howson, the Board finds that OPA 272, with the exception of the NHS boundary on the lands owned by Capobianco and Bazar, the agricultural use policies, and the location of the secondary school symbol on the lands in the northwest quadrant of Neyagawa Blvd. and Dundas St.W., which will be considered below, constitutes good planning. OPA 272 has regard for the Provincial Policy Statement, 1997 (the "PPS"), it conforms to the Regional OP and it conforms to the specific framework for development of the Town's North Oakville Secondary Plans, set out in OPA 198.

The Board finds, based on Ms Howson's evidence, that both the settled portions of OPA 272 and the portions still in dispute must be considered in light of three key General Development Objectives contained in section 4.1 of OPA 198. These objectives are as follows:

- Establishing as a "first priority of the Town a natural heritage/open space system to protect, preserve, and, where appropriate, enhance the natural environment...";
- "New urbanism" which is a planning approach incorporating inter-related patterns of land use, transportation and urban form;
- A transit-first approach to transportation designed to create a multi-modal transportation system which should reduce reliance on the automobile.

The Board accepts Ms Howson's evidence that OPA 272 achieves these objectives, and significantly, achieves them in an appropriate balance.

With respect to the Shell lands, the Board will allow the modification of section 7.6.4.2 of OPA 272 in accordance with Exhibit #107. The Board's final order on this matter will be withheld until the Board has been advised that the Town and Shell have entered into a site plan agreement.

With respect to the Shevchenko Foundation lands, the Board orders that section 7.6.13.3(b) of OPA 272 be amended in accordance with Exhibit #108. Appendix 7.3, the North Oakville Master Plan (the "Master Plan"), will be amended in accordance with Exhibit #109.

With respect to the Joshua Creek Community lands, the Board orders that section 7.6.8 of OPA 272 be amended in accordance with Exhibit #110.

There are four issues remaining in dispute:

1. the location of a storm water management pond north of Burnhamthorpe Rd. and west of Ninth Line;
2. matters raised by the Residents Association of North Dundas ("RAND") in respect of the width of existing Burnhamthorpe Rd. and the protection of existing residential uses in North Oakville;
3. the boundary of the Natural Heritage System with respect to lands owned by Diam Contractors Limited, Antonio Capobianco In Trust, A. Capobianco and Sons Ltd. (the "Capobianco lands") and by David Bazar and Marie Deguire (the "Bazar lands"); and
4. the location of the secondary school symbol, currently proposed for the northwest quadrant of Neyagawa Blvd. and Dundas St. W.

#### *1. The Location of Storm Water Management Ponds:*

Mr. and Mrs. McGowan and Mr. Anderson raised concerns about the proposed location of storm water management ponds illustrated on the Master Plan. Ms Howson reviewed with the Board the policy framework in OPA 272 under which such facilities must be studied and approved, sections 7.4.5, 7.6.2.2(a) and 7.8.3. The Board is satisfied, based on Ms Howson's evidence, that these policies are appropriate. Until the

requisite detailed studies are done, the final location of the ponds cannot be determined. Therefore, the Board will not order any change to the location of the pond symbols as illustrated on the Master Plan.

*2. The RAND Issues:*

On behalf of RAND, Ms Knowlton spoke to the Board about the concerns of existing North Oakville residents, about the width of existing Burnhamthorpe Rd. and the protection of existing residential uses. She particularly addressed the OPA policies dealing with the Transition Area Designation.

Ms Howson testified that OPA 272 appropriately provides for the maintenance of the character of Burnhamthorpe Rd. to the extent possible, given planned urbanization. Further, she reviewed with the Board the Transition Area designation and the manner in which the OPA addresses compatibility between existing residential uses and future development. In Ms Howson's opinion the compatibility issue is addressed appropriately, there is a balance between the needs of the existing residents and the needs of the expanding urban community. The Board accepts Ms Howson's opinion. No changes will be made to OPA 272 policies with respect to Burnhamthorpe Rd. or the Transition Area designation.

*3. The Boundary of the Natural Heritage System:*

As noted above, OPA 198, in response to ROPA 8, which brought the North Oakville lands into the urban area, addressed the issue of the results of the urbanization of the lands. For the purposes of determining the extent of the boundary of the NHS mandated by the Secondary Plan, the Board must have regard to the detailed policies of OPA 198, the Halton Regional Official Plan (the "Regional OP"), ROPA 8 and the Secondary Plan. Underpinning these policies is the PPS. In addition, the Board must consider the exhaustive work done for the purposes of the Subwatershed Study, including the IAR, and the work done by the Town's and Region's witnesses for this hearing.

