

**The Application of Natural Heritage  
Policies and Legislation  
by the  
Ontario Municipal Board  
January 2004-January 2008**

Research and Report  
by  
Elke Meyfarth O'Hara  
School of Planning  
University of Waterloo

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## **The Application of Natural Heritage Policies and Legislation by the Ontario Municipal Board**

The Province of Ontario has recently implemented a series of reforms to planning legislation and policy. In order to provide the Environmental Commissioner of Ontario (ECO) with an understanding of how these reforms are affecting decision-making on natural heritage protection at the Ontario Municipal Board (OMB), this report examines the manner in which the natural heritage provisions of the 2005 Provincial Policy Statement (PPS) under the *Planning Act* were interpreted and applied by the Ontario Municipal Board (OMB), in addition to how other relevant environmental legislation was considered, such as the *Oak Ridges Moraine Conservation Act* and the *Greenbelt Act*. A summary of relevant recent cases before the OMB is presented, as is an assessment of the merits of any applicable interpretations. The report also includes a synthesis of how natural heritage legislation and policies have been interpreted by the OMB since 2004.

### **Introduction**

Ontario operates under a policy-led planning system. Land use planning on private land is conducted under authority of the *Planning Act*, which is provincial legislation that sets the rules for land use in the province. The Provincial Policy Statement (PPS) provides the broad policy framework that establishes direction on matters of provincial interest. Although the province sets legislation and policies, planning decisions for private land are made at the municipal level. Municipalities are responsible for implementing the *Planning Act* via their Official Plans, zoning by-laws and development applications. The Ontario Municipal Board (OMB) is an independent adjudicative tribunal that is responsible for settling disputes over land use planning and other

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municipal issues. The OMB hears appeals and applications on land use planning under the *Planning Act* and other legislation. The OMB is responsible for interpreting and applying policies and legislation that concern natural heritage issues and thus OMB decisions have important consequences for natural heritage protection in Ontario.

Wilkinson, in an analysis of the application of the Natural Heritage Section of the PPS by the OMB between the years 1997 and 2000, concluded that the Natural Heritage Section was “generally applied in a thoughtful and effective manner by most Ontario Municipal Board members” (Wilkinson 2002: 159). Among his findings, however, he noted that the involvement of government agencies was minimal and their lack of direct involvement in the planning process was sometimes a factor cited by OMB members who ruled against natural heritage protection. Wilkinson also found that a significant variable in the application of the Natural Heritage Section was the presiding OMB member.

Ontario Nature expanded upon Wilkinson’s analysis of nineteen OMB decisions and presented a review of 71 cases with significant natural heritage issues that were decided by the OMB between May 1996 and July 2003. The report gave support to the noted “widespread dissatisfaction with OMB decisions in the naturalist community” as it revealed that defenders of natural heritage had a 30 per cent success rate while developers had a 70 per cent success rate in winning the appeal (Ontario Nature 2003: 7). The report suggests a number of factors involved in this success percentage, including:

- Weakness of OMB support and guidance for potential appellants
- Weakness in cases presented by natural heritage defenders
- Imbalance in resources between defenders of natural heritage and development interests

- Lack of clarity in the PPS with respect to natural heritage, and whether or not decisions must be consistent with provincial policy
- Inability of some Official Plans to adequately protect natural heritage
- Variation in understanding and attitude toward natural heritage among OMB hearing officers
- Too many cases proceed to the OMB before proper municipal review, thus the resources of natural heritage defenders are “spread too thin”.

This study builds upon the work of Wilkinson and Ontario Nature. The focus here is on the application and interpretation of the natural heritage provisions of the Provincial Policy Statement (PPS) 2005 by the OMB. The PPS, issued under the authority of Section 3 of the *Planning Act*, sets out overall policy direction on matters of provincial interest in Ontario. A new PPS was implemented on March 1, 2005, replacing the previous PPS (1996, amended 1997). The current PPS requires that planning decision makers “shall be consistent with” the PPS 2005, whereas they were previously required to “have regard to” the PPS 1997. “Shall be consistent with” is a stronger test than “have regard to” and is thus intended to be a higher policy implementation standard. This report will look at whether the PPS 2005 has improved clarity with regard to natural heritage decisions.

### **Natural Heritage Policies and Legislation**

The policies and legislation examined in this report include:

- Provincial Policy Statement, 2005

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- *Planning Act*, as amended
- *Oak Ridges Moraine Conservation Act* and Plan
- *Greenbelt Act* and Plan
- MNR's *Natural Heritage Reference Manual*

Each of these policies and legislations are described in Appendix B.

### **Sampling Method**

A sampling of OMB cases was selected using a series of keyword searches in the OMB E-Decisions database for cases between January 2004 and January 2008. The keyword searches were:

- Aggregate AND natural heritage, ANSI, botanist, connectivity AND natural heritage, ecology, endangered species, environmentalist, Federation of Ontario Naturalists, Greenbelt Act, Greenbelt Plan, MNR AND natural heritage, natural connections, Natural Heritage Reference Manual, naturalist, Nature Conservancy, Oak Ridges Moraine Conservation Act, Oak Ridges Moraine Conservation Plan, Ontario Nature, Policy 2.1 AND natural heritage, Policy 2.3 AND natural heritage, Provincial Policy Statement 2005 AND natural heritage, Sierra, species at risk, Save the Oak Ridges Moraine AND natural heritage, wetland AND PPS 2005 OR Greenbelt Act OR Greenbelt Plan OR Oak Ridges Moraine OR Natural Heritage Reference Manual, woodlot AND natural heritage, woodland AND natural heritage.

The sampling method is based on the approaches used by Wilkinson (2002), in an earlier analysis of the application of the Natural Heritage Section of the PPS by the OMB between the years 1997 and 2000, and by Ontario Nature (2003), in a review of OMB natural heritage decisions between 1996 and 2003.

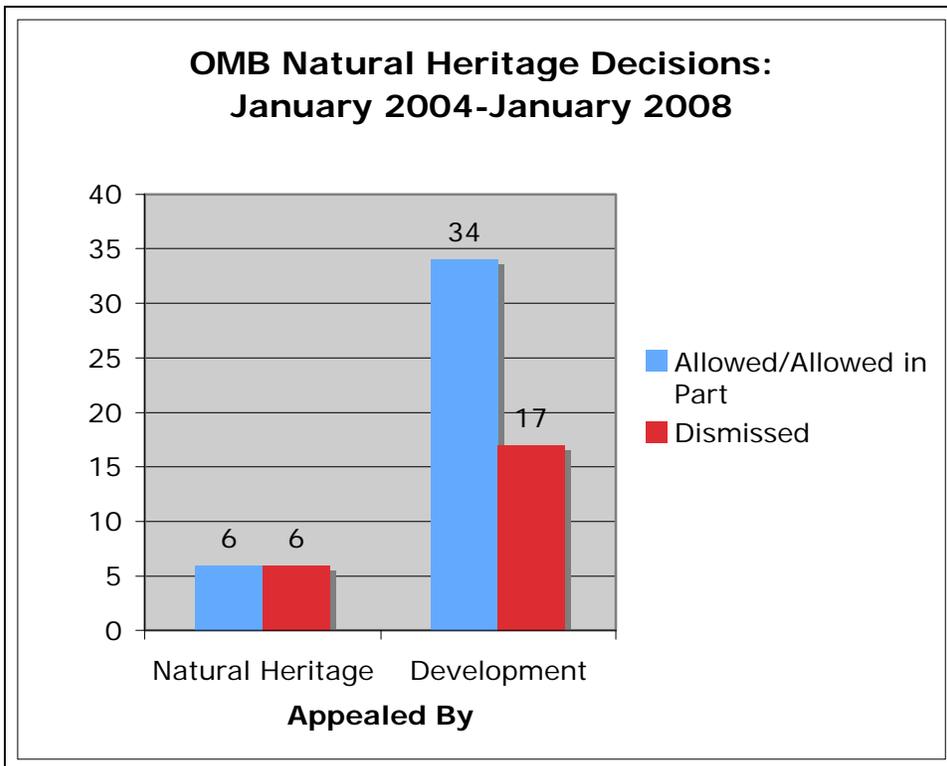
The initial search produced 228 potential cases. These cases were read in their entirety in order to determine relevancy. Cases were deemed irrelevant to the search if they did not contain a significant focus on natural heritage protection. Also excluded

were preliminary rulings, pre-hearing conference memos, mediated decisions and settlement decisions. 63 OMB cases remained for analysis.

## Results

Of the 63 appeals deemed relevant to this report, 51 were pro-development and 12 were pro-natural heritage (see Figure 1). Of the 51 appeals launched by development, 21 were allowed, 13 were allowed in part and 17 were dismissed. Of the 12 appeals launched in defense of natural heritage, 3 were allowed, 3 were allowed in part and 6 were dismissed.

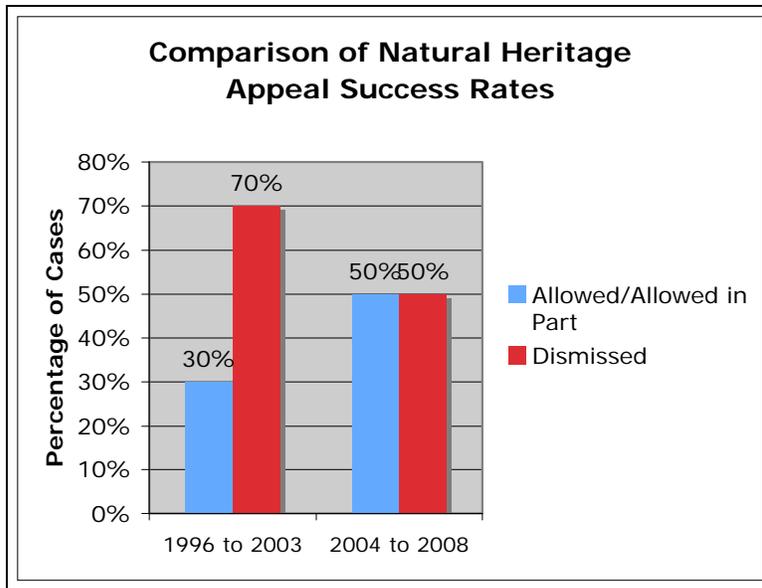
Figure 1. OMB Natural Heritage Decisions



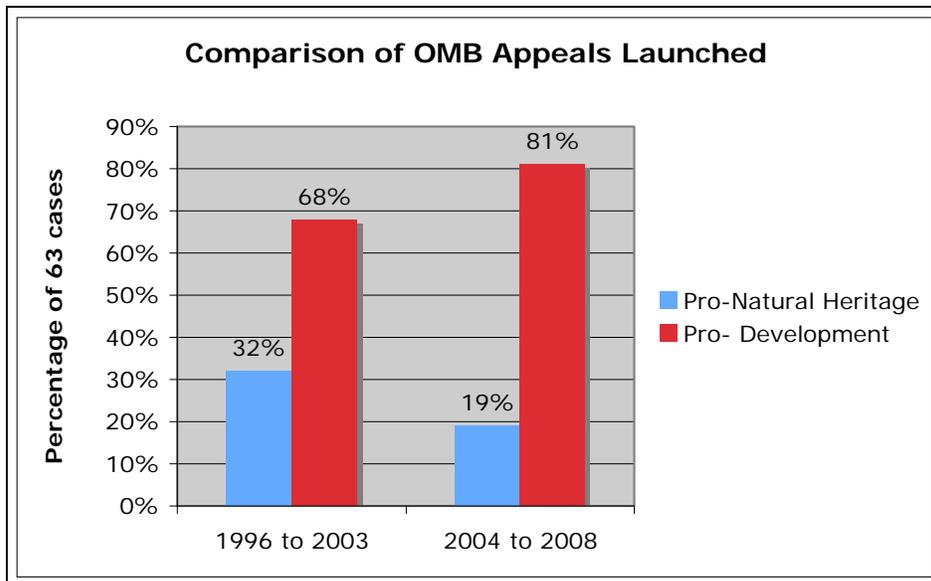
Although the numbers are too small to be statistically significant, it is interesting to note that the percentage of pro-natural heritage appeals with successful outcomes has

increased to 50 per cent in this study, as opposed to 30 per cent in the Ontario Nature study (see Figure 2), but the percentage of appeals being launched by natural heritage defenders has decreased to just 19 per cent, as opposed to 32 per cent in the Ontario Nature study (see Figure 3).

**Figure 2. Comparison of Natural Heritage Appeal Success Rates**



**Figure 3. Comparison of OMB Appeals Launched**



As the goal of this report is to specifically examine the manner in which the natural heritage provisions of the 2005 Provincial Policy Statement (PPS) under the *Planning Act* were interpreted and applied by the Ontario Municipal Board (OMB), in addition to how other relevant environmental legislation was considered, such as the *Oak Ridges Moraine Conservation Act* and the *Greenbelt Act*, this database of 63 cases was further refined to include only those cases with a significant discussion of the PPS 2005 and/or other relevant environmental policies and legislation. Fifteen cases were selected for more detailed analysis. See Appendix A for summaries of each of these cases. Information presented in the summaries include natural heritage issue(s), overview of the case, positions of parties, useful quotations or comments, government agency participation, natural heritage policies and legislation applied in the case, and the Board's decision. Each summary concludes with the interpretation and application of natural heritage policies. To follow the format of Wilkinson's 2002 study, this section of the summary uses "successful" to denote the effective use of the policy in relation to the final ruling; "neutral" to denote that the policy was not a central issue in the case; and, "unsuccessful" to denote that the policy was not used effectively in relation to the final ruling.

### **Analysis of OMB Cases**

In twelve of the fifteen OMB cases analysed here, natural heritage policies were successfully interpreted and applied. In general, Board Members gave appropriate weight to natural heritage concerns and attempted to balance natural heritage with other provincial concerns in a manner consistent with the PPS. It is important to note, however, that the successful application of the policy does not automatically result in a successful

appeal for natural heritage defenders. For example, in Decision Number 1488, Board Members Jackson and O'Connor gave a very thorough and detailed review of the natural heritage issues involved in a proposed residential development. In many instances, they preferred the testimony of the pro-natural heritage witnesses and they concluded that the subject lands met the criteria for Significant Wildlife Stop Over Habitat for land migratory birds but, ultimately, the development appeals were allowed in part. Jackson and O'Connor added the following statement to their decision:

The Board also wishes to be reflective of the views of most of the planning witnesses and the public that the best use of this site is as a public park. In the time available before the Board's final Order is issued, now that numbers of units and the perimeters of the development are better known, the Board directs the Town of Oakville to consider whether the Town of Oakville will make a final offer to purchase or to expropriate all of the Palm Place property.

