CITATION: Town of Oakville v. Clublink, 2018 ONSC 6386
COURT FILES: CV-17-585698 and CV-17-587268
DATE: 20181025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CORPORATION OF THE TOWN OF OAKVILLE Applicant	*Sandra Barton, Rodney Northey, Jennifer King, and Nadia Chandra*, for the Town of Oakville
– and –	
CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED Respondents	*Earl Cherniak, Cynthia Kuehl, and Mark Flowers*, for Clublink Corporation ULC and Clublink Holdings Limited
AND BETWEEN:	
CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED Applicants	
– and –	
CORPORATION OF THE TOWN OF OAKVILLE Respondent	
	HEARD: July 16-17, 2018

E.M. MORGAN J.

I. Sections 33 and 34 of the *Ontario Heritage Act*

[1] Clublink Corporation ULC and Clublink Holdings Limited (together, "Clublink"), the owner of the renowned Glen Abbey Golf Course (the "Golf Course" or "Glen Abbey"), seeks to demolish the Golf Course and redevelop it as a residential community. The Town of Oakville (the "Town") opposes this plan. It has designated the Golf Course and the property on which it is situated a heritage site under section 29, Part IV, of the *Ontario Heritage Act*, RSO 1990, c. O.18 ("*OHA*").

[2] The dispute is, formally speaking, narrowly focused on a question of procedure: having had its property designated under s. 29 of the *OHA*, can Clublink now apply to the Town under s. 34(1) of the *OHA* for permission to demolish the entire Golf Course, or must it proceed under s. 33 and apply to alter the property? For the parties, this is a significant procedural distinction for a number of reasons. One of the most important of these reasons is a tactical one based on the different routes of appeal entailed in an application under each of these respective sections of the *OHA*.

[3] Clublink prefers the s. 34(1) option, as any decision by the Town council under that section carries with it a right of appeal to the Local Planning Appeal Tribunal ("LPAT"). LPAT has the authority to either uphold or overturn the decision of Town council under s. 34. By contrast, the Town prefers the s. 33 option, as the only right of "appeal" under that section is to the Conservation Review Board ("CRB"). The CRB, however, cannot overrule the decision of the Town, but rather only has powers to make recommendations to Town council, which retains the power to make a final decision on the property owner's application.

[4] Beyond the narrow procedural issue at stake, each side in this controversy expresses great suspicion of the other's ultimate ambitions. Clublink made it clear during the hearing of the matter that it fears that the Town will compel it to forever run an aging and outdated sporting facility. For its part, the Town made it clear it fears that Clublink will replace an extraordinarily picturesque property which is a centrepiece of the Oakville community with something altogether ordinary. Like dueling Joni Mitchells, Clublink accuses the Town of making it captive on a carousel of time, while the Town accuses Clublink of taking paradise and putting up a parking lot.

[5] Neither of these portraits is accurate. But perhaps more importantly, each side's portrayal of the other significantly overstates the actual legal contest in this Application and Counter-Application. Neither the Town's designation of Glen Abbey as a cultural heritage landscape, nor Clublink's redevelopment proposal, is at stake here.

[6] The question considered in the Application and Counter-Application before me here is, as stated above, a strictly procedural one: can Clublink use section 34 of the *OHA*, which permits a property owner to apply to Town council for permission to "demolish or remove a building or

structure on the property", to seek consent for the removal of the Golf Course in its entirety (or nearly its entirety)?

[7] The Town submits that the Golf Course is not a "building or structure", and that its natural and landscaped features such as trees, creeks, tees, greens, fairways, bunkers, and watercourses, are likewise not buildings or structures within the terms of section 34. Clublink submits that section 34 is a remedial section for properties designated under the *OHA* and that its terms are sufficiently broad to cover properties of all shapes and sizes including the Glen Abbey Golf Course.

II. The Glen Abbey property

[8] Clublink has owned the Glen Abbey property since February 1999, when it bought it from the Royal Canadian Golf Association, the predecessor of what is now known as Golf Canada. The property is located at municipal address 1313 and 1333 Dorval Drive, Oakville, Ontario (the "Property"). It consists of an 18-hole course designed by Jack Nicklaus to be a championship golf course that was constructed in the 1970s, together with a number of buildings. The roughly 94 hectares of the Property includes 32 hectares of valleylands located in the Sixteen Mile Creek Valley and approximately 62 hectares of tablelands above the valley.

