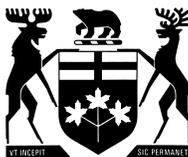


ISSUE DATE:

**Apr. 22, 2008**



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL060416

Loblaw Properties Ltd., Friends of Saugeen Shores *et al* have appealed to the Ontario Municipal Board under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the County of Bruce to approve Proposed Amendment No. 13 to the Official Plan for the Town of Saugeen Shores (SSOPA #13-06.44)

OMB File No. O060096

Loblaw Properties Ltd., Friends of Saugeen Shores *et al* have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 44-2006 of the Town of Saugeen Shores

OMB File No. R060096

Loblaw Properties Ltd., Friends of Saugeen Shores *et al* have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 75-2006 of the Town of Saugeen Shores

OMB File No. R060172

AND in the matter of a Motion brought by Friends of Saugeen Shores to reopen the hearing of the merits for the purpose of adducing fresh evidence.

## **APPEARANCES:**

### **Parties**

Town of Saugeen Shores

Shoreline Shopping Centres Limited

Friends of Saugeen Shores

Loblaw Properties Limited

### **Counsel\***

G Magwood\*

D. Wood\* and S. Mahadevan\*

E. Gillespie\*

D. Wood\*, as agent for S. Zakem\*

## **DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE BOARD**

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Shoreline Shopping Centres Limited [Shoreline] has a 6.9 hectare site on the east side of Highway 21 in the south end of the former Town of Port Elgin, now the Town of Saugeen Shores. Highway 21 is known as Goderich Street. Shoreline intends to develop the site for commercial retail uses that include regional retail uses. The site

is generally rectangular except that the northwest corner now houses a restaurant and is not part of the subject lands. The western boundary of the site is Highway 21. To the north of the site are the restaurant and several houses. To the south of the site is the Saugeen Acres Mobile Home Park with some commercial uses on the Highway 21 frontage. The eastern boundary of the site is the Saugeen Rail Trail. The Trail is a converted CN Rail line that is part of a relatively new network of recreational rail trails in Bruce County that is still under development.

The western portion of the site fronting on Highway 21 is designated Highway Commercial. The eastern portion of the site fronting on the Rail Trail is designated Residential. The zoning by-law divides the site similarly and adds an area zoned for Planned Development. The matters before the Board would redesignate and rezone the site to permit a commercial retail development on the entire site.

The matters under appeal in this proceeding are all site specific. Site specific Official Plan Amendment 13 and Zoning By-law 44-2006 to permit major commercial retail uses across the entire site were filed, and subsequently approved, prior to the adoption of a new Town of Saugeen Shores Official Plan and Comprehensive Zoning By-law 75-2006. These new planning instruments incorporated the site specific policies of OPA 13 and the site specific provisions of By-law 44-2006. Those portions of the new Official Plan and Comprehensive Zoning By-law 75-2006 that have been appealed are site specific references that deal with the subject lands.

### **Status of Parties and Appeals**

Douglas Harrison, Margaret Grottenthaler, Barb Steep, Chuck LaWand, David Steep, Lyn Ogilvy, Bob Steep, Marian Steep, Anne McNeilly, Paul Steep, John Sifton and Trish Wilson [Harrison et al.] are the only interests who have appealed the site specific sections of the Town's new Official Plan. Specifically, they had appealed section 4.9.3 to this Board. Just prior to the start of the hearing of the merits, the Board was advised by counsel for Harrison et al. that Harrison et al. had entered Into Minutes of Settlement with Shoreline, were withdrawing their appeals and withdrawing from these proceedings. At the request of Harrison et al., Shoreline has filed these Minutes of Settlement as Exhibit 14 in this proceeding. Having regard to s.17(39) of the *Planning Act*, all appeals against section 4.9.3 of the new Town's new Official Plan having been

withdrawn prior to the start of the hearing merits, and the time for filing appeals having expired, that section of the Plan is now in full force and effect.

The Concerned Women's Coalition, The Owen Sound Cycling Club and The Cycle Ontario Alliance have withdrawn their appeals as noted in Exhibit 62 as filed in this proceeding.

Loblaw Properties Limited [Loblaw] and Shoreline have reached a settlement, subject to the Board approving certain amendments to the proposed zoning by-laws before the Board. Loblaw has withdrawn its appeal of OPA 13 and did not attend the hearing of the merits or call a case in this proceeding.

### **Issues Remaining Before the Board**

The settlement and withdrawal of Harrison et al. had the effect of removing seven issues from the Issue List leaving nine issues to be decided in this hearing. The Issue List was finalized as a result of a prehearing before a panel of the Board differently constituted. While seven of the original sixteen issues on the Issue List are clearly marked as having been placed there by Harrison et al., the remaining nine issues do not indicate which Party or Parties placed each one on the Issue List.

The Town and Shoreline appear in support of the proposals before the Board; Friends of Saugeen Shores [FOSS] is the only Party to call a case in opposition. Four interests originally granted Party status had that status converted to Participant status at a prehearing conference. These interests are: Robert Pearce, Ronald G. McIntosh, Anne Judd, and Charles Hazell. Of the four, only Ms Judd addressed the Board.

The remaining nine issues before the Board may be grouped under the following categories:

1. safety;
2. traffic and transportation;
3. water and waste; and
4. weight to be given to the new Official Plan.

The only appeals filed against the site specific sections of the new Official Plan were filed by Harrison et al., and withdrawn once settlement was reached with Shoreline. No other part of the Town's new Official Plan is before the Board in this proceeding. FOSS appealed several other sections of the new Official Plan but failed to pursue the appeals or appear at Board proceedings to hear those appeals. As a result, a panel of the Board, differently constituted, deemed the appeals abandoned. Remaining before the Board in this proceeding, then, is OPA 13, site specific By-law 44-2006 and the site specific provisions of Comprehensive By-law 75-2006.

Shoreline has submitted a concept plan, including a conceptual landscape plan, to assist the Board and all parties to understand the approximate relationship of buildings, parking areas, pedestrian areas, and landscaping for the site. While reference was made to the concept plan, there is no site plan before the Board.

Settlement with Harrison et al. requires, among other things, that landscaped buffering be introduced between the subject lands and their residential properties. The landscaping buffer is to enhance privacy for adjacent residents, both in their homes and in their rear yard amenity spaces, and to emphasize separation between the residents' properties and the anticipated commercial retail development of the subject lands.

The Board heard from four qualified land use planners. Ms Sylvia Rifalski-Misch and Ms Jean Monteith appeared for the Town. Ms Monteith was involved in the development of the new Official Plan and has particular knowledge of the Rail Trails Master Plan. Both Ms Monteith and Ms Rifalski-Misch are full members of the Canadian Institute of Planners and Registered Professional Planners in Ontario. Mr. Eric Saulesleja appeared for Shoreline and, at the time of the hearing, was a Provisional member of the Canadian Institute of Planners and the Ontario Professional Planners Institute. Mr. Steven Rowe appeared for FOSS. Mr. Rowe is also a full member of the Canadian Institute of Planners and a Registered Professional Planner in Ontario.

Evidence on safety formed the preponderance of evidence called by FOSS. Of the eleven witnesses called by FOSS, nine witnesses were tendered to give evidence on safety. Mr. Rowe's planning opinion was primarily confined to safety and the interpretation of "safety" in several planning instruments. The Board also heard from a safety expert tendered by Shoreline.

The Board also heard from witnesses regarding concerns of First Nations women and from a hydrogeologist and two transportation experts.

### **County of Bruce Official Plan**

The subject site is within the urban settlement area of the former Town of Port Elgin. The Bruce County Official Plan designates this area as Primary Urban Community. At section 5.2.2, the Plan states:

“...It is the policy of County Council to encourage and strengthen the role of Primary Urban Communities as regional service centres within the County. These communities will accommodate the largest concentration and the widest range of residential, tourism, economic and social services and facilities... It is the policy of County Council that higher order commercial facilities such as shopping centres and department stores serving residents and visitors in the County will locate in the Primary Urban Communities...”