In another case where development appeals were allowed in part, Board Member Flint, In Decision Number 2517, dismissed a development appeal to designate buffers as Residential instead of Environmental Protection. Flint upheld the argument that "an EP designation is necessary in order to conform to section 2.1 of the PPS that states "Natural features and areas shall be protected for the long term" (2.1.1) and "Development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas" (2.1.6).", stating that:

In regard to the designation of the buffer areas, the Board prefers the testimony and opinion of Mr. Russell that, read in context, the Town's Official Plan policies are intended to provide strong and secure protection for local and regional heritage features and functions. In doing so, the Official Plan conforms to the goals and purpose of the PPS and County Official Plan to protect for "the long term" and "sustain for future generations" respectively. The Board is persuaded, in this instance, that such protection is more securely achieved when the Official Plan classification as well as the zoning for the buffer areas is EP: amendments to Official Plans require extensive scrutiny, study and deliberation.

Adjacent lands were also the focus of Decision Number 0724, in which the Greenspace Alliance of Canada's Capital (GACC) wanted the Board to introduce a  
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provision to the City Of Ottawa Official Plan, requiring an Environmental Impact Statement for development within a 30-metre buffer of Rural Natural Features. Board Member Denhez referred to both the 1997 and 2005 PPS for “parameters and comparisons” on the issue of adjacent lands. As stated by the Board, “the principle and importance of adjacency are in Provincial policy”. The Board noted the importance of adjacent lands to “ecological diversity and connectivity” and noted the repeated emphasis of the PPS 2005 on “ecological functions”. Board Member Denhez stated, “adjacency is a significant issue under the PPS, and thus deserves to be a significant issue under the OP. The test, as articulated in the 2005 PPS and useful for the purposes of good planning, is for: the ecological function of the adjacent lands (to be) evaluated and (for it to be) demonstrated that there will be no negative impacts on the natural features or on their ecological functions”. Board Member Denhez ultimately found the City’s approach to lands near RNFs to be consistent with the PPS 2005 and dismissed the GACC’s appeal for a 30-metre buffer. However, he was “not satisfied that the system described by the City, even if appropriate, is accurately reflected in the OP” and therefore ordered the City to insert a description of its approach to adjacent lands in the OP with specific details of the process, “for the sake of predictability and transparency”.

In the three natural heritage decisions directly involving the Greenbelt Plan, natural heritage policies were successfully interpreted and applied. In Decision Number 2206, Board Member Eger dismissed the development appeals, stating,

The onus in this case was on the applicant Camp Villas to clearly show that the lands are not Environmental Policy Area in character and function for the Board to find that it is appropriate to alter their current designation and zoning. Having reviewed all the evidence and as contained in these reasons, the Board finds that this onus has not been met and the approval of the applications would not result in good planning... In addition, it should be noted that the area proposed for development by these applications is also within the Natural Heritage System of the *Greenbelt Plan* which adds to the view they

are environmentally significant. At paragraph 106, *Material Handling v. Essex* [2002] OMBD No. 1133, the Member captured the essence of the Board's discretion in balancing established policy and individual appeals- *Establishing a policy implies that it should be followed fairly and equally unless there is some good and sufficient reason, arising out of the circumstances before the Board, to do otherwise. This marks the reasonable exercise of discretion.*

The Board is not compelled by any of the circumstances of this case to exercise such discretion. The Board orders that the appeals are dismissed.

Decision Number 1794 involved a proposal for severance and development of three lots backing onto Bronte Creek valley land. The primary issue before the Board was whether or not dedication of the entire 15-metre setback area should be required as a condition of severing the existing property, and, if not, what portion, if any, should be required to be dedicated and how should any non-dedicated land in the setback area be protected. Board Member Pendergrast allowed the development appeals in part but ruled, importantly, that:

In presenting its considerations and conclusion regarding this issue, the Board notes at the outset that the Bronte Creek valley is a major river valley and a significant natural feature, and is identified as such in the Greenbelt Plan and the Regional and Local Official Plans. As stated in the comments of Conservation Halton on the applications, "Bronte Creek provides an important ecological linkage between Bronte Creek Provincial Park and Lake Ontario. The (Greenbelt) Plan states that the river valleys that run through existing urban areas and connect the Greenbelt to the Great Lakes are a key component of the long-term health of the Natural System." (Tab 4, Exhibit 2a, page 51). Given its significance, the question of how best to protect the valleyland adjacent to 256 Bronte Road and the 15-metre setback area intended to protect the stability of the valley slope and to buffer it from nearby development is clearly an important one.

Having considered the evidence presented, the Board is convinced that the preferred method of protecting the 15-metre setback area is to have the area dedicated to the Town so that it, together with the valleyland to the west that has already been dedicated, will be in public ownership.

In Decision Number 3289, the Greenbelt Plan and the Oak Ridges Moraine Conservation Plan were acknowledged by Board Members Eger and Gates in their decision. They noted that, "The Province's aggressiveness in enacting the *Oak Ridges Moraine Act, 2001* and the *Greenbelt Act, 2005* and their regulations appears to have substantially changed the positions of the parties such that many of the once disputed areas are now protected by one or other of these respective plans." They allowed the

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development appeals in part, applauding the “Environment First” principle of the proposed Secondary Plan for North Leslie:

In considering an OP for the last large greenfield parcel of land in Richmond Hill, the Board was looking for a grand vision. Largely through the policy direction of the Province, and the prodding of the Town and other public agencies, and the ultimate acceptance by the landowners, this grand vision was realized by anchoring the plan for North Leslie on a comprehensive natural heritage system. This system, consisting of approximately 30% of the land under review, includes many north-south nature and trail linkages centered on the three tributaries of the Rouge, the Greenbelt, provincially identified environmentally significant features and areas of scientific interest, the southerly edge of the Oak Ridges Moraine, and an east-west surface linkage through a pipeline easement. Both the landowners and the public agencies are to be congratulated for their spectacular yet sensitive vision for North Leslie.

Board Member Campbell showed similar enthusiasm for the systems-based approach put forward by the Town of Oakville’s Secondary Plan for North Oakville in File Number PL04118:

The Board finds, based on a review of the evidence of the witnesses, the direction of the policy documents and a review of the Subwatershed Study, that not only is a systems approach an appropriate approach to determining the boundaries of a NHS in a developing urban area, it is the best approach. It is clearly the best approach given what experts now understand about environmental biology. No longer can society afford to look at the “natural environment” as isolated pockets of green which have been fortunate enough to have survived in an urban landscape. The Board is convinced by the evidence adduced in this hearing, that for the natural environment to have a chance of sustainability in developing urban areas, a systems approach must be taken to delineating boundaries. The Board was particularly persuaded by the evidence of Dr. Stephenson and Dr. Tegler, that the use of a systems approach substantially increases sustainability of the natural environment in an urban context “by supporting the diversity of species and making the natural area more resilient to the effects of urbanization”. This approach demonstrably facilitates the balancing act mandated by the PPS between the need for urbanization in the Province and the protection of the Province’s natural heritage.

Campbell’s ruling was called precedent setting by the popular media. Although some concepts, most notably landscape connectivity, were misapplied by the Town in this case, the case itself serves as an important example of how ecological concepts have become accepted in land use planning in Ontario. Higher standards are beginning to take precedence when planning applications are considered. In Decision Number 2536, Board Member Granger dismissed a development appeal against an Environmentally Sensitive

Landscape designation proposed by the Region of Waterloo. Granger stated, “ROPPA 22 represents an advanced planning approach to recognizing, maintaining or improving landscape connectivity and ecological functions in areas of the region noted for their concentrations of high quality natural areas” and noted that the “land use planner for the Region is of the opinion that ROPPA 22 is consistent with the PPS, noting the importance of natural features being protected for the long term and the maintaining, restoring or where possible, improving diversity and connectivity of ecological function and biodiversity of natural heritage systems for the long term as set out in PPS policies 2.1.1 and 2.1.2. His evidence and opinion regarding the PPS was not contradicted by any other evidence.”

Not all the cases examined were quite as progressive. In one very recent example, File Number PL980499, PL060924 dated January 16, 2008, the Applicant “contravened the previously agreed upon direction of the Board... by clearing and grading land and in the building of a road across the wetland in dispute.” Despite this, Board Member Culham allowed the development appeals in part. Culham stated:

The Board concludes that the actions of the Applicant undermine the trust that the Township, the County, and the population at large may hold in the ability of the Board in fairly managing events once the matter is before it. This Board does not accept that in providing the judicial framework, the Court expected the Board to ignore or pretend that such an egregious action did not occur. They occurred; they damaged the wetland; the Applicant acted wrongly. In considering a remedy, the Board accepts the limitations established by the Courts. The Board takes no further action.”

## **Conclusion**

There were 63 OMB appeals involving natural heritage between January 2004 and January 2008 that met the parameters of this report. Of these appeals, 51 were pro-development and twelve were pro-natural heritage. Of the 51 appeals launched by

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development, 34 were allowed or allowed in part and seventeen were dismissed. Of the twelve appeals launched in defense of natural heritage, six were allowed or allowed in part and six were dismissed.

The percentage of pro-natural heritage appeals with successful outcomes has increased to 50 per cent, as opposed to 30 per cent in the Ontario Nature study that reviewed OMB natural heritage decisions between 1996 and 2003. However, the percentage of appeals being launched by natural heritage defenders has decreased to 19 per cent, as opposed to 32 per cent in the Ontario Nature study.

Of the fifteen OMB cases selected for more detailed analysis, natural heritage policies were successfully interpreted and applied in twelve of those cases. In general, Board Members gave appropriate weight to natural heritage concerns and attempted to balance natural heritage with other provincial concerns in a manner consistent with the PPS. This is consistent with Wilkinson's 2002 study, which concluded that the natural heritage policies of the PPS 1997 were generally applied in a thoughtful and effective manner by the OMB. It is important to note, however, that the successful application of the policy does not automatically result in a successful appeal for natural heritage defenders.

Planning decision makers "shall be consistent with" the PPS 2005, whereas they were previously required to "have regard to" the PPS 1997. As argued by Wilkinson (2002), the looser phrasing of "have regard to" served to impair the effectiveness of the Natural Heritage Section of the PPS 1997 as it was frequently interpreted as being non-binding. A participant in a 2004 OMB appeal likened the PPS to the Bible in that its statements are subject to interpretation. The new wording of the PPS 2005, "shall be consistent with", is

a stronger test than “have regard to” and is thus intended to be a higher policy implementation standard.

Although the PPS 2005 has been in place for three years, there are very few OMB cases that focus on the natural heritage policies of the “new” PPS. Of the 63 cases reviewed for this report, only ten discussed the natural heritage policies of the PPS 2005. In most of these cases, the natural heritage policies were applied successfully. While it is encouraging to note that the OMB appears to be applying natural heritage policies effectively, the number of cases involving natural heritage is simply too low to draw conclusions as to how the new policies are playing out in Ontario’s planning system. Therefore, this report is unable to state conclusively whether or not the PPS 2005 has improved clarity with regard to natural heritage decisions.

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## Appendix A: OMB Case Summaries

<b>OMB File Number(s):</b> PL03132	
<b>Decision Number:</b> 0724	<b>Issue Date:</b> March 21, 2007
<b>Board Member(s):</b> M.C. Denhez	
<b>Appeal:</b> Pro-Natural Heritage	
<b>Natural Heritage Issue(s):</b> Adjacent lands (to natural heritage features)	
<p><b>Overview:</b> The Greenspace Alliance of Canada’s Capital (GACC) wants the Board to introduce a provision to the City Of Ottawa’s new Official Plan (OP) that would require an Environmental Impact Study (EIS) for development within 30 metres of an Rural Natural Feature (RNF). RNFS are defined in the draft OP as “natural areas in the rural area that contain woodlands, wetlands, and wildlife habitat that were identified by the Natural Environment Systems Strategy as significant in the context of the City of Ottawa”. The mapping of the RNFs does not follow the outlines of the physical feature, but instead the legal property line. This means that in some cases the lands designated RNF extend beyond the actual physical boundary of the natural heritage feature, and in some cases the natural heritage feature extends beyond the lands designated RNF and are thus unprotected. While an EIS is required for development within 30 metres of a Natural Environment Area (NEA) or Provincially Significant Wetland (PSW), no such requirement exists for development within 30 metres of RNFs. The GACC appealed OP Section 3.2.4, “to insert the same requiremnt for an EIS, for development within 30 metres of an RNF, as there is for development near a wetland or NEA”.</p>	
<p><b>Position of Parties:</b> The City of Ottawa objected to the proposed change to the OP. The City argued that most natural features already include a built-in buffer (i.e. from the edge of the physical feature to the property line). They also argued that the correct way to address potential effects, from projects on adjacent lands, was via the “generic residual” environmental provisions of the OP rather than via a 30 metre buffer. These generic residual provisions apply to all properties and even lands with no environmental designation may require environmental studies concerning vegetative cover, erosion prevention, protection of endangered species, and consideration of the sub-watershed.</p> <p>The City and the Ottawa-Carleton Home Builders Association (OCHBA) argued that the assessment of proposed development adjacent to an RNF would be “operationalized at the pre-consultation level”, meaning that a collection of studies would be triggered when a development application was being prepared.</p>	
<b>Government Agencies:</b> n/a	
<p><b>Notes:</b> The City of Ottawa objected to the proposed change to the OP but did not dispute the “underlying principal that development near environmental assets should be scrutinized” and agreed that “only a small percentage of the City’s land mass had been studied in depth, so identification of environmental assets was a work in progress”.</p>	
<p><b>Natural Heritage Policies and Legislation:</b> The Board referred to both the 1997 and 2005 PPS for “parameters and comparisons” on the issue of adjacent lands. As stated by the Board, “the principle and importance of adjacency are in Provincial policy”. The Board notes the importance of adjacent lands to “ecological diversity and connectivity” and notes the repeated emphasis of the PPS 2005 on “ecological functions”. The Board finds that “adjacency is a significant issue under the PPS, and thus deserves to be a significant issue under the OP. The test, as articulated in the 2005 PPS and useful for the purposes of good planning, is for: the ecological function of the adjacent lands (to be) evaluated and (for it to be) demonstrated that there will be no negative impacts on the natural features or on their ecological functions”.</p>	
<p><b>Decision:</b> The appeal for 30 metre buffers around RNFs was dismissed. The Board ruled that the City’s approach to lands near RNFs was consistent with Provincial Policy. However, the City of Ottawa was required to add a description of its approach to lands near RNFs to its Official Plan “for the sake of predictability and transparency”.</p>	
<b>Interpretation and Application of Natural Heritage Policies:</b> Successful.	

