ONTARIO MUNICIPAL BOARD

IN THE MATTER OF subsection 51(39) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant:	Sustainable Brant
Subject:	Proposed Plan of Subdivision Conditions
Appellants:	City of Brantford, Ministry of Municipal Affairs and Housing
Subject:	Proposed Plan of Subdivision
Municipality:	County of Brant
OMB Case No.:	PL090536
OMB File No.:	PL090536

IN THE MATTER OF subsection 34 (19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant:	Sustainable Brant
Appellant:	City of Brantford
Appellant:	Ministry of Municipal Affairs and Housing
Subject:	By-law No. ZBA 34/07
Municipality:	County of Brant
OMB Case No.:	PL090536
OMB File No.:	PL090537

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant:	City of Brantford
Appellant:	Sustainable Brant
Appellant:	Hopewell Developments (Ontario) Inc.
Subject:	County of Brant Official Plan
Municipality:	County of Brant
OMB Case No.:	PL090536
OMB File No.:	PL121070

SUBMISSIONS OF SUSTAINABLE BRANT

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I. PART I: OVERVIEW

1. The position of the Appellant Sustainable Brant on the matters before the Board is that:

(a) there was no agreement, explicit or implicit, in connection with the 2000 Brant County Official Plan ("2000 Brant OP" or the "prior Brant OP") between the City of Brantford ("City") and the County of Brant ("County") to change the land use designation for the Schedule C lands (which include the subject lands owned by Hopewell Development (Ontario) Inc. ("Hopewell") from Agriculture to another land use designation; indeed the overwhelming weight of the evidence demonstrated that the subject lands remained designated Agriculture in the 2000 Brant OP;

(b) because there was no agreement, explicit or implicit, in 2000 between the City and the County, there was no legal authority for the County to unilaterally change the land use designation of the subject lands in the 2010 Brant County Official Plan ("2010 Brant OP" or the "new Brant OP") from Agriculture to Employment; having done so, the County violated the requirements of s. 474.12(2) of the *Municipal Act, 2001*;

(c) what the County should have done, if it wanted to proceed without agreement from the City, was to seek from the Legislative Assembly of Ontario an amendment to the *Municipal Act, 2001* removing the requirement for an agreement with the City with respect to the subject lands; having failed to do so, the 2010 Brant OP cannot stand in the face of the aforementioned provision of the *Municipal Act, 2001*;

(d) accordingly, the answer of the Appellant Sustainable Brant on the first issue before the Board is that the County must restore in the 2010 Brant OP, the requirement for agreement with the City and reach an agreement with the City, before the subject lands can be re-designated from Agriculture to some other land use designation not identified in s. 474.12 of the *Municipal Act, 2001*; and

(e) finally, with respect to the second issue before the Board neither the zoning by-law amendment 61-90 ("ZBLA") nor the plan of subdivision PS/07/SS ("POS") that are the subject of this appeal, complied with the 2000 Brant OP because its designation for the subject lands remained agricultural and the ZBLA and POS were approved by the County as if the agricultural designation for the subject lands no longer existed at the time of the approval of these instruments in 2009.

II. PART II: THE FACTS

A. Brantford-Brant Local Government Pilot Project Agreement

2. Section 474.12 of the *Municipal Act, 2001* has a lengthy history and to properly interpret this section it is necessary to go back three decades beginning with the 1980 Brantford-Brant Local Government Pilot Project Agreement ("1980 Agreement") between the City, the County, and the Township of Brantford ("Township").

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab A, *Brantford-Brant Local Government Pilot Project Agreement*.

3. The 1980 Agreement established the "Fringe Area", (an area generally referred to as the "Greenbelt" within which the subject lands are located), which was to be designated as "Restricted to Agriculture and Related Uses" in what was then the geographic area and territorial jurisdiction of the Township.

> **Reference**: **Exhibit 7A**, Witness Statement of Mark Dorfman, p. 000002, para. 16 and p. 000016; and Exhibit 9, Tab B, p. 53.

4. Under paragraph E-2 of the 1980 Agreement, the City, the Township, and the County agreed with respect to the Fringe Area that the Township's Official Plan ("Township OP") would be amended to reduce the areas designated for urban development. This was intended to reduce the amount of urban development for the Fringe Area so as to, among other things, preserve farmland.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab A, *Brantford-Brant Local Government Pilot Project Agreement*, para E-2, p. 0018.