The County Plan encourages the development of recreational trails and, in section 4.6.5 dealing with rail trails, the County encourages the conversion of railway rights-of-way when no longer required for transportation purposes. The section goes on to state:

“...Consideration of the compatibility of the proposed trails and the adjacent uses should be included as part of any conversion...”

The Town undertook a major exercise to develop its Parks and Trails Master Plan, and the rail trail itself forms the eastern boundary of the subject site. There is no evidence before the Board to suggest that a Highway Commercial designation that contemplates a major commercial retail use is incompatible with an adjacent rail trail.

No amendment to the Bruce County Official Plan is necessary for the designation of the entire subject site for Highway Commercial use.

The Board finds that OPA 13 conforms to the Bruce County Official Plan.

### **Town of Saugeen Shores Old Official Plan**

In support of the application for OPA 13 and By-law 44-2006, Shoreline submitted:

- a planning analysis,
- a market demand and impact analysis,
- a functional servicing report,
- a transportation study, and
- an archaeological assessment to Ministry of Culture requirements for stages 1 and 2 of such assessments.

The proposed zoning by-law amendment contained in By-law 44-2006 establishes detailed requirements and performance standards to implement OPA 13 and, in that regard, conforms to OPA 13. The changes to the proposed by-law, found at Tab F of Exhibit 59 as filed in this proceeding, result primarily from the settlement between Shoreline and Loblaw and remain within the ambit of OPA 13.

The applications and supporting documentation were submitted to and reviewed by, among others, the Ministry of Municipal Affairs and Housing, the Ministry of Culture, the Saugeen Valley Conservation Authority, applicable school boards, the applicable power utility, and Town and County staff. The County sought a minor change dealing with the size of retail stores which resulted in slightly amended applications. There were no agency objections to the proposed use and no major concerns identified. The public was advised of the amended applications and a public meeting held. The Town adopted OPA 13 and site specific by-law 44-2006. Bruce County is the approval authority for local official plans; the County approved OPA 13 to the Town's old Official Plan.

The Town's old Official Plan echoes and implements the County Official Plan objective to "strengthen the role of Primary Urban Communities as regional service centres". The Town's Plan emphasizes the role of Port Elgin as one of two central commercial service areas in the Town. At section 3.1.2(d), the Plan specifically calls for the provision of "...opportunities to develop space-extensive commercial... uses that... cannot reasonably be located in a downtown area...". Policies for Highway Commercial development along Highway 21 reiterate the Town's intention to locate space extensive commercial uses here.

While encouraging space-extensive commercial uses to locate in the Highway Commercial areas along Highway 21, the Town is also clear in its intention to reduce the impact of such developments on adjacent uses. Section 3.2.5.4 of the Plan sets this out in considerable detail. This section includes the following policies:

“...reducing access points by combining exits and entrances...To achieve this similar and compatible Highway Commercial uses should be grouped...

Landscaping shall be provided between any Highway Commercial use or parking areas and the adjacent road.

The effects of Highway Commercial uses on adjacent Residential Areas shall be minimized by:

- a) Providing buffer strips and/or screening between such uses;
- b) The arrangement of lighting facilities ... to minimize impact to the Residential Area ...”

The Plan also emphasizes the desirability of “...user-friendly bicycle and pedestrian...” access systems to link commercial and residential areas and the two settlement areas in the Town.

The County and the Town have both been actively engaged in developing a rail trail system through the conversion and renovation of an abandoned CN Rail line. Not all of the trail is open for public use and not all of the trail has been improved. Part of the rail trail forms the eastern boundary of the subject lands. This section of the rail trail has been improved with a new surface appropriate for both cyclists and pedestrians and is open for public, non-motorized use.

The Town seeks, and Shoreline agrees to, the establishment of an appropriate connection to the rail trail from the subject lands that enhances safe access for pedestrians and cyclists and becomes a trail head access location. The details of the access link between the subject site and the rail trail are matters for review in the context of site plan control.

FOSS opposes matters being left to the site plan stage. Mr. Rowe was candid in disclosing that a concern of FOSS is that site plan matters are between the municipality and the proponent and that if FOSS disputed a site plan matter it had no ability to appeal the matter to the Board.

Efforts to renovate and improve the rail trail are only one aspect of the Town's efforts to secure safe cycling routes and pedestrian links. Highway 21 is a major arterial as it runs through the Town of Saugeen Shores. High rates of speed along with vehicular traffic that includes trucks make the highway generally unsuitable for cycling. The Town has chosen to focus its attention instead on a combination of improvements to the rail trail, the extension of secondary and collector roads whose traffic characteristics can more easily accommodate cyclists, and the expansion, as appropriate, of sidewalks.

The Board finds that OPA 13 maintains the intent, and conforms to the policy directions, of the Town's old Official Plan.

### **Town of Saugeen Shores New Official Plan**

Coincident with the processing of OPA 13 and site specific by-law 44-2006 the Town was engaged in a process to develop a new Official Plan and Comprehensive Zoning By-law. The County approved the new Official Plan with some slight modifications. As noted above, that Plan incorporated the site specific policies of OPA 13. Similarly, the new Comprehensive Zoning By-law incorporated the site specific provisions of by-law 44-2006.

Issue #6 on the Issue List asks the following:

“Should weight be given to the new Official Plan in relation to the appeals of OPA 13 and By-law 44-2006 and, if so, how much?”

The Official Plan in effect at the time of application is the old Official Plan. When a new Official Plan is being developed, and is ultimately adopted almost coincident with the review and adoption of an amendment to the old Plan, the Board considers the policy direction of that new Plan when assessing an amendment to the old Plan. The new Official Plan is relevant but not determinative. In that regard, some weight should be given to the new Official Plan.

In this case, the new Official Plan incorporates the site specific provisions of OPA 13. In addition, the new Official Plan carries forward the key policy directions of the old

Official Plan cited above. Highway Commercial areas should accommodate space-extensive commercial retail uses. Access points should be limited and uses grouped together. User-friendly bicycle and pedestrian connections should be established. Landscaping and screening should be used to separate and buffer adjacent uses, especially residential uses, from the impact of commercial retail uses.

The concept plan for development of the subject lands shows a possible approach to the siting of buildings, landscaping and buffering, pedestrian walkways, and connection to the rail trail. Specific details on these matters, including "...features to promote public safety...", are specifically referred to the site plan stage through site plan control outlined in section 4.4.2 of the new Official Plan. No site plan is before the Board. The concept plan is just that: a concept plan and not a site plan. This requirement of the new Official Plan was not appealed by FOSS and is in full force and effect.

The Board finds that OPA 13 is consistent with the policy direction of the new Official Plan. If the new Official Plan had been determinative in this matter, the Board further finds that OPA 13 would conform to the new Official Plan.

### **Zoning By-law Amendments**

The site specific sections of the new Comprehensive zoning by-law, By-law 75-2006, incorporate the provisions of By-law 44-2006. Changes proposed to By-law 44-2006, found at Tab F of Exhibit 59, are also reflected in changes proposed to By-law 75-2006, found at Tab G of Exhibit 59. The changes proposed to both of these by-laws result primarily from the settlement between Shoreline and Loblaw. The Board finds that the changes to By-law 44-2006 conform to OPA 13; the changes to By-law 75-2006 conform to the new Official Plan.

### **Safety**

Three questions were put to the Board regarding safety in the Issue List. The first question is:

Should OPA 13 not be approved and By-law 44-2006 be repealed because the development concept shown on the

Shoreline Shopping Centres Site Plan dated April 4, 2006 is unsafe in terms of personal safety in this location? [It is understood that this issue is not raising a traffic safety issue.]

The concept plan referred to in this question was modified by the requirements of the settlement between Shoreline and Harrison et al. and filed as Exhibit 24 in this proceeding [plan SD-045]. The Board extended this issue to encompass Exhibit 24.

