

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: May 10, 2017

CASE NO(S): PL160331

PROCEEDING COMMENCED UNDER subsection 38(4) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant (jointly): ClubLink Corporation ULC, ClubLink Holdings Limited
Subject: Interim Control By-law No. 2016-024
Municipality: Town of Oakville
OMB Case No.: PL160331
OMB File No.: PL160331
OMB Case Name: ClubLink Corporation ULC v. Oakville (Town)

PROCEEDING COMMENCED UNDER subsection 38(4) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant (jointly): ClubLink Corporation ULC, ClubLink Holdings Limited
Subject: Interim Control By-law No. 2016-115
Municipality: Town of Oakville
OMB Case No.: PL160331
OMB File No.: PL170007

Heard: January 30 and 31, February 1 to 3, 6 to 9 and February 15, 2017 in Oakville, Ontario

APPEARANCES:

Parties

ClubLink Corporation ULC &
ClubLink Holdings Limited

Town of Oakville

Counsel

Mark Flowers and Kate Fairbrother

John Doherty, Roberto Aburto and Jonathan Minnes

Regional Municipality of Halton

Isaac Tang and Anne Caddoo

DECISION DELIVERED BY B. W. KRUSHELNICKI AND ORDER OF THE BOARD

[1] In February, 2016, the Town of Oakville (“the Town”) enacted an Interim Control By-law No. 2016-024 (“the ICBL” or “the by-law”) under s. 38 of the *Planning Act* (“the Act”) applicable to the lands on which the Glen Abbey Golf Course (“the golf course” / “Glen Abbey”) owned by ClubLink Corporation (“ClubLink” or “the Applicants”) restricting the use of the land to the existing uses and a short list of permitted uses associated with the golf course use.

[2] ClubLink appealed the passage of the ICBL. An initial pre-hearing conference (“the first PHC”) was held by the Board (otherwise empaneled) on June 7, 2016 and a hearing was set to begin January 30, 2017. Since the by-law was about to expire in February 2017, the Town extended the by-law for an additional year as permitted by the Act. The Applicants appealed this extension as well. The Board has before it both appeals. A second pre-hearing conference (“the second PHC”) was held on July 26, 2016 and yet another panel of the Board issued a Procedural Order which included an agreed list of participants and an Issues List.

[3] The by-law was enacted as many such ICBLs are, in response to a request for pre-consultation on a development proposal for the Glen Abbey GC property. The request for a pre-consultation meeting was made on October 22, 2015 and the pre-consultation meeting itself was held on November 18, 2015.

[4] Pre-consultation meetings are organized by the development review personnel of the municipality and are a common method of efficiently preparing for the receipt of a significant forthcoming application. The municipal staff will generally invite other municipal staff and the staff of the agencies who have some role in the review of the application. The Applicant’s representatives (including the technical advisors) are

present and are advised of all the studies and other requirements that will be needed to render the application “complete” in accordance with a list of potential studies endorsed by the Official Plan (“OP”) as provided by the Act. The product of the pre-consultation process in this case was a “pre-consultation agreement” which outlines the requirements for a complete application. This agreement and the studies are important to the issues in this decision.

[5] The ICBL was enacted at a council meeting with no official prior notice (as is permitted by the Act) on February 1, 2016 and appealed by the landowners on March 31, 2016. This was followed by the Ontario Municipal Board PHC’s in the summer 2016 as identified above, and by the passage on November 1, 2016 of the amendment to extend the by-law (“By-law 2016-115”) for an additional year. This was further appealed on December 5, 2016.

[6] An ICBL is regarded by some as an unusual planning instrument under the Act. It falls within the zoning provisions of the Act and is meant as many testified in the hearing, to be a tool available to a municipality to temporarily restrict uses on lands to the existing uses (usually) while the municipality undertakes a required land use planning study or studies. Commonly the basis for an ICBL is that it provides a pause or “breathing space” needed to study a matter before proceeding with policy or regulatory changes. Because an ICBL restricts uses to those that exist, it is generally used to forestall the issuance of a building permit for a permitted but not yet existing use at least temporarily while studies are undertaken.

[7] It may be worth reviewing the entire section of the Act as many of its elements are important in addressing the issues in these proceedings:

38.(1) Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land,

buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.

(2) The council of the municipality may amend an interim control by-law to extend the period of time during which it will be in effect, provided the total period of time does not exceed two years from the date of the passing of the interim control by-law.

(3) No notice or hearing is required prior to the passing of a by-law under subsection (1) or (2) but the clerk of the municipality shall, in the manner and to the persons and public bodies and containing the information prescribed, give notice of a by-law passed under subsection (1) or (2) within thirty days of the passing thereof

(4) Any person or public body to whom notice of a by-law was given under subsection (3) may, within sixty days from the date of the passing of the by-law, appeal to the Municipal Board by filing with the clerk of the municipality a notice of appeal setting out the objection to the by-law and the reasons in support of the objection.

(5) If a notice of appeal is filed under subsection (4), subsections 34 (23) to (26) apply with necessary modifications to the appeal

(6) Where the period of time during which an interim control by-law is in effect has expired and the council has not passed a by-law under section 34 consequent on the completion of the review or study within the period of time specified in the interim control by-law, or where an interim control by-law is repealed or the extent of the area covered thereby is reduced, the provisions of any by-law passed under section 34 that applied immediately prior to the coming into force of the interim control by-law again come into force and have effect in respect of all lands, buildings or structures formerly subject to the interim control by-law

(6.1) If the period of time during which an interim control by-law is in effect has expired and the council has passed a by-law under section 34 consequent on the completion of the review or study within the period of time specified in the interim control by-law, but there is an appeal of the by-law under subsection 34 (19), the interim control by-law continues in effect as if it had not expired until the date of the order of the Municipal Board or until the date of a notice issued by the secretary of the Board under subsection 34 (23.1) unless the interim control by-law is repealed.