5. Under paragraph E-9 of the 1980 Agreement, the City, the Township, and the County agreed that the Province would provide special controls for the Fringe Area so that an order in council and legislation would be required for any significant change to its land use designation.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab A, *Brantford-Brant Local Government Pilot Project Agreement*, para E-9, p. 0020.

6. Under paragraph E-10 of the 1980 Agreement, if the City, the Township, and the County agreed to a change in land use designation for any areas within the Fringe Area, including the area designated "Restricted to Agriculture and Related Uses", no special controls would be necessary and the normal amendment process (under the *Planning Act*) would apply.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab A, *Brantford-Brant Local Government Pilot Project Agreement*, para E-10, p. 0020.

7. Under paragraph H-3.3 of the 1980 Agreement, the City, the Township, and the County agreed to request the province to provide in legislation a principle that the area designated "Restricted to Agriculture and Related Uses" could not be used for any

purpose other than agriculture and purposes associated with agriculture, among other uses identified therein. Furthermore, the paragraph made it clear that these parties agreed that any amendments within the area designated "Restricted to Agriculture and Related Uses" that might be allowed by the province under paragraph E-9 should also conform to that principle, and that nothing in paragraph H-3.3 was intended to limit the powers of these municipalities to agree to changes as specified in paragraph E-10.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab A, *Brantford-Brant Local Government Pilot Project Agreement*, para H-3.3, p. 0024, and Map A, p. 0025.

8. What is clear from the 1980 Agreement, therefore, is that if there was no agreement, explicit or implicit, amongst the three municipalities for a change of land use designation from Agriculture to some other designation not identified in the area designated "Restricted to Agriculture and Related Uses", there could be no change in designation. Accordingly, as the subject lands are contained within this area they are subject to the same interpretation.

B. Brantford-Brant Annexation Act, 1980

9. The terms of the 1980 Agreement were subsequently codified in the *Brantford-Brant Annexation Act*, which was assented to in June 1980 ("1980 Act"). The purpose of the 1980 Act was to reflect the 1980 Agreement.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab B, *The Brantford-Brant Annexation Act*; and **Exhibit 10**, Witness Statement of Paul Stagl, p. 8.

10. Subsection 4(1) of the 1980 Act required the portions of the lands described in Schedule C to be designated by the Township OP "**and in subsequent amendments thereto**, so as to ensure the preservation of farmland, the provision of municipal water supply and the development of mineral resource extraction and for uses related to agriculture and mineral resource extraction" (emphasis added).

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab B, *The Brantford-Brant Annexation Act*, s. 4(1), p. 0030.

11. Subsection 4(13) of the 1980 Act stated that if an amendment were to be made to the Township OP for a land use designation other than that referred to in subsection 4(1), it had to be done with the agreement of the City, the Township, and the County.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab B, *The Brantford-Brant Annexation Act*, s. 4(13), p. 0032.

12. What is clear from the 1980 Act is that if there was no agreement, explicit or implicit, amongst the three municipalities for a change of land use designation from Agriculture to some other designation not identified in the area covered by Schedule C, there could be no change in designation. Accordingly, as the subject lands are contained within this area they are subject to the same interpretation.

13. Subsections 4(1) and 4(13) of the 1980 Act (later incorporated in s. 474.12 of the *Municipal Act, 2001*) are consistently reflected in all subsequent planning documents with the exception of the 2010 Brant OP, the ZBLA, and the POS.

C. Town of Brantford Official Plan

14. The Township OP, which came into effect on April 21, 1983 and May 25, 1984, reiterated the history of the 1980 Act in s. 3.1 under the heading "Background" and indicated that the goals and objectives of the Township OP included (1) implementing the 1980 Act, (2) maintaining the lands within the "Restricted to Agriculture and Related Uses Area" for agriculture, among other resource uses, and (3) recognizing the joint interest of the City, Township, and County regarding future amendments within this area, in accordance with s. 4(13) of the 1980 Act.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab J, Township of Brantford Planning Area Official Plan, pp. 0097-0098.