As detailed as a concept plan may be, and as closely as it may appear to resemble a site plan, it is not a site plan. There is no site plan application before the Board. The subject lands are subject to site plan control. The final details of the site plan will be reviewed in depth during the course of site plan review by the Town. The Town's Official Plan is clear and specific in directing that matters of design for safety, among others, are to be included in the site plan and form part of site plan control. This requirement of the Official Plan is not under appeal. No evidence was led to persuade the Board that appropriate public officials charged with the responsibility of reviewing the site plan in the context of this requirement for site plan control would fail in their professional duty or otherwise betray the public interest and thereby place the public at risk with the development of this site.

The phrasing of the issue itself invites an assessment of whether or not the concept plan is safe. The second and third questions regarding safety, phrased in the alternative, suggest the study process to be followed to assess safety in the design of the concept plan.

The second and third questions regarding safety were:

In the alternative, should a Crime Prevention Through Environmental Design [CPTED] audit be required to be carried out as part of the implementation of development on the site?

Should the Board retain jurisdiction of the matter in regard to the audit?

A Crime Prevention Through Environmental Design [CPTED] audit has been done for this site.

**Evidence of Emanuel Jech:**

Emanuel Jech is a Certified Level Two CPTED Practitioner and a Certified Protection Professional. No other witness appearing before the Board in this proceeding has achieved this high level of certification. Although one other witness holds CPTED certification, she has not achieved Level Two CPTED Practitioner certification. Mr. Jech has conducted 18 retail-related safety and security assignments and 10 assignments that were entirely retail. No other witness appearing before the Board had similar extensive and direct experience with retail facilities.

Mr. Jech was retained by Shoreline to carry out a CPTED assessment of the subject site and proposed development and, in doing so, to consider concerns related to personal safety raised and identified by appellants. Mr. Jech was retained subsequent to the settling of the Issue List with the safety issues noted above. His witness statement and CPTED audit report were filed in accordance with the requirements of the Procedural Order.

In undertaking his CPTED assessment, Mr. Jech visited and examined the subject site on several occasions. He examined the initial concept plan for development as well as the concept plan filed as Exhibit 24, which was modified to reflect some of the settlements. In addition to the site itself, Mr. Jech considered the relationship of the site to its adjacent uses. For the rail trail, Mr. Jech made a point of examining it some 8 or 9 times, including walking and cycling the opened trail adjacent to and within the vicinity of the subject site. In addition, Mr. Jech also walked and cycled substantial additional sections of the opened trail that extend well to the south of the site and as far north as Southampton, the second urban settlement area in the Town. Certain unopened sections of the trail, including an old rail trestle bridge, were cited as being safety concerns appropriate for consideration in the context of the proposals before the Board. On this basis, Mr. Jech visited and examined these sections as well.

There are three recognized CPTED principles: natural surveillance, natural access control, and territorial reinforcement. Underlying all three is an assumption of proper maintenance. CPTED Ontario has added maintenance as a fourth concept to

emphasize its importance. For access control and territorial reinforcement, Mr. Jech pointed to the limited vehicular access to the site and the clear separation of vehicular and pedestrian areas. Full pedestrian, and by extension cyclist, access and egress is provided from Highway 21, with additional access and egress to the residential streets and neighbourhood on the north side of the site. Intended pedestrian and cyclist access and egress to the rail trail to the east serves the dual purpose of access control and territorial reinforcement for both the subject site and the rail trail at that point.

Natural surveillance, as the term itself implies, calls for design, layout and buffering that maximizes observation of the site. Mr. Jech was clear in his evidence that this was not an absolute that should trump all other considerations. If it were, there would be no privacy fencing, tall hedging, or other extensive planting to buffer and separate Highway Commercial uses from adjacent roadways and neighbouring non-commercial uses. Nor, by extension, would there be on site landscaping and planting that would include coniferous trees that would block sight lines or deciduous trees that might also interfere with sight lines but would provide some spatial delineation and enhance the pedestrian realm, especially in summer's heat.

In Mr. Jech's professional opinion, the reasonable expectations of users of a site – including those of users of adjacent sites – need to be considered and balanced. To that end, Mr. Jech notes that abutting residential neighbours have stated a strong desire for privacy and separation from the proposed commercial use to enhance enjoyment of rear yard amenity space. A desire for buffering and separation between Highway Commercial uses and adjacent non-commercial uses is also a requirement of the Town's Official Plan.

To assess whether it is reasonable to assume that this buffering and separation would create a condition of unacceptable risk to public or personal safety on the subject site, Mr. Jech considered several additional matters.

The intended purpose of the site is that of commercial retail. Legitimate users of the site will be a combination of those employed at or in support of the retail use and customers of the retail facilities. Those uses have defined hours of operation, with the natural surveillance that derives from activity.

Shoreline is proposing a development that includes both a Wal-Mart and a Canadian Tire. Mr. Jech considered five comparator sites: a large stand-alone grocery in Port Elgin since there is no Wal-Mart there now, Wal-Mart store sites in Goderich and Hanover, a Canadian Tire store site in Kincardine, and a combined Canadian Tire and Wal-Mart site in Strathroy. Police “calls for service” were examined for all sites. He testified that “calls for service” in retail facilities are generally not crimes against persons but are, rather, crimes against property. Having considered all of the foregoing, in Mr. Jech’s professional opinion there is no inherent safety issue with regard to site layout or any causal relationship between these types of development and crimes against persons.

Mr. Jech also considered the rail trail and its relationship to the subject site. The section of the rail trail adjacent to the subject site is clear, wide and has unobstructed views. Sections of the trail a bit further north are characterized by lush vegetation, some of which closes in on the trail. The vegetation serves to separate the trail from adjacent uses, which include residential uses.

Ms Monteith, one of the land use planners testifying in this proceeding, has had extensive experience in the Town of Saugeen Shores and recreational rail trail planning. In Ms Monteith’s professional opinion, the trail is intended for recreational use with an opportunity in this section of the trail to walk or cycle along a relatively quiet route that allows for some appreciation of trees, shrubs and natural vegetation. In Mr. Jech’s professional opinion, an improper application of the natural surveillance CPTED principle that failed to recognize and balance reasonable expectations and interests would result in the clear cutting and removal of great swaths of vegetation and trees from the rail trail.

**Need for Consultation and Challenge to the Adequacy of a CPTED audit:**

Mr. Jech’s analysis and conclusions were challenged by several witnesses called by FOSS. In the course of challenging the CPTED audit completed by Mr. Jech, FOSS witnesses began to challenge the adequacy of a CPTED audit as the appropriate process to assess safety of the concept plan. In particular, FOSS now asserts that the appropriate process is one that involves extensive consultation, including consultation with interests outside the Town of Saugeen Shores and residing on lands that are at

minimum some 14 kilometres from the subject site. The Board reviews the evidence tendered by witnesses for FOSS on matters related to the safety issues in the following sections.

**Evidence of Laura Robinson:**

The Board qualified Ms Robinson as an expert coach in cycling and Nordic skiing with a focus on safety. With Ms Robinson, as with several other FOSS witnesses, the Board cautioned that testimony must be relevant to the proceedings and bear upon the matters the Board must consider in dealing with OPA 13 and the zoning by-law amendments in this proceeding. Ms Robinson lives in the area and is personally very familiar with the rail trail. The Board understood that Ms Robinson would be focusing her evidence primarily on the safety of the rail trail and its relationship to the subject site and matters before the Board. While Ms Robinson knows of CPTED she is not a CPTED practitioner.

In her testimony, Ms Robinson expressed concerns about sight lines along the rail trail being obscured by vegetation but acknowledged that this was not the case for the section of the trail adjacent to the subject site. She testified that unauthorized motorized vehicles used sections of the rail trail reserved for pedestrians, cyclists, and skiers, and that this was dangerous. The Board finds that this is a question of sign and barrier maintenance and enforcement that is independent of the question of whether Highway Commercial use is appropriate on the subject site.