(7) Where an interim control by-law ceases to be in effect, the council of the municipality may not for a period of three years pass a further interim control by-law that applies to any lands to which the original interim control by-law applied.

(8) Subsection 34 (9) applies with necessary modifications to a by-law passed under subsection (1) or (2).

[8] The ICBL for the golf course was premised upon the completion of three studies. In his report to council leading up to its consideration of the ICBL, Mr. Simeoni, the Town's planning director, identified the three studies as:

- 1) An Urban Structure Review;
- 2) A Land Use Economic and Impact Analysis Study; and
- 3) The Cultural Heritage Landscapes Assessment of the Glen Abbey Golf Course.

[9] These three studies or studies like them were listed as requirements for a complete application in the pre-consultation agreement. The agreement, however, does not clearly identify who is responsible for completing the studies. The Applicant assumes that they are responsible for the studies and provided them as part of their development application. The Town is conducting the studies (some of which had been initiated prior to this process) and assumes that it will complete the studies as part of the ICBL process.

[10] The completion of these studies raises an issue about whether the development application is complete, a matter that was to be addressed by a motion scheduled to be heard by another Member of the Board on March 28, 2017. The question addressed in that proceeding is not critical to the considerations of this panel of the Board, but the issue of whether an application is complete and the date on which it is deemed to be complete, may be important for reasons other than determining the merits of the ICBL before the Board.

[11] On November 10, 2016, while the ICBL was in full effect, ClubLink's planning consultants submitted development applications for the property with all the studies they regarded as necessary in fulfillment of the agreement arising from the pre-consultation meeting. Shortly thereafter, on December 8, 2016, Mark Simeoni, wrote to Mark Bradley, one of ClubLink's planners advising him that the application had been received

but that it was deemed incomplete, pending the completion by the Town of the three studies being undertaken as part of the ICBL process.

[12] The lands that are the subject of these proceedings are well known to many. Glen Abbey Golf Course is located in the midst of a residential area in the Town of Oakville. Four of the back nine holes are located within the ravine formation of the Sixteen Mile Creek. The balance of the holes are located on the “table lands” to the west of creek.

[13] The course was designed by Jack Nicklaus, a well-known member of the world’s golf aristocracy, and was constructed as a tournament golf course for use as the frequent home of the Canadian Open Golf Tournament held annually as part of the Professional Golf Association (“PGA”) tour. In addition to the championship course, it is also the location of the headquarters of Golf Canada and home to the Canadian Golf Hall of Fame, among other golf related uses.

[14] For the first 30 years of its existence, that is until the expression of development interest made in 2015 by its current owners ClubLink, there had never been any hint that the lands would be used for anything other than a golf course, one of Canada’s best known courses to be sure. ClubLink purchased the course some years ago from Golf Canada and has operated it as part of its stable of golf courses that are available to ClubLink members and in some cases to the general public.

[15] The proposal by ClubLink for the golf course lands is predominantly residential with a mix of other uses and a significant component of open space. Although the Board is not considering the merits of the application in this proceeding, some understanding of the nature and scale of the proposed development is relevant.

[16] The site occupies a total of 92.72 hectares (“ha”) (229 acres) and a total of 3,222 dwelling units are proposed in the form of 141 detached dwellings, 299 units in various forms of townhouses and 2,782 apartment dwellings. Approximately 5,500 square metres (“s. m.”) of office commercial space is proposed along with about 5,800 s. m. of retail space. A small community space is proposed along with about 11 ha of parks and open spaces. About 32 ha is reserved as part of the natural heritage system with the valley lands of the Sixteen Mile Creek proposed to be conveyed to a public authority.

[17] The lands are located a short distance north of the Queen Elizabeth Way and is bounded by Dorval Drive to the south and west, and Upper Middle Road on the north. Its eastern boundary is just east of the alignment of the Sixteen Mile Creek. Across the creek from Glen Abbey is the Oakville Golf and Country Club, a private nine-hole course located on Sixth Line.

[18] Glen Abbey is located within the “Urban area” designation of the Region of Halton Official Plan (“RHOP”) and the valley lands are identified as “Regional Natural Heritage System”. No amendment to the Region’s Official Plan is necessary for the application and none is proposed.

[19] The site is identified as one of the Town’s residential areas within the Urban Structure Schedule (A1) of the Town of Oakville Official Plan which is titled Livable Oakville (“the Town’s OP” applicable to the area of the Town south of Dundas Street) and is within the Town’s “Built Boundary” identified for compliance with the Provincial Growth Plan.

[20] Schedule H of the Town’s OP is a more detailed Land Use Schedule for the “West” area which is the larger neighbourhood in which the golf course and the adjacent residential lands are located. This schedule designates the table lands of the golf course as “Private Open space” and the valley lands as “Natural Area”.

[21] The table lands of the golf course are zoned O2 and the valley lands are zoned O2 and N, "Private Open Space" and "Natural Area" respectively. The golf course and its accessory uses are permitted by the zoning. A special exception exists in the zoning (O2-114) for a small site located roughly in the middle of the lands at the top of the ravine bank. This site exception permits some additional uses such as a hotel, a facility that was apparently a part of the original thinking for the golf course site as a tourism facility.

[22] The ClubLink application basically proposes to amend the Town's OP and zoning by-law and to subdivide the lands to give effect to the plans of the Applicant for various residential and other uses as described above.