15. Furthermore, the Township OP also stipulated, pursuant to s. 4(13) of the 1980 Act, that land use designation amendments to the Township OP within the area designated as "Restricted to Agriculture and Related Uses" required the agreement of the City, the Township, and the County.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab J, Township of Brantford Planning Area Official Plan, p. 0100; and **Exhibit 10**, Witness Statement of Paul Stagl, p. 9.

16. What is clear from the Township OP is that if there was no agreement, explicit or implicit, amongst the three municipalities for a change of land use designation from Agriculture to some other designation not identified in the area covered by Schedule C there could be no change in designation. Accordingly, as the subject lands are contained within this area they are subject to the same interpretation.

D. Municipal Restructuring

17. Subsequently, on January 1, 1999, a municipal restructuring order of the Minister of Municipal Affairs came into effect that resulted in the Township and a number of other municipalities being amalgamated into the County.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab E, Order under the Municipal Act by the Minister of Municipal Affairs and Housing regarding municipal restructuring, pp. 0060, 0062; Tab F, p. 0073; and **Exhibit 10**, Witness Statement of Paul Stagl, p. 11.

E. The 2000 County of Brant Official Plan

18. The 2000 Brant OP came into effect in stages in 2001, 2002, and 2003.[1] One of its purposes was to ensure consistency with the 1980 Act that the 2000 Brant OP states "is the result of an agreement between the [City, Township, and County]".

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab L, Decision of the Ministry of Municipal Affairs and Housing, County of Brant Official Plan, September 5, 2001, para. 14.22.2, item 17, p. 0198; and **Exhibit 10**, Witness Statement of Paul Stagl, p. 13.

19. The 2000 Brant OP indicates that the Fringe Area is primarily designated as "Agricultural" except that the subject lands are within Industrial Special Policy Area 3 ("ISPA3"), which policy states that lands designated Heavy Industrial on "Schedule "A" and noted with the number 3 "are to be considered to be in an **Agricultural** designation **until** such time as appropriate **agreements** can be **reached with** the **City** of Brantford regarding servicing and design. **Heavy Industrial designation** and the appropriate policies of this Plan **would apply subject to reaching** an **agreement with** the **City** and obtaining a Zoning By-law Amendment" (emphasis added). ISPA3 in the 2000 Brant OP came into effect on September 5, 2001.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab L, Decision of the Ministry of Municipal Affairs and Housing, County of Brant Official Plan, September 5, 2001, pp. 0178, 0217.

20. What is clear from the 2000 Brant OP is that if there was no agreement, explicit or implicit, between the City and the County for a change of land use designation from Agriculture to some other designation not identified in the area covered by Schedule A lands marked with the number 3 under ISPA3 (Schedule C under 1980 Act) there could be no change in designation. Accordingly, as the subject lands are contained within this area they are subject to the same interpretation.

F. Municipal Act, 2001

21. The *Municipal Act, 2001*, which came into force on January 1, 2003, repealed the 1980 Act. However, the *Municipal Act, 2001*, by virtue of s. 474.12(1) and (2), incorporated the earlier requirements of the 1980 Act in so far as they related to Schedule C lands.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman**,** Tab I, *Municipal Statute Law Amendment Act*, S.O. 2002, c. 17, s. 7, Royal Assent, November 26, 2002, p. 0087; and Tab H, *Municipal Act*, 2001, s. 474.12(1)(2), p. 0086.

[1] The 2000 Brant OP is sometimes referred to in Mr. Dorfman's witness statement (Exhibit 7A), as the 2003 County of Brant Official Plan, due to the fact that it was approved in stages from the 2001-2003 period.

22. Subsections 474.12(1) and (2) were incorporated into the *Municipal Act, 2001* by Bill 177, the *Municipal Statute Law Amendment Act, 2002*, which received first reading on September 24, 2002, approximately one year after ISPA3 was adopted in the 2000 Brant OP.

> **Reference: Exhibit 13**, Bill 177, *Municipal Statute Law Amendment Act, 2002*; **Sustainable Brant Book of Authorities (SBBOA), Tab 1:** Bill 177, *Municipal Law Statute Law Amendment Act*, 2002, s. 91; **Exhibit 9**, List of Documents of Mark Dorfman, Tab I, *Municipal Statute Law Amendment Act*, S.O. 2002, c. 17, s. 7, Royal Assent, November 26, 2002, p. 0087.