In her testimony Ms Robinson attempted to demonstrate that dangerous, threatening, and misogynistic behaviour characterized sections of the rail trail and that women and girls using the trail were at risk of assault. In this regard Ms Robinson introduced photographic evidence of graffiti and debris in and around the old rail trestle bridge that is well inside the unopened section of the trail and at some considerable distance from the subject site. She also introduced items of clothing found near the rail trail at various locations, suggesting that this might be taken as evidence of inappropriate sexual behaviour. She had no knowledge of how the clothing came to be there or under what circumstances it was discarded.

At the time of qualifying Ms Robinson to provide expert opinion evidence, the Board did not appreciate that Ms Robinson had appealed the matters before the Board

on behalf of the Concerned Women's Coalition, was a key organizer of the Coalition, that the Coalition was now a committee of FOSS, that Ms Robinson was a director of FOSS, that Ms Robinson had personally contacted nearly all of the FOSS witnesses, had briefed them on the issues as she saw them in persuading them to testify, and served as a key representative of FOSS in directing counsel for FOSS in this proceeding. The Board has no doubt that Ms Robinson has strong views and has expended a great deal of energy in pursuing certain issues. The Board finds, however, that Ms Robinson is not an independent expert. Her role in the Concerned Women's Coalition and FOSS has taken her from independent expert to advocate. As such, the Board further finds that her testimony is so coloured by her advocacy that the Board attaches no weight to her evidence.

Even if the Board were to discount her advocacy, taken as a whole the Board finds that Ms Robinson failed to establish a nexus between her concerns about the rail trail and the expansion of a land use already permitted on portions of the subject site.

The Board did not find Ms Robinson's testimony helpful in dealing with the specific matters before the Board.

**Evidence of Sarah Jones:**

Ms Jones appeared as a lay witness called by FOSS. She filed no initial witness statement but FOSS did file a reply witness statement from Ms Jones. The reply witness statement deals primarily with hearsay evidence regarding sexual assaults alleged to have occurred in or near a rail trail in the Parry Sound area, some four hours drive from the subject site. Ms Jones has not been tendered as an expert witness. While the testimony of all witnesses is expected to be relevant, the testimony of lay witnesses is limited to direct evidence. The Board finds first that evidence regarding a rail trail at such distance from the subject site is not relevant and second finds that the intended evidence is hearsay, unreliable, and therefore will not be admitted. The Board did permit Ms Jones to testify on her direct knowledge of the subject site and its relationship to the rail trail.

Ms Jones resides on the Cape Croker reserve and is a member of the Chippewas of Nawash First Nation. She decided to testify after having a conversation with Ms Robinson. She has been to Port Elgin approximately four times in the last four

years, the most recent being approximately nine months prior to her appearance at this hearing. She undertook no preparation and examined no witness statements, reports, studies or plans. She walked part of the Saugeen rail trail once, and that was on the morning of her testimony. She brought her eleven year old daughter with her and with Ms Robinson walked the trail from just south of the subject site through the unopened portion of the trail to the old rail trestle bridge. Notwithstanding her testimony that the bridge is unsafe, she encouraged her minor daughter to enter upon the bridge and bridge area and Ms Jones herself traversed the bridge. Ms Jones testified that she believes the trail and bridge are unsafe and referenced debris including a bottle of pills. Like Ms Robinson, Ms Jones had no knowledge of the origin of any of the debris or how it came to be where it was.

The Board finds Ms Jones's evidence not relevant to the matters before the Board. In deliberately exposing her minor child to conditions Ms Jones felt were dangerous, the Board further finds Ms Jones judgement questionable and evidence unreliable.

The Board attaches no weight to the evidence of Sarah Jones.

**Evidence of Margery Holman:**

Ms Holman was qualified to give expert opinion evidence on matters of personal safety and site design with a focus on recreation. While Ms Holman knows of CPTED she is not a CPTED practitioner. The Board understood that Ms Holman's evidence was intended to address the rail trail and its relationship to the subject site.

Ms Holman visited the site and rail trail once. She acknowledged in her evidence that rail trails are not part of her research or study and she has no particular knowledge of the trail beyond her one site visit, a review of materials forwarded to her on behalf of FOSS, and discussions with Ms Robinson. Her testimony focused on sections of the rail trail at some considerable distance from the subject site and emphasized especially the unopened sections of the rail trail and the abandoned trestle bridge. In referencing these sections Ms Holman cited ditches, vegetation, graffiti and debris and suggested they may demonstrate possible sexual assault of women, particularly in the unopened section near the trestle bridge. Not only did Ms Holman present no persuasive or reliable evidence that would enable the Board to reach such a conclusion, she

presented no persuasive or reliable evidence to suggest that there would be any clear nexus between such imputed sexual assaults and the extension of Highway Commercial uses across the subject site.

Ms Holman cited the proposed building on the eastern portion of the site as a barrier at the edge of the rail trail that would increase safety concerns. She acknowledged that there are high and dense hedges at the edge of the rail trail immediately to the south of the subject site that provide privacy and separation between the trail and the Saugeen Acres Mobile Home Park. She had no evidence of any assaults against women using the trail in this location but suggested that the hedges should be torn down. Ms Holman did not consider the Official Plan policies that specifically call for separation and buffering, including landscaping, or the reasonable expectation of privacy for the mobile home residents.

The Board did not find this evidence relevant and attaches no weight to the evidence of Margery Holman.

**Evidence of Narina Nagra:**

Ms Nagra is the Safety Director of the Metropolitan Action Committee on Violence Against Women and Children, more commonly known as METRAC. METRAC pioneered a safety audit process different from CPTED that has been used primarily to assess existing public, non-commercial facilities. The Toronto Transit System is a notable example. Ms Nagra was qualified to give expert opinion evidence on personal and community safety. The Board understood her evidence would focus on these aspects of the matters before the Board in this proceeding.

Ms Nagra was contacted by Ms Robinson to testify in this matter. Her witness statement was filed only in reply after the filing of Mr. Jech's witness statement. Ms Nagra acknowledged that she did not visit the site, had no knowledge of the community, and did not review any statistics related to crime on rail trails prior to filing her witness statement. Ms Nagra has no experience with a CPTED assessment or METRAC safety audit process that deals with either a rail trail or a commercial retail facility. Further, Ms Nagra acknowledged that she is unaware of any METRAC safety audit having been done on either a rail trail or a commercial retail facility. In forming the opinion in her witness statement, Ms Nagra testified that she drew on extensive discussions with Ms

Robinson, a review of the earlier concept plan, and on Mr. Jech's witness statement and CPTED assessment.

Ms Nagra acknowledged that she did not walk any part of the rail trail until 7:00 AM of the morning of her testimony. On the subject site itself, Ms Nagra opined that buildings nearer Highway 21 would block sight lines for part of the eastern sections of the site and that this would be problematic for those sections of the site; and further that the building at the eastern end of the site presented a danger to users of the rail trail by blocking a view of the rail trail from Highway 21. The subject site is rectangular with its short side having the frontage on Highway 21. It is very deep, extending a considerable distance to its eastern edge. The evidence before the Board is that the speed and volume of traffic of traffic on Highway 21, coupled with the considerable distance to the rail trail, makes it very difficult to see any activity on the rail trail at present.

Ms Nagra opposes any landscaping that would create a visual separation and privacy for adjacent residential uses from the commercial retail use. Where screening hedges now exist, Ms Nagra echoes Ms Holman in suggesting they be removed. Notwithstanding Ms Monteith's evidence regarding the type of recreational experience the Town intended in developing the rail trail, Ms Nagra testified that the rail trail should be completely paved and fully lit.