<b>OMB File Number(s):</b> PL040510	
<b>Decision Number:</b> 2517	<b>Issue Date:</b> September 14, 2007
<b>Board Member(s):</b> J. Flint	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Buffers, PSWs	
<p><b>Overview:</b> Consulate Developments (Ontario) Inc (Consulate) owns a 37.16 hectare property in the Town of Collingwood. The property is characterized by pockets of woodland and wetland. Consulate wants to develop the property with a 389-unit residential subdivision, and has appealed the Town of Collingwood’s Official Plan, applied for a zoning by-law amendment and for approval of a draft Plan of Subdivision. Most of the environmental issues were settled with Blue Mountain Watershed Trust Foundation and the County of Simcoe. The issue in dispute is the delineation between the land to be designated Environmental Protection (EP) and the land to be designated Residential. The question before the Board is: Should the buffers (that separate the parcels of land proposed for residential development from the PSW) be designated EP as desired by the Town, or Residential as desired by Consulate?</p>	
<p><b>Positions of Parties:</b> The Town of Collingwood, the County of Simcoe and Consulate Developments (Ontario) Inc. all agree that the buffer areas should be zoned EP; they agree to their size, location, limited uses, regeneration and purposes; and they agree that the buffers are separate and distinct from the Provincially Significant Wetland (PSW). However, there is “diverse expert opinion” about the designation that should apply to the buffers.</p> <p>Consulate wants the buffers to be designated Residential, arguing that only the mapped PSW should be designated EP. The Town maintains that the EP designation is necessary for the buffers areas, in order to conform to Section 2.1 of the PPS 2005.</p>	
<b>Government Agencies:</b> Nottawasaga Valley Conservation Authority (NVCA)	
<p><b>Notes:</b> “The Board also accepts and adopts Mr. Russell’s opinion that while the EP area must incorporate the PSW area, it can also appropriately encompass a larger area such as the EIS peer review recommends and the County Official Plan sanctions. This higher standard shall take precedent when planning applications are considered; and recent precedent has been established for such a higher standard.”</p>	
<p><b>Natural Heritage Policies and Legislation:</b> PPS 2005</p> <p>“On the other hand, Mr. Russell’s opinion is that the buffer areas should be designated EP. He bases his opinion on the PPS, County Official Plan and Town Official Plan. He maintained that an EP designation is necessary in order to conform to section 2.1 of the PPS that states “Natural features and areas shall be protected for the long term” (2.1.1) and “Development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas” (2.1.6).”</p>	
<p><b>Decision:</b> The appeal to designate the buffers as Residential was dismissed. The Board exercised its powers pursuant to section 88 of the Municipal Act and directed that Area D be designated Environmental Protection. “In regard to the designation of the buffer areas, the Board prefers the testimony and opinion of Mr. Russell that, read in context, the Town’s Official Plan policies are intended to provide strong and secure protection for local and regional heritage features and functions. In doing so, the Official Plan conforms to the goals and purpose of the PPS and County Official Plan to protect for “the long term” and “sustain for future generations” respectively. The Board is persuaded, in this instance, that such protection is more securely achieved when the Official Plan classification as well as the zoning for the buffer areas is EP: amendments to Official Plans require extensive scrutiny, study and deliberation.”</p> <p>The appeals for a zoning by-law amendment and for approval of a draft Plan of Subdivision are approved.</p>	
<b>Interpretation and Application of Natural Heritage Policies:</b> Successful.	

<b>OMB File Number(s):</b> PL050556	
<b>Decision Number:</b> 2206	<b>Issue Date:</b> August 3, 2006
<b>Board Member(s):</b> M.F.V. Eger	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Valleyland, woodland, ESA, endangered species	
<b>Overview:</b> In December 2004, Camp Villas Corporation (Camp Villas) applied to amend the Official Plan for the Town of Caledon and the Town's Zoning By-law 87-250. The purpose of the applications was to redesignate and rezone to permit the development of a single detached dwelling on a new lot on lands currently designated as Environmental Policy Areas and zoned Hazard Lands.	
<b>Position of Parties:</b> Camp Villas is of the position that it had a contractual agreement with the Town to look at the northeast area of Block 144 for future multi-lot residential development. Camp Villas modified its intent and filed for official plan and zoning by-law amendments for a single detached dwelling after the Greenbelt Act 2005 came into effect and created a moratorium on multi-lot developments. The Town of Caledon, the Toronto and Region Conservation Authority (TRCA) and local residents all oppose the applications and contend that the lands should not be developed on the basis on their environmental significance.	
<b>Government Agencies:</b> Toronto and Region Conservation Authority (TRCA)	
<b>Notes:</b> "The significant difference in position and evidence between the proponent and the public agencies was the perspective from which they examined the application. The proponent's witnesses focussed on the fact that the applications before the Board should be viewed as a minor development comprising only one additional residential lot. To a large extent, the assessment of the proposed development area and how it could be serviced was also from this perspective. On the other hand, the public agencies' approach was much more comprehensive and the evidence called supported the view that the subject portion of Block 144 is important, is part of and contributes to the environmental significance of the larger valley and woodland system. The Board finds that the evidence of the public agencies is to be preferred to that of Camp Villas' witnesses and flowing from that the applications to amend the official plan and zoning by-law should not be approved." "Authority Staff also conducted a detailed review of Mr. Kaiser's EIS and concluded that there was not an adequate inventory of the larger woodland area. Other concerns were that the EIS specifically concentrated on the proposed development site, the fauna and wildlife inventories were not sufficient (too little data) and there was no data included for lands east of the unopened Mount Hope road allowance. Overall, their conclusion was that the analysis contained in the EIS was not adequate because it was focussed on the development of lands above the top of bank in isolation of an examination of the site's location and ecological contribution to the larger woodland and valley corridor."	
<b>Natural Heritage Policies and Legislation:</b> PPS 1997, Greenbelt Plan, NHRM "Mr. Gaetz is a biologist/ecologist with the TRCA. Based on a review of TRCA's databases, normally used for plan input and review purposes, he concluded overall that the subject corner of Block 144 is part of a larger and diverse woodland community and valley land system. More specifically, he emphasized that the Natural Heritage component of the <i>Provincial Policy Statement, 1997</i> recognizes the importance of remaining natural areas and their function as a single unit. Exhibits 22 and 23 show the subject area in the context of the larger woodland that is estimated at approximately 75 hectares and the Cold Creek which is a sub watershed of the Humber River. The woodland area as identified by the TRCA extends to the rear of the homes on Egan Crescent. Using the Natural Heritage Reference Manual, this size of woodland within an urbanizing context represents a significant woodland. It is also his opinion that the valley system associated with the Humber River also functions as a large landscape feature providing linkages for wildlife."	
<b>Decision:</b> The appeals are dismissed. "All of Block 144, including the subject lands are currently designated Environmental Protection Area and	

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zoned Hazard Lands. The subject applications propose to alter this designation and zoning for an area of about .27 hectare to permit one new residential lot. The onus in this case was on the applicant Camp Villas to clearly show that the lands are not Environmental Policy Area in character and function for the Board to find that it is appropriate to alter their current designation and zoning. Having reviewed all the evidence and as contained in these reasons, the Board finds that this onus has not been met and the approval of the applications would not result in good planning. The applications do not have sufficient regard for the Natural Heritage Component of the PPS, 1997, and do not conform to the Region of Peel and Town of Caledon official plan policies for the protection of significant environmental features and their over arching ecosystem approach to planning. The applications also run contrary to the longstanding Valley and Stream Corridor policies of the TRCA.

The Board was also asked by counsel for Camp Villas to apply another test – to give weight to the fact that if the Board allowed the appeals, the balance of Block 144 would go into public ownership. He indicated that because the remaining lands would be within the Natural Heritage System of the Protected Countryside in the Greenbelt Plan, there could be no further applications for development eliminating all concerns expressed by the parties and the residents regarding future applications and cumulative adverse environmental impacts. In its decision the Board has set out the scope of the applicable planning policy in this case. In addition, it should be noted that the area proposed for development by these applications is also within the Natural Heritage System of the *Greenbelt Plan* which adds to the view they are environmentally significant. At paragraph 106, *Material Handling v. Essex* [2002] OMBD No. 1133, the Member captured the essence of the Board’s discretion in balancing established policy and individual appeals-

*Establishing a policy implies that it should be followed fairly and equally unless there is some good and sufficient reason, arising out of the circumstances before the Board, to do otherwise. This marks the reasonable exercise of discretion.*

The Board is not compelled by any of the circumstances of this case to exercise such discretion.

The Board orders that the appeals are dismissed.”

**Interpretation and Application of Natural Heritage Policies: Successful**

<b>OMB File Number(s):</b> PL051313	
<b>Decision Number:</b> 1794	<b>Issue Date:</b> June 22, 2006
<b>Board Member(s):</b> E. Pendergrast	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Significant Valleyland, connectivity	
<p><b>Overview:</b> “Thornwood Development Group Inc. submitted consent applications to the Committee of Adjustment of the Town of Oakville to permit two lots to be severed from the residential property at 256 Bronte Road. Thornwood’s objective is to divide the property into three freehold lots and to develop the lots for residential dwellings...256 Bronte Road is located east of Bronte Creek and backs onto creek valley land that was dedicated to the Town in the context of the 1985 severance that created 260 Bronte Road. Although the rear lot line of 256 Bronte Road generally corresponds to the staked top-of-bank of the creek valley, staff of Conservation Halton have recommended that further work is needed in order to determine the exact location of the stable top-of-bank, and that the land within a 15-metre setback from the staked or stable top-of-bank, whichever is greater, should be protected and renaturalized. The key issues in dispute are how the protection of the 15-metre setback should be achieved, and how many new lots should be created through severance.”</p>	
<p><b>Position of Parties:</b> “The Town and the Region, with the support of Conservation Halton, advocated dedication of the entire 15 metres east of staked or stable top-of-bank. The applicant’s position was that a conservation easement was both a more desirable approach and also would allow for more reasonable development of the proposed three lots, including the provision of a rear amenity space with a depth of approximately 7.5 metres per dwelling, notwithstanding that the proposed conservation easement would ensure that no development took place on that amenity space. The Region did not take a position on the number of severances, but the Town’s position was that there should be only one severance in order to create only two lots. Thornwood’s position was that there should be two severances and three lots.”</p>	
<b>Government Agencies:</b> Conservation Halton	
<p><b>Notes:</b> “</p> <p>The reason given by Mr. Dragicevic for preferring an easement to dedication have primarily to do with maintaining private amenity space for each of the proposed dwellings. In this regard, the Board accepts as highly reasonable Ms De Vito’s evidence that putting residents in charge of regulating their own backyards is a problematic way to ensure that the setback area will be appropriately renaturalized and protected, since the kind of protection sought by Conservation Halton is at odds with the way most people use their backyards. In addition, the Board was presented with no specific example by any witness of how a prohibition against structures or other development as a term of an easement had effectively protected a comparable buffer area on a privately owned lot.</p>	
<p><b>Natural Heritage Policies and Legislation:</b> PPS 2005, Greenbelt Plan</p> <p>“In view of the date of application, the 2005 Provincial Policy Statement applies to the proposal. The property is also subject to the Greenbelt Plan, which identifies the Bronte Creek Valley as a River Valley Connection and Water. As set out in the Region’s October 17, 2005 letter (Exhibit 2a, Tab 3), subsection 3.2.5, 2a) of the Greenbelt Plan is applicable to the property. As summarized in the Region’s comments that subsection provides that, “in considering land use changes or redevelopments in or abutting an urban river valley, applications should strive for planning approaches that establish or increase the extent of width of vegetation protection zones in natural self-sustaining vegetation, especially in the most ecologically sensitive areas.”</p> <p>“In considering this matter, the Board has also been guided by Mr. Ketcheson’s submissions in his closing arguments that there is no right to a severance, and that the Board has the power to require dedication of the 15-metre setback area without compensation as a condition of giving a provisional consent to sever off either one or two lots, and, in particular, that a required dedication is consistent with certain criteria in subsection 51(24) of the <i>Planning Act</i>, including:</p>	

- a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2;
- c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any; and
- h) Conservation of natural resources and flood control.

**Decision:** Appeals are allowed in part.

“In presenting its considerations and conclusion regarding this issue, the Board notes at the outset that the Bronte Creek valley is a major river valley and a significant natural feature, and is identified as such in the Greenbelt Plan and the Regional and Local Official Plans. As stated in the comments of Conservation Halton on the

applications, “Bronte Creek provides an important ecological linkage between Bronte Creek Provincial Park and Lake Ontario. The (Greenbelt) Plan states that the river valleys that run through existing urban areas and connect the Greenbelt to the Great Lakes are a key component of the long-term health of the Natural System.” (Tab 4, Exhibit 2a, page 51). Given its significance, the question of how best to protect the valleyland adjacent to 256 Bronte Road and the 15-metre setback area intended to protect the stability of the valley slope and to buffer it from nearby development is clearly an important one.

Having considered the evidence presented, the Board is convinced that the preferred method of protecting the 15-metre setback area is to have the area dedicated to the Town so that it, together with the valleyland to the west that has already been dedicated, will be in public ownership.”