[9] Situated on the Property is also a building known as the RayDor Estate, which is leased to Golf Canada and a number of other office tenants. This portion of the Property, which has the municipal address 1333 Dorval Drive, is not part of the Golf Course, and was already subject to a designation under the *OHA* at the time of Clublink's purchase in 1999. This previous designation, which took place in 1993, remains in force. It relates to the RayDor Estate building alone, and by its express terms does "not extend outward to include the golf course".

[10] In addition, in July 2016 ClubLink purchased part of the backyard of a residential property that abuts the Property, municipally known as 1301 Greeneagle Drive (the "Greeneagle Property"). The Greeneagle Property has never been part of the Golf Course or the Property, and prior to 2016 was owned by an owner unrelated to Clublink.

[11] The Town submits that for 30 years after its construction in the 1970's, there was no talk by the owner of the Golf Course of converting it to any other use. Clublink submits that this is not quite accurate, and that on one or two occasions, including in the process of appraising it for property tax purposes, Clublink and its predecessor in title, together with the Town, did raise the potential for redeveloping the Golf Course and Property. Regardless of this debate among counsel, the fact is that the Golf Course has been consistently used as a championship golfing facility, has frequently been the home of the Canadian Open, and has been a prestigious scenic and recreational focal point for the Town of Oakville.

[12] In 2015, Clubink's contract for hosting the Canadian Open was coming to an end. Although it still described Glen Abbey as one of its premier golfing properties, Clublink determined that it was economically advantageous to contemplate redeveloping the Property as a residential community, and to that end retained planners and commenced work on a redevelopment proposal. At about the same time, the Town engaged in what it calls a Cultural Heritage Landscape strategy

and began identifying properties that could be designated as cultural heritage properties under the *OHA*.

[13] The parties each contend that the other commenced their respective process as a response rather than proactively, but in fact they each appear to have come to their processes as a result of independent decisions. In any case, for the purposes of this Application the reciprocal arguments about 'who started it' are not particularly relevant. There is nothing inherently wrong with a property owner submitting a redevelopment proposal, and likewise nothing inherently wrong with a municipality identifying a property as suitable for cultural heritage designation. The question is, the Town having designated the property under the *OHA*, what is the proper route for the owner to take in seeking to make far-reaching changes to the property in the nature of those proposed by Clublink?

[14] That said, a brief explanation of background is necessary to put the Town's heritage designation and Clublink's redevelopment proposal into the relevant policy context. In early 2015, the Town began the process of implementing its Cultural Heritage Landscape strategy by engaging in a three-stage process: a) phase 1 – conduct an inventory of public and private lands for potential cultural heritage landscapes and narrow the 50 identified potential significant cultural heritage sites to 8 possible sites for designation; b) phase 2 – conduct a detailed assessment of the 8 properties and narrow the high priority landscapes to 4 for potential designation; and c) phase 3 – implement appropriate measures for protection of the 4 properties identified as significant cultural heritage landscapes.

[15] At a meeting of Oakville municipal council in May 2017, council directed staff to give priority to Glen Abbey in implementing cultural heritage protection measures. This ultimately resulted in the designation of the Property (including the entire Golf Course and, apparently, the Greeneagle Property) under s. 29 of the *OHA*. Once designated, s. 33 of the *OHA* provides that the owner may not "alter the property or permit the alteration of the property if the alteration is likely to affect the property's heritage attributes".

[16] In its factum, counsel for the Town of Oakville describes the significance of the Golf Course, stating that it is one of Canada's most famous courses, was designed as a tournament golf course that has hosted the Canadian Open, Canada's premier golf tournament, and was the first one designed by legendary golfer and designer, Jack Nicklaus [para 34]. The Town's written submissions go on to describe the features of the designated property that the designation seeks to preserve, noting that it contains "tees, greens, fairways, bunkers, hills, mounds, paths, trails, trees, vegetation, streams, creeks and ponds" [para 35].