[23] Interim Control By-laws when passed by a municipality, generally restrict the use of the land temporarily for one year to the uses that exist on the land, as opposed to the "existing permitted uses" which would include uses that may be permitted by the underlying by-law, but do not exist. The restriction can be extended for up to one additional year, after which the by-law expires or is replaced by a new policy or by-law arising from the requisite studies. ICBLs are unusual in that they can be passed without prior notice or consultation. However, as a safeguard, they can last no longer than a total of two years, and once an ICBL has been passed and has expired or been replaced, another ICBL cannot be passed for the same lands for a period of three years following expiry.

[24] In this case, the ICBL that was passed permitted the existing uses but prohibited some of the uses that had previously been permitted by the zoning by-law. These prohibited uses include almost all the uses permitted in the exception zone such as the hotel and public hall. It also prohibited a number of uses under the O2 and N zones. The Town explained that it wanted to restrict uses while the studies were underway, but that it did not want to interfere with any of the current existing uses such as the golf course, business office, retail store, restaurant and sports facility, and it especially did not want to interfere with uses associated with Golf Canada or the PGA Canadian Open

event. The Appellant found it curious that the ICBL identified “outside miniature golf course” as prohibited interim use.

[25] The issues before the Board have been carefully identified by the parties in the pre-hearing process and can be usefully referenced in the course of our analysis of merits of this ICBL.

[26] ClubLink’s first issue is whether the Town has demonstrated a valid planning justification for the ICBL. Related to this is the second issue, namely whether there exists a legitimate need for the ICBL. The Board regards these questions as interconnected in terms of the analysis of the evidence.

[27] In support of their concern that there is no need for the ICBL, ClubLink established that their proposal would require neither a Regional Official Plan Amendment nor a Municipal Comprehensive Review for compliance with the Provincial Growth Plan. The Region’s planner, Mr. Benson, confirmed the former and Mr. Glenn of the Region confirmed the latter in a letter following a request by Mr. Simeoni for Mr. Glenn’s opinion on the matter. In the absence of either of these major requirements for the development to proceed, ClubLink questions the need for an ICBL.

[28] Mr. Bradley, ClubLink’s planner, also established that the proposal is not a new growth area or a new community that requires an area specific Secondary Plan. Instead it is being proposed as part of an extension or addition to an existing residential area located within the Town’s built boundary. According to Mr. Bradley, ClubLink does not propose an intensification area as one might find in a designated growth area, a transit node or a mobility hub. On the contrary, the densities proposed, although higher than adjacent existing residential areas, are nevertheless in keeping with the existing density standards of the OP for residential areas.

[29] Despite these assertions, the Town's position is that the application by ClubLink is a single large scale redevelopment of an existing use to a much more intensive use with significant implications for the growth patterns of the municipality.

[30] According to the Town, the growth of the municipality has been carefully planned through the Livable Oakville Plan. The process identifies six areas, including the Town's Urban Growth Centre, as growth areas slated for significant growth and intensification. As the Town's planning director insists, the ClubLink proposal would accommodate growth of about 6,000 persons in an area that has been identified for the past 30 years as a golf course use in a Private Open Space designation. The development contemplated by this proposal is completely "unexpected and unplanned" as the planning director firmly explains, and merits a growth study and analysis that takes account of town-wide growth patterns before proceeding.

[31] Mr. Bradley asserts that growth and intensification are permitted outside the identified growth areas so long as they take place within the Urban Area identified for residential uses in the structure plan. Mr. Bradley contends that the Town has a policy framework for considering the growth that is contemplated by this application. An ICBL is not required for this framework to be applied. Instead he says that the only test that must be satisfied is provided by s. 11.9. This simply requires that the development be compatible with adjacent and nearby existing residential development within or adjacent to an existing stable residential neighbourhood. In other words, he argues, the application is for a redevelopment and modest intensification within the urban boundary that is entirely consistent with the Town's OP and need only be reviewed as an ordinary development application. The scale of the proposal is large, but the density and form of development are within the range provided by within similar residential designations in the Town.

[32] The Town's analysis takes a different approach. Although some modest growth and intensification can be expected in other undeveloped and underdeveloped areas of the existing Town, nothing like the scale of development proposed by ClubLink is contemplated. Instead, the Town's OP protects stable residential neighbourhoods from large-scale changes that affect their character. The Town's policy for growth and intensification in the stable residential neighbourhoods is outlined in s. 11.1.8 of the OP and applies only to those areas that have been designated Low Density, Medium Density and High density. Mr. Simeoni's evidence is that Glen Abbey is designated Private Open Space and Natural Areas and so does not qualify for a simple application of s. 11.

[33] Although the development proposal may be regarded by ClubLink's planner as simply a routine application meriting no more than a peer review of the submitted studies, the Board agrees with the Town that the magnitude of the proposal in terms of the Town's growth prospects along with the potential for impact, together warrant some consideration of the implications for planned function, overall Town-scaled urban structure as well as local character and compatibility. While the parties quibbled over whether the ClubLink proposal would or would not be the "third largest growth area in the Town," the Board concludes that no matter how it measures up to other approved growth areas in the Town, the proposal will be very significant to the future structure of the Town and will have implications that warrant study and carefully planned change.

[34] The Town further explains that an urban structure study is already underway. In 2015, the Town commenced an Official Plan Review with the aim of bringing its OP (2009) into conformity with the Growth Plan. Staff recommended that, as part of the OP review, a study of the Town's urban structure be conducted to include as part of the review, the growth areas identified in the 2009 Plan.