Ms Nagra testified that the CPTED assessment was insufficient in that it did not include a survey of users. Since the site is now vacant, there are no commercial retail customers or employees to survey. In Ms Nagra's professional opinion a consultative survey process that specifically included First Nations women was necessary to fully capture the needs of what she referred to as vulnerable populations. She noted that METRAC, in its Community Safety Audit Resource Kit, defines safety as "freedom from the threat, fear and experience of all kinds of violence, oppression, and discrimination". Although the METRAC kit, approach and this definition of safety may be useful in certain contexts, the Board finds that they do not assist the Board in evaluating the appropriateness of a Highway Commercial use for the entire subject site.

FOSS placed the safety issues on the Issue List. On Ms Nagra's evidence, among others, FOSS was now asserting both the superiority of the METRAC approach over the CPTED approach, and the need to engage in a METRAC style of consultation.

If a CPTED audit, specifically referenced in the Issue List, was no longer to be considered sufficient, then FOSS was at this point either attempting to amend the Issue List indirectly or was inviting the Board to answer the second safety question in the negative.

The Board did not find Ms Nagra's evidence helpful and attaches no weight to the evidence of Narina Nagra.

**Evidence of Connie Guberman:**

Ms Guberman appears at the Board under summons. No filing was made to provide an outline of her evidence to Parties opposite, in spite of the clear requirements of the Procedural Order. Ms Guberman is qualified under CPTED but has not achieved the Level 2 certification that Mr. Jech has achieved. Since Ms Guberman is under summons and is the only CPTED qualified expert called by FOSS, and given the clear reference to a CPTED audit in the Issue List, the Board qualified Ms Guberman to give expert opinion evidence on CPTED and personal safety matters and permitted her testimony.

Ms Guberman was contacted by Ms Robinson to assist in finding safety experts who could testify in this matter and, later, to testify herself as a CPTED expert. Ms Guberman read Mr. Jech's CPTED assessment over the weekend prior to her testimony. She acknowledged that she spoke to counsel for FOSS the evening before her testimony and provided her opinion to him. She acknowledged that she had not done a safety audit of a commercial retail facility such as that proposed here. She acknowledged that the safety audit she did for a retail facility was for a parking garage, and that was done a decade or more ago. She acknowledged that she provided her professional opinion in this matter without any site visit or site examination. Her opinion is that the CPTED assessment undertaken by Mr. Jech is inadequate.

The extraordinarily limited degree of preparation and study undertaken by Ms Guberman prior to proffering her opinion does not rise to the standard of professional analysis the Board expects of witnesses tendered and qualified to provide expert opinion evidence, regardless of whether that witness is under retainer or summons.

The Board did not find this evidence helpful and attaches no weight to the evidence of Connie Guberman.

**Evidence of Carolyn Andrew:**

FOSS tendered Ms Andrew as an expert in personal and community safety from a municipal planning perspective. Ms Andrew acknowledged that she is not a Member of the Canadian Institute of Planners or a Registered Professional Planner in Ontario. Ms Andrew and FOSS contend that she should be qualified to give the Board land use planning evidence because her research and written works have been used in planning courses and she has been invited to speak at land use planning conferences. The Board dismisses this suggestion. A medical doctor speaking at a planning conference on urban health issues does not, thereby, become a qualified land use planner any more than the planner hearing the presentation becomes a medical doctor. The Board refused to qualify Ms Andrew to give the Board expert opinion evidence in land use planning.

Ms Andrew is not qualified as a practitioner of community safety planning and is not a certified CPTED practitioner. She acknowledges that her strength is in theory and the Board qualified her to give expert opinion evidence on safety planning theory. However, the Board again cautioned that evidence must be relevant to the matters before the Board in this proceeding and not be repetitive. In this regard, the Board emphasized the number of safety experts that FOSS had already tendered and the amount of theoretical evidence the Board had already heard and, in the interests of efficiency, did not wish to have repeated.

Ms Andrew was contacted by Ms Robinson who, Ms Andrew testified, told Ms Andrew what the case was about. Ms Andrew prepared both her main and reply witness statements without either visiting the Town of Saugeen Shores or undertaking a site visit. She agrees that her involvement in a safety audit was in the mid-90's and dealt with a surface bus system in Ottawa.

With regard to the rail trail, and in sharp contrast to Ms Nagra, Ms Andrew agreed that municipalities may properly provide a variety of recreational opportunities that are targeted to different key populations and may have different levels of associated risk. She further agrees that each community is different in its attitudes

regarding safety and that makes it difficult to take general and broad statistical results and apply them to a particular community.

Ms Andrew testified that Mr. Jech's CPTED assessment failed to consider the ability to escape and get help and appeared to discount the fear of crime. She also testified that the crime statistics reviewed by Mr. Jech were inadequate. Ms Andrew sought to rebut Mr. Jech's professional opinion that there is no inherent safety issue with regard to site layout or any causal relationship between these types of development and crimes against persons. Specifically, Ms Andrew stated in her reply witness statement that:

"What seems limited about ... [the Jech CPTED assessment] ... is that no effort was made to look at evidence about crimes against persons associated with Wal-Mart sites in other parts of Canada, nor about crimes associated with recreational trails in Canada. One can find this evidence, both as it relates to Wal-Mart sites (the death of a Wal-Mart employee in Brooks Alberta and an article in the Abbotsford Times of May 11, 2004 about a stabbing in the Abbotsford Wal-Mart) and as it relates to recreational trails (the August 2003 murder of Ardeth Wood in Ottawa and the July 2002 murder of Chrystal Dawn Beirsto in Charlottetown). **This kind of material might have led to a more thorough analysis of the relationship between crime and particular types of physical environments...**" [emphasis added]

Ms Andrew is a full professor in the School of Political Studies and Director of the Centre on Government at the University of Ottawa. Ms Andrew acknowledged that she drew these examples from news articles and could not recall all the details. Exhibits 30 and 31, filed in this proceeding, are news reports reviewing the incidents in Alberta that Ms Andrew suggested are the "...kind of material [that] might have led to a more thorough analysis of the relationship between crime and particular types of physical environments...". A simple reading of these news stories clearly indicates that, in the case of the death, the only association the crime had with a Wal-Mart is that the victim was a part-time Wal-Mart employee. In the case of the stabbing, the news report indicates that this was done by a 13 year old boy who stabbed a 7 year old girl with an Xacto knife in a Wal-Mart store. There was no known motive for the attack, nothing to suggest there was anything in the commercial use or the design of the commercial facility that contributed to or precipitated the attack, and a psychiatric evaluation of the boy was expected.

The Board dismisses the suggestion that considering these events would have produced any useful analysis of the relationship between *crime* and particular types of *physical environments* let alone a *more thorough* analysis of the relationship between crime and particular types of physical environments than was undertaken by Mr. Jech. Ms Andrew eventually admitted that she had included these references for shock value.

The Board does not find this evidence helpful. The Board further finds that the clear statement in Ms Andrew's reply witness statement, quoted above, comes perilously close to a *prima facie* attempt to mislead the Board on a matter of central importance to the issues being considered by the Board in this proceeding.

The Board attaches no weight to the evidence of Carolyn Andrew.

**Evidence of Mary Eberts:**

FOSS tendered Ms Eberts as an expert on the legal status or condition of aboriginal women in Canada and the implications of that status or condition for their safety. There was no challenge to Ms Eberts's expertise on the legal status or condition of aboriginal women in Canada. The Board was well satisfied with her credentials in this regard and qualified Ms Ebert to give expert opinion evidence in this area. Following cross-examination of Ms Ebert on her qualifications, the Board did not qualify Ms Eberts as an expert on the implications of that legal status or condition for the safety of aboriginal women. The Board had no doubts that Ms Eberts was familiar with questions of safety and risk and had occasion, through her legal research and legal advocacy, to read and digest expert reports in this area and work with experts in the field. Working with experts in a field while undertaking legal research or advocacy may advance one's understanding of the field but that does not make one an expert in that field.