[17] Counsel for the Town then goes on to observe what the Town perceives as the cultural significance of this landscape:

> Since it opened in 1976, Town planning policy has recognized the importance of the Glen Abbey property a major golf-related recreation and tourist facility, which provides the Town with significant tourist, economic and cultural benefits, and

> accordingly, has constrained its present and future uses to uses that are compatible with the property's principle use as a golf course [para 36].

[18] To be sure, it is not the Town's position that having been designated a cultural heritage landscape, the Golf Course must be frozen in time. Counsel for the Town made it clear in their submissions in court that the Town understands that a golf course, like many other sporting facilities, needs updating and renewal as time goes on. The Town is not in principle opposed to renovating and modernizing the 1970's-era design, but requires Clublink to go through the procedure provided for in the *OHA* for applying for such changes – i.e. a s. 33 application to alter any heritage attributes of the Property.

[19] As indicated, in the meantime Clublink proceeded to work on its redevelopment proposal. It hired a heritage consultant who specified how various cultural heritage resources on the Glen Abbey property could be retained in the proposal. Thus, in addition to a range of housing, the redevelopment proposal envisions a preservation of all streams and waterways, including the Sixteen Mile Creek that runs through the property. Clublink's counsel describes in its factum the proposal as having been produced with an eye to preserving the public, community-oriented nature of the property by conveying significant portions of the park and woodland areas of the property to the municipality or other appropriate public authority [para 2].

[20] Counsel for Clublink goes on to state what Clublink perceives as a significant contribution to the heritage aspects of the Property:

> Clublink contemplates that the entire valleylands, which includes Sixteen Mile Creek, and other portions of the property (totaling approximately 50 hectares or 124 acres) would be conveyed to a public authority without compensation as a condition of approval of the redevelopment. The result would be the conversion of privately owned green space, now accessible only to those who can access the golf course, to public green space open to everyone [para 15].

[21] As can be seen, the Town's conception of Glen Abbey's significance and Clublink's conception of its significance do not meet. Counsel for Clublink focused its development proposal on the Provincial Policy Statement with which s. 3(5) of the *Planning Act* requires new developments to conform. This includes heritage considerations as well as housing considerations, environmental considerations, protecting existing ecosystems, infrastructure considerations, and intensification of development. The Town, on the other hand, focused its designation proposal on preserving the Golf Course as a socio-cultural amenity, and implemented the Ministry of Tourism, Culture and Sport guidelines proclaiming that a cultural heritage "landscape", and not just a discrete property, could be designated under s. 29 of the *OHA*.

[22] In other words, while Clublink invoked planning principles, the Town invoked Culture and Sport principles. No amount of preservation of greenery, water, and aesthetic vistas can satisfy the Town, since what the Town wants to preserve is the Golf Course *qua* golf course. Likewise, no amount of permission to renovate or update the aging sporting facility can satisfy Clublink, since what Clublink wants is to demolish the Golf Course and build single-family housing on the portion that it does not turn over in a raw, natural state, to the public.

[23] The Town's mistrust of Clublink's development ambitions and Clublink's mistrust of the Town's cultural heritage preservation ambitions have led to a procedural stalemate. Clublink wishes to remove the Golf Course in its entirety, and has applied to Town council do so under s. 34(1) of the *OHA*. While Clublink is perhaps not optimistic about the Town's response to this application, it takes comfort in the fact that s. 34 provides for the possibility of a binding appeal to LPAT. The decision of LPAT will therefore be the final one.

[24] The Town wishes to preserve the Golf Course, and has refused to accept and process Clublink's s. 34(1) application. Rather, it has advised Clublink to apply under s. 33 of the *OHA* for permission to do alterations to heritage aspects of the Golf Course. While the Town is perhaps not optimistic about Clublink's response to such an application, it takes comfort in the fact that s. 33 provides only for a non-binding recommendation on appeal to the CRB. The Town's own decision will therefore be the final one.