[35] When ClubLink came forward with their proposal for development of Glen Abbey, Town staff recommended that the consideration of this area as a new growth areas be included as part of the OP review study. It is the completion of this study (among others) that the Town says warrants the enactment of the ICBL. The Board agrees with the rationale for the study and with the practical necessity of enacting the by-law to permit the completion of the study prior to further detailed consideration of the land use changes on the subject lands.

[36] By adopting the urban structure study approach, the Town has identified a need and in doing so, has established a legitimate justification for the study and the by-law that enables the completion of the study. This approach takes a development proposal that had not been in the radar of the Town's plans for growth, and provides a comprehensive assessment. Indeed, if ever there was a development proposal that warranted and justified the appropriate establishment of an ICBL to allow a study of land use policy and implications for the Town's growth, it is a proposal to develop a significant portion of a 230-acre parcel of land in the heart of a residential area of the Town on lands that had for several decades been designated and zoned for open space and natural area.

[37] The Board further agrees, though to a lesser extent, that the ICBL is warranted by the need for the completion of the Cultural Heritage Landscape Assessment ("the heritage assessment"). Mr. Flowers argues that the heritage assessment is not a "land use policy study" under s. 38 (1). That section states that an ICBL can be passed only "(w)here the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of *land use planning policies* in the municipality or in any defined area or areas thereof." (emphasis added). The Board agrees that the authorities generally dictate that s. 38 of the Act, including this excerpt, must be interpreted strictly. Nevertheless, cultural heritage landscape policies have significant land use implications. They fall generally within discipline of municipal land use policy and are governed by Official Plan policy. Consequently, the Board is satisfied that the study is one that touches upon land use planning policies for the

purpose of applying s. 38 of the Act. The heritage assessment is also already underway as part of a larger pre-established Town Heritage Strategy, all of which had included the Glen Abbey lands within the terms of the study. This, too, constitutes a fair justification of need for the ICBL.

[38] Of the three studies, the Board agrees with Mr. Flowers that the Economic Impact Study is not strictly speaking a land use study. Mr. Simeoni explained that this study would provide important information of (among other things) the impact of the loss of the Glen Abbey Golf Course to the local economy. This may undoubtedly be a matter of some interest in economic development terms. However, from a planning perspective, there is little in the sphere of land use policy that can guarantee the existence of the golf course as a business, and such a study is therefore not a matter of policy warranting the enactment of an ICBL.

[39] Having said this, however, there remains ample justification for the ICBL based on the growth study and of the heritage landscape assessment of the Glen Abbey site.

[40] ClubLink's planner Mr. Bradley then says that the ICBL is not necessary because the studies that the ICBL is premised upon have been completed as part of, and are included with the development application submitted to the Town. The studies were identified as required by the pre-consultation agreement and the applicant has accordingly provided them.

[41] To be sure, it was not clear from the agreement that the Town was reserving the right to do the studies. ClubLink had assumed that because the studies were simply listed along with all the other technical studies which would normally be required of the Applicants, they as the Applicant would be responsible for them. ClubLink complains that the Town had not even begun to review the development application and had not begun its review of the studies that were submitted. As part of the cross-examination of both Mr. Butler and the Region's witness, Mr. Benson, Mr. Flowers was able to discern that it is their belief that the ICBL not only prohibited certain uses temporarily as a strict

reading of the section would yield, but they also believed that the effect of and ICBL is to prevent any development applications from being made for the lands that are the subject of the by-law.

[42] The Town argues that it is an entirely reasonable and valid planning rationale for interim control that the Town suspend other uses on an interim basis while it conducts an urban structure review that would assess the implications that proposed development would have on existing planned growth areas. Its existing plans for accommodating growth are currently in accord with both the Region's Official Plan and the Province's Growth Plan.

[43] The Town also states that it does not matter that the agreement did not specifically assign responsibility for the studies in the pre-consultation agreement. They take the position that these studies are very important to the Town. And because the studies had already been initiated by the Town, they therefore assumed responsibility for them to ensure that they are completed to their own satisfaction.

[44] The Board concludes that when the agreement was being developed, it was not clear who would be doing all the studies and so a division of labor was not clearly set. While they should probably have settled this sooner and more clearly, it is not unreasonable for the Town to have proceeded as it did.

[45] What then appears to have happened is that in the time between November 10, 2015 when the pre-consultation meeting took place and February 1, 2016 when the ICBL was passed, the Town on the advice of its planning director decided that the studies were so important that they warranted the passage of an ICBL and that the Town needed to complete the studies – some of which were already well underway - under their own auspices. Because of the Town-wide policy implications among other things, it was not something they were willing to leave to the developer's consultants and a peer review.

[46] The Board understands and accepts what took place, recognizing that the Town may well have concluded that it needed to do the studies itself. However, this turn of events leads us to the next issue raised by ClubLink – “has the Town acted in good faith?” The Board regards this issue to be closely related to the issue of delay and whether the Town is simply adopting interim control as a means of thwarting a proper consideration of the development proposal.

[47] This issue was informed by a very thorough and helpful review by counsel on all sides, of several cases dealing with similar versions of the issue. It is also informed by the presentation of correspondence obtained in many instances through the Freedom of Information process by ClubLink counsel, a series of documents – mostly emails - filed as the “Exhibit 16” series. The conclusion of the Board, based on an analysis of this material, is that there is no evidence that Town officials – both those elected to, and those employed by council – acted in bad faith.