## **The Provincial Policy Statement**

Ms Howson reviewed with the Board the relevant portions of the PPS (Exhibit #6a, TAB 5). Policy 1.1, Developing Strong Communities, calls for urban areas to be the focus of growth in the Province. In Ms Howson's opinion, ROPA 8 and OPA 198 followed the provincial policy direction by bringing the North Oakville lands into the urban area. The Secondary Plan, OPA 272, accomplishes the goals of the PPS, in her opinion, by providing for a full range of land uses, for an appropriate range and mix of housing, for an appropriate public infrastructure and ensuring the economic well-being of the Town.

With respect to Resources, Policy 2, in Ms Howson's opinion the agricultural policies are not applicable to OPA 272 as the subject lands were properly brought into the urban area through ROPA 8 and OPA 198. However, what is of enormous significance with respect to these lands is Policy 2.3, Natural Heritage.

Policy 2.3.1 provides:

Natural heritage features and areas will be protected from incompatible development.

- (a) Development and site alteration will not be permitted in:
  - Significant wetlands south and east of the Canadian Shield; and
  - Significant portions of the habitat of endangered and threatened species.
- (b) Development and site alteration may be permitted in:
  - Fish habitat
  - Significant woodlands south and east of the Canadian Shield
  - Significant wildlife habitat; and
  - Significant areas of natural and scientific interest

If it has been demonstrated that there will be no negative impacts on the natural features or the ecological functions for which the area is identified.



Section 2.3.2 provides, "Development and site alteration may be permitted on adjacent lands to (a) and (b) if it has been demonstrated that there will be no negative impacts on the natural features or on the ecological functions for which the area is identified".

In Ms Howson's opinion, the objective of the PPS is to protect natural heritage features and adjacent lands from the negative impacts of incompatible development. Policy 2.3.3 speaks directly to "the diversity of natural features...and the natural connections between them", mandating maintenance and improvement, where possible.

In Ms Howson's opinion, the Secondary Plan has achieved the directions of the PPS; it has established a NHS comprised of core areas and linkages which are to be protected from the negative impacts of incompatible development. The Board accepts Ms Howson's opinion and finds that OPA 272 has appropriate regard for the policies set out in the PPS.

### **Regional Official Plan (1995)**

The Regional OP speaks to a "proper balance" being maintained among "...protecting the natural environment, enhancing its economic competitiveness and fostering a healthy, equitable society". Within the urban system, which, following ROPA 8, includes the North Oakville lands, it is the goal of the Region *inter alia* to "...retain local community identity, create healthy communities, promote economic prosperity, maintain a high quality, sustainable natural environment, and preserve certain landforms permanently".

The "Greenlands System" is specifically addressed in Part D, which speaks to "...an interconnected system of natural areas and open space that will preserve areas of significant ecological value while providing, where appropriate, some opportunities for recreation".

The Regional OP was amended by ROPA 25 after the subject application was filed. However, ROPA 25 contains a special policy for the North Oakville lands. The Board was asked to, and will make a determination on the conformity of OPA 272 with ROPA 25.

The Greenlands System policies set out in the Regional OP are enhanced in ROPA 25. It provides in Policy 114 "the goal of the Greenlands System is to maintain as a permanent landform an interconnected system of natural areas and open space that will preserve areas of significant ecological value..." Policy 115 specifically allows for a "systems approach" to be utilized in identifying and protecting the Greenlands System within a Secondary Plan provided that, *inter alia*, the Region has been consulted, the public and affected agencies have been informed, and most significantly, the Board finds "...utilizes a systems approach that is based on a detailed and comprehensive analysis, carried out as part of a Subwatershed Study covering at least the Secondary Plan area".

Having heard the evidence of Ms Howson and the Town's and Region's experts, Mr. Stephenson (biologist/ecologist), Dr. Tegler (ecologist), Ms Axon (environmental planner/ecologist), Mr. Gregory (plant ecologist) and Mr. Tufgar (water resources engineer), the Board is satisfied that in developing the policies for, and the boundaries of, the NHS, the Town appropriately utilized the regionally permitted systems approach. Even the Capobianco expert witnesses agreed that a systems approach to developing the boundaries of a NHS is an appropriate method to be utilized. While Counsel for Capobianco seemed to suggest that a features based approach to determining the boundaries of the NHS might be more appropriate, especially in the vicinity of the Capobianco lands, the Board accepts the evidence of the expert witnesses that there is good reason to use a systems based approach. The use of such an approach contributes to good planning when a valuable, irreplaceable natural heritage system is to be identified and protected. To use any other approach after the completion of the Subwatershed Study would be a retrograde step.