III. Is a golf course a "structure"?

[25] Clublink submits that s. 34 is the correct procedural route for seeking the Town's permission to demolish the Golf Course. This includes the demolition or removal of 16 buildings as well as the tees, greens, sand traps and other hazards, embankments, fairways, cart paths, irrigation and drainage systems, and other infrastructure of which the Golf Course is comprised.

[26] Section 34(1) of the *OHA* provides that,

> No owner of property designated under section 29 shall demolish or remove a building or structure on the property or permit the demolition or removal of a building or structure on the property unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the demolition or removal.

[27] There is little doubt that the various buildings that are part of the Golf Course fall within the ambit of s. 34(1). The real issue between the parties is whether the other unique characteristics of the Golf Course qualify as "structures" for the purposes of this section.

[28] The Town takes the view that the landscaping and other distinctive features of the Golf Course are not "structures" in this sense. It submits that a narrow interpretation of this provision is necessary to implement the overall policy of the *OHA* in preserving cultural heritage, and that any broad or flexible interpretation of a word such as "structure" in s. 34(1) will result in the owner of a property designated under s. 29 sidestepping the municipality's right to determine the cultural heritage value and attributes of a designated property. In this sense, the Town perceives Clublink's resort to a s. 34 application as a form of "improper conduct".

[29] Clublink takes a broader view of how s. 34(1) is to be interpreted. It submits that an application under this section is a specific right granted to owners of designated properties in order to protect it from potential overreaching by municipal authorities. It takes issue with the Town's understanding of the purpose of the *OHA*, and characterizes the legislation's purpose as incorporating the need "to balance the interests of the public, community and the owner":

Tremblay v Lakeshore (Town), [2003] OJ No 4292, at para 27 (Div Ct). In this sense it sees redevelopment as consistent with the goals of the *OHA*, stressing that the policy under Part IV of the *OHA* – "Conservation of Property of Cultural Heritage Value or Interest" – is one of conservation, not preservation, and that "conservation work must be coordinated and integrated with planning and other future-oriented activities": *Rams Head Development Inc. v Toronto*, 2010 CarswellOnt8559, at para 63 (OMB), quoting Parks Canada, *Standards and Guidelines for the Conservation of Historic Places in Canada.*

[30] The competing prongs of the *OHA*'s policy objectives were discussed at length by the Supreme Court of Canada in *St. Peter's Evangelical Lutheran Church v Ottawa*, [1982] 2 SCR 616, 623-4. The Court observed that municipal concerns over heritage are to be exercised in a way that accommodates the owner's economic interests.

> The *Ontario Heritage Act* was enacted to provide for the conservation, protection and preservation of the heritage of Ontario. There is no doubt that the *Act* provides for and the Legislature intended that municipalities, acting under the provisions of the *Act,* should have wide powers to interfere with individual property rights. It is equally evident, however, that the Legislature recognized that the preservation of Ontario's heritage should be accomplished at the cost of the community at large, not at the cost of the individual property owner, and certainly not in total disregard of the property owner's rights. It provided a procedure to govern the exercise of the municipal powers, but at the same time to protect the property owner within the scope of the *Act* and in accordance with its terms.

[31] The dual aspect of the heritage policy was reiterated by the Court of Appeal in *Toronto College Centre Street Ltd. v Toronto (City)* (1986), 56 OR (2d) 522, at para 38. Cory JA, for a unanimous Court, stressed that the *OHA* is to be interpreted purposively, and that the purpose is to accomplish heritage conservation in a way that does not run counter to the property owner's rights.

> ...the provisions of the Ontario Heritage Act, 1974 allowing municipal interference with private property rights should be construed purposively and liberally in order to allow municipalities to effectively preserve Ontario's heritage. On the other hand, the court recognized that there was a counterbalancing need to give equally liberal construction to those provisions of the Ontario Heritage Act, 1974 that were designed to protect the landowner's rights.

[32] The Court of Appeal went on in *Toronto College* to acknowledge that it is in the very nature of a designation under the *OHA* that the ability to fully exploit privately owned property will be curtailed. Thus, it was compelled to state, at para 42, that as a substantive matter, "[t]o achieve its aims the Act must interfere with private property rights." This acknowledgement was then tempered with the observation that the other side of the coin from the *OHA*'s substantive objectives, which are tilted toward the municipality, are its procedures, which are tilted toward the owner. Thus, the Court was compelled to continue, at para 42, with the statement that, "[t]o counterbalance such interference numerous procedural safeguards are enacted for the benefit of the property owner."