[48] In raising this issue, Mr. Flowers took pains to explain that this is not an allegation of *bad* faith in the sense in which that phrase is used in the context of quashing a by-law. In other words, he does not seem to be alleging malicious behavior, fraud or even sinister purposes. Instead, he asks whether the Town acted in good faith and if not, has the Town acted in a way that lacks transparency and candour, or has it acted with insincere intentions, saying one thing but quietly seeking to do something else? In common practical terms, he is asking the Board to conclude that the Town is using the interim control power of the Act for political reasons, that is to curry the favor of the public who oppose a development by delaying a project, or thwarting it prematurely before it has a legitimate chance to be judged fairly upon its merits. He asks whether the Town is acting in an authentic public interest or is it responding to a vested interest or to circumstances that are unrelated to the adopted planning policies of the Town and to the principles of good planning?

[49] Let us first consider the conduct of Town staff. Mr. Simeoni learned of the proposal by ClubLink in the summer of 2015 and, following a request by ClubLink

planners, his staff promptly organized a pre-consultation meeting to initiate the process of development review with a draft agreement. Mr. Bradley explained that the content of the draft agreement seemed to change several times in the days before the meeting, especially in respect to the listing of the studies. Some changes appeared to have been made the very night before the meeting. Was an ICBL considered at this point and is this evidence of some conspiracy to contrive studies simply to provide justification an ICBL? The Board does not see this as a reasonable conclusion to draw from the events reflected in this body of evidence.

[50] Mr. Simeoni explained when asked, that the idea of an ICBL for Glen Abbey was something that he thought about for some time between November 2015 and February 2016. The decision to recommend a by-law to council became firm in January at the time that he began writing the report that would become the ICBL report to Council on February 1, 2016. He did not discuss the prospect of an ICBL with ClubLink or many other people other than a small group of Town staff whose advice he sought. Was his deliberation on the issue of recommending an ICBL evidence of lack of candour? Should he have informed ClubLink of his thought process? The Board fails to see anything sinister in this and concludes that this is simply a case of a conscientious civil servant forming his professional advice for his council and awaiting his own personal commitment to the strategy before proceeding.

[51] One of the features of an ICBL is the fact that it can be passed without notice or consultation. Mr. Simeoni did provide a very minimum amount of advanced notice to ClubLink – a few days – something he was not obliged to do. He did this by way of a personal telephone call to Mr. Valentin, ClubLink's representative. ClubLink regards it as a profound discourtesy if not an offence that they were not informed until the Friday before the Monday council meeting at which the ICBL was passed.

[52] At the same time, it was apparent that others in the community knew that the ICBL was forthcoming. It is not clear how information about the ICBL was disseminated, but the prospect of a forthcoming ICBL was an item of communication among some in the community. This led ClubLink to question whether others received prior notice of the ICBL.

[53] The correspondence also shows that following his arrival in a new job, Mr. Simeoni, in a casual response to a cheeky email from a former colleague (albeit on the Town's official email system), referred to the ClubLink proposal as a "problem file". It is a stretch to conclude that this unguarded reference to a challenging file is somehow evidence that Mr. Simeoni harbored bad feelings toward the application or the applicants that led him to abandon his duty to act in good faith.

[54] The correspondence goes on to show that Ms. Clohecy, Mr. Simeoni's supervisor, wrote a note to council on October 23, 2015 informing them of the proposal to develop Glen Abbey. She does this in keeping with their "practice of notifying you when significant applications are scheduled for pre-consultation..." The implication of bringing this to the Board's attention seems to have been that this disclosure was meant to forewarn councillors of an application so they could prepare to oppose it.

[55] Another member of staff, the development review manager, wrote to his colleagues that he has concerns about making the pre-consultation process more public (by a web link) than it needs to be because of the potential for what he regards as primarily technical review to become politicized.

[56] Several email exchanges are provided containing communications among between the Mayor, councillors and citizens about the proposal. Generally, the Mayor referred the correspondence to staff so that they could provide information to the public and answer questions. Many residents wrote to their councillors to object to the proposal even in the early stages when they first learned of it. A councillor advised his constituents to attend public meetings to learn more and provide their input.

[57] The question raised is: does this body of evidence when taken individually or as a whole, reflect the Town in its many persons acting appropriately and in good faith? Is the ICBL that results from this process an honest attempt to provide a period of time in which to study an important development proposal or is this a scheme to block this development before it has a chance to proceed?

[58] A careful review of these materials would not lead a reasonable reader to a conclusion of bad faith. Instead, it appears that elected officials acted in a way that is expected of them when participating in local democratic situations such as interacting with constituents. They informed themselves and shared information with those who elected them.

[59] Similarly, the evidence shows that staff did what they are supposed to do. They responded to an application, interacted with developers and their representatives respectfully and with as much candour as the circumstance allowed, and generally undertook their duty of formulating and providing professional advice as best they could. They exchanged information when it was appropriate to do so and they conducted internal discussions about how to properly process the application so that it could be dealt with by staff.

[60] Members of the public sought out information and communicated concerns and formed early and firm opinions, as they are wont to do. They shared these with each other and with their councillors and began to organize sympathetic opinion and support.

[61] The actions and intentions of members of the public are also reflected in the presentations that were made by participants during this hearing. A list of the participants who made representations to the Board is attached to this decision as Appendix B. It is not necessary to review each of the submissions in detail. Indeed, the presenters were brief and complied with the Board's direction by coordinating their presentations and not repeating one another's evidence.

[62] There were a few main themes in the presentations by the participants. First, most of them candidly admitted that they simply opposed the development or redevelopment of the subject lands in a way that some considered to be incompatible with the existing development. Others lamented the loss of the golf course, the notoriety or celebrity of the site and the role it plays in providing a vast expanse of green space in the middle of the Town. Many expressed surprise noting that there was little hint that someday the lands would be developed.