#### **OPA 198**

OPA 198 explicitly speaks to the significance of the NHS and the care which must be taken in delineating and protecting the system. Due to the significance of this system to the Town, and the dispute over its boundaries, the Board has thoroughly considered the provisions of part 4.1(e) General Development Objectives: Environment and Open Space:

1. To establish as a first priority of the Town a natural heritage/open space system to protect, preserve and, where appropriate, enhance the natural

environment, the majority of which is in public ownership, by evaluating through the Subwatershed Study all natural features and functions including but not limited to all those identified in the North Oakville Heritage Inventory and Analysis as Categories 1 to 5 and east-west linkages...which protects and enhances the existing natural environment;

2. To create a sustainable natural heritage/open space system which provides a balance between active and passive recreational needs and links to the existing open space system within the Town;
3. Through the Subwatershed Study, to identify and evaluate for protection and preservation all natural heritage features and functions...identified in the North Oakville Natural Heritage Inventory and Analysis...;
4. To incorporate measures intended to achieve the goals of environmental protection and enhancement...;
5. All ESA's, ANSI's,...provincially significant wetlands and significant woodlots be identified, protected and preserved within the Official Plan, Subwatershed plans and all secondary plans for this area;
6. The boundaries and extents of the Natural Heritage features as identified in the North Oakville Natural Heritage Inventory and Analysis...will be amended concurrently with the secondary plan(s) approval process to reflect the results of the Subwatershed Study...The diversity of natural features in an area and the natural connections between them should be maintained and improved where possible and protected as part of the secondary plan(s) approval process...

In considering this part of OPA 198, the Board particularly notes these words: it is an objective of the Town "to establish as a first priority of the Town a natural heritage/open space system to protect, preserve and where appropriate, enhance the natural environment, the majority of which is in public ownership, by evaluating through the Subwatershed Study all natural features and functions..." (emphasis added). The Board must give due regard to the fact that the Town has determined that, for the lands in North Oakville, its first priority is the establishment of the NHS. While the creation of residential communities at requisite densities, incorporating the best community planning and urban design, is a key objective, this objective is to be realized in light of the fact that the establishment of the NHS is the first priority of the Town. These communities, employment districts, the transportation system and servicing are to be

developed while “protecting”, “enhancing” or “integrating the area’s natural heritage features”.

### **OPA 272, North Oakville East Secondary Plan**

The vision of the Town for the North Oakville lands is contained in section 7.2.2. In part this section reads: “the character and pattern of the community will be significantly influenced by a planned natural heritage system...” Again, in section 7.2.3.1 the natural heritage system is to be established as “a first priority of the Town”. The OPA sets out in section 7.3.5 the key areas to be contained in the NHS: Core Preserve Areas (“key natural feature or groupings of key natural features, together with required buffers and adjacent lands intended to protect the function of those features and ensure the long term sustainability of the Natural Heritage component of the System within the urban context” (emphasis added); Linkages and Optional Linkage Preserve Areas; High Constraint Stream Corridors Areas; Medium Constraint Stream Corridor Areas; and Other Hydrological Features.

Sections 7.4.6 through 7.4.13 contain detailed policies for the Natural Heritage and Open Space system. Section 7.4.7.1(a) speaks to Core Preserve Area. As both the Capobianco and Bazar disputed lands are situated in such Core preserve Areas, it is important for the Board to have particular regard to the words of this section:

#### **Core Preserve Areas**

- (i) The Core Preserve Area designation on Figure NOE3 includes key natural features or groupings of key natural features together with required buffers and adjacent lands intended to protect the function of those features and ensure the long-term sustainability of the Natural Heritage Component of the System within the urban context.
- (ii) The Core Preserve Areas were designated based on an evaluation, which considered the following criteria:
  - Diversity – Areas with diverse habitats and/or supporting a rich assemblage of species;
  - Size – Sufficient size to protect interior habitat;
  - Contiguity – Designed to protect interior habitat;

- Connectivity – the unit can be linked to other units;
- Significance – Areas supporting significant species or habitats;
- Representiveness - Areas which include appropriate representational features associated with areas of natural and scientific interest (ANSI) designations or a candidate ANSI designation; and
- Overall watershed functionality including hydrologic processes which protect the flow regime of receiving streams.