[33] It is evident that s. 34(1) of the *OHA*, with its right of appeal to the LPAT, is one such procedural safeguard. That is, if an owner of a designated property is not satisfied with the substantive determination by the municipal council as to whether demolition should be permitted to occur, the owner is protected by means of a procedural right to appeal the decision to a tribunal with authority to overturn the municipal decision. It almost goes without saying that the interpretation of the *OHA*, as with all statutes, is to reflect the object and intention of the legislature that enacted it: Sullivan and Dreidger, *Construction of Statutes* (4th ed., 2002), pp. 1-2. The objective of the legislature in providing procedural protection for the property owner, as identified by the Court of Appeal in *Toronto College*, therefore provides an important guidepost in interpreting and applying section 34(1).

[34] Section 26 of the *OHA* defines "property" as "real property and includes all buildings and structures thereon". There is, however, no specific definition in the *OHA* for "structure" as it is used in section 34(1). The interpretation of this term, as indicated above, is to be in keeping with the statute's policy objectives, and is to involve consideration of the context of the provision within the statute and of the statute as a whole: Sullivan and Dreidger, p. 282. It is to be read in its "grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 SCR 27, at para 21.

[35] Counsel for the Town, in their written submissions, place considerable emphasis on the fact that the expert consultants retained by Clublink did not use the term "structures" to describe the golf course and its natural features, but rather primarily used this term to refer to buildings. It is the Town's view that Clublink's experts referred to the phrases "structure", "building", and "landscape" as distinct categories. It is equally the Town's view, and that of its experts, that landscape features such as greens, fairways, etc. are not in ordinary usage, nor in heritage usage, commonly referred to as "structures".

[36] Counsel for Clublink responds to this argument by pointing out that the expert reports submitted on its behalf were done in support of its redevelopment proposal, and not in response to the s. 29 designation. Accordingly, Clublink submits that these reports did not consider whether the golf course and its various features were "structures" within the meaning of the *OHA* one way or another, and that they do not address the issue in the way the Town claims that they do. It is equally Clublink's view, and that of its experts, that man-made features such as artificial ponds, sand and water hazards, mounds, berms, embankments, bridges, tees, etc., are in ordinary usage, as well as in construction usage, commonly referred to as "structures".

[37] I do not find any of the experts particularly helpful in this regard. Debating the non-*OHA* meanings of a versatile term such as "structure" does little to advance the statutory interpretation question. What is more to the point is the way that the word is used in the very statutory context under consideration. Counsel for Clublink notes that the definition of "property" in s. 26 of the *OHA* states that this includes "real property and all buildings and structures thereon"; and, similarly, s. 34(1) itself refers to demolishing or removing a "building or structure on the property". This language in the statute signals that "structures" are not limited to buildings but rather includes things other than just buildings.

[38] Further, the evidence is that the Golf Course was constructed in accordance with Jack Nicklaus' professional design. It is not raw land, and it is substantially more than a landscaped garden. As Clublink points out, portions of the course have been renovated and rebuilt over time, and like all such constructions these features have a limited life. Counsel for Clublink emphasizes the evidence in the record of substantial irrigation infrastructure, subsurface drainage construction, earthwork spectator mounds or berms, artificial reservoir ponds, complex designed greens constructed in accordance with specific United States Golf Association standards, engineered bunkers, paved cart paths, etc.. All of these features require installation, physical maintenance, periodic renovation, and elaborate construction. Clublink submits that features that need to be constructed are structures that can be demolished.

[39] In other legal contexts, golf courses and other recreational facilities that have features similar to golf courses, have apparently been treated as structures. Thus, for example, in *Mont-Sutton Inc. v R*, 1999 CarswellNat 1186, the Federal Court of Appeal found that ski trails are a form of surface construction and can therefore be depreciated. The court in *Mount-Sutton* specifically emphasized, at para 21, that a designed and constructed ski trail is unlike "land or a plot of land on which a structure is erected (and which) cannot be depreciated." Following this case, the federal government issued a tax bulletin in which it specifically recognized that, like ski trails, the most identifiable features of a golf course – greens, tees, fairways – are man-made surface constructions and are depreciable assets: ITTN Bulletin, June 14, 2001.