[63] Some residents noted that they had purchased their homes in the Glen Abbey neighbourhood on the assumption that the lands would be permanently kept as a golf course or at least open space. One local resident shared marketing materials that were used to entice purchasers to live near the golf course in townhouse groupings named after Nicklaus, Hogan and Palmer, names that are well known among golfing enthusiasts.

[64] However, the resident participants (or at least some of them) also fairly acknowledged that the golf course is a privately-owned business and they could not assume that it would be there forever. For those who understood this, their resolve was unaffected. They were careful to make their submissions on the land use issue separately from the question of the continuation of the business. The future of the golf course, they conceded, may be a business decision in the hands of ClubLink; the future of land use, they insisted, is a public interest decision, since the lands were acquired with the OP designations and zoning protecting it for open space and natural areas.

[65] A final theme of the participants' presentations was that, while they may oppose any development or redevelopment of this site, they understood and, it seemed, had been properly advised that the issue before this panel of the Board would not be the merits of the development or redevelopment of the lands, but the appropriateness of the ICBL. On this point the advice of several presenters was simply that the proposal warranted further study and they urged the Board to afford the Town – its staff and

council - the time needed to do so by allowing the ICBL and denying the appeal. They recognized that if and when there was to be a debate about the merits of proposal itself, they would have the opportunity to be a part of that discussion at some future time.

[66] This was equally true of the Town Council Meeting of February 1, 2016 and the Planning Development Committee Meeting of November 1, 2016 at which the ICBL was initially adopted and later renewed respectively. As part of the duty to have regard to the decisions of council, the Board reviewed the recordings of the meetings. The review of the recordings was equally valuable in having the required regard and in drawing a conclusion about whether there was any apparent evidence that the process was not conducted in good faith.

[67] At both meetings, the Mayor and councillors took pains to state that the purpose of the meetings was not to deal specifically with the merits of the proposal to redevelop Glen Abbey, but rather that it was to consider the merits of the ICBL as a tool for interim control while studies could be completed that may at some future time inform decisions pertaining to Glen Abbey. This was clearly understood by elected officials and acknowledged by several of the delegates (many of whom also appeared before the Board) when speaking to the issues before council. As part of the care taken to keep this distinction alive, the mayor also reminded councillors and the public at these meetings of the need to maintain an open mind towards the proposal until the product of the proposed studies could be reviewed and considered.

[68] None of the conduct observed could be fairly construed as evidence of bad faith (or even as a lack of good faith if there is a difference). On the contrary, all appearances point to the conduct of a typical planning process conducted in the public realm: public officials acting in accordance with their mandates and professional duties; elected officials taking an interest in a major development in the Town and communicating about it with each other and their constituents; residents forming opinions about public land use proposals and respectfully and civilly organizing to oppose elements of the proposal. Frankly the evidence demonstrated no more than a

fervent and well-mannered response to a significant development proposal making its way through a transparent and accountable land use planning process, which included a proposal for interim control.

[69] One final issue that could be considered a point related to good faith is the matter of the assessment dispute involving the Glen Abbey lands. ClubLink points to the 2006 planning report commissioned by the Town and prepared by Ruth Victor in support of a higher assessment for the Glen Abbey lands (“the Victor Report”). Ms Victor prepared an opinion which advanced the position that the “highest and best use” of the lands is for “low and medium density residential uses” and that, in her estimation, the site could support the creation of 950 residential units. The Town adopted this position for the purposes of establishing the assessed value of the property as it would yield a higher assessed value and more taxation revenue.

[70] ClubLink regards this as evidence of the fact that the Town anticipated and supported the eventual redevelopment of the lands. The enactment of the ICBL now contradicts that position and is evidence of bad faith by the Town when faced with a development proposal.

[71] There is certainly an inconsistency that warrants some form of explanation. Mr. Butler offers the view that although the Victor Report is an independent planning opinion, it is one prepared for establishing what could potentially be the “highest and best use” for the purpose of assessment. As he explained, it is not an opinion prepared to establish the merits of such a redevelopment scheme (and those merits are not being tested here in any event) and, given that it was prepared over a decade ago, it could not address conformity with the current Livable Oakville Plan, the Region of Halton OP or other current issues such as Growth Plan conformity and heritage.

[72] The Board concludes that the Victor Report offers evidence of little more than an attempt by the Town, perhaps in a fit of unwise avarice, to maximize property tax revenue from the Glen Abbey site without regard for how such an approach could

undermine the careful consideration of the redevelopment of this area. By adopting a position that was not supported by its own plans and by-laws, the Town imprudently aligned itself with a planning opinion that concluded (for assessment purposes) that such uses could be approved. With the passage of time, this approach may have proven to be unwise, short sighted and self-interested. Although it may reflect bad judgment, it does not reflect bad faith in the passage of the current ICBL.

[73] In short, the Board can find no compelling evidence of bad faith. The Board simply observes what took place, based on the evidence presented in the form of the Exhibit 16 series, the recording of council deliberations and the conduct of presenters in the hearing, and from all this I conclude that a process has taken place that is anticipated by the Planning Act.

[74] The Board further concludes that the ICBL in this instance was properly formulated, fairly considered and presented to council first in February 2016 and then for renewal in November 2016 for its consent, which it gave.

[75] The last substantive issue raised by ClubLink is: "Does the Interim Control By-law unfairly target the Glen Abbey Golf Club lands?"

[76] Mr. Bradley points to other proposed developments, some of which are comparable in scale and significance to the ClubLink proposal, where the Town did not enact an ICBL.