Section 7.4.7.2 speaks to boundaries, providing “the boundaries of the Core and Linkage Preserve Area and High Constraint Stream Corridor Area designations shall be maintained generally in accordance with the designations on Figure NOE3 and the North Oakville Subwatershed Study”. Minor modifications to boundaries are permissible in the detailed planning process, “however such minor modifications will not negatively impact the Natural Heritage component of the Natural Heritage and Open Space System...”

The Board finds that the words of the relevant policy documents are clear: the NHS in the North Oakville lands is of immense value to the Town, the Region and the Province; they are a “first priority” of the Town in planning the Secondary Plan area. After extensive study and review by a panoply of experts, with input through the IAR process from the Region and the Province, the Town determined to use a systems based approach in setting out policies for the identification and protection of its NHS. The Board finds that such an approach constitutes a superior and forward-looking method of protecting this Province’s natural heritage. The Board accepts the evidence of the Town’s and Region’s witnesses that the systems approach is the best hope a municipality has to preserve not only isolated “pockets of green”, but also to preserve and enhance vital, living natural systems.

The systems approach, as Dr. Stephenson testified, “improves sustainability of the environment in an urban context”. The Board accepts the evidence of Dr. Stephenson and others that the systems approach, with its focus on diversity of habitat, species and genetics, can best delineate a NHS which will be sustainable, in the midst of urban development. The systems approach is well set out in section 7.4.7.1, particularly with respect to Core Preserve Areas.

As noted above, the Capobianco expert witnesses agreed that the systems approach to delineating the NHS is appropriate.

Having found that the systems approach to identifying and protecting the NHS is appropriate, the Board finds that if it accepts the evidence of the Town and Region that the Capobianco and Bazar proposed "exclusion lands" meet the criteria for inclusion in a Core Preserve Area, the matter ends there. Any suggestion that either the Bazar or Capobianco lands should be removed from the NHS because the owners are "losing" a development opportunity, or that lands of other owners were excluded, or that the lands are in some manner being sterilized, is not sustainable. The Board heard evidence from the Capobianco witnesses that the boundaries of the NHS had been changed in a number of areas. It was implied that such changes were as a result of settlement negotiations and that Capobianco was the victim of inequitable treatment in the finalization of the boundaries.

The Board is not satisfied by the evidence adduced by Capobianco, that other boundary changes were made solely for the purpose of reaching a settlement. Even if the Board were able to find that the changes were made only to reach a settlement, that is not determinative of the issue of the NHS boundary in the vicinity of either the Capobianco or Bazar lands. Having heard days of exhaustive evidence on the reasons for including lands in the NHS, be they lands containing a natural feature, buffer lands, or adjacent lands, the Board is convinced that every portion of the NHS is unique and is included for specific reasons. The movement of a boundary of one core cannot be translated into the basis of the movement of a boundary in another core.

The Board accepts the submissions of the Town and the Region that if there is a "legitimate and valid planning purpose" to the establishment of the NHS boundary, the boundary should be sustained by the Board. In *Rodriguez Holding Corp. v. Vaughan (City)*, (2006) 25 MPLR (4<sup>th</sup>) 100, the Divisional Court said, "there is a well-recognized line of legal precedent standing for the proposition that, absent any bad faith on the part of the municipality or other statutory authority...a statutory authority can enact a by-law which will effectively freeze the uses to which an owner's lands may be put provided that the action taken by the statutory authority is pursuant to a legitimate and valid land use planning purpose". The Court of Appeal upheld this decision, finding that an open space by-law did not effect a "*de facto* expropriation".

Therefore, the Board finds that if it has been demonstrated to the Board's satisfaction that the lands which Capobianco and Bazar want excluded from the NHS were properly designated based on the criteria set out in section 7.4.7 of OPA 272, the boundaries will not be changed.

### **The Capobianco Lands**

The lands which Capobianco argues should be excluded from the NHS are located in a Core Preserve Area, Core Area # 10, Buttonbush Swamp, as identified in the Subwatershed Study, Figure 6.3.11 (Exhibit # 9c). The Board accepts the evidence of the Town and the Region, proffered through their highly qualified expert witnesses, that the Subwatershed Study, as mandated by OPA 198, provided a firm foundation for the establishment of the Core Preserve Areas, integral to the NHS. The Board is satisfied, based on the evidence of these witnesses, and a detailed review of the Subwatershed Study, that the boundaries of the NHS were established based on work done in the areas of wildlife biology, fisheries biology, plant biology, water quality, hydrogeology, hydrology and fluvial geomorphology.