As a result of the Board's decision regarding qualifications, certain references, statements and materials were struck from the witness statement filed by Ms Eberts. These included references to theoretical circumstances of the risk of violence to, and assault of, native women as a result of:

- no public transit between Saugeen First Nation and the subject site,

- licensed establishments in the area of the subject site,
- the belief that Bruce Nuclear Power and the Canadian Auto Workers education centre both attract large numbers of men who are either single or away from their families and that this circumstance may be a safety risk factor, and
- areas described as remote and located near the subject site that may present physical opportunities for assault.

Also excluded was a download from a web page in the United States from what appeared to be an advocacy group opposed to Wal-Mart generally. The download purported to record crime statistics associated with 15% of the Wal-Mart locations in the continental United States. The material drew no distinction by race or gender, had no stated author, no author of the report was being called to prove the material, on its face the material made no reference to Wal-Mart in Ontario or elsewhere in Canada, and no expert was being called to demonstrate to the Board that the Wal-Mart locations or reported incidents were comparable to the subject site or actual conditions in Port Elgin. Even if the Board had been prepared to qualify Ms Eberts as an expert in safety, the Board would not have admitted this downloaded material given the circumstances described above.

While Ms Eberts testimony was interesting, the Board finds that Ms Eberts failed to establish a nexus between the legal status or condition of aboriginal women in Canada and any land use planning grounds upon which the Board could allow or deny any or all of the appeals before the Board dealing with OPA 13 and the two zoning by-law amendments. With respect to the matters before this Board, the Board attaches no weight to the evidence of Mary Eberts.

**Evidence of Steven Rowe:**

As noted above, Mr. Rowe is a full member of the Canadian Institute of Planners and a Registered Professional Planner in Ontario. Since Mr. Rowe's evidence focused primarily on safety requirements of various planning instruments, it is included in this section.

Well prior to the hearing of the merits a panel of this Board, differently constituted, had a motion to dismiss the appeals before it. Although the motion did not proceed, motion and response records were filed. Included in the response material was an affidavit sworn by Mr. Rowe. His affidavit, which contained professional opinions, was sworn with no site visit. His witness statement for the hearing of the merits is essentially the same as his affidavit and, like his affidavit, was prepared without any site visit.

For his affidavit in the motion response, Mr. Rowe relied on Laura Robinson, her description of the site and rail trail conditions, and her conclusion that the site and rail trail were not safe. He cites CPTED principles then concludes, based on information from Ms Robinson, that the concept plan for the site does not appear to be consistent with CPTED principles. Mr. Rowe acknowledges that he is not a CPTED practitioner.

He repeats his affidavit conclusion that there is a:

“...real issue of safety and therefore land use compatibility between the proposed shopping centre development and the users of the rail trail. Similar concerns arise in relation to users of the site and cyclists...”

For his witness statement, he acknowledged that, in addition to Ms Robinson, he read and relied on the witness statements of Carolyn Andrew, Margery Holman, and Mary Eberts, among others, to reinforce and confirm this opinion respecting safety and his conclusion regarding land use compatibility. He testified that he believed the characteristics of the Bruce Nuclear Power workers created a safety issue. He did not challenge the contention in various FOSS witness statements that motels and licensed establishments in the vicinity of the subject site exacerbated this alleged risk.

He did not note that motels and licensed establishments are permitted uses under the C3 zone that deals with Highway Commercial and is the same zone now on the front of the subject site and proposed for the entire site.

He did not consider the Highway Commercial policies of the Town's Official Plan that require landscaping, screening and buffers between Highway Commercial uses and adjacent residential uses. Nor did he consider section 4.8.2.3 of the Official Plan that deals with trail policies and specifically states:

“...For new development located adjacent to the Rail Trail, the Town may require buffering and screening of adjacent land uses to ensure protection of the recreational use and enjoyment of the Rail Trail by the entire community...”

Mr. Rowe cited section 4.1.2 of the Plan, which states:

“The Town shall consider land use compatibility when new residential, commercial and industrial uses are proposed in proximity to sensitive uses...”

Under cross-examination, he agreed that this section is under section 4.1 Environmental Review and is not a general land use compatibility clause. He also agreed that, with its placement in the Environmental Review section, it would be reasonable to infer that “sensitive uses” are environmentally sensitive uses and the rail trail does not fit that category.

Mr. Rowe took the Board to several sections of the Provincial Policy Statement, some of which were also addressed by the other land use planning witnesses – Ms Rifalski-Misch, Ms Monteith, and Mr. Saulesleja -- as being relevant and germane to the matters before the Board. In the context of safety issues, however, Mr. Rowe also asked the Board to consider section 1.5.1, dealing with public spaces, parks and open space, and sections 3.1 and 3.2, dealing with natural and man-made hazards.

Mr. Rowe suggests that section 1.5.1 should be read to include private spaces. The Board did not find this suggestion persuasive and prefers the interpretation of Ms Monteith that this section is clearly intended to apply only to **public** spaces.

Mr. Rowe’s evidence in support of the application of sections 3.1 and 3.2 appears to rest most heavily on the evidence of the Ms Robinson, Ms Holman, and Ms Eberts with respect to safety and risk. Having regard to the Board’s findings on reliability and weight to be given to the safety evidence of these witnesses, the Board finds no persuasive foundation to suggest that the matters before the Board offend the requirements of sections 3.1 and 3.2.

Having regard to the foregoing, the Board is not persuaded by Mr. Rowe’s evidence and prefers the land use planning evidence of Ms Rifalski-Misch, Ms Monteith and Mr. Saulesleja.

**Evidence of Valencia Root-Anoquot:**

Valencia Root-Anoquot is an Aboriginal woman from the Ojibwe nation who has resided on the Saugeen First Nation reserve for all of her life except to attend post-secondary studies. Her children attend school in Port Elgin; she is regularly in the community and knows it well. Her evidence covered three distinct areas: lack of consultation with First Nations women regarding development of the subject site, water quality, and transportation. Her evidence on water and transportation will be dealt with in those sections.

The question of consultation with First Nations women was introduced by witnesses called as safety experts and repeated by Steven Rowe in his capacity as a land use planner. Ms Root-Anoquot broadened this somewhat by grounding her call for consultation in matters relating to water quality and transportation as well as safety.

Ms Root-Anoquot's evidence was careful, measured and precise. Her witness statement included several paragraphs that paralleled the risk factor elements included in Ms Eberts witness statement that are referenced above. In her oral evidence, Ms Root-Anoquot specifically declined to repeat or refer to several of these paragraphs. The Board treated those omissions as being a decision by Ms Root-Anoquot to abandon these references and effectively delete them from her witness statement.

On the question of consultation, neither Ms Root-Anoquot in her evidence nor FOSS in submissions relied upon any formal doctrine of a duty to consult. Ms Root-Anoquot specifically acknowledged that Saugeen First Nation is some 14 kilometres from the subject site and, at that considerable distance, there is no formal planning requirement for notice or consultation. She also drew a distinction between notice going to or consultation with the Band Council and consultation with First Nations women. In her view, Band Councils do not necessarily represent the particular perspectives and concerns of First Nations women. In spite of the distance to the subject site and the lack of any formal requirement, Ms Root-Anoquot felt it was the proponent's responsibility to reach out and consult with First Nations women on the proposed development of the site.

The proponent and the Town have engaged in extensive public consultation in the course of reviewing and processing OPA 13 and in developing the Town's new

Official Plan, which incorporates the site specific policies of OPA 13. First Nations representatives attended at least one consultation meeting on the new Official Plan. On the evidence of Ms Rifalski-Misch and Ms Monteith, the Board finds that interested members of the public had ample opportunity to inform themselves about OPA 13 and the Town's new Official Plan and ample opportunity to come forward and give their views from whatever perspective those view may arise. The key here is that the opportunity existed to participate in an open and public process that led ultimately to a decision by the Town Council regarding the community's vision for the Town as a whole and the subject lands in particular. Failure by some interests to take advantage of the opportunity to participate in the Town's public decision process does not then place a responsibility on the proponent to consult separately with those interests. Finally, consultation and involvement in a public decision process does not mean the decision is ultimately one supported by all those involved. Disagreement with a decision does not invalidate the public consultative process that preceded it.