**Interpretation and Application of Natural Heritage Policies:** Successful

<b>OMB File Number(s):</b> PL060548	
<b>Decision Number:</b> 2536	<b>Issue Date:</b> September 17, 2007
<b>Board Member(s):</b> D.R. Granger	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Connectivity, natural heritage features	
<p><b>Overview:</b> This hearing addresses remaining appeals related to the Blair/Bechtel/Crickston Environmentally Sensitive Landscape (BBCESL) designation, as set out in a decision of the Region of Waterloo (Region) that approved proposed Amendment No. 22 (ROPPA 22) to the Regional Official Policies Plan (ROPP). The hearing of the appeals will focus on the appropriateness of these lands being included within said designation.</p>	
<p><b>Position of Parties:</b> “The land use planner for the Region is of the opinion that ROPPA 22 is consistent with the PPS, noting the importance of natural features being protected for the long term and the maintaining, restoring or where possible, improving diversity and connectivity of ecological function and biodiversity of natural heritage systems for the long term as set out in PPS policies 2.1.1 and 2.1.2. His evidence and opinion regarding the PPS was not contradicted by any other evidence. The planner for the appellants maintains that the boundary of the BBCESL can be retracted to exclude the agricultural lands of the appellants. He noted that these lands are already protected by the agricultural designations restricting the uses to primarily agricultural. He confirmed his relying on the evidence of the ecology/natural heritage expert of the appellants with respect to the appropriateness of any boundary retraction. It is his opinion that it is unfair to prejudge today what might potentially be appropriate in 20 or 30 years, including the possibility of urban expansion of the Blair settlement area onto the subject lands.”</p>	
<b>Government Agencies:</b> n/a	
<p><b>Notes:</b> “ROPPA 22 represents an advanced planning approach to recognizing, maintaining or improving landscape connectivity and ecological functions in areas of the region noted for their concentrations of high quality natural areas in this case areas focusing on the Laurel Creek headwaters and the Blair-Bechtel-Crickston Creek areas. These two areas generally coincide with non-prime agricultural lands that could be looked at as having potential for urban expansion or other limited non-farm related rural uses in the future. In order to address the possible conflict between non-farm related uses and environmentally sensitive uses, the Region has set out to identify and protect those areas of concentration of high quality natural areas for long-term protection from any development other than continued agriculture. This general principle as confirmed in ROPPA 22 is not in dispute and, as now in effect, represents an environmental step forward in the protection of important overall natural landscapes, as opposed to separate islands of natural areas, that can include cultural uses such as farming or even areas of human settlement as in this case including the village area of Blair, acknowledged to be the earliest inland settlement in Ontario. ROPPA 22 represents an added level of long-term protection and finality of land use.”</p>	
<p><b>Natural Heritage Policies and Legislation: PPS 2005</b>  “Having considered all of the evidence presented, the Board finds that the inclusion of the lands of the appellants in the BBCESL is consistent with the PPS, conforms to the in-force policy 4.6.2 of ROPPA 22, is appropriate, represents good planning and is in the overall public interest of the community.”</p>	
<p><b>Decision:</b> Appeals are dismissed.  “The Board is satisfied that the boundary of the BBCESL is most appropriate with the inclusion of the subject lands. To exclude the lands and leave open the prospect of future development potential could result in a significant narrowing of the landscape connection between the natural lands identified to the west with the natural lands identified to the east and less prospect of the potential to improve and expand the natural swale area linkage along the north boundary of the subject lands. The Board is cognizant that the BBCESL represents a landscape protection and not one individual natural feature. As a landscape feature, cultural activities, including the existing farm use of the subject land is</p>	

anticipated to continue, albeit with the hope of greater stewardship in an effort to afford better protection for the natural environment. While land use is being further restricted over the long-term planning period of the regional official policies plan, the existing agricultural use will continue as a legally permitted use. All parties acknowledge the right to make applications for change pursuant to the *Planning Act* in the future. In conclusion, the appeals by Peter Glaser, Guenter Lotzmann and Martin Gedja are dismissed and Amendment No. 22 to the Regional Official Policies Plan is approved as adopted by Waterloo Region.

**Interpretation and Application of Natural Heritage Policies:** Successful.

<b>OMB File Number(s):</b> PL04118	
<b>Decision Number:</b>	<b>Issue Date:</b> January 11, 2008
<b>Board Member(s):</b> S.B. Campbell	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Natural Heritage System, candidate ANSI	
<p><b>Overview:</b> “On June 2, 1998, Regional Official Plan Amendment No.8 (“ROPA 8”) was approved by Council of the Regional Municipality of Halton (the “Region”). ROPA 8 (Exhibit #6a, TAB 1) sets out proposed expansions to the existing urban area of the Region to accommodate the projected residential and employment growth which could not be accommodated within existing urban areas. Included in this expanded area were lands in the Town of Oakville (the “Town”) known as the “North Oakville Lands”, that is, lands south of Highway 407, north of Dundas Street West, west of Ninth Line and east of Tremaine Road. It is intended that these lands will eventually accommodate 50,000 residents...”</p> <p>The North Oakville Secondary Plan was the focus of long and intense negotiations between the municipality and private developers. The planning process included two separate subwatershed studies and two separate subwatershed plans, with the municipal planners and the developers each presenting a different Natural Heritage System for the suburban site.</p> <p>“By August 14, 2007, after an extended period of successful mediation and negotiation, the Board was informed that a comprehensive settlement endorsed by Town Council and most of the (NOMI) landowners had been reached. During the course of this hearing further settlements were reached.”</p> <p>“Of the four issues remaining in dispute, one focuses on natural heritage issues and will be summarized here: the boundary of the Natural Heritage System with respect to lands owned by Capobianco and lands owned by Bazar. The lands which Capobianco argues should be excluded from the NHS are located in a Core Preserve Area, Core Area # 10, Buttonbush Swamp, as identified in the Subwatershed Study A portion of the Capobianco lands, including lands which the Capobiancos want removed from the NHS, form part of Unit 1 of the Candidate Oakville-Milton Wetlands and uplands Life Science Area of Natural and Scientific Interest (the “candidate ANSI”).”</p>	
<p><b>Position of Parties:</b></p> <p>“It was the evidence of Mr. Speller, who is neither a hydrogeologist nor a water resources engineer that the Capobianco lands do not act as a source of water for the kettle wetlands on the adjacent lands.”</p> <p>“The evidence of Messrs. Speller and Cymbaly focused, the Board finds, on a comparison between the boundaries of the NHS in Core Area # 10 and in other cores. The witnesses alleged unfairness or inequitable treatment.”</p> <p>Mr. Bazar proffered no expert evidence to the Board. His focus in his testimony was on the lack of wildlife he sees on his land since Highway 407 was constructed. He does not want to be “penalized” with a NHS designation for having retained a woodlot on his property. He believes that too much land is being preserved in North Oakville. He believes that the Secondary Plan represents a “clever plan by the Town to acquire private land without compensation”.</p>	
<b>Government Agencies:</b> MNR, Conservation Halton	
<p><b>Notes:</b> The Board finds, based on a review of the evidence of the witnesses, the direction of the policy documents and a review of the Subwatershed Study, that not only is a systems approach an appropriate approach to determining the boundaries of a NHS in a developing urban area, it is the best approach. It is clearly the best approach given what experts now understand about environmental biology. No longer can society afford to look at the “natural environment” as isolated pockets of green which have been fortunate enough to have survived in an urban landscape. The Board is convinced by the evidence adduced in this hearing, that for the natural environment to have a chance of sustainability in developing urban areas, a systems approach must be taken to delineating boundaries. The Board was particularly persuaded by the evidence of Dr. Stephenson and Dr. Tegler, that the use of a systems approach substantially increases sustainability of the natural environment in an urban context “by supporting the diversity of species and making the natural area more resilient to the effects of urbanization”. This approach demonstrably facilitates the balancing act mandated by the PPS between the need for urbanization in the Province and the</p>	

protection of the Province's natural heritage.

**Natural Heritage Policies and Legislation: PPS 1997, NHRM**

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

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

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

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

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

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

The Board finds that the Capobianco exclusion lands are "adjacent lands" for the purposes of the planning documents. Following the direction of the PPS, these lands may only be developed if it has been demonstrated that there will be no negative impacts on the natural features or on the ecological functions for which the area is identified. Having reviewed the evidence of Messrs. Speller and Cymbaly, the Board finds that there would be no negative impacts attendant on the development of the exclusion lands. Rather, the Board finds that the Town and region witnesses compellingly demonstrated that the Capobianco lands, "adjacent lands", would have substantial negative impacts on the NHS in Core Area # 10 as they contribute to the provision of vital interior woodland habitat.

**Decision:** The appeals are dismissed.

Capobianco appeal is dismissed: "Having reviewed the evidence of all the witnesses, and the exhaustive work that was done in the Subwatershed Study, the Board accepts the evidence of Ms Howson that the land use designations on the Capobianco lands are appropriate and reflect good planning in delineating the boundaries of the NHS based on the Subwatershed Study. That study, after duly justifying the use of the systems approach to identifying the NHS, conclusively demonstrates the significance of the natural heritage features and functions on and adjacent to the Capobianco lands. The reasons for including the exclusion lands in the NHS are well documented; they are lands adjacent to significant woodlands and wetlands and

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any development on these lands would have a negative impact on the natural features and ecological functions for which the area is identified. When the Board hears evidence that it is dealing with lands containing, or vital to the survival of, provincially or globally rare species and habitats, it must proceed with utmost caution. In this case, the Capobiancos adduced no evidence which would persuade the Board to adjust the boundaries of the NHS in the vicinity of these species and habitats.”

Bazar appeal is dismissed: “The Board applies the same reasoning to the Bazar lands that it applied to the Capobianco lands. The Town has demonstrated to the satisfaction of the Board that there are legitimate land use planning reasons for the designation of the Bazar lands. Mr. Bazar’s wish to take advantage of the “development potential” of the lands does not outweigh the value of the lands to the preservation of the NHS in North Oakville.”

**Interpretation and Application of Natural Heritage Policies: Successful**

<b>OMB File Number(s):</b> PL061020, PL070322	
<b>Decision Number:</b> 1675	<b>Issue Date:</b> June 18, 2007
<b>Board Member(s):</b> M.C. Denhez	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> PSW, species at risk	
<p><b>Overview:</b> “This four-day hearing for a motion to dismiss is the latest in an almost twenty-year dispute over a PSW in the City of Ottawa. 1374537 Ontario Ltd. and Findlay Creek Properties Ltd. (developers), two of the Tartan group of companies (Tartan), own land in and near the PSW in the City of Ottawa (City). The subject lands are in two parcels, rezoned for subdivisions – one rezoned by By-law 2006-380, the other by By-law 2007-103. The Sierra Club of Canada and the Greenspace Alliance of Canada’s Capital (appellants) appealed both By-law 2006-380 (Board File PL061020) and By-law 2007-103 (Board File PL070322). There is disagreement over the boundary of the PSW, whether the subject lands fall inside that boundary, and ancillary ecological impacts.</p> <p>The lands were designated for development in Regional and City Official Plans in 1988, 1989, 1997 and 2003. There were 29 separate approvals by senior governments, and six environmental assessments (including federal and provincial). In 1999, the subject lands were rezoned for "Future Growth"; in 2006-7, the two By-laws under appeal proposed to specify the <i>kind</i> of development.”</p> <p>“</p> <p style="padding-left: 40px;">The true matter in issue in this Appeal is the conformity of the zoning by-laws to the Ottawa Official Plan 2003 and the Provincial Policy Statement 2005. Historical approvals are of minimal relevance (Appellants' Response to Motion).</p>	
<b>Government Agencies:</b> DFO, MNR, MOE, South Nation Conservation	
<p><b>Position of Parties:</b> Usually, zoning by-laws set forth the regulatory scheme for uses and development on land, pursuant to an Official Plan (OP); and appeals usually imply challenges to that regulatory content. These appeals are different: the appellants are not challenging the By-laws so much as the entire premise of developing the subject lands at all. They say that confusion over mapping (dating from 1991) meant that approvals had been issued in error, that the subject lands were largely within a Provincially Significant Wetland (or linked to it), and that all the development foreseen in the appealed By-laws was improper. The developers, with City support, brought this Motion to Dismiss without a hearing, arguing that it is the appellants who are in error, that all planning grounds have been abundantly addressed and disposed of by the environmental assessments under senior governments, and that the ecological debate is substantively concluded. Even if there were any loose ends (which they deny), then (i) appellants should have raised them years ago, and (ii) the Board lacks jurisdiction to address them today anyway.</p>	
<p><b>Notes:</b> “Unlike many other Motions to Dismiss, often heard in advance of the hearing on the merits, this Motion was heard on the scheduled start date, i.e., when evidence was supposed to be <i>ready</i>. The appellants, however, did not consider themselves ready: their own affidavit (W. Amos, May 16, 2007) referred to “evidence being developed”. According to their counsel, however, the missing information was hydrogeological – the "foundational information" for the 29 federal and provincial approvals. There was no mention of other gaps that might hinder their response to this Motion.</p> <p>Since hydrogeological data <i>per se</i> were not part of the Motion materials, the Board was not persuaded that further hydrogeological data would be necessary for the purposes of the Motion, or even germane to the immediate issues at hand. The Board directed that argument of the Motion proceed, with the proviso that <i>if</i> further information did become necessary for the appellants in this Motion, the Board would “cross that bridge when it came to it” and revise instructions.”</p> <p>“In support of the above contentions, the appellants proposed to rely exclusively on environmental evidence, with experts in botany (Mr. Dugal), hydrology, soils, reptiles, amphibians, birds, fish, mercury, ecology, climatology and endocrinology. No land-use planners were on their proposed witness list (Affidavit of W. Amos, May 16, 2007).”</p>	

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“It is undisputed that definition of protected PSW boundaries is the prerogative of MNR, beyond the jurisdiction of the Board to redefine. It matters little whether anyone else – including the Board – were to consider the deal ecologically astute and creatively opportune on one hand, or a cynical sellout on the other: it is MNR’s decision to make. Ontario also identifies legal recourses for those dissatisfied with MNR’s position; here, those recourses were not used, and in any event, the appeal process to this Board is not one of them.”

“The appellants' empty-handedness extended even to information that should have been easy for them to substantiate. For example, the Notices of Appeal allege the presence of one animal species and one tree species at risk: Blanding's turtle and a “grove” of Butternut. However, the appellants could not point to a single sighting of Blanding's turtle within many kilometres of the subject lands. According to appellants' own Exhibit 21, the closest sightings were on the opposite side of the Rideau River west of Manotick, and at the eastern edge of the City in the Mer Bleue Wetland. Evidentiary matters were not much better concerning Butternut. Mr. Dugal's article (Exhibit 22) said that he had seen Butternut in the wetland, but the Notice of Appeal says that it is in UNA108; in either case, one would think that a “grove” of Butternut could not be so elusive: substantiation would have been helpful – a corroborative sighting, or a photo – but there was nothing of the kind...In short, in contrast to the volumes of official findings, the Board again found nothing to support the appellants’ contentions of environmental damage, that might be a ground on which the Board could allow all or part of the appeal.”

“For good measure, there are policy dimensions. As mentioned, the developers' counsel argued that if appellants' premise were accepted, it would explode the notion of finality to any environmental decision, and that this was against public policy.

Here, the appellants' apparent intent was to extend stricter environmental protection than the original processes/approvals provided. However, their premise cuts both ways. If the Board agreed to downplay previous environmental assessments and decisions of senior governments, what Pandora’s box would it open? Would there be a single wetland or other ecological asset in Ontario that could be considered safe? As counsel for the appellants pointedly repeated, developers usually have more resources than environmental NGO’s; so what would stop any developer from declaring that

-since the very first operational provision of the PPS – Section 1.1.1(a) – calls for "efficient development", then *ipso facto*,

-every protective decision could similarly be revisited by the Board, the minute a municipality incorporated it (or re-incorporated it) into an OP or by-law, as an attempt to pre-empt “efficient development”?