The Board is particularly impressed by the work that was done by the Technical Advisory Committee, which brought together experts from MNR, Conservation Halton, the Region, landowners and the Town and the thorough review of this work done through the Inter-Agency Review ("IAR") process. The Board accepts the evidence of the Town and the Region that the IAR process allowed for "a high degree of coordination and exchange of extensive data".

The fact that the boundaries of the NHS were established through the use of a systems, rather than features approach is significant to the Board in determining the appropriateness of the boundaries. Even Mr. Speller, the Capobianco's biologist agreed that a systems approach is appropriate.

The Board finds, based on a review of the evidence of the witnesses, the direction of the policy documents and a review of the Subwatershed Study, that not only is a systems approach an appropriate approach to determining the boundaries of a NHS in a developing urban area, it is the best approach. It is clearly the best approach given what experts now understand about environmental biology. No longer can society afford to look at the "natural environment" as isolated pockets of green which have been

fortunate enough to have survived in an urban landscape. The Board is convinced by the evidence adduced in this hearing, that for the natural environment to have a chance of sustainability in developing urban areas, a systems approach must be taken to delineating boundaries. The Board was particularly persuaded by the evidence of Dr. Stephenson and Dr. Tegler, that the use of a systems approach substantially increases sustainability of the natural environment in an urban context "by supporting the diversity of species and making the natural area more resilient to the effects of urbanization". This approach demonstrably facilitates the balancing act mandated by the PPS between the need for urbanization in the Province and the protection of the Province's natural heritage.

Dr. Stephenson provided compelling evidence on the significance of Core Area #10, the Buttonbush Swamp Core. The Board accepts his evidence, and the work found in the Subwatershed Study, that this core is significant in that it provides habitat for a variety of forest, open country and wetland birds. The evidence is also convincing that the Core supports a large number of significant plant species.

The Board has reviewed the considerable evidence given by a variety of witnesses on "forest interior habitat" and the role such habitat plays in the health and viability of certain bird species. The Board finds that such habitat should be protected from the depredations of development, especially those resulting from increased edge condition and embedded development.

A portion of the Capobianco lands, including lands which the Capobiancos want removed from the NHS, form part of Unit 1 of the Candidate Oakville-Milton Wetlands and uplands Life Science Area of Natural and Scientific Interest (the "candidate ANSI"). The Board understands that this area is at this time only a candidate ANSI, but the work done by MNR on this candidate ANSI is relevant to a consideration of the boundaries of the NHS.

Exhibit #22, MNR's report on the candidate ANSI is vital to the Board's understanding of what lies on and around the Capobianco lands. The report says of the lands, which include the Capobianco lands, "the Oakville-Milton ANSI supports three provincially rare wetland community types: Buttonbush Thicket, Bur Oak and Swamp White Oak swamps...The Bur Oak swamps are a southern wetland type, and they are,



in addition to the Swamp White Oak swamps, considered globally rare community types" (emphasis added). This Board must proceed with extreme caution when considering whether development on or adjacent to lands containing "globally rare community types" is appropriate.

In reviewing the flora and fauna found in Core Area #10, Dr. Stephenson testified that the area is home to two provincially rare bird species, a herpetofauna that is both a species of concern and provincially rare, three regionally rare plant species, 37 locally rare plant species and six locally rare bird species. He characterized this area as one of "high diversity".

The ANSI report also speaks of "kettle wetlands" in the vicinity of the Capobianco lands. The report says that these wetlands "are reliant on precipitation and surface runoff and because they have little or no surface outflows, any contaminants that get into them are not flushed out. As a consequence, kettle wetlands are very sensitive to development, water taking and nutrient inputs. Due to their sensitivity and significance, development in the surface catchments of the kettle wetlands would have a negative impact on ANSI values. Protection should be afforded to the groundwater catchments of the kettles" (emphasis added).

It was the evidence of Mr. Speller, who is neither a hydrogeologist nor a water resources engineer that the Capobianco lands do not act as a source of water for the kettle wetlands on the adjacent lands. Mr. Tufgar, a qualified water resources engineer testified on behalf of the Town and prepared Exhibit #60, a Drainage Pattern for the Capobianco and Adjacent Lands. It was Mr. Tufgar's opinion, supported by Exhibit #60, that the Capobianco exclusion lands drain into the features identified as the important wetlands in the ANSI report and the Subwatershed Study. Under cross-examination Mr. Tufgar confirmed that he has done sufficient analysis to opine that a diversion of water coming from the Capobianco lands would have a negative impact on these significant wetland features.