[77] As one example, the proposal to redevelop the Saw Whet Golf Course in the west of the Town had not been accompanied by a proposed ICBL. Mr. Simeoni explained that this proposal was made in the context of a policy in the Livable Oakville Official Plan to consider this area for redevelopment in the future subject to the completion of various studies. In other words, it would be subject to the equivalent scrutiny of studies as is required of ClubLink prior to approval, so it did not require an ICBL. Also, it had not come as a "surprise" in the way that the Glen Abbey

redevelopment had arrived on the doorstep of the Town. Although it was never identified as a “growth area” which is the complaint made against the Glen Abbey proposal, the policy framework ensured that the redevelopment of Saw Whet would be fully studied for its impact on the Town’s growth pattern and structure before any development was accepted.

[78] A similar example is the proposal for the Life Sciences Technology District (“LSTD”) on lands adjacent to the east of the new hospital in the north end of Town. This proposal is for significant growth estimated at a combined development of 11,000 jobs and residents at full build out. The Town is dealing with this in a different way from the Glen Abbey proposal – specifically it is not imposing an ICBL – and ClubLink claims that this is unfair treatment.

[79] The Town’s defense of its differing approach rests on what it considers to be differing fact situations including especially a pre-existing policy framework for the kind of development (though perhaps not the scale) proposed by the LSTD.

[80] The LSTD is located outside the area covered by the Town’s Livable Oakville Plan and is instead within the North Oakville West Secondary Plan (“NOWSP”) which governs the newly developing area north of Dundas Street on the west side of the Town. It differs from the ClubLink proposal in a number of ways. It is not a redevelopment of a significant existing use located in the center of the established Town and is not situated in the midst of an existing residential neighbourhood with potential issues of compatibility with existing stable residential neighbourhoods. In fact, it is outside the Town’s built boundary. There are no identified heritage implications of the development that warrant special study.

[81] Although, the LSTD is not identified as a growth area within the Town’s policy framework (partly because it is not located within the area of the Town’s OP), the proposal has also been endorsed by council for consideration and given its own policy framework as part of the NOWSP. In a report submitted to Oakville council, the area

was identified in s. 8.6.5.1. and s. 8.6.5.2. of the NOWSP as a Health Oriented Mixed Use Node (“HOMUN”). The NOWSP provides generalized land use permissions and identifies further studies and consideration for mixed uses at this location that generally align with the health sciences theme within the employment area of the NOWSP.

[82] The report and recommended approach for the development of the area received the endorsement of Town council in May 2015 and later by Regional council to ensure conformity with the RHOP. Together these reports endorse a policy-based approach to the development of this area that distinguishes it fundamentally from the circumstances present in the Glen Abbey process.

[83] The Board accepts this analysis as a legitimate distinction for approaching the two development proposals. In short, the Town has endorsed in principle the LSTD and has placed it on a policy-based development process which includes study and detailed review in conformity with local and regional planning policies. It proposes to put the Glen Abbey proposal – a proposal with a very different fact situation - into a policy-based process following the studies that Town staff says the Town needs to complete before considering the development of the area.

[84] The Board concludes that the proposals are being treated differently, but that this does not reflect an unfair targeting of the Glen Abbey proposal. Rather, it reflects different fact situations and the application of different policy frameworks based on those fact situations.

[85] Returning to the issues list, the Town has identified three issues for the Board’s consideration. The Town asks whether the ICBL conforms to the Growth Plan and whether it is consistent with the Provincial Policy Statement (“PPS”).

[86] Mr. Bradley holds the opinion that by removing certain uses that were previously permitted, the ICBL is not in conformity with the Town's OP and the Growth Plan. This was unclear to the Board which prefers the evidence of Mr. Simeoni, Mr. Butler and indirectly Mr. Benson that the ICBL conforms to the Growth Plan. Their reasoning is that by affording the Town the opportunity to consider the implications for an additional growth area on the Town's approved growth areas, the ICBL ensures that a significant new growth area in the Town will not imperil the Town's ability to achieve a vital goal of the Growth Plan which is to accommodate the growth assigned to it by the Region and indirectly the Province.

[87] The Town and the Region are persuasive that the Town's OP carefully and strictly complies with the Growth Plan in accepting and accommodating the growth allocation by the Region, based on the original Growth Plan and on Amendment 2. The ICBL maintains conformity by ensuring that a significant new growth proposal would support or more importantly would not imperil the Town's policies for accommodating future growth and that it would not disrupt the structure and growth pattern planned for the Town.

[88] The Board is also satisfied that the ICBL is consistent with the PPS. Specifically, the PPS promotes healthy, livable, safe communities with adequate supplies of land to accommodate growth and provide for a mix of uses. Oakville's OP has been carefully constructed to achieve the aims of the PPS and an ICBL that provides the opportunity to study a significant growth proposal further advances the goals of the Plan. The PPS also identifies the importance of conserving built heritage resources and significant cultural heritage landscapes both of which are the subject of the studies underlying the ICBL. Altogether the enactment of the ICBL is consistent with the PPS.

[89] Finally, the Town also asks whether the ICBL is required to afford the Town the time to study the implications of a significant growth proposal. This is especially relevant in considering the appeal of the renewal of the ICBL for an additional year. The studies undertaken by the Town are complex and the growth study in particular is

comprehensive. They require the time that the ICBL affords, including the time provided by its renewal. The Town has adequately accounted for the time that it has taken so far and satisfies the Board that it is likely that the studies and associated policy changes will be available before the ICBL expires.