23. Subsection 474.12(1) of the *Municipal Act, 2001* provides that the part of the County described in Schedule C of the 1980 Act "shall be designated by the County in its official plan, and in subsequent amendments thereto, so as to ensure the preservation of farmland, the provision of a municipal water supply and the development of mineral resources extraction and uses related to agriculture and mineral resource extraction". Subsection 474.12(2) provides an exception to subsection (1) by allowing the County to amend its official plan "for any land use designation other than those referred to in subsection (1) if the City…and the County…agree to the proposed land use designations".

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab H, *Municipal Act*, 2001, s. 474.12(1)(2), p. 0086.

24 What is clear from the *Municipal Act, 2001* is that if there was no agreement, explicit or implicit, between the City and the County for a change of land use designation from Agriculture to some other designation not identified in the area covered by Schedule C there could be no change in designation. Accordingly, as the subject lands are contained within this area they are subject to the same interpretation.

G. The 2010 County of Brant Official Plan

25. The 2010 Brant OP was adopted by the County on September 7, 2010, with final approval coming from the province on August 10, 2012. The 2010 Brant OP does not refer to the 1980 Agreement, the 1980 Act, or subsections 474.12(1)(2) of the *Municipal Act, 2001*. The new Brant OP (1) re-designated the subject lands as Employment (in site specific policy areas 2 and 16), and (2) removed ISPA3 that had been in the 2000 Brant OP and its references to the subject lands being designated Agriculture and the need for an agreement with the City before a change from that land use designation.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab N, County of Brant Official Plan, Adopted September 7, 2010; and Tab R, Ministry of Municipal Affairs and Housing, County of Brant Official Plan Decision, August 10, 2012.

H. Appeals by Sustainable Brant

26. Sustainable Brant filed an appeal in connection with the 2010 Brant OP designation of the subject lands as Employment because of the failure of the new Brant OP to refer to any agreement with the City concurring in the land use designation change

from Agriculture as per s. 474.12 of the *Municipal Act, 2001*. Sustainable Brant also filed appeals concerning the ZBLA and the POS on the grounds that they did not conform to the 2000 Brant OP, in particular ISPA3.

> **Reference: Exhibit 6C**, Common Book of Documents of the City of Brantford and the County of Brant, Tab 34 (noted as Tab 35 in Exhibit Index), Sustainable Brant Notice of Appeal of County of Brant Official Plan, dated September 4, 2012; and **Exhibit 10**, Witness Statement of Paul Stagl, p. 3 (Sustainable Brant ZBLA and POS appeals filed June 8, 2009).

I. Summary

27. In summary, the facts in this case demonstrate that there is an unbroken line of agreements, Acts, and planning documents, consistently sanctioned and authorized by the province and/or the Legislative Assembly of Ontario stretching from 1980 to 2003 between or respecting initially three municipal governments (City, Township, and County), and after 2000 two municipal governments (City and County). What these agreements, Acts, and planning documents indicate is an unwavering commitment to the simple principle that if there was no agreement between the municipal governments for a change of land use designation from Agriculture to some other designation not identified in the geographic area covered by Schedule C, there could be no change in land use designation. Because the subject lands have consistently been identified as being included in this geographic area, they are subject to the same interpretation. What the facts also reveal is that the only documents that do not adhere to this simple principle are the 2010 Brant OP, the ZBLA, and the POS. Their unauthorized departure from this principle is what triggered the appeals by Sustainable Brant in this case.

III. PART III: THE ISSUES

28. The issues before the Board include:

- Does the [2010 Brant OP], as it applies to the subject lands, contravene s. 474.12 of the *Municipal Act* [Issue # 1(a)]? If so, what modifications, if any, are required to the [2010 Brant OP] so that it conforms to s. 474.12 [Issue # 1(b)]?

- Could the proposed zoning and subdivision of the subject lands be in conformity with the [prior Brant OP] [Issue # 2]?