[40] If constructed golf course features are depreciable, they cannot be land or landscape but rather are something constructed on the land or landscape. The Alberta Government Municipal Board has used this logic to conclude that golf courses are "structures" for the purposes of municipal tax assessment. In *Calgary Golf & Country Club v Calgary (City)*, 2004 CarswellAlta 2378, at para 72 rev'd on other grounds, 2006 ABQB 312, the Board reasoned:

> Golf course features like tees, greens and fairways are man-made and artificial constructions built on the land through bulldozing and other construction methods. They support human activities and in this specific case, the activity of golfing. Tees, greens and fairways and other golf features are thus like structures that support human activity and thus are building like.

[41] Employing analogous reasoning, the Ontario Municipal Board has held a landfill to be a "structure" within the meaning of the *Planning Act*: *Re City of Vaughan Official Plan Amendment 332 and Zoning By-law 364-91*, 1996 CarswellOnt 5842. Likewise, the British Columbia Supreme Court has found a drag strip to be a "structure" for zoning purposes: *British Columbia Custom Car Association v Mission (District)*, 1990 CarswellBC 534. Both decision-makers emphasized that these structures are "heavily engineered", *Re Vaughan*, at para 28, and are a "thing constructed": *BC Custom Car*, at para 35.

[42] I have little trouble accepting this logic. If a landfill and a drag strip are "structures" because of their engineered features, and if a golf course is a "structure" for income tax depreciation purposes and for municipal tax assessment purposes, then a golf course can certainly be a structure for cultural heritage purposes. While the statutory context of taxation is, of course, different from that of cultural heritage, the treatment of property features is the same. Tax

depreciation looks to the cost of man-made construction, not of natural land or garden landscapes, and s. 34 of the *OHA* looks to the demolition or removal of man-made construction, not of natural land or garden landscapes. The constructed features of a golf course are "structures" for *OHA* purposes just as they are for the other, analogous statutory purposes.

[43] In any case, it is empirically the case that creating a golf course requires structural work on the underlying land. Indeed, if there were no structural changes to be made to a property in order to turn it into a championship golf course, an owner would hardly need to hire Jack Nicklaus.

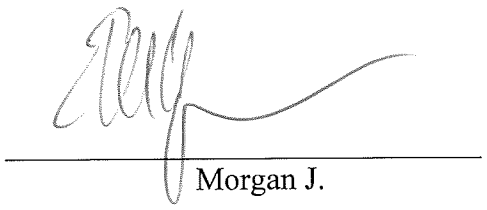
[44] It is evident that it is the structural aspects of Glen Abbey – the routing, shape and slope of the fairways and greens, the elevated mounds and berms for audience viewing, the creation of sand traps and other hazards, the underground irrigation and drainage engineering, the routing and installation of cart paths, etc. – that make it a championship course and, from the Town's point of view, a cultural heritage landscape in the first place. It is the architecture of the Golf Course, and not just some superficial, non-structural gardening or grooming of the landscape, that has made this Golf Course what it is.

IV. Disposition

[45] I find that the Glen Abbey Golf Course is both composed of structures and overall is a structure for the purposes of s. 34 of the *OHA*. Clublink has the right to make an application to the Town under s. 34(1) of the *OHA* for demolition and/or removal of buildings on Property and of the other structures of which the Golf Course is comprised. This includes the component parts of the Golf Course: tees, greens, hazards, fairways, cart paths, berms, embankments, and other related constructions and infrastructure.

[46] The Town is ordered to process Clublink's s. 34 application.

[47] The parties may make written submissions as to costs. I would ask that these include a Bill of Costs and accompanying submissions of no more than 3 pages.



October 25, 2018

Morgan J.

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REASONS FOR JUDGMENT

E.M. Morgan J.

Released: October 25, 2018