In this scenario, the developer could then demand and challenge the "foundational information" on which senior governments made their protective decisions; and on the basis of purported conflict with the PPS (along with any references to "efficient development" in the local OP – all purported "planning grounds"), the developer could call on the Board to approve subdivisions almost anywhere, notwithstanding "protected" status.

Under that scenario, which the Board considers the inexorable corollary of the appellants' premise, the outcome could be as disastrous to the appellants’ interests as it was chaotic. It would be the antithesis of the word "planning".

#### **Natural Heritage Policies and Legislation: PPS 2005**

“The relationship between wetlands, planning and development is complex. Though “swamps” were once disparaged, that was before there was an understanding of their immense significance for biodiversity. Today, Section 2.1.3(b) of the Provincial Policy Statement (PPS) imposes an outright ban on development of significant wetlands in this region, like the ban on development in significant habitat for species at risk. There are also statutory procedures for development *near* ecological assets; those statutory procedures involve many government agencies”

**Decision:** Motion to dismiss granted.

“The Board has carefully considered all the evidence, as well as the able submissions of counsel. The Board finds that the Motion to Dismiss should be granted, because the appeals do not disclose land use planning ground *upon which they could succeed*. First, the boundaries of the protected PSW, defined by the Province, did not correspond to appellants’ assumptions – not because of some “review by all affected parties in the field” as the developers suggested, but because the Province made a conscious *trade-off* – which (whether one agrees or disagrees) was within its jurisdiction to make. Next, the other environmental grounds have already been disposed of, in the six environmental assessments and 29 approvals of other statutory bodies, including senior governments. The Board disagrees with appellants’ premise, that the Board necessarily provides an alternate forum for parties dissatisfied with environmental decisions, to revisit those issues before the Board when they were unable or unwilling to contest them before the designated bodies having jurisdiction. Parenthetically, the Board is also unconvinced that the appellants’ argument is in the long-term interest of greening Ontario.”

**Interpretation and Application of Natural Heritage Policies:** Successful.

Thorough and thoughtful review of the evidence. Even though the motion to dismiss the pro-natural heritage appeal was granted, the PPS natural heritage policies were acknowledged, examined and applied appropriately.

<b>OMB File Number(s):</b> PL051311	
<b>Decision Number:</b> 0043	<b>Issue Date:</b> January 9, 2007
<b>Board Member(s):</b> J.E. Sniezek	
<b>Appeal:</b> Pro-development	
<b>Natural Heritage Issue(s):</b> wetland, fish habitat	
<p><b>Overview:</b> Ms Pieper owns property on Lake Waseosa with a frontage of 340 m and an area of 4.75 ha. There is an existing cottage on the property. The proposal involves the creation of four parcels...The focus of the hearing has been about P (phosphorus) and the potential increase in P in Lake Waseosa that is now at a level that exceeds the predictive model for the lake. The reasons for this could be malfunctioning septic systems, naturally occurring P levels or higher levels due to surface runoff or naturally occurring sources such as wetland areas. None of the planning or scientific witnesses were able to predict where or when algae blooms could occur.</p>	
<p><b>Position of Parties:</b> At the outset of the hearing the solicitor for the Town of Huntsville (the town) indicated that there had been a settlement between the applicant and the town and the town wished to withdraw as a party to the proceedings. The Board consented to the withdrawal of the town. The residents (Lake Waseosa Ratepayers Association) concerns relate to the existing condition of the lake and the risks posed by the proposed new lots as well as the vacant lots. The residents also question the ability of the town to enforce the conditions of development. The residents urge the Board to apply "Precautionary Principle" to this proposed development and not allow the appeal because of the potential risks.</p>	
<b>Government Agencies:</b> n/a	
<b>Notes:</b> n/a	
<p><b>Natural Heritage Policies and Legislation:</b> PPS 2005</p> <p>Mr. Hunter opined on the Provincial Policy Statement (PPS) concerning water quality issues, efficient and cost effective development patterns, resource based recreational development and health, safety and environmental concerns. In addition, he felt that the site in question is suitable for individual servicing and that natural heritage and water quality issues had been addressed.</p> <p>Mr. Hunter provided the following comments with respect to Section 51(24) of the <i>Planning Act</i>:</p> <ul style="list-style-type: none"> <li>a) There are no items of provincial interest in the development and the development is consistent with provincial directions with respect to development standards along lakes and shorelines with capacity issues.</li> <li>b) The proposal is not premature and considering the environmental evaluation, the proposed lots can be developed with no negative impacts. No service extensions are required. The development will set a standard for the review of shoreline development.</li> <li>h) There are no issues with respect to flooding on the property. The local Fish Habitat I will be conserved and protected. The water quality will be protected by the design of the septic systems, storm water management facilities and buffer areas.</li> </ul>	
<p><b>Decision:</b> The appeals are dismissed.</p> <p>"It appears that the planners in this case have only focussed on the Phosphorus tree to the exclusion of all the other trees or risks in the lakeshore planning forest. The issues of lake capacity and risk from other sources have not been addressed. The residents and Dr. Robertson have raised sufficient issues of risk to place into question the assumptions used to evaluate this proposal. The appeals are dismissed."</p>	
<b>Interpretation and Application of Natural Heritage Policies:</b> Neutral	

<b>OMB File Number(s):</b> PL020446	
<b>Decision Number:</b> 3289	<b>Issue Date:</b> November 23, 2006
<b>Board Member(s):</b> M.F.V. Eger and D.L. Gates	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Natural Heritage System, significant wildlife habitat, connecting corridors	
<p><b>Overview:</b> The proposal before the Board is to expand the urban boundary of the Town of Richmond Hill. “In considering an OP for the last large greenfield parcel of land in Richmond Hill, the Board was looking for a grand vision. Largely through the policy direction of the Province, and the prodding of the Town and other public agencies, and the ultimate acceptance by the landowners, this grand vision was realized by anchoring the plan for North Leslie on a comprehensive natural heritage system. This system, consisting of approximately 30% of the land under review, includes many north-south nature and trail linkages centered on the three tributaries of the Rouge, the Greenbelt, provincially identified environmentally significant features and areas of scientific interest, the southerly edge of the Oak Ridges Moraine, and an east-west surface linkage through a pipeline easement. Both the landowners and the public agencies are to be congratulated for their spectacular yet sensitive vision for North Leslie.”</p> <p>As this case is too lengthy to summarize all issues, just the major Natural Heritage issues are discussed here:</p> <p>“Lands on the edge of development pose certain environmental challenges that are not present elsewhere. One such challenge is who should end up owning these large natural areas? A second challenge is how the natural areas shall be used. A final challenge is that if it is decided that these natural areas should ultimately come into public ownership, must landowners convey them without compensation or who should bear the cost? In so far as the Board concurs with all the evidence supporting public ownership of the natural areas, how will all these lands come into public ownership and who will bear the cost? The unfortunate truth of the matter is that not all of the natural areas will come into public ownership through the development process, or at least not at any time soon. This is because the Planning Act provisions clearly stipulate when such conveyances can be required as a condition of development approval (severance, subdivision, condominium) and in the Board’s opinion, the Act never anticipated a situation where about one third of the development area would be sought to be transferred into public ownership.</p> <p>Thus the conundrum for the Board became whether it should approve a plan for the urbanization of North Leslie that has as its foundation a NHS and Greenbelt system some of which may never come into public ownership.”</p>	
<p><b>Position of Parties:</b> Generally, all witnesses supported the goal of public ownership of the NHS. Many reasons were given such as long-term stewardship and management of these important environmental lands.</p>	
<p><b>Government Agencies:</b> Toronto and Region Conservation Authority (TRCA), MMAH</p>	
<p><b>Notes:</b> “The Province’s aggressiveness in enacting the <i>Oak Ridges Moraine Act, 2001</i> and the <i>Greenbelt Act, 2005</i> and their regulations appears to have substantially changed the positions of the parties such that many of the once disputed areas are now protected by one or other of these respective plans. This may also be the reason for SRVS’s lack of presence at this hearing and the ability of the parties to settle many of the issues that were outstanding at the commencement of this hearing. It is unfortunate that some of these issues could not have been settled earlier.”</p> <p>“The North Leslie Secondary Plan is premised on the principle of “Environment First”. Section 2.1 says – This means that development will only be approved if it can be demonstrated that the natural heritage system and its functions have been protected and the integrity of the water resource system, both surface and ground water resources, have been protected. In order for the long-term sustainability of the Natural Heritage System, the ecological features and their functions must be protected, restored and enhanced through the development of this plan.”</p> <p>“During the ecological phase of the hearing, the landowner’s evidence was given by Dr. Coleman on behalf</p>	

of Belg; Mr. Sandilands on behalf of Manson; Mr. Charlton for Endean; Mr. Cunningham for Bawden-Wood; and Mr. Fraser for Mizrahi and Richmond Greenhouses. Mr. Sharp and Ms Lewis gave evidence on behalf of the public agencies. Mr. Varga, Mr. Heaton and Mr. Bazinet were summoned by SRVS. The Board finds that the extensive and current fieldwork and analysis undertaken by the owner's and public agencies' witnesses in establishing the proposed NHS is to be preferred over the SRVS witnesses. For example, Mr. Varga's proposed seven additional local scale "connecting corridors" (Exhibit 80) as part of the proposed NHS. These included additional corridors between wetland features, additional forest cover as compensation for loss of woodlot area and filling in or rounding off of other features. In all cases, but for the Mizrahi property, the evidence of Ms Lewis, Mr. Sharp and Dr. Coleman rejected these recommended connections as unnecessary for the functioning of the NHS or not reflecting current field conditions. It was clear from the evidence that the SRVS' witnesses were not relying on the most up-to-date field work and analysis which had been given in evidence earlier in this hearing.

"The Board simply contrasts the policy recommended by the Ecologist's group with the evidence of Mr. Varga and Mr. Heaton. Mr. Varga had recommended a no development buffer of 120 metres around the nesting habitat in PSW34. But in cross-examination he admitted that there is no basis for such criteria in the 1997 PPS or the Natural Heritage Reference Manual. Mr. Heaton referenced a document entitled *MNR's Management Guideline for the Protection of Heronries in Ontario, 1984*, as the basis for recommending a 300 metre buffer. He also suggested a one-kilometre heavy development buffer zone during breeding season, mid-March to the first of August. This would impact more than half the North Leslie plan area. In cross-examination it was established that that document was applicable to forest management areas and not to an area like North Leslie.

Also, the Board finds that this opinion is just not reasonable given the colony has established and expanded in an area in close proximity to Highway 404 and Leslie Street.

Later in Mr. Heaton's cross-examination, it was agreed that the relevant document is a 2000 MNR document entitled the *Significant Wildlife Habitat Technical Guide*. This document identifies heron colonies of twenty-five nests or more as significant wildlife habitat within the meaning of the PPS, unless they are located on the Oak Ridges Moraine where fewer nests are considered significant. North Leslie has eighteen nests located south of the Moraine."

**Natural Heritage Policies and Legislation:** PPS 1997, Greenbelt Plan, ORMCP

"The Provincial Policy Statement, the Oak Ridges Moraine Conservation Plan, Greenbelt Plan and the Rouge North Management Plan (as set out in the Greenbelt Plan) apply to North Leslie as set out in this decision."

"Woodlands, wetlands and watercourses within the area of the Oak Ridges Moraine and identified in the Oak Ridges Moraine Conservation Plan as Key Natural Features or Natural Linkage Areas form part of the recommended NHS in North Leslie. As well the Greenbelt Plan includes a Natural Heritage System that includes those areas of the Protected Countryside with the highest concentration of the most sensitive and significant natural features and functions. The Greenbelt Plan recognizes the necessity of managing these natural features and functions in a comprehensive way. The North Leslie Plan also incorporates the Greenbelt Plan's Natural Heritage System. The NHS and the Blended Plan not only incorporate these features but also the provincial policy that protects them.

The Board finds that the proposed Secondary Plan provides for the establishment of a NHS that appropriately recognizes all significant environmental lands and provides for a regional scale corridor connecting the ORM with the Rouge Watershed through the North Leslie lands as envisioned in provincial policy documents."

"It is clear through the drafting of the Oak Ridges Moraine and Greenbelt Acts, Amendments and Regulations and the evidence of Mr. Sit, a Planner with the Ministry of Municipal Affairs and Housing, that the Provincial Government did not intend to prohibit development on the North Leslie lands outside of the natural areas.

The Board accepts the evidence of Mr. Sit and the Town and other public agencies' positions that the Greenbelt Act should be given a broad and liberal interpretation as a whole and that the intention of this legislation is not to permit active parkland within the Protected Countryside of the Greenbelt. The Board

concedes that the legislation could express this intention more clearly.”

**Decision:** The appeals are allowed in part.

“The Provincial Policy Statement, the Oak Ridges Moraine Conservation Plan, Greenbelt Plan and the Rouge North Management Plan (as set out in the Greenbelt Plan) apply to North Leslie as set out in this decision. The Board is satisfied that the proposed amendments to the Region of York Official Plan and the Town of Richmond Hill Plan are comprehensive and, subject to the findings of the Board in this decision, are appropriate, have regard for and reflect the provincial policy context and represent good planning. The Board will allow the appeals by Belg and E. Manson, in part. Further, the Board directs the parties to revise Exhibit 320 - the Regional Official Plan Amendment and Blended North Leslie Secondary Plan in accordance with the Board’s Decision.”