IV. PART IV: ARGUMENT AND LAW

A. Issue #1(a): The New Official Plan of the County of Brant as it Applies to the Subject Lands Contravenes Section 474.12 of the Municipal Act

1. The New Official Plan of the County of Brant Impermissibly Changes the "Agriculture" Designation of the Subject Lands to Another Land Use Designation

29. The evidence for Sustainable Brant is that the 2010 Brant OP contravenes s. 474.12 of the *Municipal Act, 2001* because the planning document changes the land use designation of the subject lands from "Agriculture" to "Employment" without agreement from the City.

> **Reference: Exhibit 7A**, Witness Statement of Mark Dorfman, pp. 000003, 000013.

30. The evidence for Hopewell, on the other hand, suggests that s. 474.12 was not a matter for consideration in respect of the 2010 Brant OP because there had been no change in land use designation from the prior Brant OP. The Hopewell evidence suggests that the change from the agricultural land use designation occurred at the time of the 2000 Brant OP because the City and the County "had agreed to the prescribed change in land use designation with the approval of the 2000 Brant Official Plan that established the Schedule "A" 'Heavy Industrial' designation in place of the (former) Brantford Township 'Restricted to Agriculture and Related Use Area' designation".

> **Reference:** Testimony of Paul Stagl, Examination in Chief, December 4, 2014; and **Exhibit 10**, Witness Statement of Paul Stagl, p. 18, para 4.2.1.2(i) and (ii).

31. As noted in paragraph 18 above, one of the purposes of the 2000 Brant OP was to ensure that it was consistent with the 1980 Act. Therefore, under the 2000 Brant OP the Fringe Area remained primarily designated agricultural, but Schedule A designated the subject lands "Heavy Industrial" but subject to ISPA3 that stated:

> > "[ISPA3] applies to lands designated Heavy Industrial on Schedule "A", noted with the number 3 are to be considered to be in an Agricultural designation until such time as appropriate agreements can be reached with the City…regarding servicing and design. Heavy Industrial designation and the appropriate policies of this Plan would apply subject to reaching an agreement with the City and obtaining a Zoning By-law Amendment".

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab L, Decision of the Ministry of Municipal Affairs and Housing, County of Brant Official Plan, September 5, 2001, p. 0217.

32. Mr. Mark Dorfman, who was called as a witness by Sustainable Brant and was qualified by the Board to give opinion evidence on land use planning, testified that the 2000 Brant OP designated the Hopewell Industrial Plan lands (the subject lands) as "Heavy Industrial", but was explicit that the land was "really designated as

'Agricultural'", pursuant to ISPA3. Furthermore, the authority for allowing "Heavy Industrial" land uses without the need for further amendment to the official plan was contingent on the fulfillment of a condition precedent, namely an agreement with the City.

> **Reference**: **Exhibit 7A**, Witness Statement of Mark Dorfman, p. 000018.

33. Mr. Paul Stagl, who was called as a witness by Hopewell and was qualified by the Board to give opinion evidence on land use planning, testified that the designation of the subject lands as "Heavy Industrial constituted a change in land use designation, which received the agreement of the City…". Thus, according to Mr. Stagl, the requirements of subsection 474.12 of the *Municipal Act, 2001* were met in 2000.

> **Reference:** Testimony of Paul Stagl, Examination in Chief, December 4, 2014; and **Exhibit 10**, Witness Statement of Paul Stagl, p. 14, para 4 and pp. 18-19.

34. Sustainable Brant submits that the evidence of Mr. Stagl goes against the overall weight of evidence of two land use planners who testified before the Board and two other land use planners (one from the County and one from the province) who did not testify at the hearing but whose correspondence is in evidence and was adopted by Mr. Dorfman. Quite simply while the City and the County agreed to the wording for ISPA3, this cannot in any way be construed to mean that the City agreed, explicitly or implicitly, to a change of land use designation for the subject lands in the 2000 Brant OP.

> **Reference:** Testimony of Mark Dorfman, Examination in Chief, December 3, 2014.

35. Both Mr. Dorfman and Mr. Paul Moore, the latter who was called as a witness by the City and was qualified by the Board to give opinion evidence on land use planning, testified that in their expert opinion Schedule A of the 2000 Brant OP must be interpreted in the context of the relevant planning policies that give effect to the 2000 Brant OP. What this means is that Schedule A of the 2000 Brant OP has to be read (and indeed explicitly states that it is to be read) in conjunction with the other schedules and "the text of the [OP]" in order to determine the land use designation.