FOSS submits that the public consultation was not equivalent to the type of consultation or survey that would result from the METRAC process. The Board agrees. But that difference does not mean that the METRAC approach is better or more appropriate or that the Town's approach is lacking. Official Plans are statements of a community's vision and ambition. The Town Official Plan, which specifically sets out so many of the Highway Commercial policies to which FOSS witnesses appear to object and which specifically states that matters of safety are to be dealt with at the site plan stage, is not under appeal and not before the Board in this proceeding. Moreover, FOSS itself set the language of the safety issues and specifically referred to a CPTED audit. A CPTED audit has been done.

**Traffic and Transportation:**

Three issues were devoted to traffic and transportation matters. The first of these is:

Should provision be made for dedicated bicycle lanes in either or both directions along Highway 21?

The Board heard from witnesses who testified to the high volume, high rates of speed, and mix of vehicular traffic that includes large trucks on Highway 21. While the

Board agrees that Highway 21 would probably provide the most direct north-south route, the Board is persuaded by the evidence of Ms Monteith that Highway 21 is not a suitable route for a dedicated bicycle lane.

Even if Highway 21 were deemed appropriate for a dedicated bicycle lane along the frontage of the subject lands, the lane would need to be provided by way of a road widening or dedication of lands in the context of a municipal requirement associated with an application for site plan approval. No site plan is before the Board. Even if a site plan was before the Board, sections 41(7)(a) and 41(8)(a) of the *Planning Act* clearly identify the circumstances in and purposes for which a municipality may require the dedication of lands in the context of site plan approval. Bicycle lanes are not included in the list.

As put, this question has no relevance to the matters before the Board in this proceeding.

The second question regarding traffic and transportation is:

Should a form of public transit or transportation be established as a result of the proposed development?

The issue was put forward by FOSS with testimony primarily by Ms Root-Anoquot. There is no public transit system in the Town at present. There are currently two urban settlement areas: Port Elgin and Southampton. Evidence before the Board is that Southampton has a large population of seniors. The Town is exploring the opportunities for limited forms of transit that would assist seniors in getting around and between the settlement areas.

Ms Root-Anoquot takes the position that the lack of general public transit creates a safety risk for those travelling between Saugeen First Nation and the subject site. She testified that in her view young people would be drawn to the subject site for possible jobs and shopping. With no public transit between the reserve and the subject lands she testified that she felt these young people would make poor choices in terms of when they returned to Saugeen First Nation in the evening, what route they would take, what form of transportation they would choose, and with whom they would choose to travel. Ms Root-Anoquot spoke feelingly about what she perceives as social challenges on the

reserve that, in turn, create challenges for the delivery of good parenting and the ability to educate young people in good life choices. When asked the obvious question as to why members of Saugeen First Nation have not collaborated to car pool, run taxis, or establish their own limited transit or shuttle service, Ms Root-Anoquot replied that conflict and lack of co-operation at Saugeen First Nation made such options impossible to implement.

As difficult as these circumstances may be, the Board has no jurisdiction to require Saugeen First Nation to provide any transportation or transit service. Similarly, the Board has no jurisdiction to require the Town of Saugeen Shores to provide any transportation or transit service. The matters before the Board are questions of land use, specifically the expansion of Highway Commercial use across a site that already has permission for Highway Commercial use on a part of the site. And Highway Commercial uses are also in the surrounding area on Highway 21 already.

The question of whether a public transit system should be introduced is a Town-wide, or perhaps even a County-wide, matter that is separate and independent from the narrow and specific matter of the appropriateness of Highway Commercial use on the entire subject site. The Board finds that the question of whether or not there is a public transit system that serves the subject site is not relevant to the Board's determination of the amendments before it.

The third question regarding traffic and transportation is:

Has sufficient consideration been given to potential "cut through" traffic from development on the site through the surrounding neighbourhoods?

The Board heard from Mr. David Argue on behalf of Shoreline and Mr. Jeff Mark on behalf of FOSS. Both men were qualified to give the Board expert opinion evidence on traffic and transportation matters.

The subject site has two points of egress: Highway 21 on the west and a proposed connection to the residential neighbourhood to the north. Mr. Argue undertook an empirical traffic count study of current traffic conditions and cut through traffic and predicted the likely increase in such traffic as a result of the proposed commercial retail use. He concluded that there would be some increase in cut through traffic but opined

that the increase was not significant. In support of this position, he noted that residential streets to the north offered a circuitous route for traffic rather than the direct route of Highway 21.

Mr. Mark carried out no empirical traffic count study. On reviewing Mr. Argue's study he conceded that it did address some of the issues of cut through traffic for the neighbourhood to the north. He did not offer any counter opinion to that of Mr. Argue that the projected increase in cut through traffic was not significant. Nor did he offer the opinion that the matters before the Board should be dismissed as a result of potential future cut through traffic resulting from the commercial retail development of the subject site.

Mr. Mark made a number of recommendations for further study and roadway improvements in the broad general area of the subject site but directed these matters generally to the Town. Certain recommendations, for example the redesignation of certain streets and other road improvements distant from the subject site, are not matters before the Board.

The Board finds, on the evidence of Mr. Argue, that sufficient consideration been given to potential cut through traffic from development on the site through the surrounding neighbourhoods.

**Water and Waste:**

Regarding Waste, the question before the Board was:

Has sufficient consideration been given to waste generated from the site and its disposal?

FOSS led no evidence on this matter. This issue appears to have been placed on the Issue List at a time when Ms Anne Judd had Party status and when she may have intended to pursue this issue with evidence in a case she might have called. In the end, Ms Judd appeared as a Participant in this matter and simply expressed concern.

The Board heard from Ms Rifalski-Misch and Mr. Saulesleja, both of whom confirmed that the Town had sufficient landfill capacity for current and projected needs

for the next 14 years. Both Ms Rifalski-Misch and Mr. Saulesleja noted that on-site waste handling and storage would be addressed at the site plan stage.

The Board finds, on the evidence of Ms Rifalski-Misch and Mr. Saulesleja that sufficient consideration has been given to waste generated from the site and its disposal.

Regarding water, the question before the Board was:

Has sufficient regard been given to the Provincial Policy Statement section 2.2.1 (Water) and the amount of impervious vs. pervious surface and water quality related to the site? If not, will sufficient regard be given in the implementation of development of the site?

Ms Judd raised the question of whether adequate regard had been given to this section of the Provincial Policy Statement and to stormwater management as a result of development of the site.

The Board heard from Ms Violet Caibaiosai, a First Nations woman qualified to give the Board expert opinion evidence on traditional native knowledge and culture, particularly the relationship between Anishinaabek women and water. Ms Caibaiosai spoke earnestly and with feeling about her concern for the quantity and quality of water and the impact that development generally might have. Her evidence was echoed by Ms Root-Anoquot. Although this evidence was not tied specifically to commercial retail use of the subject site, the Board understood this evidence to be a general call to step lightly on the land and environment when undertaking development.

The Board heard from Mr. Jim Phimster, a hydrogeologist appearing for Shoreline. Mr. Phimster reviewed the requirements of section 2.2.1 of the Provincial Policy Statement dealing with water, particularly to minimize stormwater volumes and contaminant loads and to maintain or increase pervious surfaces. Mr. Phimster reviewed the conceptual proposed stormwater management plan for the subject site and concluded that it is consistent with these objectives. In Mr. Phimster's professional opinion the details of stormwater management facilities should be reviewed by the Town and the Saugeen Valley Conservation Authority [SVCA].

The zoning by-law amendments before the Board include a holding provision. Ms Rifalski-Misch and Mr. Saulesleja both testified that one of the conditions for lifting the hold is that:

“...a stormwater management plan for lands zoned is approved by the Saugeen Valley Conservation Authority and incorporated into the Site Plan Control Agreement...”