**Interpretation and Application of Natural Heritage Policies:** Successful

<b>OMB File Number(s):</b> PL020603	
<b>Decision Number:</b> 1678	<b>Issue Date:</b> Oct 21, 2004
<b>Board Member(s):</b> M.A.F. Stockton	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Natural heritage system	
<p><b>Overview:</b> The Board has before it an appeal by Castle Glen Development Corporation (“Castle Glen”) with respect to its application for an Amendment to the Official Plan for the Town of the Blue Mountains. In support of this appeal are the Town of the Blue Mountains (the “Town”), the County of Grey (the “County”) and the Niagara Escarpment Commission (the Commission”). Castle Glen, the Town, the County and the Commission are referred to from time to time as the Allied Parties. Opposed is the Castle Glen Ratepayers Association Inc. (the “Ratepayers”).</p>	
<p><b>Position of Parties:</b> “Fundamentally, the Allied Parties and the Ratepayers disagree on the approach to be taken with respect to the natural heritage issues. As discussed earlier, the draft OPA contains strong measures for protection of the natural features and functions on the subject property. A certain body of work has been completed to date, but all parties agree that more work remains to be done before development takes place. Castle Glen and the Public Agencies prefer what they described consistently as the “drilling down” approach: that is, at each stage of development, the required environmental studies become more and more specific.</p> <p>The Ratepayers and their witnesses preferred what they describe as the “precautionary” or “environment-first” approach. In other words, while they acknowledge that the regime set out in Article 8 of the OPA is a good one, its application as development proceeds is too late in the process. A much greater level of study should be done <i>now</i>, before any designations by way of mapping are contemplated. They believe that not enough is known about the site at this time to make any determinations about appropriate land use designations.</p> <p>Furthermore, the Ratepayers feel that it is inappropriate to proceed with any development on the non-deferred lands until all studies have been completed on the deferred lands above the brow. The opinion expressed by several of their witnesses, more specifically, was that insufficient study has been completed to ensure that there are no essential natural connections between the deferred lands above the brow of the Escarpment, and the non-deferred lands below the brow.”</p>	
<b>Government Agencies:</b> Nottawasaga Valley Conservation Authority (NVCA)	
<p><b>Notes:</b> “Dr. Brett Tegler gave evidence on behalf of the Ratepayers on all environmental issues. Dr. Tegler was qualified as an “Applied Ecologist”, and not as a land use planner. He admitted that he was not a hydrogeologist, geologist, hydrologist or fisheries biologist. He described himself as subscribing to the principles of conservation biology, an emerging science, which involves an “environment-first” approach to land use planning. While the Board generally found Dr. Tegler’s evidence to be earnest, sincere, principled and professional, it prefers the evidence of Castle Glen’s experts, and the Town’s peer reviewers, for a number of reasons. Dr. Tegler admitted that he had spent only two days on the subject lands, as opposed to the aggregate 37 days of Castle Glen’s and the Town’s witnesses. Furthermore, Dr. Tegler conceded that he had read only some of the reports, and had not been in attendance for all of their evidence. He had not read the transcripts of the evidence which he missed, relying instead on “notes” of the proceedings. To be fair, he had missed some of the hearing due to personal matters. However, he explained that his retainer by the Ratepayers had been limited, and it was argued by the Ratepayers that this limited retainer was appropriate in the circumstances. The Board does not wish to suggest that the Ratepayers’ position is completely unfounded. However, the fact remains that the level of study concluded by Castle Glen’s witnesses was extensive in comparison to that of the Ratepayers’ experts, and more useful to the Board.</p> <p>The same may be said for the panel of experts, who appeared on behalf of the Nottawasaga Valley Conservation Authority (NVCA). They attended for even less of the hearing, and had read even fewer of the studies. Again, the Board found their evidence to be sincere and professional, but nevertheless finds their evidence to be less useful to the Board than that of the Castle Glen witnesses, and the panel of peer</p>	

reviewers for the Town. It is the mandate of conservation authorities in the Province of Ontario to comment on matters relating to fish habitat and watersheds. However, this particular panel also gave evidence touching on woodlands. It is the position of the solicitor for the County of Grey that it is the County's responsibility to speak for the Province on matters of Provincial interest other than fish habitat and watersheds, and that therefore the Board should ignore this panel's evidence touching on woodlands. It is the position of the NVCA that commenting on fish habitat and watersheds naturally extends to other areas of the natural environment. The Board believes that it may be necessary for conservation authorities to extend their consideration of fisheries and watershed issues into other facets of the natural environment. The Board did not find the evidence of the NVCA witnesses inappropriate or necessarily beyond their authority. As stated earlier, however, the Board did prefer the evidence of other witnesses on watershed and fisheries issues."

**Natural Heritage Policies and Legislation:** NHRM, PPS 1997, NEP

"Much of the debate on environmental issues centred around the use of the Natural Heritage Reference Manual (Exhibit 40). All witnesses agreed that this manual and the Natural Heritage System which flows from it, represents one method of giving effect to the PPS, and in particular section 2.3... While the use of the Natural Heritage Reference Manual appears to be widespread in environmental planning, it is important to remember that the Manual does not represent a policy document for planning purposes, nor is the use of a natural heritage system mandated."

"The Ratepayers also spent a considerable amount of time arguing that connectivity and diversity, both essential elements under section 2.3 of the PPS, had not been addressed in the draft Official Plan amendment. In the first place, it was argued that the subject property must be considered in the context of the natural features and functions of surrounding lands. This is particularly true in the context of protection of watercourses and fisheries on lands downstream in Black Ash Creek and Silver Creek. In the second place, it was argued that by deferring the study of the lands above the brow of the escarpment, the possibility of essential connections between those lands and the lands below the brow was being ignored. In short, it is argued by the Ratepayers, there is an incomplete understanding at the Official Plan level of the natural features and functions on the subject lands. This understanding cannot be gleaned at a later date by going from broad policies to more specific studies to be performed in the planning process"

"Although the NEP is the senior planning document, it remains for the Board to be satisfied that the proposed Official Plan amendment, as required by the *Planning Act*, has regard for the Provincial Policy Statement. In this regard, the Board is mindful of the language of the Divisional Court in *King City Preserve the Village Inc. v. York (Regional Municipality)*, [2001] O.J. No. 5363, which states that the Board in making its decision must have proper regard, and not merely pay "lip service" to the PPS.

This is not always easy. The Board is required to balance properly and fairly the sometimes competing principles contained in the PPS. On one hand, the Board is required to have due regard to section 2.3, which speaks to natural heritage concerns, and in particular directs that natural heritage features and functions are to be protected from incompatible development. On the other hand, the Board must have regard for the principles of the PPS, which speak to the dependency of the Province's long term economic prosperity, environmental health and social well-being through the management of change and promotion of efficient, cost-effective development and land use patterns "which stimulate economic growth and protect the environment and public health."

**Decision:** The appeal is allowed in part.

"The Board finds that a proper and fair balance has been achieved in the draft OPA with respect to the principles contained in the PPS. The Board is satisfied, on one hand, that the policies contained in the draft OPA have due regard for section 2.3 of the PPS. On the other hand, the Board accepts the evidence, principally from Mr. Genest, that this region is key to the economic development of the Province. The welfare of the area is largely dependent on its resort and tourist communities, and the subject proposal is quite consistent with those objectives.

The Board finds that the proposed Official Plan amendment has proper regard for the

Provincial Policy Statement, and conforms to senior planning documents. Furthermore, in the Board's view, it is a significant improvement on the current planning regime of OPA 7, and it represents appropriate land use policy for 2004."

The proposed development is feasible and an appropriate use for the land. It maintains a proper balance between protection of the Province's natural heritage, and its economic future...Accordingly the Board allows the appeal in part and approves the Official Plan amendment, to the extent of the non-shaded areas as contained in Exhibit 217, as Official Plan policy for the non-deferred lands in the Castle Glen secondary plan area. There is presently under way a Class Assessment, with respect to the installation of services to the site. The Board will withhold its Order until proof has been provided to the Board that this study has been satisfactorily completed."

**Interpretation and Application of Natural Heritage Policies:** Unsuccessful.

<b>OMB File Number(s):</b> PL031169	
<b>Decision Number:</b> 1488	<b>Issue Date:</b> May 18, 2006
<b>Board Member(s):</b> N.C. Jackson and G.C. O'Connor	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> significant wildlife habitat	
<p><b>Overview:</b> The Appellant, Palm Place Development Inc., has applied to amend the Town of Oakville Official Plan and to rezone a parcel of land situated, north of the shore of Lake Ontario, on the south side of Lakeshore Road West between Great Lakes Boulevard to the east, and Burloak Drive to the west, near the boundary with the City of Burlington. At issue is the greening of the Town of Oakville and in particular, waterfront, with important environmental considerations including wildlife habitat for migratory land birds. Also at issue on the other hand, is the validity of the existing Official Plan policies specifically the designation on the east half of the Palm Place property of Private Open Space.</p>	
<p><b>Position of Parties:</b> “The current proposal is for 370 dwelling units in three separate towers with 12 storeys on the waterside stepping down to 7 storeys on the Lakeshore Road West side of the site. The proposal now includes the locating of the three towers on the westerly half of the site. The easterly half of the site is to be conveyed to the Town of Oakville, or other public body for public purposes. The Appellant has made the offer to convey the easterly half for nominal consideration as part of the planning process, but contingent upon the approval to construct 370 units on the west half of the site. The Town of Oakville opposes the appeals but confirms that residential development is appropriate up to 27 dwelling units. The Town has considered possible acquisition or expropriation of the Shell House Lands. The Bronte Village Ratepayers’ Association opposes the development based upon the impact on the surrounding residential neighbourhood. The Association, like the Town, supports the development of the subject property in the form of Low Density Residential for up to 27 units. The primary intent of the Association has been the acquisition of the Shell House Lands for a public park use. The Halton Region Conservation Authority opposes the development based upon migratory bird habitat. The Conservation Authority, originally a party, sought a change at the commencement of the hearing to part-time party status. This was approved. The Region of Halton, originally a party, has by correspondence withdrawn from the hearing.”</p>	
<b>Government Agencies:</b> Halton Region Conservation Authority	
<p><b>Notes:</b> Interesting discussion of who is qualified to testify before the Board:  “The Board, after having listened to submissions and the answers given by Ms Barrett as to her qualifications and experience, will qualify her to give opinion evidence as an ecologist. The Board considers an ecologist as one who has regard for the relationship of all natural life including birds, mammals and reptiles with the environment and each other. The Board considers Ms Barrett qualified to give opinion evidence respecting such matters including birds. She did not claim a specialty with respect to birds only. The Board finds it inappropriate to provide the negative requested by counsel, where the positive was not claimed. As an ecologist, she is a generalist with some knowledge and experience with respect to birding. This entitles her to give the Board the benefit of her knowledge including her opinion. The Board will decline the request to note that she has no specialty in birds. The rider sought is to some degree inconsistent with the term “ecologist”, when no specialty in birds as an ornithologist was sought in the first place...The Board agrees with Mr. Kovacevic that in the case of <i>Rice v. Sockett</i> 8 D.L.R. 84 Ontario Divisional Court 1912, those giving opinion evidence do so on the basis of being possessed of special knowledge or skill upon which the expert is called to testify. The particular knowledge may be by way of study or experience. In this case, it is clear to the Board that the witness Barrett should be entitled to testify and give opinion evidence to this Board as an ecologist, by virtue of her education and experience.”</p>	

Mr. Taylor confirmed that the Authority is still interested in the role of the subject property as a stopover for migratory birds and the nature of the subject property as a natural wildlife habitat. He confirmed the undertaking of a study in the spring of 2005. In the view of the Authority, the subject property, in conjunction with other parks to the north: Shell Park, Burloak Woods and Bronte Woods, do serve to meet criteria as Significant Wildlife Habitat. Mr. Taylor stated that the conveyance of the east half of the property to a public authority could compensate for the habitat loss on the west side, which is proposed for development. The remaining concern of the Conservation Authority is the 12-storey proposed height and the possibility of bird collisions or strikes. The Authority proposes a maximum height of approximately 25 metres or 8 storeys to equate with the existing tree line.

**Natural Heritage Policies and Legislation:** PPS 1997, PPS 2005, SWHTG

“Mr. Sandilands reviewed the definition of Natural Wildlife Habitat in the Provincial Policy Statement (PPS, 1997) in effect for this application. He then reviewed the four categories of Significant Wildlife Habitat as set out in the Natural Heritage Manual of the Ministry of Natural Resources. It was Mr. Sandilands’ opinion that development could be permitted in a Significant Wildlife Habitat if there were no negative impacts. Negative impacts, in Mr. Sandilands’ opinion of the PPS, mean the loss of natural features or ecological function for which an area is identified. Mr. Sandilands’ opinion was that the loss of that significant feature would mean that it would no longer continue to exist. Since the habitat is lost and resulting activities would not permit it to continue to reside in or utilize the subject area, loss is not the same as reduction. Mr. Sandilands referred to an Ontario Municipal Board Decision by R. Boxma in *Aurora (Town) Zoning By-law 2213-78 et al* [2001] O.M.B.D. No.752.

Mr. Sandilands concluded that the lands proposed for development at Palm Place do not qualify as Significant Wildlife Habitat. In arriving at this conclusion he referred to the Significant Wildlife Habitat Technical Guide, the 2005 Migration Study and other bird counts as comparisons. It was his view that the first four criteria for evaluation of Significant Wildlife Habitat: relative importance of the site, presence of species of conservation of concern, species diversity and abundance were not met.”

**In contrast:** “(Ms. Barrett’s) concluding evaluation of Palm Place differed from Mr. Sandilands’ in that she opined that Palm Place was an equal contributor to habitat for migrant birds with Bronte Park and Shell Park, and met criteria for designation for Significant Wildlife Habitat. She admitted that there was no other study in Town of Oakville to compare other Significant Wildlife Habitat with. Nonetheless, she felt she had supplied sufficient information to warrant finding of a Significant Wildlife Habitat. Ms Barrett referenced the National Heritage Manual and the statement that there could be gaps that warranted the identification of Significant Wildlife Habitat even after other natural areas had already been identified. She took the Board to Appendix Q of the Significant Wildlife Habitat Technical Guide (Exhibit 53, Page. 993) to determine whether Palm Place as evaluated could meet the criteria of that document. It was her opinion that meeting any of the eight criteria could warrant such designation. She differed from Mr. Sandilands on his use of the document and opined that all eight criteria were met as follows (see pdf for details)...

In determining whether there can be development in an area of Significant Wildlife Habitat, she opined that the Provincial Policy Statement would not have been given sufficient regard with the development as proposed since there would be degrading of that habitat so that it would no longer be significant. She referenced the loss of vegetation where the building was proposed as well as a loss of vertical habitat. There would be increased levels of disturbance from people, cars and pets as being predators. The proposed buildings at 12-storeys would prove to be an obstruction of the view for birds to Shell Park, a physical barrier to bird movement and a collision course for the birds.”

Derek Coleman, on behalf of Appellant,: “It was his concluding opinion that in respect of the environmental issues of tree removal and migratory bird considerations that Palm Place was not a Significant Wildlife Habitat, was not of significant linkage, did not result in the loss of current ecological function and that therefore the application appealed to this Board conformed and had regard for the Provincial Policy Statement, the Halton Regional Plan and the Town of Oakville Official Plan.”