> **Reference:** Testimony of Mark Dorfman, Examination in Chief, December 3, 2014; and Testimony of Paul Moore, Examination in Chief and Re-examination, December 3, 2014; **Exhibit 12D**, Schedule A of the 2000 Brant OP.

36. Accordingly, Schedule A, a map, cannot be decoupled from the 2000 Brant OP but rather needs to be interpreted in the context of the text and special policies that governed it. In this case, ISPA3 of the 2000 Brant OP clearly stated that the subject lands "are to be considered to be in an Agricultural designation until such time as appropriate agreements can be reached with the City…regarding servicing and design".

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab L, Decision of the Ministry of Municipal Affairs and Housing, County of Brant Official Plan, September 5, 2001, p. 0217.

37. To the evidence of Mr. Dorfman and Mr. Moore on how to interpret the land use designations in the 2000 Brant OP must be added the documentary evidence of two other land use planners. In a letter dated September 10, 2008 by Mr. Scott Oliver, Team Lead – Planning, Ministry of Municipal Affairs and Housing ("MMAH"), he advised Mr. David Johnston, Director of Development Services for the County that based on the policies in the 2000 Brant OP, the subject lands were still designated "Agricultural". In a memorandum from Mr. Johnston on January 15, 2009, he advised the County Planning Advisory Committee of the same thing.

> **Reference: Exhibit 5**, Document Brief of the Corporation of the City Brantford, Tab 4, Letter from Mr. Scott Oliver, MMAH to Mr. David Johnston, County Director of Development Services, September 10, 2008, p. 1, para 5; **Exhibit 6C**, Common Book of Documents of the City of Brantford and the County of Brant, Tab 11, County of Brant report No. PA-9-03 from David Johnston to the Chairman and Members of the Planning Advisory Committee, January 15, 2009, p. 15.

38. Therefore, roughly 8-9 years after Mr. Stagl alleges that the 2000 Brant OP changed the land use designation of the subject lands from Agriculture to Heavy Industrial, senior land use planners at the province and the County, respectively, were saying otherwise. Accordingly, Sustainable Brant submits that the overwhelming weight of the evidence suggests that a proper interpretation of Schedule A of the 2000 Brant OP showed the subject lands in fact remained within an agricultural designation.

2. There Was No Agreement Between the City of Brantford and the County of Brant Regarding a Change in Land Use Designation

39. Section 474.12 of the *Municipal Act, 2001* reflected a continuation of the purposes of the 1980 Act to ensure a land use control and land use designation amendment process for lands in the Schedule C Fringe Area, including the subject lands. The intent of the wording was to designate the Schedule C area so as to (1) ensure the preservation of farmland, and (2) require that an amendment to that agricultural designation first be agreed to by the City and the County.

> **Reference: Exhibit 9**, List of Documents of Mark Dorfman, Tab H, *Municipal Act*, 2001, s. 474.12(1)(2), p. 0086; **Exhibit 10**, Witness Statement of Paul Stagl, pp. 11-12.

40. Therefore, Sustainable Brant submits that on a plain reading of s. 474.12(2) it is clear that (1) there has to be an agreement with the City if there is to be a change in land use designation from agricultural to another land use designation not identified in subsection 474.12(1) of the *Municipal Act, 2001*, and (2) there is no evidence before the Board of any such agreement.

41. The evidence of Mr. Stagl, on the other hand, is that the County complied with s. 474.12 in amending the 2010 Brant OP because the County and the City "had agreed to the land use designation change with the approval of the [2000 Brant OP] and s. 474.12(2) does not require agreements for subsequent amendments".

> **Reference: Exhibit 10**, Witness Statement of Paul Stagl, p. 17, para 2.

42. In response, Sustainable Brant submits that the overwhelming weight of the evidence does not support Mr. Stagl's contention that there was an agreement (or acquiescence by the City amounting to an agreement) for the following reasons:

(a) Both Mr. Moore, for the City, and Mr. Dorfman, for Sustainable Brant, testified that ISPA3 in the 2000 Brant OP still designated the subject lands Agriculture and the Heavy Industrial designation was not to apply to these lands until there was an agreement between the City and the County, which agreement did not occur;

> **Reference:** Testimony of Mr. Paul Moore, Examination in Chief, December 3, 2014; **Exhibit 7A**, Witness Statement of Mark Dorfman, p. 000003; Testimony of Mark Dorfman, Examination in Chief, December 3, 2014.