[90] The Board does not adopt the Appellant's position that the Town is "dragging its feet" and that ClubLink is prejudiced by the time that is being taken. ClubLink admitted that given the time needed for a complete review of a large and complicated development application and the issuance of approvals, it is unlikely that the ICBL would extend the time needed for a full review.

[91] The Board accepts that the process is being conducted expeditiously and in time, at least within the boundaries of time constraints provided by the ICBL provisions of the Act.

[92] The Region's sole issue in this hearing is conformity with the RHOP, a matter that was not profoundly at issue. The ICBL permits a growth study to ensure conformity with the Region's growth allocation and it ensures that studies that have proper regard for cultural heritage are completed before development takes place in an area whose heritage value is under study. The ICBL and the studies they permit are in conformity with the RHOP.

[93] Having considered all of the issues raised in respect to the proposal for an ICBL and the one-year renewal of the ICBL, the Board finds for the Town and concludes that the ICBL is appropriate and necessary. It is justified and based on a legitimate planning rationale. It has been enacted in good faith, does not unfairly target the subject proposal in comparison with others and there is no evidence that it has been enacted for purpose of delay or to frustrate the proper assessment of the merits of a development application. It is in conformity with the RHOP and the Provincial Growth Plan, and is consistent with the PPS.

[94] For these reasons, the Board orders that the appeals of By-law No. 2016-024 which establishes interim control under s. 38 of the Act and By-law No. 2016-115 which amends the original by-law by extending interim control for one year are dismissed.

“B. W. Krushelnicki”

B. W. KRUSHELNICKI
EXECUTIVE CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
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**MEMORANDUM OF ORAL RULING DELIVERED IN THE COURSE OF THE
HEARING ON FEBRUARY 1, 2017 BY B.W. KRUSHELNICKI**

This ruling arises at the commencement of the cross examination of the Town of Oakville planner, Mr. Simeoni, by Mr. Flowers, counsel for ClubLink. The planner was about to explain the circumstances surrounding a document that Mr. Flowers was putting to the witness which reflected a conversation that took place between him and the Town's solicitor and assistant solicitor.

At this point Mr. Doherty rose to object, explaining that the document about to be discussed had been obtained under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). He explained that a Freedom of Information ("FOI") request had been made by Mr. Flowers' office some time ago and it was later learned that although there had been a screening process for the disclosure to ensure compliance with FIPPA, several documents had inadvertently been provided which were believed to be protected by solicitor-client by privilege.

When this occurred, counsel for the Town contacted the Board and sought to have certain of the documents "sealed" from further disclosure pending a hearing of the matter by the Board and a ruling on the issue of whether the documents could be used in the hearing or should remain protected by privilege. The Board agreed to seal the documents and an *in camera* motion hearing was conducted by another Board Member who ruled, upholding the disclosure of certain documents and the protection of others.

The Town says that the document now in question in this hearing was overlooked and should have been included in the list of sealed documents and protected as a privileged communication involving discussions between a solicitor and client. Mr. Flowers does not agree.

The Board again conducted an *in camera* hearing to take submissions on the disclosure and admissibility of the document in question.

In the hearing, Mr. Doherty repeated the explanation that documents had been disclosed that should not have been and that the ruling by my colleague should be extended to protect this document and any others that had been inadvertently released.

Mr. Flowers maintains the document is not protected by privilege and even if it is, the privilege has been waived by the act of releasing it.

The protection of privileged communications from disclosure and use in a hearing is an important protection that ensures the confidentiality of certain discussions and written exchanges. It is a necessary feature of the process that ensures that a person who comes before a tribunal or court can candidly seek advice from counsel that protects their rights and assists them in advancing their interests. Among other things, confidentiality guarantees that nothing that is communicated when seeking legal advice can be used against the person seeking the advice. Privilege is therefore a key component of the right to seek legal advice and to have one's interests represented by counsel.

The privilege that attaches to communications is not a free pass. Certain conditions must be met to gain the privilege. The communication must be between a client and a lawyer acting in a professional capacity. The Board is satisfied that that was the case in this instance.

Secondly, privilege does not attach to all communications involving a lawyer, but does apply to communications that take place within a "relevant legal context". This was the case in the present instance. Lawyers and other staff of the municipality were clearly communicating about how to proceed in a matter that clearly had legal implications for the municipality and where the municipality and its staff sought to manage risks associated with future conduct.

Finally, privilege attaches where the communications include seeking information and providing advice. Privilege does not exist simply because a lawyer was present or because a lawyer's name is listed routinely in the "cc." line of an email. The presence of the lawyers in the communication must be related to seeking, formulating and giving advice within a legal context.

I conclude from a review of the requirements for solicitor-client privilege, that the circumstances of this case and the content of the communication in question are privileged.

In the alternative, Mr. Flowers argues that even if the document is privileged, the privilege has been waived by the act of releasing the document. The document in question was embedded in an exchange (an "email chain") that had many iterations. In the review of the documents prior to the FIPPA release, the embedded document was overlooked and was released in error as part of the chain. The Board concludes that the disclosure was clearly inadvertent. It was the result of an error – an honest error.

Furthermore, as Mr. Doherty argues "there was no implied waiver, no manifestation of a voluntary intention to waive the privilege". The Board agrees and concludes that the release was simply an error on the part of the Town and it should not result in a document remaining incorrectly disclosed for use in the hearing.

Following the ruling and the direction to restore the confidentiality of the document, the hearing continued and Mr. Flowers resumed his cross examination of Mr. Simeoni.

"B. W. Krushelnicki"

B. W. KRUSHELNICKI
EXECUTIVE CHAIR

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