In weighing the evidence of Mr. Speller and Mr Tufgar on this issue, the Board prefers Mr. Tufgar's evidence, as his qualifications specifically inform his opinion on the movement of water between areas of land.

The Board must, in applying the policy documents correctly, consider both the potential impact of development on specific natural features and functions on the Capobianco lands and on adjacent lands. The systems approach to delineating the boundary of a natural heritage system, by definition includes what might otherwise be characterized as “only” adjacent lands. The evidence that this Board has heard and read in this hearing demonstrates that lands adjacent to specific natural features have a crucial role to play in ensuring the health and viability of the Province’s natural heritage.

The PPS provides in section 2.3.1 “natural heritage features and areas will be protected from incompatible development”. Section 2.3.3 provides “the diversity of natural features in an area, and the natural connections between them, should be maintained and improved where possible”. Section 2.3.2 addresses “adjacent lands”, providing “development and site alteration may be permitted on adjacent lands to a) and b) if it has been demonstrated that there will be no negative impacts on the natural features or on the ecological functions for which the area is identified”.

“Adjacent lands” is a defined term in the PPS: “adjacent lands means those lands, contiguous to a specific natural heritage feature or area, where it is likely that development or site alteration would have a negative impact on the features or area. The extent of the adjacent lands may be recommended by the Province or based on municipal approaches which achieve the same objectives” (emphasis added).

Dr. Tegler reviewed with the Board MNR’s Natural Heritage Manual, which was prepared as “a guide for those who require additional information on technical issues relative to the application of section 2.3 – Natural Heritage of the PPS”. “Adjacent lands” are addressed at length in this document (Exhibit #6a, TAB 7). The manual reinforces the words of the PPS, making it clear that the municipality “may define adjacent lands using a variety of approaches depending on site-specific conditions. In all cases, these approaches should meet the overall objective of protecting significant woodlands (and wetlands) from incompatible development”.

It was the opinion of Dr. Tegler, Dr. Stephenson, Mr. Tufgar and Ms Axon, after an extensive review of subjects like edge effect, the impact of embedded development and drainage patterns, that not only are the Capobianco exclusion lands “adjacent

lands”, but also that development on these lands would have an adverse impact on both the significant woodland and wetland features and functions of Core Area # 10.

Mr. Tufgar’s evidence on the hydrologic function of the exclusion lands and its impact on the kettle wetlands is discussed above and the Board accepts his evidence. The Board finds that the Capobianco exclusion lands are adjacent to significant wetlands, and any development on these lands would have an adverse impact on the long-term sustainability and functioning of these wetlands.

Dr. Stephenson testified that one basis for the delineation of core boundaries in the Subwatershed Study was an intent to “minimize edge” of woodlands. Therefore development which would increase edge or which protrudes into core areas is, in his opinion, inappropriate. The Capobianco plans for the exclusion lands include two intrusions into the Core as well as changes to the Core boundary along the southern “finger”. Dr. Stephenson testified that the Town’s NHS boundary in this area minimizes edge, while the Capobianco plans would result in almost 1.5km of additional edge in the area.

The Subwatershed Study addressed the subject of woodland edge, working with “an overall goal of creating a Core with a minimum edge to interior ratio...The objective was to avoid the creation of potential development areas ‘embedded’ within the natural habitats of the Cores”.

Dr. Stephenson and Ms Axon testified about edge effects including increased predation into the woodland and the introduction of invasive species. They spoke to the importance of minimizing areas of “direct interface between human activity and natural heritage”. Further, they discussed the necessity of protecting interior woodland habitat within the context of protecting general woodland habitat. Such habitat is crucial to the health of area sensitive bird species. It was the evidence of these witnesses that the increase in edge effect and fragmentation of the core attendant on the Capobianco proposal would seriously reduce the area of interior and deep interior habitat in Core Area # 10. Exhibit #39, prepared by Ms Axon demonstrates the extent of such habitats.

Dr. Tegler, Dr. Stephenson and Ms Axon addressed the negative impact the Capobianco proposal would have on species movement. The systems approach to determining the boundary of the NHS is premised, in part, on the need to facilitate