(b) The testimony of both Mr. Moore and Mr. Dorfman regarding the lack of any agreement between the City and the County concerning a change in land use designation of the subject lands is corroborated by documentary evidence from Mr. Oliver (MMAH) and Mr. Johnston (County);

> **Reference: Exhibit 5**, Document Brief of the Corporation of the City Brantford, Tab 4, Letter from Mr. Scott Oliver, MMAH to Mr. David Johnston, County Director of Development Services, September 10, 2008, p. 1, para 5; **Exhibit 6C**, Common Book of Documents of the City of Brantford and the County of Brant, Tab 11, County of Brant report No. PA-9-03 from David Johnston to the Chairman and Members of the Planning Advisory Committee, January 15, 2009, p. 15.

(c) Mr. Stagl himself admitted under cross-examination by the City that he was unaware of any agreement having been signed by the City and the County in relation to the subject lands;

> **Reference:** Testimony of Paul Stagl, Cross-examination by Counsel for the City, December 4, 2014.

(d) The actual amendments to the *Municipal Act, 2001* that placed s. 474.12 in that law were introduced in the Legislative Assembly of Ontario in September 2002 one year after the 2000 Brant OP was approved by MMAH in September 2001. When asked during cross-examination why, if there was an agreement between the City and the County to change the land use designation from Agriculture in a document approved in September 2001 would the legislature need to enact s. 474.12 one year later, Mr. Stagl testified that he did not know. Sustainable Brant submits that the only logical inference to be drawn is that there was no agreement and the legislature was simply maintaining the status quo unless an agreement was reached;

> **Reference:** Testimony of Paul Stagl, Cross-examination by Counsel for Sustainable Brant, December 4, 2014; **Exhibit 13**, Bill 177, *Municipal Statute*

> *Law Amendment Act, 2002*; **SBBOA, Tab 1:** Bill 177, *Municipal Law Statute Law Amendment Act*, 2002, s. 91; **Exhibit 9**, List of Documents of Mark Dorfman, Tab I, *Municipal Statute Law Amendment Act*, S.O. 2002, c. 17, s. 7, Royal Assent, November 26, 2002, p. 0087.

(e) The County elected not to call any witnesses at the hearing, including particularly Mr. Johnston, who had prepared a report for the County Planning Advisory Committee in 2009 that was consistent with the interpretation of Mr. Dorfman and Mr. Moore that no agreement had been reached by the City and the County in respect of the matters addressed in ISPA3 of the 2000 Brant OP, which report was referred to by Mr. Dorfman during the latter's examination in chief on December 3, 2014; and

> **Exhibit 6C**, Common Book of Documents of the City of Brantford and the County of Brant, Tab 11, County of Brant report No. PA-9-03 from David Johnston to the Chairman and Members of the Planning Advisory Committee, January 15, 2009, pp. 1, 4, 5, 6, 8, 9, 10, 15.

(f) There is no evidence from the County that it had entered into an agreement with the City, sought to enter into an agreement with the City, or that the City otherwise acquiesced in the interpretation of the IPSA3 proffered by Mr. Stagl in this hearing about the existence of an agreement.

43. The term "agreement" is defined in *Black's Law Dictionary* as: "1. A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. 2. The parties actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance".

> **Reference: SBBOA, Tab 2:** Bryan A. Garner, *Black's Law Dictionary*, 10th ed (Minnesota: Thomson Reuters, 2014) at 81.

44. Sustainable Brant submits that there is no evidence that there was an "agreement" between the City and the County as the term is legally defined or colloquially understood. There is no evidence of any action, explicit or implicit, by the City and the County that can reasonably be interpreted to constitute a manifestation of mutual consent to a change in the land use designation of the subject lands from agricultural to another land use designation.