In addition the Board notes that the detail of landscaping, especially as it relates to pervious surfaces and soft landscaping that may enhance the pedestrian realm, is also left to the site plan review stage.

The Board finds, on the evidence of Messrs Phimster and Saulesleja and Ms Rifalski-Misch, that sufficient regard has been given to the Provincial Policy Statement section 2.2.1 (Water) and the amount of impervious vs. pervious surface and water quality related to the site.

### **Provincial Policy Statement**

Under cross-examination, Mr. Rowe conceded that the section most instructive to the Board with regard to safety is section 1.1.3.4, which states:

“...Appropriate development standards should be promoted which facilitate intensification, redevelopment, and compact form, while maintaining appropriate levels of public health and safety...”

The Board finds that the Town decision to address matters of public safety for commercial development at the site plan stage is consistent with the requirements of the Provincial Policy Statement.

The Board further finds that this extension of a Highway Commercial use is consistent with the requirements of section 1, particularly section 1.1.3 of the Provincial Policy Statement that deals with intensification in settlement areas. The Board finds that the Town has taken appropriate consideration of section 1.6 which deals with infrastructure and public service facilities, particularly with reference to water and waste.

Having regard to section 3(1) of the *Planning Act*, the Board finds that OPA 13, By-law 44-2006, as amended by Tab F of Exhibit 59, and By-law 75-2006, as amended by Tab G of Exhibit 59, are consistent with the Provincial Policy Statement.

### **Matters of Provincial Interest**

FOSS asks the Board to find that section 2(o) of the *Planning Act* has not been met by the planning instruments before the Board. This section of the *Act* requires that both the municipality and the Board:

“...in carrying out their responsibilities under this Act, shall have regard to...matters of provincial interest such as...

(o) the protection of public health and safety...”

Having regard to the evidence before the Board, reviewed in the foregoing sections, the Board finds that the Town has had regard for matters of provincial interest as set out in section 2(o) of the *Planning Act* and that, through the course of this hearing process, the Board has had regard for matters of provincial interest as required by section 2 of the *Planning Act*.

### **Board’s Response to the Issues**

**Issue #1:** Should OPA 13 not be approved and By-law 44-2006 be repealed because the development concept shown on the Shoreline Shopping Centres Site Plan dated April 4, 2006 is unsafe in terms of personal safety in this location? [It is understood that this issue is not raising a traffic safety issue.]

For the reasons cited above, the Board answers in the negative.

**Issue #2:** In the alternative, should a Crime Prevention Through Environmental Design audit be required to be carried out as part of the implementation of development on the site.

(a) Should the Board retain jurisdiction of the matter in regard to the audit?

A Crime Prevention Through Environmental Design audit has already been carried out; there is no reason for the Board to retain any further jurisdiction with regard to the audit.

**Issue #3:** What type of connection between the site and the Saugeen Rail Trail should be provided?

A connection having been sought by the Town and agreed to by Shoreline, the Board finds that the detailed design of the connection is a matter properly left to the site plan review process.

**Issue #4:** Should provision be made for dedicated bicycle lanes in either or both directions along Highway 21?

Having regard to section 41 of the *Planning Act*, and to the matters before the Board in this proceeding, the Board answers in the negative.

**Issue #5:** Should a form of public transit or transportation be established as a result of the proposed development?

The Board has no jurisdiction to impose a requirement of a public transit system on the Town; for this reason the Board answers in the negative.

**Issue #6:** Should weight be given to the new Official Plan in relation to the appeals of OPA 13 and By-law 44-2006 and, if so, how much?

The Board finds that the new Official Plan is relevant but not determinative.

**Issue #7:** Has sufficient consideration been given to waste generated from the site and its disposal?

For the reasons cited above, the Board answers in the affirmative.

**Issue #8:** Has sufficient regard been given to the Provincial Policy Statement section 2.2.1 (Water) and the amount of impervious vs. pervious surface and water quality related to the site? If not, will sufficient regard be given in the implementation of development of the site?

For the reasons cited above, the Board answers in the affirmative.

**Issue #9:** Has sufficient consideration been given to potential “cut through” traffic from development on the site through the surrounding neighbourhoods?

For the reasons cited above, the Board answers in the affirmative.

### **Request to Disregard Evidence**

At the close of the hearing, FOSS presented the following to the Board:

“FOSS wishes to advise the Board that it requests that any evidence adduced at this hearing and all other references that may be on the Board’s record or files in regard to CAW or Bruce Power workers be disregarded by the Board in making a determination on the FOSS appeals.”

While Mr. Rowe was the clearest of the FOSS witnesses in making such references in his oral testimony, these references appeared frequently throughout letters of appeal and witness statements. Tied to specific suggestions of increased risk with motels and licensed establishments near the subject site, they appear to have been much of the basis for the allegations of lack of safety advanced by FOSS. The Board agrees to the request.

### **Motion to Adduce Fresh Evidence**

After the hearing of the merits was completed but prior to the issuance of the Board’s decision, FOSS brought a motion to adduce fresh evidence. Specifically, FOSS sought to introduce the Saugeen Shores Police Service 2006 Annual Report. The Board proceeded by way of written submissions in this matter.

The test for adducing fresh evidence after the conclusion of a hearing or trial or on appeal was set out by the Ontario Court of Appeal in *Sengmueller v. Sengmueller*, [1994] O.J. No. 276 at paragraph 9.

“...The normal basis on which an appeal court in this jurisdiction will exercise its discretion in favour of admitting fresh evidence is clear and well-established. It will do so when (1) the tendered evidence is credible, (2) it could not have been obtained, by the exercise of reasonable diligence, prior to trial, and (3) **the evidence, if admitted, will likely be conclusive of an issue in the appeal...**”  
[emphasis added]

The Board’s *Rules of Practice and Procedure* refer to similar reasons in Rule 115 relating to the Board’s powers on review of a decision. With respect to fresh evidence, Rule 115 provides as follows:

“...The Board will hear a motion to review a decision only if the reasons provided in the request raise an arguable case that the Board...

(e) should consider evidence which was not available at the time of the hearing, but that is credible and **could have affected the result...** [emphasis added]

The Board is satisfied that the Saugeen Shores Police Service 2006 Annual Report was not available at the time of the hearing and is credible. This motion then turns on the question of whether this report could have affected the result. FOSS submits that the report would assist in the Board’s consideration of Issues 1 and 2 regarding safety, and the question of safety for cyclists on Highway 21 as that may relate to Issue 4 regarding dedicated bicycle lanes on Highway 21, and would have affected the Board’s findings and decision on these matters.

The Board finds that had the Saugeen Shores Police Service 2006 Annual Report been adduced in evidence at the hearing of the merits it could not have affected the result. The report is general to the Town of Saugeen Shores and not specific to the subject lands or the planning instruments before the Board. The report does not provide any further illumination beyond the evidence already heard and dealt with by the Board in respect of Issue 1 regarding safety of the concept plan, Issue 2 regarding a CPTED audit, or Issue 4 dealing with dedicated bicycle lanes on Highway 21.

The Motion to reopen the hearing of the merits for the purpose of adducing fresh evidence is denied.

### **Order of the Board**

The appeals of OPA 13 are dismissed.

The appeals of By-law 44-2006 are allowed in part and By-law 44-2006 is approved as amended by Tab F of Exhibit 59 as filed in this proceeding.

The appeals of By-law 75-2006 are allowed in part and By-law 75-2006 is approved as amended by Tab G of Exhibit 59 as filed in this proceeding.

The Motion to adduce fresh evidence is denied.

Shoreline has given notice that it may seek costs regarding the hearing of the merits and regarding the Motion to adduce fresh evidence. Any Party seeking costs in these matters is referred to the Board's *Rules of Practice and Procedure*.

So Orders the Board.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER  
MEMBER