And from the HRCA:

“Michelle Yvonne Cizmar of the Halton Conservation Authority was qualified to give opinion evidence in the area of environmental planning. Her evidence was that the Halton Conservation Authority performed a consultative role for wildlife habitat with advice given to municipalities who make the final decision on

designations. She reviewed in some detail the planning process and the environmental considerations. In her view, storm water issues and shoreline protection issues had been resolved and migratory birds remained the main issue. She reviewed the relationship of Palm Place to Burloak Woods, Bronte Woods, Sheldon Creek Valley, Shell Park, Little Shell Park and described their relationship as a network which qualified as a Significant Wildlife Habitat. In her opinion, the proposed development will have negative impact on the loss of habitat, particularly height. Without mitigation, the development, in her opinion, does not have sufficient regard for the 1997 Provincial Policy Statement, is not consistent with the 2005 Provincial Policy Statement and does not conform to goals and objectives of the Town of Oakville Official Plan with regards to the natural environment. In her opinion, limited development can take place subject to modifications.”

“The Board does agree with the Coleman testimony to the point that the Ontario Natural Heritage Manual provides that the identification and evaluation of Significant Wildlife Habitat is a local Planning Authority responsibility. The test under the Provincial Policy Statement is not only with Provincially Significant Wildlife Habitat but also Significant Wildlife Habitat in the local planning context of the Town of Oakville. The Board finds the Palm Place site meets substantially the criteria from Schedule Q, Significant Wildlife Technical Guide (Exhibit 53, Page 27). In the Board’s view, all criteria were met as set out in the Barrett testimony, accepted by the Board. Although the Significant Wildlife Habitat Technical Guide of the Ministry of Natural Resources document does not specify the number of criteria required, it is important that a majority be met. The Board concludes from the observations of the study and the birding literature that Palm Place together with Shell Park, Sheldon Creek Valley and the Bronte and Burloak woodlots form a resting area in the form an Open Space network, as Significant Wildlife Stop Over Habitat for land migratory birds.

This conclusion however, does not mean that there will be no development. The Conservation Authority and Ms Barrett have correctly applied the tests in the Provincial Policy Statement that development and site alteration may be permitted in Significant Wildlife Habitat if it has been demonstrated that there will be no negative impact on the natural features or ecological function for which the area is defined. This panel does not interpret this test to mean the necessary removal of the natural features or ecological functions. Rather, the evidence of Ms Barrett and the Conservation Authority planner, Cizmar, is that with the conveyance of the east half of the Palm Place property, with additional plantings on the east and west portions of the property and with architectural bird friendly designing (reflection and design) of the building, the development can proceed with a height up to eight storeys. The Board accepts this evidence in the sense that the number of migratory birds sighted at the site does not justify a designation as Provincially Significant Habitat in the manner of Point Pelee. There is however an important local planning function that can be satisfied in this case with the application of reasonable planning standards that have the proper regard for the Provincial Policy Statement.”

**Decision:** The appeals to the Official Plan and Zoning By-Law are allowed in part but the final Order is withheld (pending completion of certain items).

“The development will have appropriate regard for the Provincial Policy Statement. In particular, the development as downsized will protect the environment and give the Provincial Policy Statement the regard it should have at the top of the planning hierarchy:

1. Development and land use patterns which may cause environmental or public health and safety concerns will be avoided (1997 PPS, Exhibit 31, Volume 6, Tab187, Page 2429).
  
2. Development and site alteration may be permitted in significant wildlife habitat if it has been demonstrated that there will be no negative impacts on the natural features or the ecological functions for which the area is identified (1997 PPS, Exhibit 31, Volume6, Tab187, Page 2435).

3. The site plan is filed subsequent to the Official Plan and Zoning amendments so that the following 2005 PPS provision applies to

“The Board also wishes to be reflective of the views of most of the planning witnesses and the public that the best use of this site is as a public park. In the time available before the Board’s final Order is issued, now that numbers of units and the perimeters of the development are better known, the Board directs the Town of Oakville to consider whether the Town of Oakville will make a final offer to purchase or to expropriate all of the Palm Place property.”

**Interpretation and Application of Natural Heritage Policies:** Successful  
Very detailed and thorough examination of the issues.

<b>OMB File Number(s):</b> PL040816	
<b>Decision Number:</b> 0062	<b>Issue Date:</b> January 9, 2006
<b>Board Member(s):</b> R. Rossi	
<b>Appeal:</b> Pro- Natural Heritage	
<b>Natural Heritage Issue(s):</b> PSW, adjacent wetlands, rare and threatened species	
<p><b>Overview:</b> “The subject matter before the Board is an appeal by Heather Brooks-Hill, Jeremy Carver, Virginia Thompson and others from a decision of the Committee of Adjustment of the Township of North Kawartha that granted application for three severances and one retained lot for the purpose of creating four lots on each of which 1559642 Ontario Inc. (the Applicants) propose to construct a permanent, year-round lakefront dwelling. Floor areas of the proposed dwellings range from 2,000 to 8,000ft<sup>2</sup> ....the proponents suggest the creation of four severed lots (with one retained), and two amendments (ZBA and OPA) are required to remove the infilling requirement. The subject lands are located within 120m of the Provincially Significant Fraser Wetland Complex (located to the north of the site) and are adjacent to the Provincially Significant Fairy Lake Island Wetland Complex located on Stony Lake and which abuts the shoreline of the subject lands.”</p>	
<p><b>Position of Parties:</b> “Counsel Cork for the Appellants submitted that the Ministry of Natural Resources (MNR) “may have revised the boundaries of the Fairy Lake Island Wetland along the frontage of the subject property.” He added that the Trent Severn Waterway seeks a 30-meter, shoreline buffer strip across the entire shoreline of the subject lands to protect the adjacent Wetland. The Applicants agreed that this should be a condition of the Board’s order for provisional consent to be given.”</p>	
<p><b>Government Agencies:</b> “As stated earlier, the County wanted the MNR to become involved in the subject property by conducting a peer review through the One Window planning protocol. Planner Mudd wrote to the MNR in August 2004 (Exhibit 2, Tab 5) requesting that the Ministry peer review of the Niblett EIA. In September 2004, the MNR replied that it could not get involved unless formally requested to do so by the MMAH through the One Window protocol (Tab 7). Planner Mudd then wrote to the Ministry of Municipal Affairs and Housing (MMAH) (Tab 8) to request that it authorize the MNR to proceed with a review of the Niblett EIA on the proposed severance. The MMAH responded to Planner Mudd’s request in November 2004 (Tab 10) that the Ministry was not prepared to have the MNR get involved in the file. As noted, the independent consulting firm of Trow Associates Inc. was contacted (Tab 11) and the peer review was undertaken. That peer review agreed with the findings of the Niblett EIA, provided that mitigating factors were implemented (Tabs 12 and 13)...</p> <p>The Board dismisses Counsel Cork’s characterization of the County’s letter at Exhibit 2, Tab 7 as an expression of the County’s uncertainty as to the wetland boundaries. In the Board’s view, there was nothing persuasive before Counsel Cork for him to make such an assumption and Planner Mudd rejected his suggestion, and on whose evidence the Board places great weight and on whose evidence it relies. Further, the MMAH’s decision not to involve the MNR; the MNR’s responses to abide by the One Window planning protocol; and the County’s acceptance of the MMAH’s recommendation to engage an outside environmental consultant to conduct the peer review are persuasive evidence that both Ministries and the County considered the wetland boundaries to be correct.”</p>	
<p><b>Notes:</b> “The Board places significant weight on the expert land use planning evidence and opinion of Planner Mudd and accepts his uncontradicted evidence that this proposed development as reflected in the Zoning By-law Amendment and the Official Plan Amendment represents good planning. As the only Planner to testify in this case, his evidence carried the most weight in respect of the planning process and the Board accepts his recommendation to give provisional consent for the severance and to dismiss the appeals.”</p>	
<p><b>Natural Heritage Policies and Legislation:</b> PPS 1997, PPS 2005</p> <p>“The Niblett EIA as submitted and completed under the One Window Approach has assisted the Board in arriving at its determination that the proposed development complies with the PPS and the other relevant planning documents regarding issues and impact before it. The Board heard nothing persuasive in the cross</p>	

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examination of Messrs. Niblett and Ellingwood that would enable it to conclude that they have not suggested mitigating measures that are inappropriate in the case at hand. Regarding the PPS, the evidence is quite clear in the Board's determination – the nature of the proposed development is such that there are no demonstrated impacts on natural features or ecological impacts.”

**Decision:** The appeals are dismissed.

“The Board finds that the consent applications meet the test of Section 51(24) of the *Planning Act*. The Board dismisses the appeal and orders that provisional consent be given. The Board also dismisses the other appeals.”

**Interpretation and Application of Natural Heritage Policies:** Successful

Very long, detailed examination of case.

<b>OMB File Number(s):</b> PL061050	
<b>Decision Number:</b> 2371	<b>Issue Date:</b> August 23, 2007
<b>Board Member(s):</b> M.G. Somers	
<b>Appeal:</b> Pro-development	
<b>Natural Heritage Issue(s):</b> wetland, fish habitat	
<b>Overview:</b> Le Conseil Scolaire de District Catholique du Nouvel-Ontario (“Conseil”) proposes to construct an elementary school, Ecole St. Denis, at Centennial Drive and Ramsey View Court in the Greater City of Sudbury (“the City”). Two connected wetland features, neither Provincially Significant, are located on the subject site. Fish habitat on the site is a potential concern.	
<b>Position of Parties:</b> At the beginning of the hearing, representatives of a non-profit corporation, called the “Citizens for the Preservation of Nepahwin/Lilly Creek Wetland” (“Citizens Group”) requested (and received) party status. The Citizens Group opposed the development of the proposed school on the subject site.	
<b>Government Agencies:</b> “According to the evidence of Mr. McCullough (planner for Le Conseil), public agencies such as the Nickel District Conservation Authority (“NDCA”), the Department of Fisheries and Oceans (“DFO”) were consulted and had no objections to the Application subject to a number of conditions.”	
<b>Notes:</b> “On May 29, 2007, the Board scheduled an evening session to hear the concerns of the community regarding the proposed development. In all, sixteen citizens provided statements; ten opposed the development; while six supported it. The Board in rendering its decision carefully considered all of the participants’ statements.”	
<b>Natural Heritage Policies and Legislation:</b> PPS 2005 “The Board notes that the <i>Planning Act</i> requires that decisions made in the development approval process of the NDCA, DFO and the City have to be consistent with the PPS and as previously mentioned the proposed development will progress in light of the regulatory approval process.” <b>Fish habitat:</b> “Mr. Seyler directed the Board to section 2.1.5 of the PPS, which provides: 2.1.5 Development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal regulations. Mr. Seyler testified that his recommendations would be implemented through the permitting system of the DFO and the site plan approval process and therefore would be in compliance with section 2.1.5 of the PPS.” “Based on Mr. Seyler’s uncontradicted expert evidence on fish habitat, the Board finds that the proposed development would have a minimal impact on fish habitat on the site. In fact, the proposal based on the Golder Report, would result in an enhancement of the fish habitat for the proposed site.” <b>Wetlands:</b> “2.1.3 <i>Development and site alteration</i> shall not be permitted in: b) <i>significant wetlands</i> in Ecoregions 5E, 6E and 7E; and It is the evidence of Mr. Walker that there is no PSW on the subject site. Therefore, this section of the PPS does not apply to the subject site.” “Based on Mr. Walker’s uncontradicted expert evidence on wetlands, the Board finds that there is no PSW on the site and that section 2.1.3(b) of the PPS does not apply. Furthermore, The Board accepts with the uncontradicted evidence of Mr. Walker, that the impact on the wetlands will be acceptable.”	
<b>Decision:</b> The appeal is allowed. “The Board finds that the preponderance of the evidence supports the finding that the approval of the proposed Zoning By-law is consistent with the PPS...The Board Orders that the appeal be allowed and that the proposed Zoning By-law 2007-150(Z) as set out in Exhibit 5, Tab 4, attached hereto as Attachment “1”, be approved, subject to the following conditions...”	
<b>Interpretation and Application of Natural Heritage Policies: Successful</b>	

<b>OMB File Number(s):</b> PL060803	
<b>Decision Number:</b> 1553	<b>Issue Date:</b> June 6, 2007
<b>Board Member(s):</b> S.J. Stefanko	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Endangered species	
<p><b>Overview:</b> James Morton and Vera Morton (“Owners”) obtained a consent to sever a retirement lot (“Severance”) being 65 metres in frontage by a depth of 133 metres from their land holdings in the Township of South Dumfries. Their retained lands will contain an area of approximately 77.94 hectares. In relation to the Severance, the County of Brant passed By-law 16-07 (“By-law”), which had the effect of placing a more restrictive development limit on the severed parcel. This was done to appease certain concerns which had been raised.</p> <p>Colin Tootill resides in the immediate area and appealed the Severance, by letter dated August 10, 2006, and the By-law, by Notice of Appeal dated February 6, 2007.</p>	
<p><b>Position of Parties:</b> Tootill : “The reason for the appeal is that the Committee decision to approve the application for a retirement lot is contrary to the provisions of the Official Plan for the County of Brant. Specifically, the Official Plan does not permit the granting of a farm retirement lot if the applicant has had a previous consent to sever. The applicant had a previous consent to sever on April 28, 1970. In addition, the application is appealed because appropriate consideration was not given to the presence of an endangered species in the vicinity of the severance”.</p> <p>The Owners have brought a motion for an Order dismissing the appeals (“Appeals”) of Mr. Tootill in relation to the Severance and By-law on the basis that, inter alia, the reasons set out by Mr. Tootill do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal.</p>	
<b>Government Agencies:</b> n/a	
<p><b>Notes:</b> “I believe that paragraph 21 of the Gough Affidavit raises a genuine planning issue concerning the possible application of the 2005 PPS. It would be inappropriate for me to ignore her remarks in this regard and thereby prevent her from having the opportunity to testify before a panel of this Board.”</p>	
<p><b>Natural Heritage Policies and Legislation:</b> PPS 1997, PPS 2005</p> <p>“Even though appeals have not been taken by the Ministry of Natural Resources or the Ministry of Municipal Affairs in relation to the Severance or By-law, and even though the By-law creates a “no development zone” for a portion of the property, the 1997 PPS deals very clearly with endangered species and the need for protection. No study or report has been prepared to either conclusively dispel the concerns of Mr. Tootill regarding bald eagles or to establish absolute compliance with the 1997 PPS.</p>	
<p><b>Decision:</b> Motion to dismiss is denied.</p> <p>“Based on the foregoing, it is my view that there are land use planning issues worthy of a full hearing and that the Appeals, in the words of the Divisional Court in <i>Zellers Ltd. v. Royal Cobourg Centres Ltd.</i> (2001) O.J. No. 3792, are being pursued “for legitimate purposes” and “diligently”. Accordingly, the motion is dismissed and the Appeals shall proceed to a hearing.”</p>	
<b>Interpretation and Application of Natural Heritage Policies: Successful</b>	