45. Sustainable Brant submits further that there was a preponderance of evidence at the hearing, including *viva voce* evidence from two planning experts, corroborated by documentary evidence from the planning staff of the County and the MMAH that the subject lands remained in an agricultural designation after adoption by the County and approval by the province of the 2000 Brant OP. Furthermore, Sustainable Brant submits that there is not a scintilla of evidence of an agreement between the County and the City regarding a change in land use designation of the subject lands from agricultural to

another land use. Accordingly, Sustainable Brant submits that the change in the designation of the subject lands from "Agriculture" to "Employment" under the 2010 Brant OP contravenes s. 474.12 of the *Municipal Act, 2001*.

3. The Thirty Plus Years of Agreements, Acts, and Official Plans Leading to the Municipal Act, 2001 and Activities Since Constitute Neither a Freeze on, Veto Over, nor Extra-jurisdictional Control of, the Subject Lands

46. The thirty plus years of agreements, Acts, and official plans leading up to s. 474.12 of the *Municipal Act, 2001* and events since do not constitute a freeze on, veto over, or extra-jurisdictional control of, the subject lands. Rather s. 474.12 expresses provincial policy that has been applied consistently over the years in order to reconcile the dynamic between the City and the County. That policy is that the lands identified as Schedule C lands are to remain agricultural unless agreement is reached by the City and the County for a land use designation not otherwise reflected in s. 474.12.

47. If there had been an agreement reached to change that status quo in the 2000 Brant OP, the legislature would not have had to enact s. 474.12, which came into force in 2003. That such an agreement was not reached underscores why the 2010 Brant OP contravenes s. 474.12.

48. Nonetheless, both Mr. Moore and Mr. Dorfman set out what, from a planning perspective, the City and the County could do to achieve an agreement whether it is with respect to agreeing to extend services beyond City boundaries, or otherwise.

> **Reference:** Testimony of Paul Moore, Responding to Board Questions following Examination in Chief, December 3, 2014; and Testimony of Mark Dorfman, Examination in Chief, December 3, 2014 and Cross-examination, December 4, 2014.

49. Failing the reaching of an agreement, the City or the County could seek to amend provincial policy by asking the legislature to amend the *Municipal Act, 2001* by modifying or repealing s. 474.12. What is not open to the County is to unilaterally amend the 2010 Brant OP to eliminate what it perceives as an obstacle, but was in fact specifically enacted in the *Municipal Act, 2001* to reconcile differences between the City and the County respecting protection of agricultural land in the face of growth pressures.

B. Issue#1(b): Modifications Necessary to the New Official Plan of the County of Brant so That it Conforms to Section 474.12 of the Municipal Act

1. The New Official Plan Needs to be Modified to Reinstate the Previous Requirements of Industrial Special Policy Area 3 from the 2000 County of Brant Official Plan

50. The 2010 Brant OP designates the subject lands as "Employment" without reference to the need for any agreement with the City. It has also removed the Agriculture designation that had been in place in the 2000 Brant OP and which was designed to only be removed by agreement with the City.

51. Sustainable Brant submits that the 2010 Brant OP clearly contravenes subsection 474.12 (1) and (2) of the *Municipal Act, 2001*. Accordingly, to ensure compliance with that Act, the 2010 Brant OP should be amended to re-instate the requirements from the prior Brant OP of (1) designating the subject lands agricultural, and (2) requiring an agreement with the City before such designation could be changed to one not otherwise reflected in s. 474.12(1).

C. Issue # 2: The 2009 Zoning and Subdivision Approvals for the Subject Lands Were Not in Conformity With the 2000 Brant Official Plan

1. Sustainable Brant Adopts the Position of the City of Brantford on Issue # 2

52. With respect to Issue # 2, Sustainable Brant adopts the position of the City.

V. PART V: ORDER REQUESTED

53. With respect to Issue # 1, Sustainable Brant respectfully requests that the Board make a finding that the 2010 Brant OP as it applies to the subject lands contravenes s. 474.12 of the *Municipal Act, 2001*.

54. With respect to Issue # 2, Sustainable Brant respectfully requests that the Board make a finding that the ZBLA and the POS for the subject lands contravene ss. 24(1) and 51(24(c), respectively of the *Planning Act* as they did not conform to the 2000 Brant OP.

55. Should the Board make the above two findings, Sustainable Brant would request that the Board make a further finding that there is no basis for proceeding with Phase 2 of the hearing, and order that the appeals of Sustainable Brant be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 22nd day of December, 2014.

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