<b>OMB File Number(s):</b> PL980499, PL060924	
<b>Decision Number:</b>	<b>Issue Date:</b> January 16, 2008
<b>Board Member(s):</b> D.J. Culham	
<b>Appeal:</b> Pro-Development	
<b>Natural Heritage Issue(s):</b> Wetland	
<p><b>Overview:</b> Decision No. 3054, set the agenda for this Hearing as the hearing of evidence and making determinations on various matters including a wetland that first became a controversy at the October 2006 Hearing. The Board required that the Applicant confirm “the actual boundaries of the Environmental Protection area” for the identified wetland by “specifying the size, location, the vegetative and aquatic nature of the swamp”. The Applicant then contravened the previously agreed upon direction of the Board in Order No. 3054 dated October 31, 2006 by clearing and grading land and in the building of a road across the wetland in dispute.</p>	
<p><b>Position of Parties:</b></p> <p>Mr. Sewell on behalf of the Township of Limerick (Township) and the Limerick’s Waterways Ratepayers Association (Association) brought a motion dated November 7, 2007 essentially requesting the dismissal of the Application...Mr. Sewell cited the detail grounds for this motion in Exhibit Nov 20-1. Essentially, Mr. Sewell asserted that Trident contravened the previously agreed upon direction of the Board in Order No. 3054 dated October 31, 2006 by clearing and grading land and in the building of a road across the wetland in dispute. In his view, the Applicant’s actions, without the required permits from the Conservation Authority, constituted a “clear breach of good faith”.</p> <p>Further, Mr. Sewell asserted that Trident did not consult or interact with the Township in any attempt at satisfying the conditions of the 1999 Draft Approval. In his view, this constituted a breach of the Board directives in previous Order No. 1735 of November 3, 2004 and in Order No. 1467 of June 7, 2005 in acting “expeditiously and in good faith”.</p> <p>In response, Mr. Burton, on behalf of Trident, requested the dismissal of the Township’s and Association’s motion and essential brought a motion to replace the Township with the County of Hastings in the clearing of the conditions of Draft Approvals of both the Plan of Subdivision and the Condominium. In addition, in the event that the Board dismissed the Township’s motion, Trident requested that the Board conclude that the Township’s actions are “frivolous, “vexatious” and for the “purpose of delay” and that the Board award costs against of Township.</p>	
<b>Government Agencies:</b> n/a	
<p><b>Notes:</b> “In considering the supporting documents and the motion brought by Mr. Sewell, the Board concludes that insufficient planning grounds exist, no matter how repugnant the Applicant’s actions against the wetlands, for the Board deciding on the basis of a “breach of good faith” or that the time limit imposed in the “1999 Order No. 1170, is at an end” on the Applicant fulfilling the conditions of the 1999 Draft Plan of Subdivision.</p> <p>As to the “breach of good faith” as asserted by Mr. Sewell, the Board finds that the information available indicates that such a breach occurred. The Board Order No. 3053 directed by agreement of the Parties that no further work occurs. Unfortunately, the Applicant took action contrary to the Order. Without the knowledge of his own lawyers, the Applicant not only cleared and widened Block L or Forest Harbour Drive but what is worse, cleared and extended this right of way and constructed a road through the wetland in question. This required excavation of wetland organic material and the replacement with aggregate. If that constituted all of the information before the Board, the Board may seriously consider the action contemplated in the motion. The Applicant could benefit from the breach of good faith. However, in contrast, the Applicant, through his consultants, proposes an alternate road and lot configuration now requiring the retention of the wetland as an Environment Protection Area. In addition, the Applicant initiated and carried out a remediation of the damaged wetland, albeit that the proposed re-vegetation did not as yet occur.”</p> <p>“The Board concludes that the actions of the Applicant undermine the trust that the Township, the County, and the population at large may hold in the ability of the Board in fairly managing events once the matter is</p>	

before it. This Board does not accept that in providing the judicial framework, the Court expected the Board to ignore or pretend that such an egregious action did not occur. They occurred; they damaged the wetland; the Applicant acted wrongly. In considering a remedy, the Board accepts the limitations established by the Courts. The Board takes no further action.”

**Natural Heritage Policies and Legislation:** PPS 1997

Based upon the testimony of Mr. Hunter, the Board finds that the proposed Amendment No.6 incorporating a retained wetland as an Environmental Protection Area as represented in A9-1 in an amended Exhibit Nov 20 -gives appropriate regard for the Provincial Policy Statement; meets the requirements of the *Planning Act*; is consistent with the intent and purpose of the existing Official Plan of the County of Hastings; and represents good planning.

**Decision:**

Both the Township’s Motion and Trident’s Counter Motion were dismissed.

The appeals (by Trident) are allowed in part.

In summary, the Board is satisfied that the amendments to the Official Plan, the Zoning By-law and the conditions of Draft Plan of Subdivision and the Conditions of Draft Plan of Common Elements Condominium give regard to the Provincial Policy Statement; meet the legislative requirements; and represent good planning.

(Appeal relating to wetland): The Board allows the appeal by The Trident Members Inc to the Ontario Municipal Board under subsection 51(39) of the *Planning Act*; the Board approves the proposed reconfiguration of the Plan of Subdivision on lands composed of Part of Lots 12, 13, and 14, Concession 4, in the Township of Limerick to the extent shown on the map in Exhibit 15 with the further amendment removing any road allowance into the wetland; and further the Board approves the conditions of Draft Plan of Subdivision as shown in amended Exhibit 10B with a further amendment to Clause 4 with the agreement of the Parties, with the insertion of the phrase “**and that such lots be in reasonable proximity to one another**”, all of which appears in Attachment 3 to this Decision.

**Interpretation and Application of Natural Heritage Policies:** Neutral.

Sets a disturbing precedent. The Applicant cleared a wetland against Board order, with no repercussions.

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## **Appendix B: Natural Heritage Policies and Legislation**

### Provincial Policy Statement, 2005

The Provincial Policy Statement (PPS), issued under the authority of Section 3 of the *Planning Act*, sets out overall policy direction on matters of provincial interest in Ontario. A new PPS was implemented on March 1, 2005, replacing the previous PPS (1996, amended 1997). The current PPS requires that planning decision makers “shall be consistent with” the PPS 2005, whereas they were previously required to “have regard to” the PPS 1997. “Shall be consistent with” is a stronger test than “have regard to” and is thus intended to be a higher policy implementation standard. This standard is not defined in the PPS 2005 or the *Planning Act*. According to the “Applying the Provincial Policy Statement” InfoSheet that accompanied the release of the PPS 2005, the new wording “requires decision-makers to apply the policies and make decisions that are consistent with the applicable policies of the PPS. It is a strong implementation standard focusing on achieving policy outcomes, but it retains some flexibility for implementation” (MMAH 2005:2)

Section 2.1 of the PPS 2005 deals with Natural Heritage. Policy 2.1.1 states that natural features and areas shall be protected for the long term. Policy 2.1.2 states that the diversity and connectivity of natural features in an area, and the long-term ecological function and biodiversity of natural heritage systems, should be maintained, restored or, where possible, improved, recognizing linkages between and among natural heritage features and areas, surface water features and ground water features. The PPS 2005 identifies eight natural heritage features that are to be protected: significant wetlands, significant coastal wetlands, fish habitat, significant woodlands south and east of the Canadian Shield, significant valleylands south and east of the Canadian Shield, significant habitat of endangered and threatened species, significant wildlife habitat and significant areas of natural and scientific interest (ANSIs).

### Planning Act

The *Planning Act* sets the ground rules for land use planning in Ontario and describes how land uses may be controlled, and who may control them. The purposes of this Act

are,

- (a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;
- (b) to provide for a land use planning system led by provincial policy;
- (c) to integrate matters of provincial interest in provincial and municipal planning decisions;
- (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
- (e) to encourage co-operation and co-ordination among various interests;
- (f) to recognize the decision-making authority and accountability of municipal councils in planning. 1994, c. 23, s. 4.

Greenbelt Act, 2005 and Greenbelt Plan, 2005

The Greenbelt Plan, issued under the *Greenbelt Act, 2005*, builds upon the policy framework established in the PPS and its implementation through municipal official plans. The Greenbelt is envisioned as a broad band of permanently protected countryside. It includes lands governed by the policies of the Oak Ridges Moraine Conservation Plan and the Niagara Escarpment Plan.

Part of the Vision (Section 1.2.1) for the Greenbelt Plan includes giving permanent protection to the natural heritage and water resource systems that sustain ecological and human health and that form the environmental framework around which major urbanization in south-central Ontario will be organized. The Greenbelt Plan includes three types of geographic specific policies for lands in the Protected Countryside: Agricultural System, Natural System and Settlement Areas. The Natural System policies are meant to protect natural heritage, hydrologic and/or landform features. The Natural System consists of a Natural Heritage System and a Water Resources System. Section 3.2.2 of the Greenbelt Plan deals with Natural Heritage Systems policies. A wide range of land uses are permitted within the Natural Heritage System, including agricultural uses, new development and site alteration and non-agricultural uses (see Policy 3.2.2 in the Policy Chart). Where regulations or standards of other agencies or levels of government exceed the standards related to key natural heritage features or key hydrologic features in

this Plan, the most restrictive provision or standard applies. However, official plans and zoning by-laws shall not contain provisions that are more restrictive than the policies of sections 3.1 and 4.3.2 as they apply to agricultural uses and mineral aggregate resources respectively.

*Oak Ridges Moraine Conservation Act, 2001 and Oak Ridges Moraine Conservation Plan, 2002*

The Oak Ridges Moraine (ORM) was the focus of an intense land use conflict in Southern Ontario that resulted in the passing of provincial legislation (Oak Ridges Moraine Conservation Act 2001) and a plan (Oak Ridges Moraine Conservation Plan 2002). The Oak Ridges Moraine Conservation Plan (ORMCP), issued under the *Oak Ridges Moraine Conservation Act, 2001*, is a provincial plan with the purpose of providing “land use and resource management planning direction to provincial ministers, ministries, and agencies, municipalities, municipal planning authorities, landowners and other Parties on how to protect the Moraine’s ecological and hydrological features and functions” (Ontario Ministry of Municipal Affairs and Housing 2003:3).

The Oak Ridges Moraine Conservation Plan Area is divided into: Natural Core Areas, Natural Linkage Areas, Countryside Areas and Settlement Areas. Natural Core Areas have a high concentration of key natural heritage features, hydrologically sensitive features or landform conservation areas. Natural Linkage Areas form part of a central corridor system that support or have the potential to support movement of plants and animals among the Natural Core Areas, Natural Linkage Areas, river valleys and stream corridors. Natural heritage protection is meant to occur primarily within the Natural Core Areas, Natural Linkage Areas and Countryside Areas of the ORM. However, a wide range of land uses, some of which conflict with natural heritage protection, are permitted in these areas (see Appendix C).

*Natural Heritage Reference Manual, 1999*

The Natural Heritage Reference Manual is an advisory document that serves as a guide to additional information on technical matters relative to the application of the natural

heritage section of the PPS under the *Planning Act*. The Natural Heritage Reference Manual was prepared by the Ontario Ministry of Natural Resources, which identifies the intended users of the Manual as municipalities, planning boards and planning authorities, and also consultants, landowners, land developers, environmental agencies, community-based organizations, non-governmental organizations (NGOs), interested citizens and the OMB. The Manual is intended for use in policy development and applications and approvals.

## Appendix C: Permitted Uses in the Oak Ridges Moraine Conservation Plan Area

Natural Core Areas	Natural Linkage Areas	Countryside Areas
<p>1. Fish, wildlife and forest management.</p> <p>2. Conservation projects and flood and erosion control projects.</p> <p>3. Agricultural uses.</p> <p>4. Transportation, infrastructure, and utilities as described in section 41, but only if the need for the project has been demonstrated and there is no reasonable alternative.</p> <p>5. Home businesses.</p> <p>6. Home industries.</p> <p>7. Bed and breakfast establishments.</p> <p>8. Farm vacation homes.</p> <p>9. Low-intensity recreational uses as described in section 37.</p> <p>10. Unserviced parks.</p> <p>11. Uses accessory to the uses set out in paragraphs 1 to 10.</p>	<p>1. Fish, wildlife and forest management.</p> <p>2. Conservation projects and flood and erosion control projects.</p> <p>3. Agricultural uses.</p> <p>4. Transportation, infrastructure, and utilities as described in section 41, but only if the need for the project has been demonstrated and there is no reasonable alternative.</p> <p>5. Home businesses.</p> <p>6. Home industries.</p> <p>7. Bed and breakfast establishments.</p> <p>8. Farm vacation homes.</p> <p>9. Low-intensity recreational uses as described in section 37.</p> <p>10. Unserviced parks.</p> <p>11. Mineral aggregate operations.</p> <p>12. Wayside pits.</p> <p>13. Uses accessory to the uses set out in paragraphs 1 to 12.</p>	<p>1. Fish, wildlife and forest management.</p> <p>2. Conservation projects and flood and erosion control projects.</p> <p>3. Agricultural uses.</p> <p>4. Transportation, infrastructure, and utilities as described in section 41.</p> <p>5. Home businesses.</p> <p>6. Home industries.</p> <p>7. Bed and breakfast establishments.</p> <p>8. Farm vacation homes.</p> <p>9. Low-intensity recreational uses as described in section 37.</p> <p>10. Unserviced parks.</p> <p>11. Mineral aggregate operations.</p> <p>12. Wayside pits.</p> <p>13. Agriculture-related uses.</p> <p>14. Small-scale commercial, industrial, and institutional uses as described in section 40, subject to subsection (5).</p> <p>15. Major recreational uses as described in section 38, subject to subsection (5).</p> <p>16. Residential development in accordance with section 14.</p> <p>17. Uses accessory to the uses set out in paragraphs 1 to 16.</p> <p>(4) With respect to land in a Rural Settlement, the following uses are permitted, subject to Parts III and IV, in addition to the uses listed in subsection (3):</p> <p>1. Residential development in accordance with paragraphs 3 and 4 of subsection 15 (1).</p> <p>2. Small-scale commercial, industrial, and institutional uses as described in section 40, but not subject to clauses (1) (a), (1) (c) or (2) (a) of that section.</p> <p>(5) The uses described in paragraphs 14 and 15 of subsection (3) are prohibited in, (a) prime agricultural areas; and (b) areas designated primarily for agricultural uses in the applicable official plan.</p>